University of Birmingham

Protocol for the Governance of University Wholly Owned Subsidiary Companies and Companies Where the University Retains an Interest.

Introduction

1.The University recognises that University wholly owned subsidiary companies and those other spin-out companies (most commonly formed to commercialise University intellectual property (IP)) where the University has a shareholding or interest, are distinct and separate legal bodies. Their Directors have duties under the Companies Act 2006 to manage the company in the best interests of all the stakeholders, which includes shareholders, members, employees etc. The University is very appreciative of the significant contribution that all non-executive Directors make to the University companies.

2. In addition to those companies where the University holds shares, the University also has membership of a number of not-for-profit or charitable companies limited by guarantee, such as the Manufacturing Technology Centre where the rights and obligations are set out between the parties within the Articles of Association, and where it is unusual for any one member, including the University to have any form of controlling interest.

3. By virtue of its ownership, shareholding or membership of the company the University retains an interest in ensuring that the company maintains good governance and financial probity. Failure in these areas presents a potential reputational risk for the University.

4. The University also recognises that companies fulfil different functions, and have differing levels of engagement with outside bodies or organisations, which involve varying levels of risk. Accordingly, this protocol sets out general principles regarding governance and financial probity, which apply to all such University companies, where the University retains a shareholding or membership, supported by further specific principles, which are dependent on the nature and function of the wholly owned subsidiary company.

5. For spin-out companies, the University (via Alta Innovations Limited, which manages the University's spin-out portfolio) will endeavour to ensure that where its shareholding is 25% or more of the total issued shares, a basic framework for governance, as identified within the protocol, is embedded within the company, through the shareholders agreement or Articles of Association . For spin-out companies where the University shareholding is less that 25%, the University will expect Alta Innovation Limited to promote and embed these principles of good governance wherever possible, during any negotiation process (for example in connection with the licensing of intellectual property) on behalf of the University.

6. Where the University is a founding member of a company limited by guarantee, it will endeavour to ensure that a basic framework of governance is enshrined within the Articles of Association, recognising that for such charitable companies, changing the governance structure at a later date is invariably difficult.

Principles applicable to all University wholly owned subsidiary companies

7. The University recognises the independence of the Board of Directors which, as long as the company remains solvent, has an overriding duty to act in the best interests of the company. While noting this point, the University would expect the following principles to apply to its wholly-owned subsidiary companies;

- When creating such new companies the presumption is that HEFCE good practice should be followed.
- The legal documents (such as the Articles of Association, shareholders agreement and service level agreement) should create accountability and scrutiny mechanisms which annually provide comfort to the University as a charity that the company is governed appropriately and also is financially well managed and solvent.
- The University and the Company should continually ensure that the Company supports the strategic goals of the University and that the annual Key Performance Targets set by the University for the Company are relevant and aligned. The method and arrangements for review of the targets and performance, together with Budget approval, will be set out in the shareholders agreement.
- The Board of Directors will ensure that the Company has an effective system of risk management and reporting.
- In line with the shareholders agreement, the Board of Directors will ensure that Directors are appointed who have the requisite skills (including an active engagement in the company's activities and a questioning and challenging approach to the running of the Company) and have an appropriate breadth of knowledge and experience for the Company's objectives and business.
- University agreement to the appointment of individual Directors of the Board will be sought by the Company. On establishment of the Company, University agreement to the Directors will normally be given either by the Council, Strategic Planning and Resources Committee or the University Executive Board, depending on University legislation and scheme of delegation for establishment of the type of company. Thereafter, agreement to Directors will be by the Registrar and Secretary.
- The University will appoint at least one University Nominated Officer to the Company (this role is outlined in 9 below).
- In addition to the annual audit of the financial statements undertaken by the external auditors, the University will include the wholly owned Company in the regular cycle of reviews by the University's Internal Audit. An opportunity for the external and internal audit to comment on an overall risk profile for the Company and who should cover what, should be confirmed as standard practice when a new Company is established and this should be reviewed at least every three years.

8. In creating a wholly-owned subsidiary company the University will impose the following obligations on the Company, either within the Articles of Association or through the Shareholders Agreement:

- To ensure that when recruiting executive directors or senior employees of the Company, the requirements of the Company's insurers are followed (e.g. at least two written references etc.), and that, as far as practicable, the normal recruitment processes of the University are adhered to, including appropriate due diligence. The recruitment panel will normally include a senior member of the University, who is not a Director of the Company (e.g. a University Nominated Officer). The appointment letter will specify the initial term of the appointment.
- To provide an effective induction for Directors, to support them in being engaged fully in the Company's business.
- To ensure that both non-executive and any executive directors have clear role descriptors together with a detailed and comprehensive understanding of the Company's operations, including the challenges and opportunities it faces.
- To ensure that normally any Chief Executive Officer (if appointed) is an employee of the University, provided to the Company either through the Service Level Agreement or via a secondment agreement.

- To maintain good links and communication between the Company and the University, e.g. via the Nominated Officer(s) and through the completion of a Service Level Agreement with the University relating to the provision of payroll, accounts (including payment of invoices etc.), HR support and other management systems.
- To ensure that the Company retains the same external auditors as the University, and keeps the same financial year, unless specifically agreed with the University.
- To ensure that the external auditors are properly briefed on the nature of the business, with the briefing being refreshed if activity changes, or at least annually.
- To ensure that the Company takes out appropriate insurance, normally with the same providers as the University, unless specifically agreed otherwise with the University.
- To engage annually with the University to complete a review of strategic alignment, Key Performance Target setting for the forthcoming year and a review of performance against the previous year's targets, recognising that poor performance may result in a reduction of investment by the University in the Company's activities. This will normally coincide with the preparation of the Budget for the forthcoming year and be approved by the Strategic Planning and Resources Committee of the University.
- To provide an Annual Report on the Company's activities to the University Strategic Planning and Resources Committee each year. The report will also include the extent to which any specific Key Performance Targets for the year have been met, and records of attendance for Directors at Board meetings.
- That the Company Directors complete an annual fraud return, agreed by the Company's Audit Committee, for submission to the University's Executive Board and made available to the University's Audit Committee. The return will contain reports of any frauds discovered during the previous 12 months, an assessment of fraud risk in the Company and the steps taken to mitigate it. It should also confirm the Company's anti-bribery policy and the steps taken by the Directors to ensure compliance. The return should be signed off by the Board of Directors or, if there is one, the Company's Audit Committee. It will be made available to the internal and the external auditors.
- That the Company Directors attend regular training (e.g. in relation to directors duties, and corporate governance) provided either by the University, the Company or an alternative provider as appropriate and relevant.

9. The role of the University Nominated Officer is as follows:

- The University will normally appoint at least one University Nominated Officer per Company, who will be a senior member of staff of the University.
- The University Nominated Officer will have full rights to attend all Company Board meetings (and Board working groups), receive all papers presented to the Board.
- To raise issues or comment at Board meetings when appropriate, feedback information to the University as necessary and generally act to ensure good communication between the Company and the University.
- The Nominated Officer(s) will not be a member of the Board, or have any voting rights at Board meetings, but will ensure that there are no issues of conflict of interest regarding information about the Company being relayed back to the University.
- On behalf of the University to ensure that the Company is acting within its constitution, and to raise any related matters with the aim of ensuring they are being satisfactorily addressed;
- To review, and discuss with the Directors when appropriate, the monthly management information on the company's performance;
- To report to the Registrar and Secretary to ensure the Registrar and Secretary is informed of any significant issue affecting the Company.

- Further responsibilities and obligations will be specified in the shareholders agreement, and will be dependent on the nature of the Company;

Application of Principles

10. The principles outlined above need to be applied proportionately to the various types of companies wholly owned by the University. Two different generic types of company have been identified. For the purposes of the Protocol they are called 'External Facing' and 'Internal'. An External Facing company is defined for this Protocol as a company whose function and purpose is to engage and contract with people and organisations externally either nationally and internationally (a current example would be Alta Innovations Limited). The University acknowledges that this type of External Facing Company, through the nature of its business, has a significantly different risk profile. An Internal company is defined for this Protocol as a company whose function and purpose is focussed solely on the University and its internal needs and requirements, with a limited or very specific purpose and range of external contracts with external suppliers or organisations, and a correspondingly lower risk profile, (a current example would be Alta Library Services Limited).

11. Following approval in accordance with University legislation and scheme of delegation, that a wholly-owned subsidiary company is required to further the University's activities, the Registrar and Secretary in consultation with the relevant Pro Vice Chancellor and the Director of Legal Services will decide, at the time of formation, which designation is appropriate for the company being created, i.e. an External Facing Company or an Internal Company. This will depend upon a number of factors, including the nature of the proposed activity.

12. An External Facing Company will:

- Normally have at least five Directors. At least two (or 50% whichever is the greater) of the Directors will be independent (i.e. not University employees or lay members of University Council). The remaining Directors will normally be University employees, and at least one of whom shall normally be a senior member of the University. The Shareholders Agreement will normally specify that the Board of Directors will have an independent Chair, (i.e. not a University employee or lay member of University Council).
- Recruit the independent Directors in accordance with the Shareholders agreement, with the involvement of a University employee Director in the selection process, to ensure the Company has a Board with:
    - Directors with knowledge and/or experience of the type of business of the Company
    - Directors who understand, interpret and challenge the financial management accounts and performance information on the Company
    - Directors who have the time and determination to understand the issues and the business, are engaged with the Company's aims and direction, are active participants on the Board, and who can bring challenge, innovation and commercial awareness to the Company
    - Directors who review and challenge the Company's objectives, risk management and operations
- Create and operate an effective Company Audit Committee and where necessary a Remuneration Committee.
- Ensure that key senior appointments within the Company are filled following open competition, and that at least one member of the interview panel will be a senior representative from the University (e.g. a Nominated Officer), who is not a Director of the Company, nor engaged in the Company's operation.

- Have two University Nominated Officers appointed by the Registrar and Secretary.

13. An Internal Company will:

- Usually have at least three Directors who will normally be University employees, and at least one of whom will normally be a senior member of the University. The Shareholders Agreement may specify that the Board of Directors will have an independent Chair, who is not a member of staff of the University.
- Ensure that the Directors have knowledge and/or experience of the type of business of the Company, understand the University's strategic requirements of the Company, and ensure that the Company supports the University.
- If appropriate, create a Company Audit Committee and Remuneration Committee
- Ensure that if there are any key senior appointments to the Company, they are made in accordance with normal University procedures
- Normally have a University Nominated Officer appointed by the Registrar and Secretary

Spin-out Companies where the University holds more than a 25% shareholding and other Companies where the University retains an interest

14. The University has a number of shareholdings in unquoted companies, which are established from time to time by the University to exploit and commercialise its IP . The University's spin out companies which result from IP are overseen on behalf of the University by Alta Innovations Limited and it is Alta Innovations which is responsible for ensuring that this protocol operates effectively for such spin-outs. It should be noted that it is a feature of spin-out companies that over time the University's shareholding is often diluted as venture capitalists and similar funders invest money in the company in return for larger shareholdings. To recognise this, where the University's shareholding amounts to more than 25% of the Company's issued share capital (i.e. the University retains the right to block a Special Resolution) the University will endeavour to ensure that any shareholders agreement or Articles of Association contain the following provisions:

- That within the first year following creation the Board of the spin-out Company will normally have at least one independent director with knowledge and experience of the business activity (i.e. for this purpose an independent Director is one who is not an employee of the University or their spouse/partner).
- That the Company will have independent external auditors, appointed through a transparent and fair process.
- That the Company will provide an annual report on activity to Alta Innovations Limited and the University Executive Board or Strategic Planning and Resources Committee
- That, in the event the Company decides to work with organisation which may conflict with the University's ethical policies or reputation, there is a right for the University to require the other shareholders to acquire its shares for a fair value within the Articles of Association of the Company.

15. As well as ensuring this protocol is applied effectively to spin-out companies, Alta Innovations Limited will be responsible for advising the University as to when amendments to Articles of Association and other governance matters of such companies are appropriate, and to take such factors into account when negotiating the formation of a new company.

16. The University is also cognisant of the potential reputational risks which may be inherent in shareholding or membership of the Company and therefore wherever possible the University will seek to ensure similar governance standards are also included in the Articles of Association of any Company Limited by Guarantee.

Review of this Protocol

17. This protocol will be reviewed, together with the list of companies which are wholly owned or where the University has a shareholding or membership, annually by the Registrar and Secretary and the Director of Legal Services and any amendments proposed to Council.

Approved by Council
27th March 2012