

**Policy for the formation, dissolution and governance of subsidiaries and joint ventures**

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**Committee Sign Off**

<b>Version</b>	<b>Committee Name</b>	<b>Date of Sign Off</b>
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<b>1</b>	<b>Introduction</b>
<b>1.1</b>	<b>Purpose</b>
1.1.1	This Policy, approved by Council and Executive Board, sets out the principles that shall apply in relation to formation, dissolution and governance of subsidiaries. Different considerations apply to minority JVs and spin-out companies and these are dealt with separately at Sections 7-9 of this Policy.
<b>1.2</b>	<b>Scope</b>
1.2.1	<p>Under Section 1.16 of the Scheme of Delegation, Council’s approval is required for equity investment and loan capital into subsidiaries for amounts in excess of £10 million (in the cumulative). Finance Committee approval is required for equity investments and loan capital in excess of £1million and up to £10million (in the cumulative).</p> <p>The Vice-Chancellor, acting through the Executive Board, may approve equity investments and loan capital into subsidiaries up to £1million (in the cumulative).</p> <p>Text in <i>italics</i> is taken directly from Charity Commissioner’s Guidance on Trading and Tax: how charities may lawfully trade (“the Guidance”).</p> <p>In approving the formation of and investment into a subsidiary, Council members as Trustees of the University will have due regard to the Guidance and this Policy. The Executive Board in exercising its delegated authority from Council to form, invest in and dissolve subsidiaries and to form, invest and dissolve minority JVs and spin-outs will similarly have due regard to the Guidance and this Policy as applicable.</p>
<b>1.3</b>	<b>Equality Analysis</b>
	N/A
<b>1.4</b>	<b>Definitions</b>
1.4.1	<p><b>Definitions</b></p> <p>Throughout this Policy:</p> <p><b>“Ancillary trading”</b> means trading ancillary to a charity’s primary purpose, legally part of the charity’s ‘primary purpose trading’. For the University, this will include such matters as student accommodation and catering;</p> <p><b>“Investment”</b> means investment by way of share capital or loan capital;</p> <p><b>“Joint-venture”</b> for the purposes of this policy means a company of which the University is a shareholder (whether minority or majority shareholder) together with one or more third parties;</p> <p><b>“Majority JV”</b> means a joint venture in which the University holds the majority of voting rights, for the avoidance of doubt, a majority JV is a subsidiary.;</p>

	<p><b>“Members”</b> means those who subscribe to a company’s memorandum (with their membership commencing upon the company’s registration) and those who agree to become members of a company and are registered as such in the register of members.</p> <p><b>“Minority JV”</b> means a joint venture in which the University holds the minority of voting rights;</p> <p><b>“Primary purpose trading”</b> means trading that is carried on by a charity in the course of carrying out a primary purpose of the charity. For the University, its primary purpose is set out in its Charter;</p> <p><b>“Non-primary purpose trading”</b> means trading which is not primary purpose trading.</p> <p><b>“Shareholders’ Agreement”</b> means an agreement made between the shareholders dealing with terms governing issue and transfer of shares, directorships and so on and/or in a joint venture to deal with the ongoing relationship of the joint ventures as shareholders in the joint venture company after completion, and covering such issues as appointment of directors, reserved matters for shareholders, capital and so on.</p> <p><b>“Spin Out”</b> means a company set up for the purpose of commercialising intellectual property rights in which the University holds an interest. The University shareholding on formation may be 50% or more provided that the intention is for the University’s interest to be diluted on investment by third parties;</p> <p><b>“Subsidiary”</b> means: a company in which the University:</p> <ul style="list-style-type: none"> <li>a) holds a majority of the voting rights;</li> <li>b) is a member and has the right to appoint or remove a majority of the directors; or</li> <li>c) is a member and controls, alone, under an agreement with other members, a majority of the voting rights</li> </ul> <p><b>“Wholly- owned subsidiary”</b> is a company of which the University is the only member.</p>
<b>1.5</b>	<b>Legislative context</b>
1.5.1	
<b>1.6</b>	<b>Health &amp; Safety Implications</b>
1.6.1	
<b>2</b>	<b>Policy</b>
<b>2.1</b>	<b>Principles</b>
2.1.1	<p><b>Establishing that a Subsidiary is the appropriate form to undertake the activity</b></p> <p>The rationale for the formation of a subsidiary will normally be for one of the reasons set out below and in the context of non-primary purpose trading. However, these reasons should not be viewed as exclusive or as preventing the placing of primary purpose trading within a subsidiary.</p> <ol style="list-style-type: none"> <li>1. The non-primary purpose trading carries risks and placing these activities into a separate legal entity may ring-fence these risks from the University’s core mission;</li> </ol>

	<p>2. The activity to be carried out by the subsidiary is likely to employ many staff and different employment terms and conditions than those applying to University staff may be appropriate;</p> <p>3. The non-primary purpose activity may generate sizeable profits and the University wishes to take advantage of the ‘gift aid’ regime which enables the subsidiary to pass its distributable profits to the University free from tax.</p> <p><i>“a trading subsidiary <b>must</b> be used in any case where there would be a significant risk to the assets of the charity, if it were to carry on non-primary purpose trading itself. If a charity incurs losses in non-primary purpose trading which it has carried on, the charity’s tax exemptions on other income may be at risk, and the trustees may be liable for breach of trust.</i></p> <p><i>The trading subsidiary must be set up in such a way as to protect the parent charity and its assets from the risks involved in the trading. The need to protect the charity’s assets from any significant risk involved in non-primary purpose trading is paramount. The fact that the trading profits would have been exempt from tax if the trading had been carried on by the charity itself does not necessarily mean that it is appropriate for the charity to carry on the trading”.</i></p> <p>Except where a trading subsidiary is mandated (due to the potential risks to the assets of the University), Council, Finance Committee or Executive Board, as the case may be, in determining whether a trading subsidiary is beneficial for the University, must take into account the additional administrative and management costs involved in its running.</p>
2.1.2	<b>Investing in a Subsidiary</b>
	<p>A trading subsidiary’s need for funding will, in most cases, be met mainly out of share capital and/or loan capital provided by the University.</p> <p>The power for the University to invest in subsidiaries is provided for at Article 4(e) of the Charter. Notwithstanding this, Council, Finance Committee or Executive Board, as the case may be, have to be able to justify the investment of the University’s resources in the subsidiary. The Guidance provides that trustees (or their delegates) should:</p> <ul style="list-style-type: none"> <li>• <i>reasonably consider that it is in the charity’s interests to make the investment, after making a fair comparison of this form of investment with other forms of investment which might be selected;</i></li> <li>• <i>include in their comparison an objective assessment of the trading subsidiary’s business prospects;</i></li> <li>• <i>be satisfied as to the financial viability of the trading subsidiary, based on its business plan, cash flow forecasts, profit projections, risk analysis and other available information; and</i></li> </ul>

	<ul style="list-style-type: none"> <li>• <i>ordinarily take appropriate advice on the investment and the financial viability of the trading subsidiary. What is ‘appropriate’ will depend on the circumstances - the cost of taking the advice is a relevant factor, and the cost should be commensurate to the size of the proposed investment.</i></li> </ul> <p>In approving investment into the subsidiary, Executive Board will need to provide or be provided with sufficient information and analysis to enable itself, Council or Finance Committee as the case may be, to carry out the above assessment and be satisfied that the investment is demonstrably for the benefit of the University.</p> <p>Further, the University must ensure that it does not provide support to trading subsidiaries, on terms which involve a greater or lesser element of gift. This could include:</p> <ul style="list-style-type: none"> <li>• <i>A parent charity must not make donations to the trading subsidiary, in cash or in kind, whether by purchasing stock for the subsidiary, and donating that stock to the trading subsidiary, or otherwise.</i></li> <li>• <i>A parent charity must not settle the debts of a trading subsidiary.</i></li> <li>• <i>A charity must, if allowing the use of its staff, buildings or equipment by a trading subsidiary, make fair charges for those uses.</i></li> </ul> <p>As well as charity law, the University, as recipient of public funds must avoid acting as a conduit of state aid into a trading subsidiary which carries out economic activities. The contravention against State Aid requires the University to make investments on a commercial, arm’s length basis. This includes indirect investment such as allowing the subsidiary to use University land and other assets, such as staff, on non-commercial terms.</p>
2.1.3	<p><b>Form of Investment into a Subsidiary</b></p>
	<p>Investment into a subsidiary is likely to either be by way of share capital or loan capital from existing resources. However, there is nothing to prevent the University seeking specific loan finance or from the subsidiary seeking outside finance subject in both cases to either Executive Board, Council and/or Finance Committee satisfying themselves of the appropriateness of the investment.</p> <p>Share investment poses the risk that the University will not recoup its investment should the subsidiary fail. However, it may give third parties, such as suppliers, greater confidence in the business.</p> <p>If the University invests into the subsidiary by way of a loan it will have a contractual right to repayment of the loan. It therefore provides greater security to the University. However as a company cannot trade whilst insolvent, and as the amount of loan capital is taken into account in determining solvency, investment by way of loan capital should not be made if there is a risk that the subsidiary will not be able to meet its obligations under the loan.</p>

	<p>Any investment into a subsidiary will be treated as non-charitable investment if it does not qualify as a qualifying investment or loan. This would have implications in relation to the University's current tax exemptions.</p> <p>To be considered a 'qualifying investment or loan' it must be made demonstrably for the benefit of the University and be on appropriate commercial terms, reflecting the level of risk and be secured over assets where possible.</p> <p>It is therefore recommended that before making any significant investment into a subsidiary, Council or Finance Committee should seek independent advice from a suitably qualified person regarding the suitability of the type and particular investment, consideration of the need to ensure diversification of its investment portfolio, and an objective assessment of the subsidiary's business prospects.</p> <p>Where the Executive Board makes an investment into a subsidiary, this will be reported to the next meeting of Council, any investments it has made into subsidiaries.</p>
2.1.4	<p><b>Governance Principles for Subsidiaries</b></p>
	<p>First and foremost, a subsidiary is a legal entity distinct from the University. Its Board of Directors will have the following fiduciary duties to the company:</p> <ol style="list-style-type: none"> <li>1. to act in accordance with the company's constitution and exercise powers only for the purpose for which they are conferred;</li> <li>2. to promote the success of the company for the benefit of its members as a whole;</li> <li>3. to exercise independent judgment;</li> <li>4. to exercise reasonable care, skill and diligence;</li> <li>5. to avoid conflicts of interest;</li> <li>6. not to accept benefits from third parties by reason of being a director; and</li> <li>7. to declare an interest in a proposed transaction or arrangement with the company.</li> </ol> <p>The day to day management of the subsidiary will be delegated to the Board of Directors subject to any limitations imposed by the Articles of Association and shareholders agreement, if applicable. The power of Directors to act is vested in the Board as a whole which will exercise such powers by passing resolutions at board meetings. Depending upon the Articles, Director's resolutions may be passed by way of written resolution as an alternative to holding a meeting. Section 550 of the Companies Act 2006, grants the directors of a company with only one class of shares the power to allot further shares (or rights to subscribe for, or to convert any security into, shares), unless the articles restrict or exclude that power.</p>

	<p>However certain matters cannot be delegated to the Board of Directors and require shareholders' resolutions. These can be either – <i>special resolution</i> requiring approval of shareholders representing not less than 75% of the total voting rights or <i>ordinary resolution</i> requiring a simple majority of shareholders' votes. Schedule 1 sets out the matters for which the Companies Act requires either special or ordinary shareholder resolutions.</p> <p>With Director's duties and those matters set out in Schedule 1 in mind, Council, Finance Committee or the Executive Board, as the case may be, will nonetheless, in agreeing to the formation of a subsidiary consider the following principles and where appropriate ensure that they are provided for in either the Articles of Association, Shareholders' Agreement or elsewhere in a proportionate manner which recognises the objectives of the proposed subsidiary, any inherent risks and the independence of the Subsidiary's Board:</p>
2.1.4.1	<p><u><i>Accountability and Alignment</i></u></p> <ul style="list-style-type: none"> <li>• the setting and monitoring by the University of Key Performance Targets to ensure strategic alignment</li> <li>• the approval of annual business plan and budget</li> <li>• the requirement for annual fraud and anti-bribery returns</li> <li>• where applicable, the requirement for anti-slavery statements</li> <li>• the maintenance of appropriate insurance policies</li> <li>• the maintenance of same financial year as University</li> <li>• the appointment of external auditors</li> <li>• the requirement to maintain a risk register</li> <li>• the inclusion of the subsidiary in Internal Audit's regular cycle of business</li> <li>• the requirement to report any issue of significance to the Chief Operating Officer of the University</li> </ul>
2.1.4.2	<p><u><i>Appointment of Directors</i></u></p> <ul style="list-style-type: none"> <li>• the right for the University to appoint University Directors (either lay Council members or University employees)</li> <li>• the right to approve the appointment of other Directors</li> <li>• the right to remove directors</li> <li>• requirement that the Directors undergo suitable induction</li> <li>• the requirement that independent Directors (not connected with the University) be subject to appropriate due diligence</li> <li>• the requirement for contracts of employment for executive directors.</li> </ul>
2.1.4.3	<p><u><i>Arm's Length transactions</i></u></p> <ul style="list-style-type: none"> <li>• to have in place secondment agreements in relation to any University employee who provides a significant amount of his/her time on the subsidiary's business</li> <li>• to have in place Service Level Agreements in relation to the use of University assets, such as HR and payroll to ensure that this are provided on commercial terms</li> </ul>

2.1.4.4	<p><u>Communication</u></p> <ul style="list-style-type: none"> <li>• the appointment of a senior member of University staff to be a University Nominated Officer</li> <li>• that the University Nominated Officer – in his/her role of ensuring good communication between the Subsidiary and the University – have full rights to attend all Board meetings and to receive the papers presented to the Board</li> </ul>
2.1.4.5	<p><u>Recruitment and Appointment of CEO and other senior employees</u></p> <ul style="list-style-type: none"> <li>• the requirement that University approve the appointment of the CEO or any other post where the remuneration exceeds a certain amount</li> <li>• the requirement to follow University recruitment policies, particularly those relating to equality and diversity and any that may be specified by University insurers</li> </ul>
2.1.4.6	<p>In addition to the above, Council, Finance Committee or Executive Board, as the case may be, will consider for any specific subsidiary the desirability of reserving other matters over which a shareholder resolution is required. These Reserved Matters will be relevant to the proposed objectives of the subsidiary and the scale of the subsidiary’s business. An illustrative and non-exhaustive list of matters which may be considered relevant to be reserved is as follows:</p> <ul style="list-style-type: none"> <li>• approval for borrowing</li> <li>• acquiring or disposal of land</li> <li>• entering into any joint venture or partnership with a third party</li> <li>• appointment of advisors</li> </ul> <p>Council will also wish to consider enabling or restrictive provisions in relation to the ability of the company to allot shares, creation of different classes of shares and alteration of share capital.</p>
2.1.5	<p><b>At what stage and by whom must these Governance Principles be considered?</b></p>
	<p>It should be noted that unlike investment into subsidiaries, the delegation from Council to the Vice-Chancellor in relation to the formation of subsidiaries is unlimited. Council will be made aware of the existence of a new subsidiary where investments by the Executive are made into (see section 3 above). Investments in excess of £1million require Finance Committee approval and Council must approve any investment in excess of £10million (cumulative).</p>



	<p>Therefore in relation to subsidiaries where the University’s investment is less than £1million (‘smaller sized subsidiaries’), Council has delegated supervisory functions to the Vice-Chancellor (who may further delegate to senior University employees). Similarly, that matters which require shareholder resolution either under the Articles of Association, Shareholders’ Agreement or Companies Act (Schedule 1), for smaller sized subsidiaries have been delegated to the Vice-Chancellor (who may further delegate). It is therefore the case, that in relation to smaller-sized subsidiaries, it will be the responsibility of the Executive Board to consider and apply these Governance Principles.</p> <p>For subsidiaries requiring more than £1million investment, it will be the responsibility of Finance Committee or Council (for those requiring in excess of £10million) to consider and apply the Governance Principles. In considering the above principles, Council or Finance Committee may choose to delegate supervisory functions and the exercise of shareholder rights to the Vice-Chancellor (who may further delegate to University senior employees). Notwithstanding these delegations, Council will retain sufficient oversight, either acting itself or through Finance Committee, through for example the receipt of annual financial performance reports, to ensure that the continuation and operation of the subsidiary remains in the University’s best interests.</p>
2.1.6	<p><b>Dissolution of Subsidiaries</b></p>
	<p><i>Trustees must routinely monitor the performance of all trading subsidiaries, and of the parent charity’s investment in them, with a view to ensuring the proper use of the charity’s assets.</i></p> <p><i>Trustees must always put the interests of the parent charity first. This will sometimes mean liquidating, or selling, a failing trading subsidiary. If trustees keep a failing trading subsidiary at the charity’s expense, they may be personally liable for the consequential losses to the charity.</i></p> <p>The approach set out in this policy is designed to ensure that the University will only invest in trading subsidiaries which have a better than reasonable prospect of success (see Section 2). Further, the adoption of the Governance Principles set out at <a href="#">Section 4</a>, should ensure that Council, whether directly or through its sub-committees, or Executive Board retain sufficient oversight to be kept well informed of any threats to the viability of a trading subsidiary. As well as promoting accountability and alignment, good communication, compliance with charity law and state aid, this policy and the Scheme of Delegation are designed to guard against situations whereby the University continues to provide financial support to an ailing trading subsidiary at a time when it was reasonably clear that failure of the subsidiary was likely. Such support could constitute a breach of trust on the part of the trustees putting them at personal risk to make good any losses to the charity.</p>

	<p>Council and/or Executive Board must consider whether it is in the best interests of the University to enforce its rights under a loan agreement where the subsidiary has defaulted. Similarly, where the University has invested share capital, Council and/or Executive Board must consider whether it is in the University's best interest to procure the subsidiary's termination or to sell the business as a going concern to a third party. Protecting the University's assets from the subsidiary's creditors outweighs considerations such as concerns about the subsidiary's employees or reputational damage arising from the subsidiary's liquidation.</p>
2.2	<p><b>SPIN OUT COMPANIES AND MINORITY JVs</b></p>
2.2.1	<p><b>Establishing the need to form a spin out or minority JV</b></p>
	<p>The Scheme of Delegation deals separately with minority joint ventures and spin out companies at Section 11.1 which references this Policy.</p> <p>In the majority of cases, these ventures do not usually require investment to be made by the University and are created for specific and limited purposes, such as commercialisation of University owned intellectual property rights.</p> <p>The decision to form a spin out company rather than commercialising the IPR through other methods such as licensing of the IPR will be based on sound commercial reasons. The University's contribution to the formation of such spin out companies is normally limited to assignment or licensing of the IPR into the company for which it receives share capital, however the University may contribute to the spin out in other ways.</p> <p>The reasons for the creation of a minority JV may be many, such as to jointly create with a commercial partner IPR or data which can be exploited commercially, but in all but the most exceptional cases, these types of ventures are unlikely to require capital investment from the University.</p> <p>It is the responsibility of the Technology Transfer Office to develop the business cases for the formation of spin out and minority joint ventures. This will be presented to an Executive Board sub-committee whose membership shall include the Provost, Chief Operating Officer and SVP Advancement and Strategic Partnerships.</p>
2.2.2	<p><b>Investing in a Spin Out or Minority JV</b></p>
	<p>Where, exceptionally, the University proposes investing into these ventures, the same considerations as set out at Section 2 apply, most importantly that the investment is in the University's interest in all the circumstances.</p> <p>Save where there are any inconsistencies between this Policy and the Scheme (which takes precedence), the following financial limits and processes apply in relation to University financial investments into spin outs and minority joint ventures.</p>

	<p>Investments up to £250,000 (cumulative) may be approved by an Executive Board sub-committee whose membership shall include the Provost, Chief Operating Officer and SVP Advancement and Strategic Partnerships.</p> <p>Investments over £250,000 and up to £1million require Executive Board approval.</p> <p>Investment over £1million and up to £10million require the approval of Finance Committee on the recommendation of Executive Board.</p> <p>Council approval for investments in excess of £10million is required on the recommendation of Finance Committee, following approval by the Executive Board. Executive Board will report to the next meeting of Council, any investments it has made into subsidiaries.</p>
2.2.3	<b>Governance Principles for Spin Out and Minority JVs</b>
	<p>As in many cases the University will not have or will not maintain for long, a controlling interest in the Company, it is important that the articles of association and/or shareholders agreement provide minority shareholder protections and rights. The decision to exclude any of these protections and rights will be taken at the time of formation and will be dependent on the purpose for which the spin out or minority JV was created and the level of the University's investment.</p>
2.2.3.1	<p><b>Consent Rights</b></p> <p>That the University's consent must be sought to:</p> <ol style="list-style-type: none"> <li>a) change the nature of business;</li> <li>b) sell the company;</li> <li>c) acquire another business or assets which could constitute a large proportion of the expanded company;</li> <li>d) take on new investment which would dilute existing shareholding;</li> <li>e) wind up the company; or</li> <li>f) engage with a third party which is in conflict with University's ethical policies or which appears on a sanctions list.</li> </ol>
2.2.3.2	<p><b>Information Rights</b></p> <p>That the University is entitled to the following information:</p> <ol style="list-style-type: none"> <li>a) annual accounts and management accounts (monthly or such longer period as considered appropriate)</li> <li>b) annual business plan and/or budget</li> <li>c) reports of company's performance</li> <li>d) minutes of Board meetings</li> </ol>

2.2.3.3	<p><b><i>Rights Attached to Shares</i></b></p> <p>To protect and maximise the University’s investment (which includes IPR):</p> <ul style="list-style-type: none"> <li>a) pre-emption rights</li> <li>b) tag along and drag along rights</li> </ul>
2.2.3.4	<p><b><i>Right to appoint University Director</i></b></p> <p>This may be regardless of shareholding or limited to when the University holds a certain percentage.</p>
2.2.3.5	<p><b><i>Arm’s Length Transactions</i></b></p> <p>In addition to the need to protect the University’s investment, to avoid contravening state aid and charity law, where the University provides on-going support to the spin-out and/or minority JV, such as use of its facilities and other assets, the University will ensure that these are provided on suitable arm’s length terms and subject to written agreement.</p>
2.3	<p><b>SCHEDULE 1</b></p>
2.3.1	<p>Under the Companies Act, special resolutions are required in order for private companies to do the following:</p> <ul style="list-style-type: none"> <li>• to alter the company's articles of association;</li> <li>• to change the company's name (alternatively, a method may be specified in the articles);</li> <li>• to re-register an unlimited private company as a public company;</li> <li>• to re-register a private company having a share capital as a public company (or vice versa);</li> <li>• to re-register an unlimited private company as limited;</li> <li>• to withdraw or modify the pre-emption rights on an issue of shares arising under section 561 of the Companies Act;</li> <li>• to reduce capital (either on an application to court or using the solvency statement procedure);</li> <li>• to approve a payment by the company out of capital for the redemption or purchase of its own shares;</li> <li>• where there are different classes of shares, at a class meeting to sanction a variation of class rights in certain circumstances;</li> <li>• to ratify an act of the directors which is beyond the company's capacity.</li> </ul>
2.3.2	<p>An ordinary resolution will generally be required in relation to the following decisions:</p>

	<ul style="list-style-type: none"> <li>• increase, consolidate or sub-divide the company's authorised share capital (if this is still relevant);</li> <li>• grant to the directors the authority to allot shares (if still relevant, and the company is not relying on section 550 Companies Act);</li> <li>• approve certain transactions involving directors such as service contracts for a period of two years or more, the transfer of non-cash assets over a certain value to or from a director and certain loans to directors;</li> <li>• declare a final dividend;</li> <li>• authorise the terms of a contract for a company to purchase its own shares.</li> </ul>
<b>3</b>	<b>Governance Requirements</b>
<b>3.1</b>	<b>Responsibility</b>
3.1.1	This Policy is owned by Council and managed by the University Secretary & Legal Counsel. See section 2.1 above.
<b>3.2</b>	<b>Implementation / Communication Plan</b>
3.2.1	This Policy is published on the University Policies web page. It has been communicated to the Executive Board, to the Boards of the main wholly-owned subsidiaries and to the Technology Transfer team.
<b>3.3</b>	<b>Exceptions to this Policy</b>
3.3.1	N/A
<b>3.4</b>	<b>Supporting documentation</b>
3.4.1	N/A