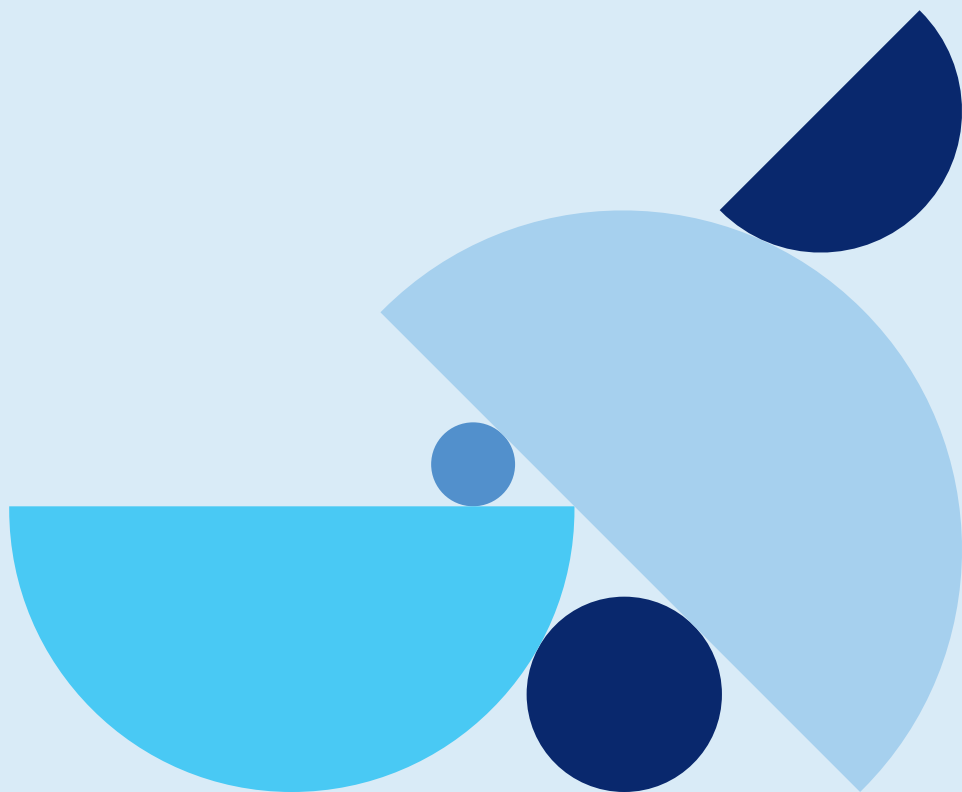


# Draft Double Option Agreement for share purchase on death



This option agreement is provided in draft form for consideration by your legal advisers. They must undertake the responsibility to ensure that it takes into account your individual circumstances and requirements and the terms of any existing documents and agreements relating to your business.

Therefore, you need to contact your legal adviser.

### Why is this a draft agreement?

You should not simply fill in the form, Zurich doesn't know enough about your business to be sure that this agreement will work for you and your business as a whole. It might be unsuitable because, for example, there is a specific provision in your partnership agreement or articles of association (as appropriate) about business share sale and purchase, and completion of this agreement in its present form may conflict with that provision. In addition this agreement may not reflect what the business owners might have wanted to happen when a co-owner dies and although this agreement is subordinate to any other governing documents of the business, any conflict should be avoided at what is likely to be a difficult time for the business.

#### Important note

This draft agreement is based on our understanding of current law and HM Revenue and Customs' practice (August 2018). Although every care has been taken in the preparation of the draft agreement, neither Zurich Assurance Ltd nor its officers, employees or agents accept responsibility for the operation of the agreement which must be referred to your own legal advisers to ensure it meets your requirements.

### What is it?

It is an agreement between co-owners of a business (a partnership, a limited liability partnership ('LLP') or a limited company) which provides that if one of them were to die, the other or others would have the option to buy the deceased's share in the business and the personal representatives of the deceased owner would have the option to sell the deceased's share in the business.

### Aims of the draft agreement

Broadly speaking, the option agreement specifies the terms on which a sale and purchase of a deceased business owner's share in the business can take place.

The overall effect of a business succession arrangement is to ensure that the deceased's spouse or other dependants can receive cash in exchange for the deceased's share in the business. The business can, as a result, remain wholly owned by the surviving business owners.

### When should this draft agreement be used?

As already mentioned, it may be used by those with a share or shares in a partnership, LLP or a limited company.

It should, however, only be used to deal with the sale and purchase of a business share following an owner's death. Zurich provides a separate draft option agreement to cover business share sale and purchase following an owner's critical illness.

As for all of the draft documents made available by Zurich, potential users should carefully check the document's appropriateness with their professional advisers before use or adaptation. The option agreement is provided on this strict understanding.

### When should this draft agreement not be used?

We reiterate that this is a draft agreement, and it should not simply be filled in. It should be referred to your legal adviser to check whether it is suitable in its current form. If it's not, it shouldn't be used.

The agreement is subordinate to the governing documents of the business, but it is still important that the two do not conflict. Professional advice is essential.

As stated above this draft agreement should not be used in conjunction with critical illness plans.

### How is a double option agreement established?

As is made clear above, this is a draft agreement, and so it should not simply be filled in. It should be referred to your legal adviser to check whether it is suitable in its current form.

If the agreement is found to be suitable for your business, the following needs to be completed (there are five parts and all parts that need to be completed are in blue shaded boxes):

#### On page 1 of the draft agreement

- It has to be dated
- Each party to the agreement should provide their full name and address
- The name of 'the Business' needs to be inserted in 'A'

#### On page 2 of the draft agreement (section 4)

- If you wish to specify the value at which your business interest is to be purchased under the agreement you need to state (in (i) and (ii) of section 4) how long that specified value will hold good for. The minimum is 1 year and the maximum is 3 years. The potential tax consequences of choosing a 'Specified Value' and the relevance of the period for which it is to operate are explained in the 'Frequently asked questions' section

**On page 3 of the draft agreement** (section 6)

- You should (in (i)) fill in the number and frequency of instalments where the policy proceeds are less than the value to be paid under the Agreement (see 'Frequently Asked Questions')
- You should (also in (i)) indicate (by entering 'x' in the appropriate box) whether or not instalments should be subject to payment of interest (and if they are, enter the rate of interest that will apply)

**On page 4 of the draft agreement**

Each party should sign the agreement, and have the signature witnessed. The address of the witness also needs to be included.

**On page 5 of the draft agreement**

(Schedule – Specified Value)

Insert the specified value (if appropriate). Please see 'Frequently Asked Questions' for more information about 'specified value.'

# Frequently asked questions

## What happens if one of the business owners suffers a critical illness?

This draft option agreement does not cover this eventuality.

Zurich provides a separate and additional draft agreement ('The Zurich Draft Option Agreement for Purchase on Critical Illness') to cover situations where business owners suffer a critical illness. We keep the death and critical illness situations separate, as not all businesses require critical illness cover, and not all individuals in the business are able to secure critical illness cover.

If a business owner suffers a critical illness where an appropriate plan is in force, the plan proceeds would normally be subject to an appropriate trust, and payable to the business co-owners, as trustees. The owner then decides whether or not to sell his shares in the business, and if he chooses not to, the trustees will retain the plan proceeds. Some businesses may decide to grant "matching" options to buy and sell to the continuing owners and critically ill owner respectively. The Zurich draft provides for this if required.

## What happens if one of the business owners leaves the business, other than by dying or suffering a critical illness?

If any business owner ceases to be a beneficial holder of shares in or capital in the business (as appropriate), this agreement will cease to have any effect in respect of them. It would be usual to review the agreement in such a case. Where there is a life assurance plan in force, usually subject to a trust, the policy will usually revert to the life assured.

## What happens if a new business owner joins the business?

As the new business owner is not a party to the agreement, a new agreement will need to be effected.

## What happens if one of the business owners disposes of, makes subject to a charge or deals in any way with his or her share?

If there are any changes in the ownership of the Business the agreement should be reviewed and if necessary replaced with a new agreement based on the new circumstances.

## What happens if after the death of a party one of the surviving parties decides that they don't want the share purchase to proceed in the way agreed, or perhaps if the deceased's spouse or civil partner wants instead to become involved with the business?

If either the deceased's personal representatives or the surviving business owners decide that they want to exercise the option to sell/buy the deceased's share in the business, then the agreement becomes binding regardless of what the other party/parties may wish to do. So, if for example, the co-owners wish to buy the deceased's shares, then the purchase will proceed, irrespective of the personal representatives' wishes.

## How is the price that should be paid for the business share decided, if a business owner dies?

This is fully covered in Section 4 of the draft agreement. There are 3 options:

1. If the business owners enter a 'specified value' as part of the agreement, that value will apply for the period specified unless a new value is specified by the owners and recorded in a memorandum executed by them.
2. At any time but not later than every one to three years (as specified), the business owners can replace that specified value with a new one, by executing a memorandum.
3. In all other cases a fair market value will have to be established by an appropriate third party at the time the purchase is to take place.

The tax implications of an arrangement based on a specified value are covered at the end of this section.

## When a business owner dies, can the business, rather than the remaining co-owners, purchase the shares?

It is possible for a limited company to purchase the deceased's shares, provided this is not restricted or prohibited in the articles of association. Once purchased, the shares are then cancelled.

A sale of shares to the issuing company will usually have some tax consequences for the personal representatives selling the shares.

A sale (and cancellation) is generally considered more complex to implement than a sale to the continuing owner(s) in their individual capacity. In view of this complexity, it is recommended that expert advice is sought before the 'corporate route' is adopted or discarded.

## Do the business owners need to make a will?

This is not essential but is highly recommended. However, where a valid will is in existence the deceased's business interest can be dealt with under the agreement more quickly.

## Do the business owners have to take out an accompanying life assurance plan?

Not having a life plan in place doesn't mean that an option agreement can't be established. However, a life assurance plan is an appropriate method of ensuring that the surviving business owners have the financial means to purchase the interest of their former colleague. Under the terms of the Zurich draft 'Flexible Business Trust', in order to preserve commerciality, a business owner cannot benefit under the trust of another unless he or she has also effected a plan in trust for their co-owners.

## What happens if there is no life assurance plan in force when a business owner dies?

If a sale/purchase of the deceased's interest in the business is to take place, the surviving business owners must seek other means of raising the funds to purchase the deceased's business interest.

## What happens if the business owner stops making payments to the accompanying life assurance plan, or the plan lapses?

The draft agreement provides for this in Section 5 (iii). The other parties can make good the shortfall by doing whatever is necessary, including recovery from business monies otherwise due to their colleague. It would be good practice to put in place suitable arrangements – say with the payments being paid for by the business or automatically deducted from the owners' post-tax salary or post-tax profit share (as appropriate) – to prevent this happening.

## What happens if the proceeds of the life assurance plan are insufficient to completely buy out the deceased's interest in the business?

The draft agreement makes provision for this in section 6 by requiring that the shortfall be made up by the payment of equal instalments over an agreed period of time. The parties to the agreement might decide that interest should be payable (and if so determine the rate of interest) or allow interest-free instalments. Specifying a value and insuring for this amount can prevent this happening.

## What happens if the proceeds of the life assurance plan exceed the value needed to purchase the whole of the deceased's share of the business?

Once again, the draft agreement makes provision for this. The surplus is retained by the surviving business owners. Again, a specified value and equivalent insurance can help avoid such a surplus arising.

## As business owners may have different sized business interests, and as some may be older than others, the life assurance costs are likely to be unequal. How can this be dealt with?

It is important that the arrangement is commercial and fair between the parties. It is thus recommended that serious consideration is given to arrangements being put in force so that the overall cost of cover is borne fairly based on who is more likely to benefit. Another option may be to share the overall cost of the arrangement in the same proportion as profits and expenses are borne.

## How quickly will the purchase proceed, when a business owner dies?

It depends on the parties involved, but under the agreement the option to sell operates for six months from the date of the business owner's death and the option to buy for three months. In both cases the option can be exercised within one month of obtaining the grant of representation if later. The different terms are there to support the position that the agreement is not, in effect, a binding contract for sale/purchase.

## Why is it important that any accompanying life assurance plans are written subject to a suitable trust?

Using an appropriate trust will not only ensure prompt payment of the proceeds (enabling the purchase to proceed, releasing funds for the deceased's beneficiaries and/or dependants) but it will also ensure that the proceeds are payable to the right people (in this case the co-business owners). Zurich offer the draft Flexible Business Trust for this purpose.

# What are the tax consequences of the Draft Double Option Agreement?

## Inheritance tax

Provided the arrangements made between the parties to the agreement demonstrate that there is no gratuitous intent, are commercial and demonstrably on terms that one would expect to see made between unconnected parties there should be no adverse inheritance tax (IHT) consequences to entering into the agreement.

Ensuring that the arrangement is on commercial terms is particularly important where a specified value is to be used for the purchase of the business interest. 'Commerciality' will be reinforced where each party is independently and professionally advised as to the value of the share in the business to be bought/sold under the agreement.

The existence of an option agreement on commercial terms does not usually affect the IHT position when a business owner dies.

Although the value of the share(s) will be added to the deceased's estate on death (usually at the value specified or otherwise determined by the agreement) business property relief would normally apply where the business is a trading business and there should be no IHT on death.

The availability of business property relief or otherwise will however be dependent on the facts and cannot be guaranteed. The risk of failing to qualify for business property relief will be significantly diminished where the agreement and intention of the parties reflects the fact that a sale and purchase under the agreement is not a foregone conclusion.

The IHT position of any accompanying life assurance plan (usually written subject to an appropriate trust) is described in the notes accompanying Zurich's draft Flexible Business Trust.

## Capital Gains Tax

If a value is specified in the agreement then it is important that it is based on the current open market value of the business interest, and that:

- the term for which the specified value will hold good does not exceed three years, and
- if one or some of the parties to the agreement are older or other than in good health and/or the business value is strongly expected to change from that specified, then a shorter term before the specified value of the business interest should be reviewed (possibly one year) should be stated
- a professional business valuation at the time of entering into the agreement and at the time of any change to the specified value is recommended.

The grant of an option to buy a share in the business will be a disposal for capital gains tax (CGT) purposes.

However, where the price to be paid is the open market value of the business share at the time of the sale/purchase it is likely that the option would have no value.

If a specified value is chosen then value could be attributed to the option but provided all the parties to the agreement are in reasonably good health and roughly the same age, such value should be negligible or nil.

There would be no CGT payable on death and the interest would be revalued for CGT. On sale under the agreement (where the share in the business is left to the deceased's surviving spouse and/or qualifies for 100% business property relief – as it would in most cases) where the price paid under the terms of the agreement exceeds the market value of the business interest on death of the business owner, a liability to CGT on the difference (if positive) could arise.

## Income tax

The existence of any option agreement does not affect the income tax position of the deceased business owner.

The income tax considerations relating to any accompanying life assurance plan (usually written subject to an appropriate trust) are described in the notes accompanying Zurich's draft Flexible Business Trust.

For greater detail on the tax and legal aspects of the double option agreement and its effects you should consult with your financial adviser who will have access to more extensive technical information.

# Draft Double Option Agreement

- For the approval of legal advisers

Provided this draft agreement has been reviewed and approved by your legal adviser, please complete it using BLOCK CAPITALS

THIS AGREEMENT is made the			day of	in the year		
<b>Between</b>						
Title		Surname	of	Address		
Full forenames						
				Postcode		
<b>and</b>						
Title		Surname	of	Address		
Full forenames						
				Postcode		
<b>and</b>						
Title		Surname	of	Address		
Full forenames						
				Postcode		
<b>and</b>						
Title		Surname	of	Address		
Full forenames						
				Postcode		
<b>and</b>						
Title		Surname	of	Address		
Full forenames						
				Postcode		
Hereinafter collectively called 'the Parties' and individually called 'the Party'						

In this Agreement unless the context does not permit the singular shall include the plural and the masculine shall include the feminine and vice versa.

WHEREAS

- A. The Parties are partners in the partnership/members of the limited liability partnership (LLP) or shareholders in the company (as appropriate) known as (Please insert name of company, limited liability partnership or partnership).
- 

**Hereinafter referred to as 'the Business'**

- B. The Parties desire to make provision for the sale and purchase of any Party's share of (Partnership), interest in (LLP) or shares in (Company) the Business (hereinafter referred to as 'the Share') in the event of his death by creating options for the sale and purchase of such Share.
- C. For the purpose of this Agreement the Business shall include any successor partnership, LLP or limited company to which the entire business of the Business has been transferred and any other partnership, LLP or company specified in a memorandum signed by all the Parties.



NOW IT IS HEREBY AGREED as follows:

**1. Option to sell**

In the event of the death of any Party the deceased Party's personal representatives shall have the option to sell the deceased's Share to the surviving Parties such option to be exercised by notice in writing served within six months from the date of death or within one month after a grant of representation in respect of the estate of the deceased has been obtained if later or such later time as the Parties shall, by mutual agreement, determine and on the exercise of such option the surviving Parties shall purchase the Share from the deceased Party's personal representatives.

**2. Option to buy**

In consideration of the grant of the option in Clause 1 above on the death of any Party the surviving Parties shall have the option to purchase the deceased Party's Share from the deceased Party's personal representatives such option to be exercised in writing served upon the deceased's personal representatives within three months from the date of death or within one month after a grant of representation in respect of the estate of the deceased has been obtained if later or such later time as the Parties shall, by mutual agreement, determine and on the exercise of such option the deceased's personal representatives shall sell the Share to the surviving Parties.

**3. Relevant proportions**

- (i) When an option in Clause 1 or 2 is exercised, the entire Share of the deceased Party shall be purchased by the surviving Parties.
- (ii) Where there is more than one surviving Party purchasing the Share then unless the Parties amongst themselves agree otherwise, each Party shall purchase such proportion of the deceased's share in the Business and pay such proportion of the value agreed for the purpose of Clause 4 hereof as corresponds to the percentage of the Business's capital (LLP or partnership) or the issued ordinary shares of the Business (company) to which that Party was beneficially entitled immediately before the event giving rise to the option in Clause 1 or 2 Provided Always that for the purposes of determining such a percentage it shall be assumed that the Business's capital or issued ordinary shares (as appropriate) did not include the Share to which the deceased Party was entitled.

**4. Price to be paid**

The value of the Share to be sold and the Share to be purchased shall be

- (i) if the purchase takes place within

of this Agreement and a Specified Value is stated in the Schedule to this Agreement the said Specified Value

- (ii) if the original Specified Value stated in the Schedule to this Agreement (or any subsequent Specified Value agreed in accordance with this sub-clause 4(ii)) has been replaced by a new Specified Value by the Parties hereto executing a Memorandum to that effect that new Specified Value. Provided however that any such new Specified Value shall only remain effective for the purpose of this agreement for a period of

from the date of execution of the Memorandum bringing it into effect unless the Parties hereto agree a different period and reflect this in the said Memorandum.

- (iii) in all other cases the fair market value of the Share at the time of its sale/purchase under the terms of this Agreement as determined by an independent auditor or professional valuer appointed by agreement between the Parties including the personal representatives of any deceased Party. Provided that if the Parties fail to appoint such an auditor or valuer within one month of the event giving rise to an option under Clause 1 or 2 of this Agreement then any Party may request the President for the time being of the Institute of Chartered Accountants in England and Wales to appoint an independent valuer for that purpose.

**5. Insurance policies and trusts**

- (i) Each Party has effected or shall effect and maintain a life assurance policy ('the Policy') providing for the payment of such sum on that Party's death as shall be mutually agreed between the Parties provided that such a Policy shall be issued to the proposer thereof upon trust for the primary benefit of the Parties hereto other than the proposer.
- (ii) Until the expiry of such a Policy or the making of a valid claim thereunder each Party shall pay all premiums and other monies payable for keeping up the Policy or such proportion of the total premiums payable in respect of all the Policies effected by the Parties as the Parties between them agree.
- (iii) In the event of any default on the part of a Party in the performance of any obligations in relation to the Policy, the other Parties may do whatever is necessary to make good such default and may recover from the Party in question all monies expended by them under this provision or may pay such monies out of the Business monies and so that any monies so paid out of the Business monies shall be charged in the books or accounts of the Business against the Party in question.



## 6. Sum assured less/greater than agreed value

If on the death of any Party the option under Clause 1 or 2 above is exercised and for any reason the sum assured payable under the Policy is

- (i) less than the Specified Value or fair market value (as appropriate) of that Party's Share the balance of the said value shall be paid in

Please enter number and frequency of instalments.

Number:

Frequency:

equal instalments and the outstanding amount from time to time shall:\*

☐ bear interest at  %

or

☐ not bear interest\*

\*Enter 'x' in appropriate box and enter interest rate if appropriate.

- (ii) more than the Specified Value or fair market value (as appropriate) of that Party's Share the surviving Parties shall retain the said excess without any obligation to the Party's personal representatives or family thereof

## 7. No restriction on disposal

Nothing in this Agreement shall in any way whatsoever prevent or hinder any Party from disposing charging encumbering or dealing in any way with his Share during his lifetime.

## 8. Effect of agreement

This Agreement shall:

- (a) bind the Parties and their personal representatives
- (b) cease to apply to any Party when he shall cease to be a beneficial holder of any Share in the Business
- (c) cease to have effect on the dissolution or winding up (as appropriate) of the Business
- (d) take effect only in compliance with and subject to the terms of the appropriate governing documents of the Business (i.e. Partnership Agreement, Members' Agreement or Memorandum and Articles) which shall take precedence over the terms hereof should there be any conflict between the two.

IN WITNESS WHEREOF THE PARTIES HAVE SET THEIR HANDS THE DAY AND YEAR FIRST SHOWN ABOVE.  
All Parties should sign the agreement and have their signatures witnessed

<b>Signed by the said</b>	
Signature of the Party	Full Name (in BLOCK CAPITALS) of the Party
<b>In the presence of:</b>	
Signature of the Witness	Full Name (in BLOCK CAPITALS) of the Witness
Address of the Witness	
Postcode	
<b>Signed by the said</b>	
Signature of the Party	Full Name (in BLOCK CAPITALS) of the Party
<b>In the presence of:</b>	
Signature of the Witness	Full Name (in BLOCK CAPITALS) of the Witness
Address of the Witness	
Postcode	
<b>Signed by the said</b>	
Signature of the Party	Full Name (in BLOCK CAPITALS) of the Party
<b>In the presence of:</b>	
Signature of the Witness	Full Name (in BLOCK CAPITALS) of the Witness
Address of the Witness	
Postcode	
<b>Signed by the said</b>	
Signature of the Party	Full Name (in BLOCK CAPITALS) of the Party
<b>In the presence of:</b>	
Signature of the Witness	Full Name (in BLOCK CAPITALS) of the Witness
Address of the Witness	
Postcode	

# Schedule

Specified value

Party’s name (Full name in BLOCK CAPITALS)

Specified Value:

Party’s name (Full name in BLOCK CAPITALS)

Specified Value:

Party’s name (Full name in BLOCK CAPITALS)

Specified Value:

Party’s name (Full name in BLOCK CAPITALS)

Specified Value:

Please let us know if you would like a copy of this  
in large print or braille, or on audiotape or CD.

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We may record or monitor calls to improve our service.

PW721415002 (10/21) CMS

