



AYLESBURY VALE DISTRICT COUNCIL

GUIDE TO CREATION AND WORKING WITH COMPANIES IN WHICH AVDC HAS A FINANCIAL INTEREST

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BACKGROUND

WHY GOVERNANCE IS IMPORTANT

The governance of any company owned or invested in by AVDC is important as there is a need to :

- Ensure that it is clear for staff, public, members and the company staff who is responsible for what, when and why?
- Ensure that AVDC and the company is clear on its roles and responsibilities
- Ensure that nothing is developed that conflicts with AVDC, or places AVDC in an unlawful position
- Ensure that any and all legal or contractual issues are complied with
- Ensure that the company is operating ethically and transparency is in line with the councils legal responsibilities.

Good corporate governance is aimed at ensuring that the above are adhered to, to maintain and improve the image of both the company and AVDC, and overall ensure that the company delivers against the reasons it was created and to its business plan.

It is also important that there is consistency across all companies that AVDC may own or relate to, so that there is a common understanding for all partners involved in oversight and management.

The aim of any company owned or part owned by AVDC is to produce overall benefits for the residents and businesses of the Vale. This may be through investment, commercial opportunity, a host of other reasons or simply by generating cash for the council through divided payments funded from profit. This also may be through purchasing or reselling elements of council services which may result in an overall better position for the council. This overarching aim should be at the heart of all decision making, and that this document seeks to assist in developing.

This document sets out a number of principles that owned (part or whole) companies should deliver. It is recognised that companies created preceding the publication of this guide may not be fully compliant, however where possible those should be moved to align with this guide where practical. It is recognised however that each company and circumstance is different, and hence sometimes departures from these principles can be justified, but the guidance forms a starting point and any departure must be justified and documented and such deviation agreed with as a minimum a Cabinet Member and potentially full Cabinet.

It is assumed that the company will operate legally at all times.

START UP

Possibly the most important phase of launching a new company is its start up process. This section of the guide gives a high level set of issues/checklist that may be useful when developing new companies – especially when wholly owned. It is not intended to be a detailed implementation plan, rather the key phases and key issues to consider.

There are 3 distinct phases of developing a company in the AVDC environment.

PHASE 1 – BUSINESS CASE AND DECISION MAKING

The key activity in this phase of developing the company is to establish the business case behind the company and to gain the necessary decisions to progress. A checklist for company set up is shown in Annex 6.

BUSINESS CASE

It is important that there is a solid basis for developing a company. Prior to developing the business case there are a number of key questions worthy of consideration :

Why do you need a company and are we sure that a company is the best solution ?

Developing a company should only be undertaken where there is a clear reason for doing so. A number of options are available for AVDC to gain many of the advantages that a company provides without the need for setting one up, and the running costs that this incurs. Advice should be sought from AVDC legal to assist in this decision making.

Principally the main reason AVDC is likely to wish to set up a company is to gain access to something or some activity that as a council it can not. This is likely to be related to making a profit in areas it is prohibited from doing or that it needs some freedom or flexibility from the bureaucratic process in local government that it can't gain in any other way. In general the Council will be setting up companies with a specific aim in mind. This may be that a Company is required in order to create an outcome for the community that the Council is not empowered to deliver itself but in general it is more likely that a Company is being set up either because a company can carry out a Council function better or more at lower cost or to generate profit for the council in the form of cash which can be reinvested in Council services that cannot ever recover their costs or other commercial initiatives. The important point to bear in mind is that the Company must deliver benefit to the Council either through :

- Reducing Council operating costs by delivering Council service at lower cost than the Council is able to do.
- Delivering services which the Council is not empowered to deliver
- Generating cash to the Council through Dividend payments
- Generating a cash lump sum by enabling the Council to sell its shares at a point in the future at a significant profit.

It must be clear which of these objectives is in focus and how the company will deliver them.

Once the decision is made that a company is the right option, a business case needs to be developed. This should ideally take the form of a 'green book'¹ compliant business case (the government standard for business cases). This is not a rigid form, but one which can flex and adapt to the issue at hand.

As a minimum it should clearly set out :

- the objectives of the business
- The investment and other resources required to achieve those objectives.
- What options for delivering this are – including benefits and dis-benefits of each
- An assessment of the best option
- What form the company should take
- A consideration of the taxation and potential State Aid issues
- How the company will generate cash for reinvestment in the Council rather than just profits for reinvestment in the Company's growth.
- A business plan (ideally no less than 5 years) and a matching financial cashflow forecast including how start up will be funded (including any risks the business may face and how significant these risks are, and the expected financial results of the business and projected dividend payments to the Council, together with any relevant outcomes that the business is expected to achieve
- Evidence, normally backed by legal opinion, that the option is not ultra vires
- The Business Plan will be rigorously scrutinised and any Business Plan that does not demonstrate a clear understanding of the target market, costs, opportunities, the competition, barriers to entry and pricing and profit strategy is likely to be rejected.

GAINING PERMISSION

Company set up is a reserved matter for Council. This means as a minimum Cabinet recommendation and Full Council resolution to set up is required. In reality much work prior to these formal stages will need to be undertaken with senior managers, stakeholders and members. Bear in mind the time it will take to complete the decision making process in full – likely minimum 3 months at the very earliest.

PHASE 2 – PRE LAUNCH PREPARATION

Once agreement to proceed is granted, there is an intensive effort in launching the company. This will include (but not limited to) :

- Who and how the company will be staffed – internal staff seconded, cost recovery options, direct employment (if the latter then personnel advice will be required)
- Clear Statement of Cost recovery arrangements to a level that would be expected if the services were being procured from a third party.
- Clear statement of which costs of setup will be funded by AVDC and which will be attributed to the Company.
- Clear explanation of how the company will generate surplus cash to be returned to the Council in the form of dividends or stock splits and what level of reinvestment of profits is expected.

¹ <https://www.gov.uk/government/publications/the-green-book-appraisal-and-evaluation-in-central-government>

- Explanation of the risks to the Council’s reputation which may arise from the Company’s operation and how they will be managed
- Assets – where will the company operate from, what IT will it use, what data does it need etc – see using assets section below. What consideration the Company will give to AVDC for their use.
- Financial arrangements – any loan or capital, who the company will bank with, accountancy, VAT and corporation tax considerations, insurances etc.
- Clear statements of the controls that AVDC will require the company to put in place, and any audit processes that AVDC may require in relation to
 - Information Security and Data Protection
 - Financial Controls
 - Intellectual property
- Media & Communications – how will the messages be communicated, how will you get to your customers, how will they contact you etc. The relationship between AVDC Customers and any other company customers, and a clear role/responsibility understanding between AVDC and the company.

All of these areas are considered in more detail in the following sections of this guide.

PHASE 3 – POST LAUNCH EARLY DAYS

Once the initial set up phases are completed and the company starts to operate in a more stable sense there should be every effort made to move the company into an independent state as soon as possible.

START UP SUPPORT

AVDC will help in the start up process where it can but it is limited in what it can provide and when. The guiding principles around start up support are:

- Up to the point of decision – everything can be done by AVDC, it is in the process of developing the business case for a company and that is a legitimate activity it can do as the council.
- Post decision and pre launch – things will start to get less clear. AVDC is still setting up the company and hence can fund most things, however once the company entity exists the distance between the company and AVDC needs to become more distinct. The guiding rule is at this point that any company will pay for itself.
- Best practise is to use the company incorporation date as a dividing line between setup by AVDC and the company existing by itself. At this point technically the company exists and should start to operate separately. This means that by that point all of the issues in this guide should be either agreed or both AVDC and the company should be clear about how they will work. Any council resources used by the company from the point of incorporation will be charged to the company at full cost recovery. If necessary Service Level Agreements (SLA) between AVDC and any company can be entered into on a full cost recovery basis – more of which is explained further on in this guide.

ARTICLES OF ASSOCIATION

One key part of company set up is the articles of association. These govern the way the relationship between AVDC and the company works, and how the company itself runs. These are different for each case, but some standardised issues are starting to form. As a minimum the Articles should cover :

- Business Plan
- Access to information by AVDC regarding the company
- Management of the company
- Board of Directors
- Share Management
- Termination
- Confidentiality
- Reserved Matters – see Annex 5

This guide goes through in more depth all of the above points and more.

STATE AID ²³

This is a summary version of the state aid rules and regulations. If you have **ANY** query regarding state aid please refer to legal advice. As a first stage you may wish to refer to the government guidance referred to in the footnote.

DEFINITION – “State aid is any advantage granted by public authorities through state resources on a selective basis to any organizations that could potentially distort competition and trade in the European Union (EU)”.

The definition of state aid is very broad because ‘an advantage’ can take many forms. It is anything which an undertaking (an organisation engaged in economic activity) could not get on the open market. Whilst it is unusual for councils at the district level to come near to State Aid issues due to size and scale, when dealing with companies and investments it is more likely and hence you should have an understanding of the principles.

STATE AID RULES

State aid rules can (among other things) apply to the following:

- grants
- loans
- tax breaks
- the use or sale of a state asset for free or at less than market price (including intellectual property)

The rules can apply to funding given to charities, public authorities and other non-profit making bodies where they are involved in commercial activities. In principle, state aid is not allowed in the EU. However the state aid rules allow for good aid, which is necessary to deliver growth and other important objectives.

The UK government supports the need for effective state aid rules to prevent distortion of competition and to create an open and competitive market in the EU on which UK firms can fairly compete and grow.

COMPLIANCE WITH THE STATE AID RULES

Public authorities are responsible for ensuring their policy measures and projects comply with the rules. *We should think about state aid early and seek advice to avoid problems and save time.*

The rules can be complex and getting it wrong can mean recovery of state aid and suspension or withdrawal of funds as well as penalties. This might have serious consequences for the recipients of aid and the delivery of policy objectives.

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443686/BIS-15-417-state-aid-the-basics-guide.pdf

³ <https://www.gov.uk/guidance/state-aid>

IS THE ACTIVITY STATE AID ?

If your proposal can answer 'yes' to any four questions set out below then it is most likely state aid.

1. *Is the assistance granted by the state or through state resources ?*

- "Granted by the State" means by any public or private body controlled by the state (which, in the UK, means national or local Government).
- "State resources" is broad: any measure with an impact on the state budget or where the state has significant control are included, for example, tax exemptions, national Lottery funding and EU structural Funds, and gifts/funds.

2. *Does the assistance give an advantage to one or more undertakings over others ?*

- An "undertaking" is any organisation engaged in economic activity.
- This is about activity rather than legal form, so non-profit organisations, charities and public bodies can all be undertakings, depending on the activities they are involved in.
- An undertaking can also include operators and 'middlemen' if they benefit from the funding
- "Economic activity" means putting goods or services on a market. It is not necessary to make a profit to be engaged in economic activity: if others in the market offer the same good or service, it is an economic activity.
- Support to an organisation engaged in a non-economic activity isn't State aid, e.g. support to individuals through the social security system is not state aid.
- An "advantage" can take many forms: not just a grant, loan or tax break, but also use of a state asset for free or at less than market price. Essentially, it is something an undertaking could not get in the normal course of business.

3. *Does the assistance distort or have the potential to distort competition?*

- If the assistance strengthens the recipient relative to its competitors then the answer is likely to be "yes".
- The "potential to distort competition" does not have to be substantial or significant: may include relatively small amounts of financial support to firms with modest market share.

4. *Does the assistance affect trade between Member States*

- The interpretation of this is broad: it is enough that a product or service is tradable between Member States, even if the recipient does not itself export to other EU Markets.

If you answer **YES** to all four questions then state aid is likely to exist.

There are then a number of other conditions that apply – in particular a de minimis rule (€200,000 in any rolling 3 year period – around £140,000 in Dec 2015). There are tight regulations about the use of this and the de minimis regulations will need to be followed, which include record keeping and standard text to be used on notices. Do not anticipate that this is automatic exemption.

To ensure that state aid has been considered a screening form will need to be kept – Annex 1. This should be lodged somewhere safely in case any accusations of state aid are lodged.

If you are **AT ALL** concerned about state aid – seek legal advice early.

GENERAL GOVERNANCE

When forming a company we are creating a separate entity from the AVDC. As such it has its own rules, roles, finance and purpose. Because it is its own entity we need to ensure that we (staff members, customers and the public) don't confuse the company with AVDC and vice versa.

This does not mean that two can't and will not work closely together, but it does mean we have to be clear where the dividing line is.

Set out below are some principles around general governance for specific things, people or actions. They are not exhaustive but they are intended to set a minimum level of things that should be addressed.

EXISTING COMPANIES AND THOSE IN PILOT STAGES

Our existing companies that pre date the adoption of this document may not be in full compliance with the content set out. There should be an effort made to move the companies to become in compliance over the medium term.

Companies or concepts that are in pilot stages may again not be in full compliance, however the spirit of this guide should be adhered to, and where possible full compliance should be reached as soon as practicable.

ROLES OF MEMBERS AND STAFF

AVDC and the Company need to be aware of who staff are working for and under what rules, and what their role is for the company and/or AVDC. We need to operate an element of compartmentalisation or 'Chinese walls' between the different roles that staff play – especially when they are working for both AVDC and the company at any point.

This means that :

- There should be clear governance and transparency to the residents of the Vale.
- When talking to members, the public or customers – clarity and transparency are key, and people need to be able and ready to explain the relationship between the AVDC and the company.
- Staff, the Company and AVDC are clear what data, equipment and resources can be used by the company (see later sections regarding the principles around these issues).
- Information and knowledge that is gained in one role is **NOT** used in the other – for example knowledge obtained by AVDC should not be used in the company and vice versa. There may be exemptions to this where agreements are in place – but the default is **NO** transfer between the two.
- Staff working for the company should be formalised in some way – this could be via rolling secondment, or by buying staff time and ideally under a SLA for clarity . AVDC Staff **can not** do work for the company without this type of arrangement being in place, once the company has moved past the inception stage (ie post company incorporation).

- Specific guidance/induction should be given to staff before they work for an AVDC company regarding these issues to avoid any accusation of State Aid or procurement/contractual breach.
- Staff should be selected to avoid potential conflicts of interest if they remain in roles with AVDC - this is particularly important when regulatory services are involved - for example when companies may be applying for permissions where AVDC is the decision maker.
- The above also applies to elected members, and as part of member induction/training we need to cover the same issues.
- These messages should be reiterated regularly to members and staff (working for the company or not).

NORMAL COMPANY STRUCTURE

Normally any company is managed by a board of directors. With the exception of the Reserved Matters, the Business and all affairs of the Company shall be managed by the Board. To that end but subject to those exceptions, the Board shall have full and complete authority, power and discretion to direct, manage and control the Business and the affairs and properties of the Company, to make all decisions regarding those matters and to perform any and all other acts or activities customary or incidental to the management of the Business.

To assist in the day to day running of the company AVDC should appoint a shareholder representative. They act in the role of shareholder in making major decisions. This would normally be an elected member of the Council.

APPOINTMENT OF AVDC DIRECTORS TO COMPANIES

As part of owning companies AVDC will appoint representative directors to the boards of those companies. Notwithstanding public sector responsibilities, all Directors of companies have legal responsibilities, as defined under the Companies Act 2006, and under a wide variety of other laws and regulations such as insolvency and health and safety legislation.

The general duties of directors are set out in Chapter 2 of Part 10 of the Companies Act 2006:

- to act within powers in accordance with the company's constitution and to use those powers only for the purposes for which they were conferred
- to promote the success of the company for the benefit of its members as a whole
- to exercise independent judgement
- to exercise reasonable care, skill and diligence
- to avoid conflicts, or possible conflicts between interests as a Director and the interests of the company
- not to accept benefits from third parties, if they may be regarded as likely to give rise to a conflict of interest
- to declare any direct or indirect interest in a proposed transaction or arrangement.

Directors appointed by a public sector body have the same responsibilities as any other director under the Companies Act 2006. They must also continue to act in accordance with other applicable legislation, relevant civil service and public sector guidelines, including around managing public money and standards for conduct in public life.

When appointing directors the following guiding principles should apply. The current (and periodic updates) of AVDC standing orders or constitution should also be reviewed to ensure no conflicts are present.

Potential Directors :

- must be aware of the ramifications of acting as a director for a company – this includes that the director would be working for in the interests of the company and not the individual or indeed AVDC. They should be able to manage any conflicts that may occur.
- should be selected so that they are sufficiently senior to act at the level required by the role
- should be selected on their ability to demonstrate skills or knowledge pertinent to the operations of the company
- should be insured against liability claims by the company so as to limit their personal liability
- should be informed of the potential risks of acting as a Company Director
- will by default be unremunerated positions
- can be either executive or non executive positions
- should be selected to avoid potential conflicts of interest if they remain in roles with AVDC – for example typically the section 151 officer, the Monitoring Officer and the Leader should not be directors of external companies. This is so AVDC is still able to hold the company to account.
- Board Members should be provided with letters of appointment which clearly explain both the role and the conditions of the appointment.

When companies set up their boards, there should be consideration paid to use of external board members. Ideally companies should not be set up solely with AVDC staff and/or members. This is to ensure the independent operation of the company. External board members can be remunerated if required.

Shareholder representatives are also likely to be required, and are mandatory for larger companies. Shareholder representatives are important conduits between AVDC and the company, and should serve as both a liaison and reporting. Similar principles to the above should be used when AVDC selects representatives. When selecting representatives the conflicts of interest principle set out above can be waived.

Shareholder representatives will as a minimum need to be an elected member is able to action issues that relate to the role. In larger concerns there may also be merit in having an officer level assistant as well, however this would be in addition to, rather than in lieu of the member.

For ease it is also worth the company identifying its representative (s) at this point. It is for the company to determine who should be this role, but ideally it should not be a director of the company and be more at the operational level.

PRESS MEDIA AND RELATIONS RELATING TO THE NEW COMPANY

AVDC investments in companies are created so that the companies can have a clear focus on particular issues and activities. The company is a separate entity and best placed to make day to day operational decisions on all press, marketing and PR activity. To support this there will be an overarching principle that the company makes its own decision regarding these activities, with a hands off approach from AVDC.

However the company and its Board should have due regard to the political and community arena that AVDC operates within and should seek to uphold AVDCs broad aims and principles.

In doing so this general guidance applies :

- The Company should do nothing to harm the reputation of AVDC in the general eyes of the electorate, and vice versa.
- It should be clear on key media (such as website and significant marketing material) that the company is owned (part or full) by AVDC.
- An explanation as to the company and AVDC relationship should be on all websites. This helps with transparency to customers and the electorate. This should include reciprocal links to and from AVDCs website.
- It should be clear to the average customer what entity they are transacting with at any time (ie the company should not seek to pass itself off as AVDC, there should be a clear understanding by customers of who they are dealing with at any time).
- AVDC may assist in the launch of new companies and at significant events – where these are deemed in the overall public interest and are requested by the company.
- AVDC will limit its activity in the day to day communications and marketing by the company – company activity should be by the company not AVDC.
- In return, AVDC will aim not to influence or interfere in the commercial activities of the company through a politically driven agenda.
- There may however be issues where a co-ordinated approach between AVDC and the company may still be required (for example major launch or crisis). This will need to be addressed preferably in advance but if necessary in a time critical manner depending on the issue.

At times of normal operation the above should suffice to ensure a healthy and clear relationship between companies and AVDC. However where there are reputational risks alternative approaches may be necessary.

It is recommended that planned significant marketing activities form part of the quarterly reporting set out elsewhere in this guide so that both parties are aware.

REPORTING & PERFORMANCE MONITORING

In its role as shareholder there should be clear and regular performance monitoring of companies that AVDC has shares in. This is to ensure that the investments made in the company are being well managed according to the business plan, and to ensure transparency to members and the electorate.

QUARTERLY REPORTING

As a minimum these should include the items below, however the shareholder representative and company representative should agree the specific reporting requirements in advance of the first quarter reports and keep these under regular review :

- Current cash flow and profit and loss position
- Current investment position (including any loan position)
- Income and expenditure forecast for the 4 rolling quarters
- Current position compared to current business plan
- Any expected issues reserved in the companies articles of association that may be need to be reported to AVDC formally over the next 6 months.
- High level reporting of planned strategic marketing activities.

FORMAL ANNUAL REPORTING

Formal reporting of companies will be annual via Scrutiny and Cabinet. This will become due on or at the end of each financial year. Where Company Incorporation occurred within the last quarter of a financial year then the first formal report will be fall due in at the following financial year end.

The annual business plan for the vehicle and should be a matter reserved for shareholders' approval in the form of Cabinet, with the appropriate scrutiny review.

This reporting should be in the form of a narrative suitable for an AVDC member report and an updated business plan. The reporting should include as a minimum :

- Those items listed above for quarterly reporting
- Should cover a retrospective look since the last annual report
- Should set the business and financial targets for the forthcoming years and projections for two further years
- Any key reporting agreed with the Shareholder Representative
- As a minimum the forward reporting should cover the next 12 months.

Where possible all reporting provided by the company should be able to be made public. Where this is not possible confidential elements should be clearly marked in accordance with AVDCs current information security policy. AVDC and the company will come to a decision regarding what level of confidentiality should be applied. This will range from 'yellow pages' through redaction to full withholding of the information

As a minimum all reporting should have at the very least a summary commentary of progress and summary financial position able to be made public. For further information see the information security section of this guide.

FINANCIAL

The main reason why AVDC will own shares in company is likely to be due to the need to create new income or to protect its financial interests. As such the financial management of shares and the companies they reside in are of fundamental importance. This section of the guide sets out principles for managing these aspects in relation to AVDC. It does not seek to replicate or substitute the normal legal, tax and financial regimes that exist for any company – it is only concerned with the direct relationship between AVDC and the company.

As with all parts of this guide each ownership or company is different and these are subject to individual negotiation.

LOANS

When setting up companies it is possible that there will be some form of loan to the new company for start up (see start up section).

When loaning to the company AVDC will be guided by :

- The need to loan at a marginal commercial rate – by this we mean that there will be some element of interest payment over and above the cost of borrowing on all loans given to owned or part owned companies. This will be proportionate to the size of loan, term and risk. The guiding principle is that the loan will not be to the detriment of AVDC, and will be made on commercial terms.
- Payback terms, level of interest and level of loan shall be determined in the company set up stage. The level of loan will be clear in any business case prepared to support the investment. The Loan is then to be agreed by resolution by the company once it is set up.
- Where possible, there should be benchmarking evidence that the rate used is commercially comparable.

DIVIDENDS AND EXTRACTING FUNDS FROM COMPANIES

The key point of investments in companies is to raise general income for the council over the longer term. There are a variety of ways in which these can be extracted and it this guide cannot determine a rigid approach to this issue due to the number of specific and unknown factors facing each set of circumstances.

When extracting/receiving funds from its investments AVDC will :

- Seek to extract funds from the company in a planned and known way
- Seek to not harm the ability for the company to fulfil its purpose or agreed business plan. Business Plans will need to feature how this will be achieved in their forward plans.
- Will do so in the most in a way as to be most advantageous to both AVDC and the company with regard to the ruling financial arrangements at the time.

AVDC ANNUAL ACCOUNTS

Summary accounts suitable for inclusion in the Councils Annual Accounts will be required. These will largely replicate those required for the companies own tax issues. These may however vary from time to time linked to legislative or regulatory changes.

The Company will need to provide draft accounts a maximum of 4 weeks after the close of the financial year, in a format agreed with AVDC.

AVDCs auditors may require further information or access to financial records during this process. If this is required AVDC and their auditors will work with the company to deal with any specific issues.

Articles of Association for companies will need to reflect these issues.

BANKING, TAXATION AND ACCOUNTANTS

As with other areas of new company formation, AVDC is not concerned with the day to day operation of the company. Therefore choices regarding bank suppliers etc are for the company to decide (within the reputational guidelines set out earlier). Due diligence will be need to ensure that any provider meets the minimum legal requirements required by UK Law.

It is strongly recommended that external accountants are used for companies so that the dividing lines between AVDC and the company are clear and transparent.

During the set up phases of any company there should be due consideration to the best approach to taxation issues, including registration for VAT etc. and advice should be externally sought or verified.

USE OF COUNCIL ASSETS

AVDC wants to ensure that any company it invests in succeeds. As such the council has access to significant assets that may be able to assist in the new company set up or over the longer term; subject to satisfying state aid issues.

However many of the assets have been procured or are contracted in such a way that their use by commercial concerns is limited. This for example may be that procurement has been through government frameworks or license for products are limited to public sector use. In addition the rules around State Aid (see the section of this guide regarding this) may mean that use of such assets may not be possible.

The basic principle is therefore that there should be NO assumption that any asset can be used by the company. Starting from this position means that each request is thoroughly considered before being agreed to.

In all circumstances all assets will also be charged at for at a minimum full cost recovery rate. This should include a profit element where legislation allows, and should include the recovery of all costs – including those leading up to the provision of service.

All requests for assistance regarding assets will originate from the company. AVDC will seek to fulfil those requests subject to the issues covered in this guide.

Where fulfilling requests AVDC will need to pay careful regard to balancing the needs of the request and any detriment to existing council service that may occur – eg where fulfilling the request may mean that normal day to day council business is impacted on. This does not mean that this can not occur, but it does mean it needs to be explicitly considered.

Set out below are some principles that will apply to specific topics. These are not exhaustive but do give some guidance on the some principles (where possible should form the basis of a SLA between AVDC and any company).

IT

The council has significant IT resources, however in most cases these have been procured or are supplied through public sector restricted contracts.

There should be no assumption that ANY IT resource can be used by or for a company activity. This includes hardware and software. Data protection issues also apply – see other sections of this guide.

Known exemptions to this are :

- Printers – these are able to create auditable charge back codes which can be charged out to the company. This is currently actively managed via the conference centre.
- WiFi – free public WiFi is available through our offices. Any member of the public can use this facility (subject to sign up conditions) and therefore the company can also intermittently use this same facility. AVDC do however reserve the right to limit access in relation to this facility.

- Some licensed software is only for use by AVDC under the terms of its licence and cannot be used by any company without explicit consent.
- AVDC can generally procure hardware at prices which are more attractive than those available to low volume purchasers. In most cases these prices are available to AVDC related companies.
- Telephony services – AVDC have procured telephony services at attractive rates which can be used by AVDC wholly owned companies.

PROPERTY & ACCOMMODATION

The council has significant property assets. As with other areas these are however funded for by the tax payer for AVDC business, therefore the default position of NON use applies. Known exemptions are :

- Public areas of offices – a number of public areas in our buildings exist. The company would have access to these areas in a similar vein to those of any member of the public and to enjoy any of the facilities in these areas. This excludes full operation of the company from these public areas.

All other property assets will be charged for at the commercial rate. For example this may include use of the conference facilities, meeting rooms or serviced office space. Where only part time use is being considered (for example during start up) there may be a case for linking this to staff recharging (see below).

STAFF

The biggest asset that AVDC has at its disposal is its staff. In many cases, and especially during start up, AVDC staff are likely to be used in helping to launch a company (especially where wholly owned).

The use of staff, especially on a flexible basis, in companies is possible but it is likely to be only possible on an agreed voluntary basis. The principle would be that the staff member always remains an AVDC employee on AVDC terms & conditions as is charged out to the company at a full cost recovery rate applicable to their grade

Two rates are possible to form this type of recharge :

- Staff employment cost (this includes ALL employment costs of staff including employment costs)
- Staff employment cost + operational costs related to employment (for example this would include accommodation overheads) – this may be a viable alternative to separate accommodation costs in start up phases.

These two rates are available via the staff time calculator available on MAVIS. They are expressed as hourly rates and hence time recording of activity will be required to determine the charge.

Any other arrangements are likely to require detailed HR input in to the process and may well involve detailed employment law consideration include TUPE. It is not the purpose of this guide to

address this issue in any depth and HR input should be sought if long term significant use of AVDC staff is considered. This protects both staff, AVDC and the company.

HOW CHARGES SHOULD BE MADE

Whatever the asset provided rates, conditions and payment cycles should be clearly set out prior to delivering service. Normally charges should be recovered on a quarterly basis, to reduce overheads this should be via a combined invoice for all services provided, and they should be subject to AVDC normal terms of payment (ie no special favours to the company).

DATA HANDLING & PROTECTION

Data and data protection is a key area for consideration when working with AVDC companies. The security of AVDC data has significant security, financial, legal and reputational risks attached to it. As such this guide is only a summary position on these issues. Reference for specific issues should be made to AVDCs current Data Protection Policy and Information Governance Group and this guide is subservient to those policies and groups.

Where any data is to be shared between the Company and AVDC a Data Sharing agreement **MUST** be put in place and agreed by the AVDC Information Governance Group which clearly addresses issues such as

- Data Ownership
- Restrictions that may apply to the use of the data
- Security requirements that the data owner may require
- Restrictions on locations to which data may be transferred
- Retention schedules
- Responsibility for response to Freedom of Information Act requests.

Any transfer of data to a Company which is not covered by a prior Data sharing agreement will be treated by AVDC as an Information Security incident and investigated as such. The outcome could result in a Disciplinary Investigation and Action being taken against individuals involved in the transfer.

Data of any sort normally limited by either legal, contractual, security or probity regulations. The assumption around the movement, transfer or access to around ANY data should be that it can NOT happen unless it is explicitly agreed. This protects AVDC, staff and the company. AVDC will seek to collaborate with any request from its companies but this presumption has to exist to protect AVDCs overall position.

Customer data in particular is highly regulated and has significant implications for individuals and organisations if mishandled. In particular the issue regarding the need to only hold data for the time necessary, and to only use it for the explicitly agreed purpose is a key one for consideration when considering the movement or sharing of data.

In the start up phases of new companies (especially wholly owned) it is likely that employees may be working on a seconded or cost recovery basis. Staff need to be very clear that they may have access to data in their AVDC role which should not be exposed or access when working for the company. This will need to be reinforced in any communications with staff, and staff should be very clear that they can not 'leak' data from AVDC to the company.

If it has been agreed that data can be moved between bodies the following must be adhered to :

- The data being moved should be checked by at least 2 people
- That only the data agreed as being moved should be moved – ie some element of redaction may be required
- Movement of data should be accompanied by a data movement form (see Annex 2) which sets out the data being moved, tracks how it is being moved, the people involved in the

process including approvals, the mode of movement, security considerations and the time and date this occurred. This is necessary to it is clear what and how data is being moved.

- Data should be moved in the most secure way available – which should include options around encryption, passwords, destruction of any hard media involved in the process once successful transfer has occurred.
- Once moved any data should be secured to a sufficient and agreed level as set out in the data movement form. This should include the standards of industry accredited protection as well as storage locations.

FREEDOM OF INFORMATION

As a body covered by Freedom of Information (FOI) legislation, AVDC is compelled to make certain data available on request. In line with our public and transparent practises the default is to make data accessible unless there are reasons why not.

Companies will be expected to work with AVDC on responding to data requests. Annex 3 sets out draft contractual positions that may form part of company set up or understand on this issue.

The simple stance to take is that if anything is given to AVDC it should be considered to be able to made public unless there is a commercial reason why not.

CONTRACTS & AGREEMENTS

It is likely that during the life of an AVDC company there will be some form of contractual relationship between the council and the company. These should be treated no differently to those between the council and any other body (except where specific legal exemptions apply – for example teckal). No advantage should be given to an AVDC company over any other who can undertake a similar role and standard procurement rules apply.

Earlier sections of this document have set out a number of issues that will guide the development of any contracts as they come forward, and these should form the basis of the n- going contract development when the need arises.

Exemptions to this may be where a company has been set up for a specific purpose and this results in the company being legally exempt from these standing arrangements.

In some cases a less formal arrangement may be required for lower level activity. Where appropriate a Service Level Agreement (SLA) approach may be appropriate. Annex 4 sets out an example SLA that may be a useful starting point.

As with any contractual arrangement a named AVDC contact should be provided as a liaison point who should serve as the first point of contact, payment information, terms etc should also be included.

ANNEX 1 – STATE AID ⁴

PART 1 – INITIAL STATE AID ASSESSMENT

1. Is the support provided granted by the State or through State resources?

The definition of state resources is aid that is granted by the state; this includes all public and private bodies controlled by the state to distribute public funds. State resources include, for example, Lottery, tax exemptions, grants, subsidies, provision of service at below market rate, the selling of public land at below market rate, etc. Funds not permanently belonging to the state but which the state may direct, such as European funds like Structural Funds, ERDF.

Yes/No:

If no, please provide an explanation.

2. Does the support confer a selective advantage to an undertaking?

A benefit which is granted for free or on favorable (non-commercial) terms to some selected undertakings (but not others), could be state aid.

Definitions:

Advantage: An advantage can take the form of direct payment of state resources in the form of grants and subsidies as well as indirect benefits that affect the public budget such as tax breaks, rate rebates, low interest loans, sale of public land below market value and the provision of services for free or at below-market rates.

Selectivity: Support that targets particular businesses, regions or types of firm e.g. SMEs or particular sectors and not others is selective.

Undertakings: An undertaking is defined as any entity, regardless of its legal status, which is engaged in economic activity and where there is a market in comparable goods or services. It does not have to be profit-making as long as the activity carried out is one which, in principle, has commercial competitors. It can include voluntary and non-profit-making public or public authorities when they are engaged in economic activity. Charities, universities, research institutions, voluntary entities, social enterprises and public sector bodies may therefore be deemed to be undertakings when they are engaged in economic activity. Support in favour of non-undertakings (i.e. entities which are not involved in economic activity) is not state aid.

Economic activity: Activity which consists of offering goods or services on a given market and which could, at least in principle, be carried out by private actors in order to make profits.

⁴ Based on the BIS State Aid Assessment form Nov 2010 - see <https://www.gov.uk/government/publications/state-aid-a-beginners-guide-guidance-notes>

Yes/No

If no, please provide an explanation.

3. Does the support distort or have the potential to distort competition?

If the support has the potential to strengthen the position of the beneficiary relative to other competitors then this criteria is likely to be met. The potential to distort competition does not need to be substantial or significant, and this criterion can apply to relatively small amounts of financial support and firms with little market share.

Yes/No

If no, please provide an explanation.

4. Does the support affect trade between Member States?

Commission's interpretation of this is broad - it is sufficient that a product or service is tradeable between member states, even if the recipient of support does not itself export to other EU markets. This test is not met only in very limited circumstances e.g. where a single, small business is involved in very localised activity e.g. hairdressers.

Yes/No

If no, please provide an explanation.

ANNEX 2 – DATA MOVEMENT FORM

AVDC Originator	<i>Insert name of officer</i>
Destination	<i>Insert company and staff members name</i>
Description of Data being moved	<i>Set out in detail the data being moved – where it currently exists, what form etc</i>
What conditions are being applied	<i>Set out any conditions/limits/redaction etc being made</i>
How will the transfer be made	<i>Email/ftp/shared link etc</i>
Identify any sensitive data within the transfer	<i>Set out if there is any</i>
How will data security risks be addressed	<i>Describe how this will be managed during the transfer process</i>
Frequency	<i>Is this data transfer a one off or regular – if regular state how and reason</i>
When the data was collected does AVDC have the powers to pass this on	<i>Yes/No</i>
Data Ownership	<i>Who will own the data once transferred</i>
Restrictions on use of data	<i>List any restrictions on it use</i>
Restrictions on Location of end data	<i>Where will this data be stored – system and location</i>
Retention Schedules	<i>What are the retention schedules for the data</i>
Named person for any FOI requests	<i>Named person in the company</i>
Checked by AVDC officer	<i>Second officer agreeing the above</i>
IGG Sign off	<i>Detail IGG meeting that this was agreed to including extract of minute</i>

ANNEX 3 – FOI DRAFT CONTRACTUAL CONDITIONS

FREEDOM OF INFORMATION ACT REQUIREMENTS

The Shareholder and the Company acknowledge that the Shareholder is subject to the requirements of the FOIA and the EIR and the Company shall, where reasonable, assist and co-operate (at its own expense) with the Shareholder to provide information to enable the Shareholder to comply with these information disclosure obligations.

Where the Company receives a request for information under either the FOIA or the EIR in relation to information which it is holding on behalf of the Shareholder in relation to the Company, it shall:

- transfer the request for information to the Shareholder as soon as practicable after receipt and in any event within two Business Days of receiving a request for information;
- provide the Shareholder with a copy of all information in its possession or power in the form that the Shareholder requires within ten Business Days (or such longer period as the Shareholder may specify) of the Shareholder requesting that information; and
- provide all necessary assistance as reasonably requested by the Shareholder to enable the Shareholder to respond to a request for information within the time for compliance set out in the FOIA or the EIR.

Where the Shareholder receives a request under FOIA or EIR which relates to the operations of the Company (a request), it shall notify the Company and afford it an opportunity to make any comments or representations in respect of the disclosure of the information sought. The Company shall respond within five Business Days of receipt of this notification. The Shareholder shall take into account any such comments or representations and shall not respond to the Request until the 5 day response period referred to above has passed.

ANNEX 4 – ILLUSTRATIVE SERVICE LEVEL AGREEMENT (SLA)

Set out below is an illustrative email of what an IT based SLA might contain. It is provided as example text to consider when considering developing a SLA for any purpose. This is not an exhaustive example but is provided to illustrate the types of things that would be covered in such a document.

Service Level Agreement (SLA)

for *Customer*

by

Company name

Effective Date: xx/xx/xxxx

Document Owner:	Company name
-----------------	--------------

Version x.x

Version	Date	Description	Author

Approval

(By signing below, all Approvers agree to all terms and conditions outlined in this Agreement.)

Approvers	Role	Signed	Approval Date
Company name	Service Provider		Xx/xx/xxxx
Customer	Customer		Xx/xx/xxxx

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Agreement Overview

This Agreement represents a Service Level Agreement (“SLA” or “Agreement”) between *Company name*. and Customer for the provisioning of IT services required to support and sustain the Product or service.

This Agreement remains valid until superseded by a revised agreement mutually endorsed by the stakeholders.

This Agreement outlines the parameters of all IT services covered as they are mutually understood by the primary stakeholders. This Agreement does not supersede current processes and procedures unless explicitly stated herein.

Goals & Objectives

The **purpose** of this Agreement is to ensure that the proper elements and commitments are in place to provide consistent IT service support and delivery to the Customer(s) by the Service Provider(s).

The **goal** of this Agreement is to obtain mutual agreement for IT service provision between the Service Provider(s) and Customer(s).

The **objectives** of this Agreement are to:

- Provide clear reference to service ownership, accountability, roles and/or responsibilities.
- Present a clear, concise and measurable description of service provision to the customer.
- Match perceptions of expected service provision with actual service support & delivery.

Stakeholders

The following Service Provider(s) and Customer(s) will be used as the basis of the Agreement and represent the **primary stakeholders** associated with this SLA:

IT Service Provider(s): Company name. (“Provider”)

IT Customer(s): Customer (“Customer”)

Periodic Review

This Agreement is valid from the **Effective Date** outlined herein and is valid until further notice. This Agreement should be reviewed at a minimum once per fiscal year; however, in lieu of a review during any period specified, the current Agreement will remain in effect.

The **Business Relationship Manager** (“Document Owner”) is responsible for facilitating regular reviews of this document. Contents of this document may be amended as required, provided mutual agreement is obtained from the primary stakeholders and communicated to all affected parties. The Document Owner will incorporate all subsequent revisions and obtain mutual agreements / approvals as required.

Business Relationship Manager: Company name

Review Period: Bi-Yearly (6 months)

Previous Review Date: xx/xx/xxxx

Next Review Date: xx/xx/xxxx

Service Agreement

The following detailed service parameters are the responsibility of the Service Provider in the ongoing support of this Agreement.

Service Scope

The following Services are covered by this Agreement;

- ***Manned telephone support***
- ***Monitored email support***
- ***Remote assistance using Remote Desktop and a Virtual Private Network where available***
- Planned or Emergency Onsite assistance (extra costs apply)
- Monthly system health check

Customer Requirements

Customer responsibilities and/or requirements in support of this Agreement include:

- Payment for all support costs at the agreed interval.
- Reasonable availability of customer representative(s) when resolving a service related incident or request.

Service Provider Requirements

Service Provider responsibilities and/or requirements in support of this Agreement include:

- Meeting response times associated with service related incidents.
- Appropriate notification to Customer for all scheduled maintenance.

Service Assumptions

Assumptions related to in-scope services and/or components include:

- Changes to services will be communicated and documented to all stakeholders.

Service Management

Effective support of in-scope services is a result of maintaining consistent service levels. The following sections provide relevant details on service availability, monitoring of in-scope services and related components.

Service Availability

Coverage parameters specific to the service(s) covered in this Agreement are as follows:

- Telephone support : 9:00 A.M. to 5:00 P.M. Monday – Friday
- Calls received out of office hours will be forwarded to a mobile phone and best efforts will be made to answer / action the call, however there will be a backup answer phone service
- Email support: Monitored 9:00 A.M. to 5:00 P.M. Monday – Friday
- Emails received outside of office hours will be collected, however no action can be guaranteed until the next working day
- Onsite assistance guaranteed within 72 hours during the business week

Service Requests

In support of services outlined in this Agreement, the Service Provider will respond to service related incidents and/or requests submitted by the Customer within the following time frames:

- 0-8 hours (during business hours) for issues classified as **High** priority.
- Within 48 hours for issues classified as **Medium** priority.
- Within 5 working days for issues classified as **Low** priority.

Remote assistance will be provided in-line with the above timescales dependent on the priority of the support request.

ANNEX 5 – MODEL RESERVED MATTERS

All Reserved Matters shall only be effective if approved by the Shareholder.

The following matters are Reserved Matters unless (where relevant) they have been approved in advance by the Shareholder under the Business Plan:

Constitution of the Company

1. Varying in any respect the Articles or the rights attaching to any of the shares in the Company.

Officers and Shareholders of the Company

2. Agreeing the appointment and the appointment terms (including any remuneration terms) of all Directors.
3. Agreeing the removal of all Directors (including any terms on which Directors are removed from their office as Directors).
4. Approving the admission of further shareholders to the Company or agreeing any rights or restrictions attaching to any shares allocated to such new shareholders.
5. Agreeing or approving the maximum size of the Board.

Future direction and development of the company

6. Forming any subsidiary or acquiring shares in any other company or participating in any partnership or joint venture (incorporated or not).
7. Amalgamating or merging with any other company or business undertaking.
8. Selling or disposing of any part of the Business.
9. Entering into any arrangement, contract or transaction with either a capital value over [£50,000 (fifty thousand pounds)] or otherwise a value of over [£100,000 (one hundred thousand pounds)].
10. Adopting or amending the annual Business Plan and any in-year changes.
11. Passing any resolution for its winding up or presenting any petition for its administration (unless it has become insolvent).
12. Apply for the listing or trading of any shares in its issued capital or debt securities on any stock exchange or market.

Management of the business of the Company

13. Changing the Company's registered office.
14. Changing the Company's name.
15. Creating or agreeing to create a charge, security or Encumbrance over the Company's assets, shares or income.

16. Adopting or agreeing any changes to any remuneration and redundancy policies of employees of the Company.
17. Adopting or agreeing any changes to any pension arrangements of any employees or officers of the Company.
18. Changing the nature of the Business or commencing any new business which is not ancillary or incidental to the Business.
19. Agreeing to enter into or entering into any acquisition or disposal of any material assets by the Company.
20. Selling rights (by license or otherwise) in or over any intellectual property owned or used by the Company.
21. Changing the Company's auditors.
22. Agree to make or making any loan (otherwise than by way of a deposit with a bank or other institution, the normal business of which includes the acceptance of deposits or in the ordinary course of business) or granting any credit (other than in the normal course of trading or giving any guarantee (other than in the normal course of trading) or indemnity.
23. Changing the Financial Year End of the Company to anything other than the other than the Shareholder's financial year end.
24. Increase or reduce the amount of its issued share capital, grant any option or other interest over or in its share capital, redeem or purchase any of its own shares or otherwise alter, or effect any reorganisation of, its share capital.

ANNEX 6 – CHECKLIST FOR COMPANY SET UP

Set out below are the main items that should be completed as a new company is formed. This is in the form of a checklist to facilitate ease of understanding. Certain items may vary depending on the type of company and specifics in each case.

Completed	N/a	Item	Detail
		Business Case Completed	
		Business case approved	
		Staffing arrangements agreed	
		Naming logos etc agreed	
		URLs and Domains purchased	
		Cost recovery and recharging agreements in place	
		Loan amount and agreement in place	
		Directors Appointed	
		Company registered	
		Bank Account set up	
		Accountants appointed – inc VAT	
		Company secretary appointed	
		Shareholder representative Appointed	
		Company Representative Appointed	
		Website and email set up	
		Support arrangements from AVDC clarified	
		Accountancy needs clarified	
		First scrutiny scheduled of business plan	
		Launch Media in place and agreed	
		Registration with ICO if required	
		Others ?	