



## Greenville Report

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**PRIVATE AND CONFIDENTIAL**



# Reconstitution of Benefacts as a Controlled Public Body under EU Rules



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# Reconstitution of Benefacts as a Controlled Public Body under EU Rules

## 1. Establishment of Benefacts

Benefacts was incorporated under the Companies Act 2014, as a company limited by guarantee without share capital on 28<sup>th</sup> November 2014 (Registered No. 553387).

### 1.1. Memorandum of Association (item no. 4) – Objects for which the company is established.

- (a) To establish, maintain and publish extracts from a database derived from publicly available sources augmented by voluntary disclosures, concerning nonprofit entities established for public benefit, however constituted, with the aim of assisting government, the nonprofit sector and its stakeholders better to understand and assess the objects and performance of such entities.
- (b) To explore the extent of the data available on nonprofit organisations operating in Ireland and the range of potential uses of that data, and regularly to expand and update the database with relevant information in order to optimise the quality and value and promote the use of the data in order to establish a self-funding business model for the company.
- (c) To do all such other things as are incidental or conducive to the attainment of the above objectives.

### 1.2. Purpose and Key Objectives

Benefacts is a not-for-profit company established in order to make the work of civil society organisations in Ireland more transparent and more accessible – to themselves, to their stakeholders and to the public at large. This means improving information about and understanding of the work of all Irish nonprofits<sup>1</sup>.

- Promoting greater public confidence in the use of the public's money

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<sup>1</sup> See Benefacts Annual Report 2020 (extracts)



- Providing decision makers with timely access to reliable data, collected and classified in a that facilitates analysis.
- Devising and developing web-based services to help reduce bureaucratic overheads and support administrative reform, specifically in line with the government's public service reform agenda.
- Providing the sector with data and information tools that will support business planning at the level of organisations and sub-sectors.

### 1.3. Principal Activity

The principal activity of the company is the creation, maintenance and deployment of an extensive database derived from the Public Regulatory Disclosures (including the financial Statements where available) of Irish nonprofits and public sector bodies and the provision of data, information, analysis and analytic services derived from the database.

### 1.4. Extracts from Articles of Association

- **The Board of Directors**

**#35.** The company shall have a minimum of three and a maximum of 11 directors. Within this range, the board may from time to time by ordinary resolution increase or reduce the number of directors.

**#38.** Vacancies for the position of director shall be filled by election at the Annual General Meeting of the company.

- **Powers and Duties of Directors**

**#41.** The business of the company shall be managed by the board, which may exercise all such powers of the company as are not by the Act or by these articles required to be exercised by the company in general meeting, subject nevertheless to the provisions of the Act and of these articles and to such directions, being not inconsistent with the aforesaid provisions as may, by special resolution, be given by the company in general meeting but no direction given by the



company in general meeting shall invalidate any prior Act of the board which would have been valid if that direction had not been given.

### **1.5. The Directors of Benefacts**

The company has eight directors:

- Mr. Tom Boland (Chair) who is a specialist in higher education and a former CEO of the Higher Education Authority
- Mr. Rory Coveney who is Strategic Advisor to the Director General of RTÉ
- Dr. Stephen Kinsella, a Professor of Economics at Limerick University
- Mr Bob Ottenhoff who is former CEO of GuideStar (USA)
- Ms. Patricia Quinn (Managing Director), a former CEO of the Arts Council
- Mr. Philip Smith, a partner in Arthur Cox law firm
- Ms. Emma Lane-Spollen, a philanthropy advisor
- Ms. Anne Vaughan, recently retired Deputy Secretary General of the Department of Social Protection and Chair of the National Statistics Board

All CVs are provided on the company website.

During 2020, the board of Benefacts met 12 times, with all meetings after March being held remotely.

### **1.6. Governance**

Benefacts complies with the Code of Practice for the Governance of State Bodies, at the request of the Department of Public Expenditure & Reform.



## 2. Benefacts' Operations

During 2015 and 2016, the company built its professional team, systems and processes and launched its free public website. An agreement to provide a quarterly data feed was made with the CSO in 2016, to provide otherwise unavailable data in support of the preparation of the national accounts.

An Annual Report Series on the nonprofit sector was launched in 2017 and an annual report on philanthropic giving in 2020.

Beginning in 2018, Benefacts worked with a group of public sector bodies to devise a proprietary compliance and risk analysis webservice (Benefacts Analytics) and shared grant reporting webservice (Benefacts Who Funds What). Each year since 2018 Benefacts has provided datasets, analysis reports and other bespoke services to a variety of users across all sectors, as a means of illustrating the utility of its data and generating revenue needed to compensate for the termination of Atlantic Philanthropic Funding in 2017. In 2020 Benefacts began to provide due diligence and risk analysis supports to the grant programmes of Rethink Ireland.

### 2.1. Financial Supports to Nonprofit Organisations

160 public sector bodies in Ireland provide more than €7 billion in financial support to at least 4,000 nonprofit organisations – many more if local nonprofits are included. Notwithstanding this high level of financial commitment distributed across so many individual agencies, each with its own administrative and accountability structures for grant making, there has until recently been no mechanism for inter- agency data sharing. This has limited investment in cross-agency digital-first approach, with no process for reducing the compliance reporting burden on the sector or building whole of government policy or risk appraisal capabilities.

### 2.2. Daily Updates of Nonprofit Data

Benefacts identifies sources of nonprofit data in the records of more than 20 public bodies, and its database, which is updated daily, amalgamates material from more than 30 additional sources, growing the database each year with about 3 million fresh data points.



Benefacts is the unique source of this cleaned, structured dataset. In addition, working with partners and clients in the sector, in government (including various departments and agencies, The Central Statistics Office, Charities and Housing Regulators, IGEES, The LGMA, Revenue and The Office of the Comptroller and Auditor General and in philanthropic organisations, Benefacts has created valued resources for a range of stakeholders, as described below:

	Raw Datasets	Free Public Info & Analysis	Bespoke Analysis	Due Diligence	Benefacts Analytics, Who Fund What
Public Media		X			
Nonprofit Sector	X	X	X		
Grant Makers		X	X	X	X
Statisticians Academics	X	X			
Policy Makers		X	X	X	X
Donors, Service Providers			X	X	

### 2.3. The Benefacts Service Today

Benefacts has now established the go-to resource for free, publicly available data on Ireland's €14 billion social economy. Registered users of its web-based services grew by 43% in 2020. These are mainly used by public servants to access structured current and historic data in ways that help reduce the overheads associated with the €7 billion worth of current annual grant expenditure by the State.

Recycling is at the heart of Benefacts' business model. It re-uses data already generated for other reasons and puts it to some other purpose. Its work of data mining, cleaning, digitising,



classifying and aggregating has created the basis for a data infrastructure serving the entire nonprofit sector and its stakeholders.

## **2.4. Selected Extracts from Benefacts' 2020 Annual Report**

### **2.4.1. Principal Activities**

The principal activity of the company is the creation, maintenance and deployment of an extensive database derived from the public regulatory disclosures (including the financial Statements where available) of Irish nonprofits and public sector bodies, and the provision of data, information, analysis and analytic services derived from the database.

### **2.4.2. Compliance with Governance Standards**

Between 2015 and 2019 Benefacts complied on a voluntary basis with the provisions of the Governance Code, which was a governance standard for nonprofit organisations promulgated by sector leaders. During 2019, by agreement with its principal funder, the Department of Public Expenditure and Reform, the company transitioned to a compliance regime in line with the provisions of the Governance Code for the Boards of State Bodies. This was in effect in 2020 and it provides, among other things, for directors to provide the company with annually updated Statement of interests and a Statement of compliance with the company's ethical and business codes of conduct.

### **2.4.3. Benefacts Data Sources**

Appendix 1 of this report provides an extract from Benefacts Annual Report 2020, entitled "Sources of the Data in Benefacts Database of Irish Nonprofits".



### 3. Critical Considerations for Benefacts

Due to its current private status as a service provider Benefacts is simply classed as a standard economic operator offering its services on the market, being neither a public entity or having any functional or legal connection with the public sector, other than as a recipient of funds at the pleasure of the State or State agencies. The fact that Benefacts offers a unique and valuable service and that it is the only service provider of its kind is not sufficient to ensure any longer-term security or fixity of tenure for the company. Due to the nature of the service, it is most unlikely that there is justification for multiple bodies creating multiple databases based on the same information sources at the taxpayers' expense. What is essential for its long-term viability is that it is conjoined with the public sector in a manner similar to other mainstream public undertakings which are also providing essential services.

Benefacts cannot be expected to compete in standard public tender competitions for the provision of its services, since there is no competitive market for those services, and since the creation of a competitive market for them would simply add considerable cost without any added benefits for the taxpayer.

The State would be better served therefore, were Benefacts to be correctly subsumed into the public environment. If that could be achieved, the service will then be properly resourced, and its survival secured. It is clear that Benefacts current structure and funding model is a major impediment to its continued viability. The question is, therefore, what type of organization would best suit its own requirements as well as those of its public sector client base.

So, what are the key features of such a model and what changes will be required in its structure and external relationships if it is to be reconstituted to meet these needs?

#### 3.1. Reconstituting Benefacts

By interfacing appropriately with the public sector Benefacts could become reconstituted as a contracting authority by satisfying the criteria to become a "body governed by public law".

Following on from that restructuring, Benefacts would then be required to continue over time to comply with the relevant provisions set out in Article 12 of EU directive 2014/24/EU.



The necessary steps to achieve this are set out in chapters 4 and 5 below.

While it is noted that the reconstitution of Benefacts would require the approval of the Government at the highest level, there are several precedents for such a development.

Ultimately, however, such a reconfiguration could offer singular benefits to the efficiency of the public service in Ireland over time.

When it has been firmly established that Benefacts satisfies the criteria in order to be recognised as a “body governed by public law”, it then has the potential to benefit from the direct award of public contracts by other contracting authorities, outside the scope of Directive 2014/24 as set out in Article 12.



## 4. Becoming a Contracting Authority

### 4.1. Introduction

Directive 2014/24/EU establishes rules on the procurement procedures for awarding public contracts for the acquisition of supplies, works and services above specified financial threshold values by certain categories of public bodies, known as “contracting authorities”.

In defining contracting authorities, the Directive provides that these comprise “the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law”.

Should Benefacts, currently a private company, without any public sector affiliations, seek to be classified as a contracting authority, it will have to satisfy all of the criteria for its chosen category of contracting authority. However, on inspection of the categories set out above, the following options are not available to Benefacts:

- the State
- regional or local authorities

Therefore, the sole option will be that of “body governed by public law”. Having chosen this option therefore, in order to become a “body governed by public law”, Benefacts must satisfy the independent and uniform interpretation of that provision under EU law, whose terminology has been clarified by the case-law of the Court of Justice (CJEU). It should also be confirmed that the law of the Member States, including Irish law, is irrelevant in this regard.

We will now proceed to identify the changes, if any, required in order to classify Benefacts as a body governed by public law. Once Benefacts satisfies those criteria it will become formally subject, *ratione materiae*, to the public sector procurement directive, Dir 2014/24/EU, and the other relevant EU directives, together with the case-law of the CJEU. It may also, subject to its new legal and factual position, become a “controlled legal person” under 2014/24 and be eligible for the direct award of public contracts, where a contracting authority or authorities exercise individual or joint control over the new legal person (see Chapter 5).



## 4.2. Article 2(1)(4) of Directive 2014/24/EU – Bodies Governed by Public Law

These bodies have all of the following characteristics:

- a) They are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- b) They have legal personality; and
- c) They are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half or whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

As the Court has consistently held, the conditions set out in the above Article are cumulative, so that if a single one is unfulfilled a body cannot be regarded as a “body governed by public law”, and therefore as a contracting authority, within the meaning of the term.

### 4.2.1. Paragraph (a) of Article 2(1)(4)

The first requirement is that the body is “established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

According to the Court, the term “specific” shows the EU legislatures intention to make only entities established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character to be made subject to the binding rules on public contracts. In Benefacts’ case there can be little doubt since according to its Memorandum of Association (item no. 4(a)), its express purpose is the aim of assisting government, the nonprofit sector and its stakeholders better to understand and assess the objects and performance of such entities. This clearly meets the criterion of having been established for the specific purpose of meeting needs in the general interest.



According to settled case-law<sup>2</sup>, needs in the general interest, not having an industrial or commercial character are generally needs which are satisfied otherwise than by the availability of goods and services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence (see BFI Holding, paras 50 & 51, Agora and Excelsior, para 37, and Adolf Truley, para 50).

It is precisely in order to achieve these objectives, outside of the marketplace and in order to further the general interests of the State, that Benefacts is now prepared to make the changes, required to be classed as a body governed by public law. It also recognises that the requirements to be met in order to be classed as such a body must be satisfied by Benefacts itself and not by another entity, even if the latter is to become its parent company in a case where Benefacts supplies it with services. As the Court has pointed out, it would not be sufficient that Benefacts was established by the State or that its activities are financed by funds derived from activities pursued by the State in order to obtain the status of a contracting authority, as all of the other elements must also be complied with.

#### **4.2.2. Legal Personality**

Benefacts already achieved legal personality under private law at the time of its foundation in 2014. It is noted that an entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority<sup>3</sup>. It is only necessary for it to establish that it satisfies all three of the criteria set out in Article 2(1)(4) of 2014/24 in order for it to be classed as a public authority and a body governed by public law.

#### **4.3. Close Dependency Criteria (Art 2(1)(4)(c) of 2014/24)**

The three alternative criteria in this provision, namely

- i. Financing for the most part,
- ii. Management supervision and
- iii. Board membership (more than half) are known as “close dependency criteria”.

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<sup>2</sup> See Case C-18/01 (22 May 2003), (paras 47) “Korhonen”

<sup>3</sup> See to the effect Case C-84/03, 13 January 2005 (paras 28-30) Commission v Spain



While financing (meaning by more than half) refers only to funding other than as consideration for services rendered to an economic operator, it is not proposed that Benefacts should employ financing as a dependency criterion in support of its new status as a body governed by public law. Rather it will rely upon the other two criteria of management supervision and board membership for this purpose.

As regards the criterion of management supervision, such supervision is based on the finding that there must be active control over the management of the body concerned such as to give rise to the dependency of that body on the public authorities equivalent to that which exists where one of the two other alternative criteria is fulfilled.

#### **4.3.1. Applicable Case-law on Close Dependency**

As regards the three alternative conditions set out in Article 2(1)(4)(c) of Directive 2014/24/EU, each reflects close dependency on the State, etc.

- **Teckal**

The Court's Judgment of 18 November 1999, *Teckal* (C-107/98, para 50) was the first to acknowledge that the specific nature of direct awards gives grounds for not applying the public procurement rules in accordance with the relevant directives, if the contract in question was concluded between on the one hand a Contracting Authority and on the other, a person legally distinct from it, in cases where the Contracting Authority exercises over the separate entity in question a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities.

Following that Judgment, the Court made clear the conditions for applying that regime<sup>4</sup>, in particular in the Judgments of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03), of 11 May 2006, *Carbotermo and Consorzio Alisei* (C-340/04), of 10 September 2009, *SEA* (C-573/07) and of 8 May 2014, *Datenlotsen* (C-15/13).

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<sup>4</sup> See to that effect Case C-266/17 and C-267/17 (21 March 2019), paras 76-79 and also see Case C-253/18, (8 May 2019), para 27



Directives 2014/24 and 2014/25 codified and made clear the Courts case-law on direct awards. The incorporation of the Direct Award Regime within the scope of the public procurement directives, means that, in practice, any recourse to that type of award presupposes the application of those directives. The EU legislature has therefore made it clear that it intended that the Direct Award Regime was to be linked to those two directives. This analysis of Benefacts position is therefore predicated upon Article 12 of Directive 2014/24/EU.

- **Case C273/00 (Adolf Truly)**

#Para 69: ... as regards the criterion of management supervision ... that supervision must give rise to dependence on the public authorities equivalent to that which exists where one of the alternative criteria is fulfilled, namely where the body in question is financed, for the most part, by the public authorities or where the latter appoint more than half of the members of its administrative, managerial or supervisory organs, enabling the public authorities to influence their decisions in relation to public contracts (See Commission v France, paragraphs 48 and 49).

#Para 70: In the light of that case-law, that criterion of managerial supervision cannot be regarded as being satisfied in the case of mere review since, by definition, such supervision does not enable the public authorities to influence the decisions of the body in question in relation to public contracts.

- **AG in Case C-300/07 (Oymanns)**

#Para 46: The Court confirmed in Adolf Truly that the criterion of management supervision "is, however, satisfied here the public authorities supervise not only the annual accounts of the body concerned but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency".

- **Case C-526/11 (IVD GmbH)**

#Para 29: .... As regards the criterion relating to management supervision by the public authorities, it must be recalled that, in principle, a review ex post facto does not satisfy that



criterion, for such a review does not enable the public authorities to influence the decisions of the body in question in relation to public contracts.

#### **4.3.2. Benefacts and the Dependency Criteria**

In reconstituting Benefacts organisation structure in accordance with the above “dependency” criteria they would have to comply with both the “management supervision” criterion and the “more than half” board membership simultaneously. That is because Benefacts would aim to become eligible to use the Article 12 provisions enable it to become a “controlled” legal person suitable for direct award of public contracts.

In that regard Benefacts, as a controlled legal person, must accept joint control over their strategic objectives and their significant decisions in line with these dependency criteria.



## 5. Benefacts Becoming a Controlled Legal Person

In Chapter 4 we considered the steps required to change the structure of Benefacts in order to meet the criteria for a body governed by public law and thus a contracting authority under EU law. As such a body, Benefacts, under its new disposition, would become subject to management supervision by the contracting authorities' directly appointed representatives, who would become members of Benefacts newly constituted board and collectively make up more than half of the total board membership.

The final act to be carried out by the new contracting authority would be to comply on an ongoing basis with the relevant provisions of Article 12 of 2014/24 relating to the codification of the original Teckal rules. These involve the contracting authority exercising, either alone or jointly with other contracting authorities, a control over Benefacts similar to that which they exercise over their own departments.

Appendix 2 set out the relevant conditions in Article 12 relating to the control of a legal person, in this case Benefacts, whereby the award of public contracts to it falls outside the scope of the Directive. The wider scope of joint representation by participating contracting authorities, the greater the opportunity for Benefacts to benefit from contract awards outside the scope of the Directive.

The following essential rules will apply to Benefacts as a controlled legal person following its reconstitution.

- (i) A contracting authority may exercise over Benefacts a control which is similar to that which it exercises over its own departments where it exerts a decisive influence over both its strategic objectives and significant decisions.
- (ii) A contracting authority may exercise, jointly with other contracting authorities, a control over Benefacts which is similar to that which they exercise over their own departments.
- (iii) The decision-making bodies controlling Benefacts may be composed of representatives of all participating contracting authorities. Individual representation may represent several or all of the participating contracting authorities.



- (iv) Those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of Benefacts, and
- (v) Benefacts does not pursue any interests which are contrary to those of the controlling contracting authorities.
- (vi) There must be no direct private capital participation in Benefacts at any point in time.
- (vii) More than 80% of Benefacts activities must be carried out in the performance of tasks entrusted to it by the controlling contracting authorities.
- (viii) For the determination of the percentage of activities in (vii) above, the average total turnover with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

## 6. In Conclusion

Benefacts should seek the necessary approvals for the reconstitution of the company in line with the proposals set out in Chapter 4 (Becoming a Contracting Authority) and Chapter 5 (Benefacts becoming a Controlled Legal Person).

Once these approvals are confirmed, Benefacts should take steps to confirm the new board members representing the participating contracting authorities and make the necessary amendments to the company's legal status as required.

END.

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## Appendix 1 - Sources of the Data in Benefacts Database of Irish Nonprofits

### Sources of the data in Benefacts Database of Irish Nonprofits

Source	Number of Entities	Machine-readable?
Companies Registration Office	9,970 companies limited by guarantee; 91 public benefit designated activity companies; 40 private or public limited companies; 55 trade unions; 666 friendly societies	Some
Charities Regulatory Authority	11,310 registered charities	Some
Department of Education	3,920 Schools	Yes
Department of Foreign Affairs*	Reported grant expenditure to 44 nonprofits in Ireland and 170 nonprofits overseas	No
Department of Further and Higher Education*	Report grant expenditure to 36 nonprofits	No
Department of Justice*	Reported grant expenditure to 370 nonprofits	Yes
Department of Rural and Community Development*	Reported grant expenditure to 480 nonprofits	No
Department of Social Protection*	Reported grant expenditure to 896 nonprofits	Yes
Health Services Executive*	Reported grant expenditure to 34 S.38 and 455 S.39 bodies	No
Housing Agency	287 Approved Housing Bodies signed up to the Voluntary Regulation Code (The Code)	No
Library of the Houses of the Oireachtas	26 charter bodies	No
Public Participation Networks in 23 counties	13,000 registered local nonprofits especially associations, clubs and societies	No
Representative Church Body	800 churches, dioceses, parishes of the Church of Ireland	No
Revenue	6,335 charities eligible for tax relief on donations	Yes
Revenue	7,179 charities eligible for tax relief	Yes
Revenue	2,652 Sports bodies eligible for tax relief	Yes
Roman Catholic Church in Ireland	2,340 churches, congregations, dioceses, parishes and other bodies of the Roman Catholic Church in Ireland	No
Sport Ireland*	Reported grant expenditure to 90 nonprofits	No
Standards in Public Office Commission	26 political parties	No
The Arts Council/An Chomhairle Ealaíon*	Reported grant expenditure to 225 nonprofits	No
Tusla - Child and Family Agency*	Reported grant expenditure to 711 nonprofits	Yes

\* Sources of data newly added to WFW for 2020



## Appendix 2 – Article 12 of Directive 2014/24/EU

### Article 12

#### **Public contracts between entities within the public sector**

1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
- (b) more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non- controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.

2. Paragraph 1 also applies where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

- (a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;
- (b) more than 80 % of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non- controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.



*For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:*

- (i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;*
- (ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and*
- (iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.*

*4. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:*

- (a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;*
- (b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and*
- (c) the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation.*

*5. For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.*

*Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.*