



Collaborations, Take-Overs and Mergers Society Street

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Outline

- Primarily, arm's length collaboration and closer forms, including merger
- What restrictions might exist? How can they be overcome or avoided?
- What role do your members play and is their consent needed?
- What is the Charity Commission's approach – is its consent needed?
- The role of the Privy Council
- Other important considerations:
 - confidentiality and exclusivity;
 - staff (pensions, TUPE);
 - apportionment of liabilities;
 - conflicts of interest; disputes; and
 - terminating or extending arrangements.

The starting point

Collaboration, competition and merger all possible in areas permitted by the charity's purposes (or "Objects"), but not outside them!

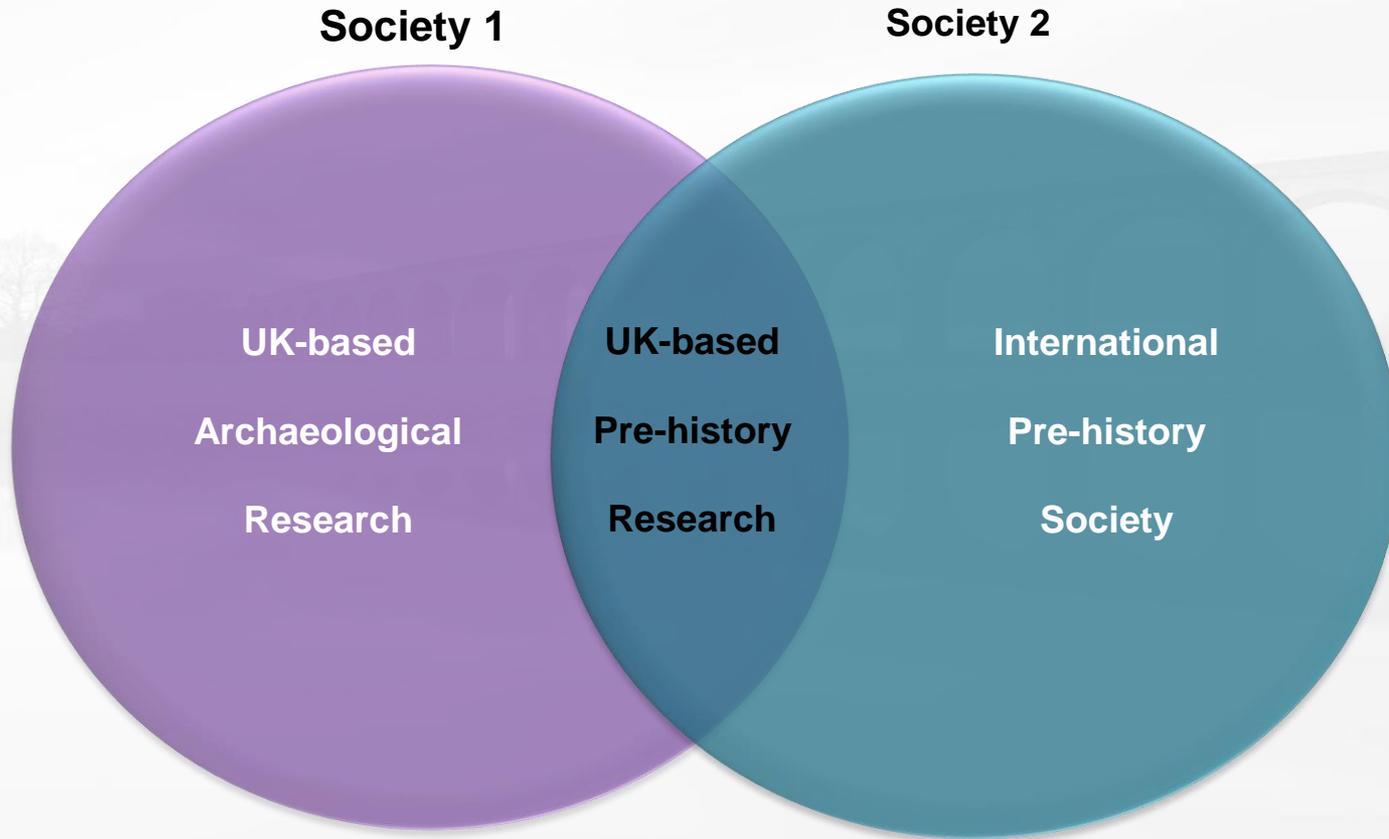
Both (all) parties need to find common ground covered by their Objects

Fundamental, "fiduciary" responsibility of the board of trustees (directors) who:

MUST act in the way they judge to be in the interests of the efficient advancement of the Objects

MUST act reasonably, in good faith and exercise due care (so take advice!)

Interaction between Objects



Governance – purposes and constitution

 Find charities

Find charities

Charity overview

Financial history

Contact & trustees

Charity framework

Linked charities

View accounts

View charity summary (SIR)

Print charity details

Advanced Search

 charity search

Enter name or number 

Advanced Search

207043 - THE ROYAL SOCIETY OF LONDON FOR IMPROVING NATURAL KNOWLEDGE (COMMONLY KNOWN AS THE ROYAL SOCIETY)

DUE DOCUMENTS RECEIVED 

Activities

THE ROYAL SOCIETY HAS THREE ROLES: A LEARNED SOCIETY; THE UK'S ACADEMY OF SCIENCE; AND AS A FUNDING AGENCY. WE

- PROMOTE SCIENCE AND ITS BENEFITS
- RECOGNISE EXCELLENCE IN SCIENCE
- SUPPORT OUTSTANDING SCIENCE

Where it operates

NORTHERN IRELAND
SCOTLAND

Other names

THE ROYAL SOCIETY (WORKING NAME)

Where it operates

NORTHERN IRELAND
SCOTLAND

Governing document

ROYAL CHARTERS DATED 1662, 1663 AND 1669

Area of benefit

NOT DEFINED

Organisation type

STANDARD REGISTRATION

Registration history

22 January 1963 Registered

Charitable objects

FOR THE IMPROVEMENT OF NATURAL KNOWLEDGE

Classification

What

- EDUCATION / TRAINING
- OTHER CHARITABLE PURPOSES

Constitutions

Charter bodies

- Ideally you would find express authority (a power) to cooperate, collaborate, merge
- Must comply with the “spirit and intendment” of the Charter
- Might need Privy Council Consent

Charitable companies (and CIOs)

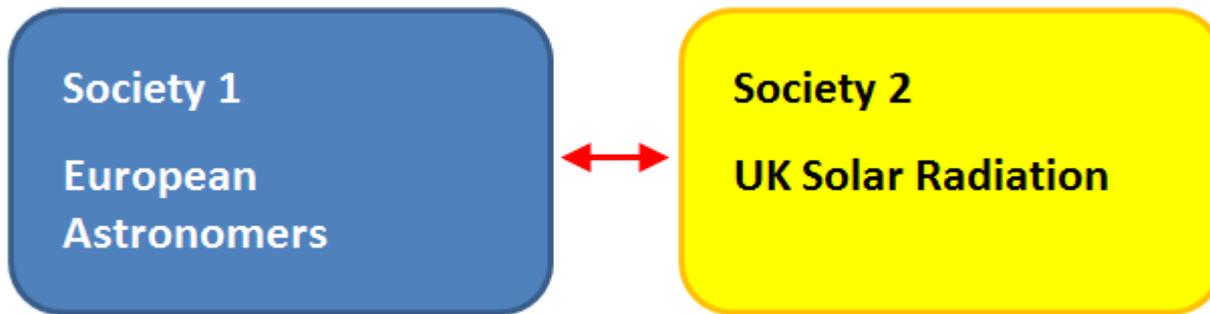
- Implied general power (subject to objects and any express restrictions)
- Unlikely to need consent

NB – mergers – check winding up provisions!

- Can be helpful – allow assets to be used for purposes “similar” to objects
- Can be problematic – dictate use of assets or require consent (almost certainly Privy Council in the case of charter bodies)

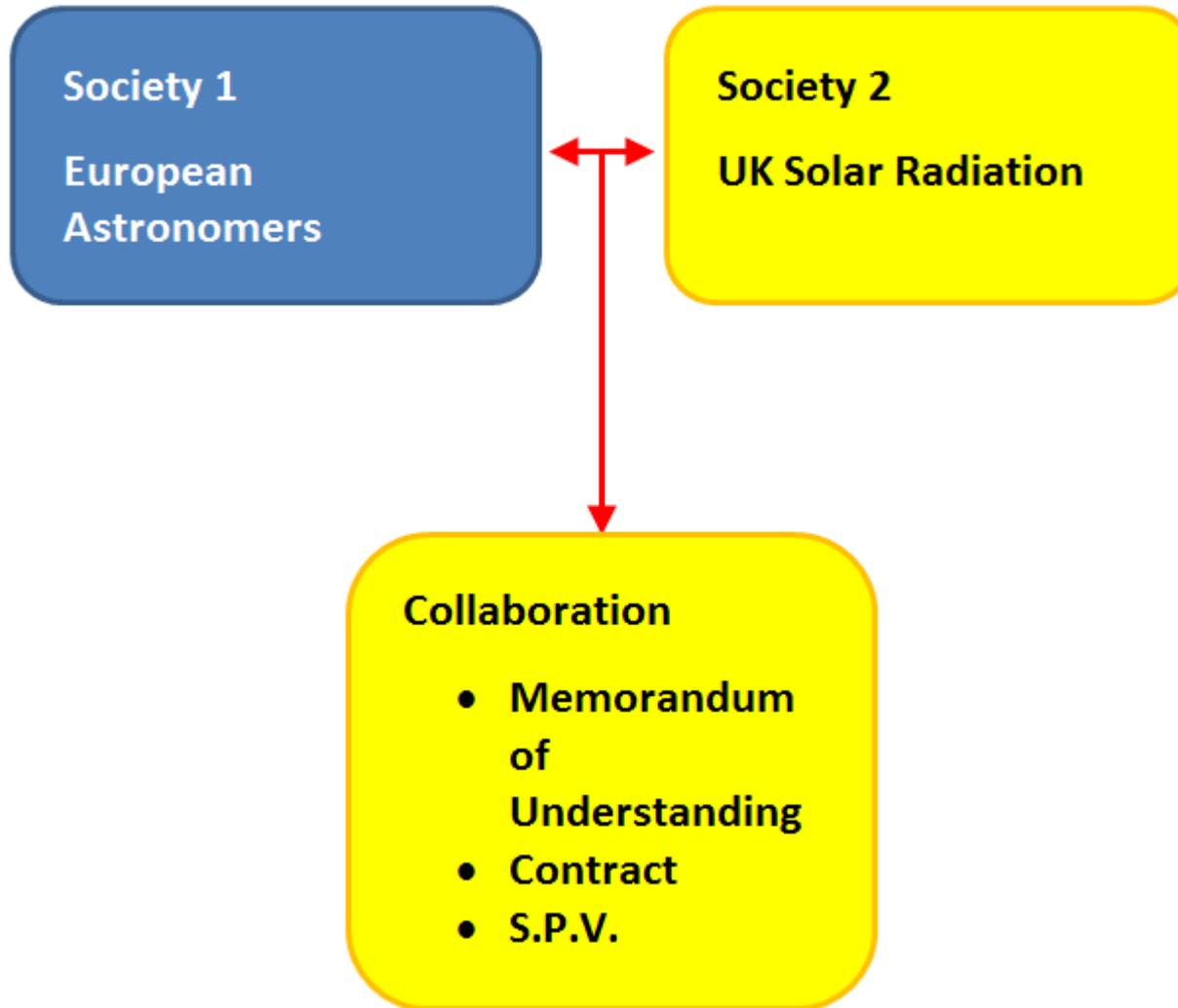
Collaboration and merger

Models



1. Competition or collaboration in overlapping areas
2. Joint “special purpose vehicle” to support overlapping areas
3. Merger (UK Solar Radiation to become a “restricted fund” within European Astronomers, for example)

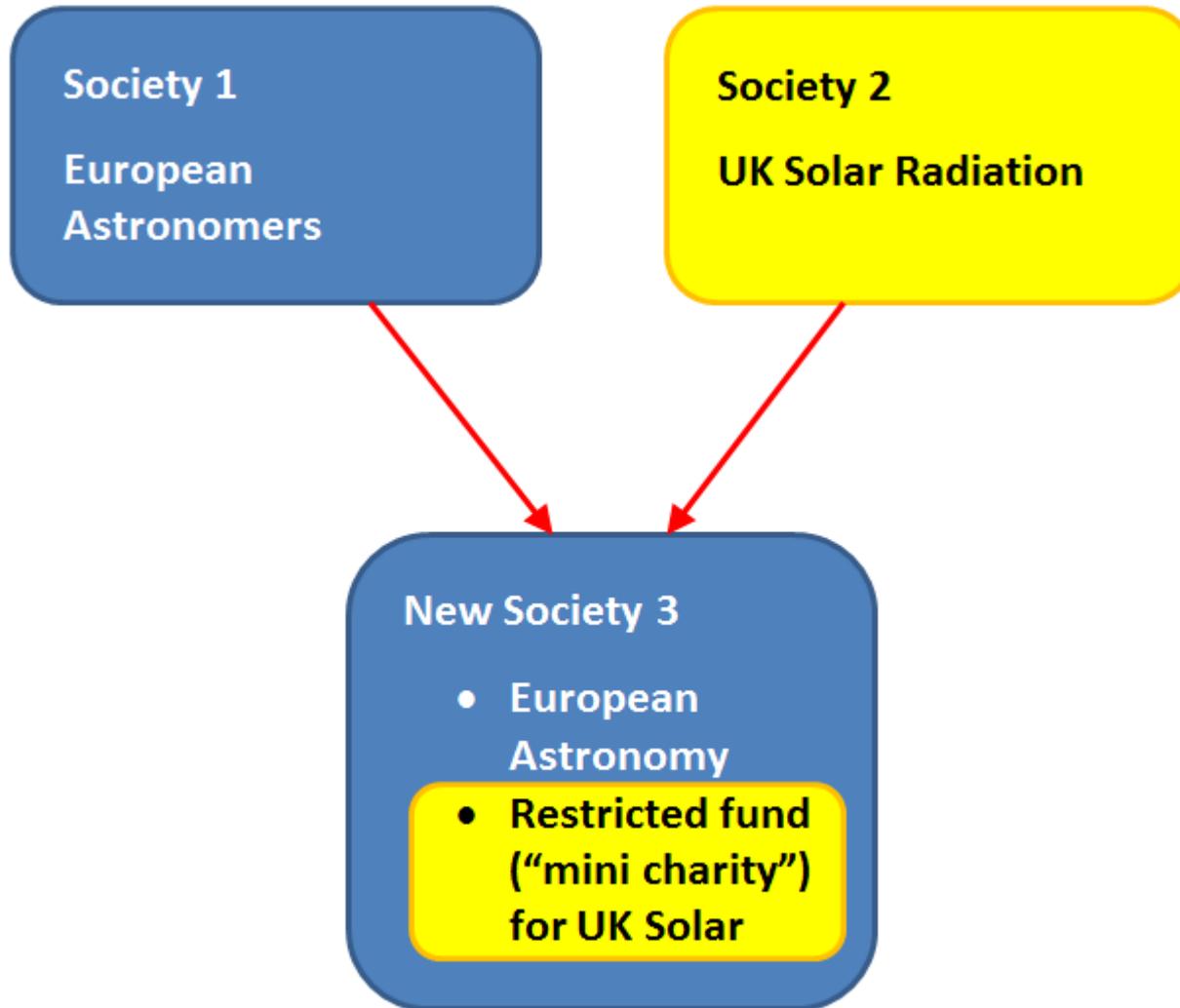
Collaboration



Non-charitable trading (or ring-fencing risk) may require a trading subsidiary (or special purpose vehicle).

Increasing levels of formality and degrees to which risk is identified and managed.

Merger



In practice a wide range of variants are possible, subject to Objects and other restrictions

Partial merger options include: constitutional links, common trustees, joint committees and one entity becoming a subsidiary of the other, e.g.

Merger

Advantages

- Economies of scale, may facilitate previously impossible activities
- Transferred assets may be ring-fenced for specific, identified purposes
- Outgoing trustees generally indemnified (protected)
- Outgoing trustees and staff may transfer (TUPE)

Disadvantages

- May result in dilution of mission, identity (include means of managing this?)
- Consents may be required (does the constitution permit it? Regulators?)
- Risks – identify and manage appropriately

Consult!

- Members and other stakeholders

Merger

Members

- Sometimes formal consent may be required (change of name, purpose, admission rules etc)
- Even where formal consent is not necessary, the membership's acceptance is likely to be essential
- Provide information, FAQs, opportunities to meet
- Listen (even if you take no action)

Other stakeholders

- Privy Council Office, Charity Commission, Information Commissioner
- Interested third parties (review contracts?)
- Press – consider the “front page test”
- Agree communications plan (mutual sign-off on public communications?)

Due diligence - confidentiality

The purpose of DD is to identify risk, so it needs to be wide-ranging
Prepare a checklist – request the other party “complete or explain”

BEFORE STARTING

Consider:

- a) Confidentiality – what information are you prepared to share and on what conditions?
- b) Exclusivity – do you need to restrict the potential partner from having similar discussions with competitors?
- c) Non-solicitation – do you need to protect your staff, customers?

Staff - TUPE

Default setting is that new operator takes over all associated staff on the same terms and conditions

Failure to do so = unfair dismissal

But some exceptions (economic technical or organisational)

BEFORE STARTING

Consult staff (involve unions if they are represented)

Consultation must be “reasonable”

MUST check pensions – transfers and mergers can trigger “s.75 debts”

Who is responsible for what?

Identify responsibilities and specify measurables

Allocate liabilities and costs

Cap liabilities?

Indemnify each other for certain liabilities?

Impose duty not to bring charity into disrepute?

Licence IP (name, logo, brand etc – but also content)?

Are you sharing data? Do you have the necessary consents from data subjects?

NOTE

Be careful with the word “partnership”! Implies capacity to represent and bind each other.

When something goes wrong...

You will need to

- 1) be able to measure and identify agreed outputs to be clear what the failure is and whose responsibility it is
- 2) pre-specify implications of breach
- 3) identify operational contacts to discuss/remedy
- 4) have a dispute escalation process
- 5) ultimately, have power to terminate, seek legal remedies (damages, mediation/arbitration etc)

Clarity essential.

Mediation is generally preferable to legal action.

Trustee decision making

Its OK to make a mistake - not all projects are successful.

But, MUST:

- act in a way calculated to advance the Objects
- act in reasonably, in good faith, with due care and skill
- identify and manage conflicts of interest
- record the rationale for the decision and the decision-making process in trustee minutes

If you need it, take advice – it shows you took a careful decision.

Conflicts of interest and loyalty

- A conflict of interest is any situation in which a trustee's personal interests or loyalties could (**or could be seen to**) prevent them from making a decision only in the best interests of the charity.
- A conflict of loyalty is a particular type of conflict of interest, in which a trustee's loyalty or duty to another person or organisation could prevent the trustee from making a decision only in the best interests of the charity.

Conflicts of Interest

Identifying conflicts

- Are any board members on both boards?
- Are any other board members “interested” (have connected outside interests)?
- Duty to avoid and declare (individual) and duty to manage (individual and collective) – standing agenda item.

Managing conflicts

- Default is non-participation
- Express provisions (especially companies) may allow for conflicts to be authorised (where no financial gain)
- Record carefully in minutes – and declare in accounts!
- Unlikely to need consent, if there are sufficient independent trustees, but it can help!
- Transparency and perception are key - manage conflicts openly

Summary

Identify objectives (Objects, organisation strategy, etc)

Record trustees' decision carefully in minutes

Define outcomes and measurables

Decide:

- What resources will you make available?
- What is your risk tolerance for the identified risks and how will you mitigate them?
- How will you select potential partners?
- What will happen to staff, IP, data?
- What legal structure is appropriate?

Consider entering a **confidentiality** and **exclusivity** agreement before sharing sensitive material!

Society Street - Collaborations, Take-Overs and Mergers



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