



Association
of Colleges

Promoting. Representing. Supporting.

Guide for Governors and Senior
Leaders on new structures
-collaborations, federations and
mergers

Technical Appendix

February 2016

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APPENDIX A

TEMPLATE EXAMPLE OF JOINT STEERING GROUP (“JSG”) [E.G. TOWARDS FEDERATION/MERGER] TERMS OF REFERENCE

1. Membership

The Joint Steering Group (JSG) shall comprise:

- Chair of each College [& possible alternate for each?]
- Principal of each College [& possible alternate for each?]
- [Two] other Governors of each College [& possible alternates?]

In attendance:

- The Clerk to each Corporation can attend all meetings.
- Others may be invited to attend the JSG meetings with the approval of both Chairs.

2. Terms of Appointment

Members will be appointed to the JSG until the [collaboration/merger/federation] proposal has reached a conclusion, subject to regular review based on need at each stage of the process.

3. Chair of Joint Steering Group

The Chair of the JSG shall alternate between the [two] Corporation Chairs, unless otherwise agreed by both Chairs in advance.

4. Quorum

The quorum for meetings of the JSG shall be four members, of which two should be from each Corporation.

5. Frequency of Meetings

The JSG shall meet as and when agreed by the majority of members of the JSG. Timescales may result in meetings being called at short notice.

6. Meeting Location

Unless otherwise agreed by both Chairs, the meeting venue will alternate between the colleges.

7. Circulation of Papers

The target is to circulate meeting papers seven days in advance of meetings. However, the timetable for the [collaboration/federation/merger] is likely to result in tight deadlines and it is likely that there will be limited notice given to members of some papers. Agenda and papers will be circulated by e-mail in order to expedite the process. Papers will be kept to a minimum.

8. Records of Meetings

The Clerks of the Corporation will act as Clerk to the JSG on an alternate basis, determined by the meeting venue, and will be responsible for despatching the papers relating to the meeting

which they will be clerking. The minutes of each meeting shall be circulated to the Members in draft within 7 working days of each meeting. All minutes and other records will be kept by both Clerks.

To assist with continuity and to assist them to continue to act as advisers to their respective Governing Bodies, both Clerks are invited to attend all JSG meetings.

9. Procedural Rules

Any other procedural matters are to be agreed at the first meeting, or subsequently as the need arises.

10. Terms of Reference

The purpose of the JSG is to oversee and steer action and progress relating to the proposed [collaboration/federation/merger] of the Colleges [names].

The JSG will act as advisers to the two Corporations. Approval of substantive matters, up to and including the final decision to merge, will rest with the Corporations, as determined by their statutory responsibilities.

The main tasks of the JSG will include as appropriate the consideration and formulation of recommendations to the two Corporations for their approval; and the monitoring as necessary of:

1. The collaboration/federation/merger timetable.
2. The collaboration/federation/merger process.
3. The arrangements and timetable for tendering and commissioning any work for both colleges.
4. Documents for publication, and arrangements for media handling and PR.
5. The outcome of any due diligence reports.
6. The outcome of any research commissioned to progress the collaboration/ federation / merger proposal.
7. The results of and response to public consultation.
8. Governance issues relating to the proposed merged college/federation.
9. Initial plans for the proposed merged college/federation.

11. External Advice

The JSG may seek the services of such external advisors as they consider necessary to fulfil their responsibilities. Where this would incur additional costs which are to be shared by both colleges, approval from both Chairs must be obtained before any work is commissioned.

APPENDIX B

TEMPLATE - NON-DISCLOSURE AGREEMENT

[JOINT LETTERHEAD/LOGOS]

RE COLLABORATION [OR FEDERATION/MERGER/OTHER] DISCUSSIONS

NON-DISCLOSURE AGREEMENT ("NDA")

BETWEEN

(1) COLLEGE A ("A")

AND

(2) COLLEGE B ("B")

[AND

(3) COLLEGE C ("C")] [OTHERS ADDED IF MORE]

(together "the Colleges") (the "Collaboration Discussions")

In pursuance of investigating collaboration and other such options (such as Federation or Merger) for working together between the Colleges (the "Permitted Purpose"), the Colleges wish to disclose to each other, [and to certain agreed advisory parties such as [NAMES]], further information concerning their activities. As a result the Colleges will be exchanging and giving each other access to certain confidential information relating to themselves and the Collaboration Discussions (the "Confidential Information").

1. In consideration of the Colleges having agreed to supply, and procure the supply of, the Confidential Information to each other, each of the Colleges hereby undertakes and agrees as follows to the other [two] college[s]:
 - 1.1 to hold the Confidential Information in confidence, for twelve months from the date of this letter, to only the Colleges and agreed advisory parties, and not to disclose or permit it to be made available to any other person, firm or company (except to other Disclosees as defined in paragraph 1.6), without prior written consent from the college whose Confidential Information it is;
 - 1.2 only to use the Confidential Information for the Permitted Purpose;
 - 1.3 to ensure that each person to whom disclosure of Confidential Information is made by one of the Colleges is fully aware of that college's obligations under this NDA;
 - 1.4 upon written demand from [any of] the other college[s], either to return the Confidential Information and any copies of it or to confirm in writing that, save as required by law or regulation, it has been destroyed. Each of the Colleges shall not be required to return reports, notes or other material prepared by them or other Disclosees or on their behalf which incorporate Confidential Information ("Secondary Information"), provided that the Secondary Information is kept confidential;
 - 1.5 to keep confidential and not reveal to any person, firm or company (other than Disclosees or to the Area Review Process or Further Education sector regulators or as otherwise

mutually agreed by the Colleges) the fact of each of the College's involvement in the Collaboration Discussions or their progress or conclusions, except as publicly disclosed in any mutually agreed Press Announcement;

- 1.6 that in this letter the expression "each of the Colleges" means one of the Colleges – either A or B [or C] - and the "Disclosees" means any of each of the Colleges subsidiaries, senior management, staff and employees together with their agreed advisers and their respective employees; and
- 1.7 that no person gives any warranty or makes any representation as to the accuracy or otherwise of the Confidential Information, save as may subsequently be agreed.
2. Nothing in paragraph 1 of this letter shall apply to any information:
 - 2.1 which at the time of its disclosure is in the public domain or accessible to the public or other colleges;
 - 2.2 which after disclosure comes into the public domain for any reason except your failure, or failure on the part of any Disclosee, to comply with the terms of this letter;
 - 2.3 which was lawfully in your possession prior to such disclosure;
 - 2.4 which is subsequently received by you from a third party without obligations of confidentiality (and, for the avoidance of doubt, you shall not be required to enquire whether there is a duty of confidentiality); or
 - 2.5 which you or a Disclosee are required to disclose, retain or maintain by law or any regulatory or government authority.
3. This letter shall be governed by and construed in accordance with English law and the Colleges irrevocably submit to the non-exclusive jurisdiction of the Courts of England and Wales in respect of any claim, dispute or difference arising out of or in connection with this letter.

Each of the Colleges indicates their acceptance of the above by signing this NDA which shall be executed in [two/three = number of colleges involved] counterparts.

We have read and agreed to the terms of the above.

Signed by:

College

Principal

Chair

A

B

[C]

Dated:

APPENDIX C

Example Memorandum of Understanding Template

**MEMORANDUM OF UNDERSTANDING (“MOU”)
BETWEEN
(1) COLLEGE A (“A”)
AND
(2) COLLEGE B (“B”)
[AND
(3) COLLEGE C (“C”)]
(together “the Colleges”)**

Purpose(s):

The proposed strategic collaboration [federation / merger / other] between the Colleges (as referred to in the Press Announcement dated [date]) will seek to explore the best means for students, staff and other stakeholders to maximise the long-term sustainability, high quality and means to meet local and national skills needs of the Colleges.

It will seek common ground with a wide range of stakeholders, [and may be amended by agreement between the parties].

The Colleges will discuss how such [collaboration/ federation/ merger] will evolve and, through consultation amongst themselves and with stakeholders, how they will ensure the needs of the region are met; and will seek to help any forthcoming Area Review(s) in [Location] by contribution of any such analysis to such Review(s).

Process:

The Colleges agree as initial stages:

1. Jointly [themselves to investigate / to commission a report (the “research report”) which will address the necessary investigation of] the risks, costs and benefits of strategic collaboration between the Colleges and explore strategic options (including, but not exclusively, collaboration, federation and merger) and their impact;
2. To consider undertaking specific & joint research into opportunities for shared services and/or to investigate the experience of others in the FE Sector in entering into such arrangements;
3. To establish a steering group (provisionally to be referred to as the [Colleges/ Collaboration] Steering Group (“CSG”), such steering group to consist of the Chairs and Principals of the Colleges [and others?] with their respective deputies being permitted to act as potential alternates);
4. To set up meetings of the CSG, in particular to consider the investigations referred to in (1) above and all other matters as necessary; and
5. To agree further press announcements and staff or student contracts / communications as necessary.

Agreements:

All the Colleges agree:

1. To work openly and honestly together to identify the opportunities and options around collaboration and the different forms (such as, but without exclusion of other forms, shared services & procurement, partnerships, joint ventures, federation, merger) and to assess the opportunities and risks they may present mindful of the Purposes(s) set out above.
2. That any such research report will be undertaken by [Name] and that the costs of such exercise (and any other such work agreed between them) is shared between the Colleges [details set out?].
3. Fully to share information – agreed specifically to be on a confidential basis to each other within the Colleges - to facilitate the work to be undertaken [by them / in the research report by [Name]] (and any other such work) and to use their best endeavours openly to discuss the conclusions of such work between them, with the intention of agreeing a favoured option or path for the future.
4. To undertake discussion between themselves via the CSG to progress the collaboration discussions in good faith and in a timely manner.
5. That any discussions will be on the basis of the students and the communities that each of the Colleges serve.
6. That, wherever possible, the Colleges will use their best endeavours to consider and enter into co-operation and cost saving opportunities between them and to foster good working relationships between their respective managers so that full consideration can be given to future working in the areas of curriculum, shared services etc.
7. The Colleges agree mutually to co-operate and support each other during the currency of this MOU.
8. The Colleges agree to [notify / refer to] each other regarding any senior level appointments or vacancies and before committing to any significant legally binding agreements and regarding any major contacts with stakeholders or media that may relate to or significantly impact on these collaboration discussions
9. [The Colleges will enter into 'exclusivity', preventing any of the Colleges independently entering into similar collaboration, partnership, shared services of federation or merger discussions with other colleges until these discussions are completed. Such ['exclusivity'/'standstill'] agreement will terminate if any individual college decides not to proceed with a proposal or option adopted by the other College(s) or otherwise by [date].]
10. [None of the Colleges will poach staff from each other nor take any action that would be [significantly/substantially] detrimental to the continual existence of any of the colleges involved in this strategic collaboration or [significantly/substantially] detrimental to the best interests of any new collaboration, merger or federation between them during the currency of this MOU.]

11. The Colleges will agree between them and will issue in a co-ordinated agreed manner, any on-going statement(s) to staff, students and stakeholders regarding these discussions, or the form of any future collaboration between the Colleges, as and when appropriate.

Termination

This MOU will continue unless and until determined [by mutual agreement in writing / on X months written notice to the other college(s)].

Legal Effect

It is the intention of the Colleges that this MOU will have effect between them and that all the Colleges will use their best intentions to undertake its terms. However, and as with any Memorandum of Understanding, the content of this MOU is not intended to be legally binding between the Colleges.

Signed by:

College	Chair	Principal
A		
B		
C		

Dated: [Date]

APPENDIX D

FE COLLEGE DUE DILIGENCE CHECKLIST

AREAS THAT MAY NEED TO BE REVIEWED IN DETAIL BY ACCOUNTING & LEGAL ADVISERS

QUALITY & CURRICULUM

- Strategic Plan(s)
- Most recent Ofsted reports – and compliance with any issues / improvements / material changes since
- Individualised Learner Record (ILR) data, Latest Self-Assessment Report (SAR), Latest Qualification Success Rate (QSR) info.
- Other Submissions to SFA (where applicable)
- Details of all external College and Student awards /scholarships /prizes achieved
- Curriculum programme and plan and details
- Details of all provision that is top 10% in England
- Details of all Level 4 and above provision, and identification of current core areas / areas of excellence
- Analysis of likely areas for synergy, “strategic fit”, cost saving and integration and revenue enhancement
- Details of any interventions current or expected by any party (e.g. SFA, FE Commissioner)

FINANCE

- Division between SFA / EFA / HEFCE / other revenues
- Current SFA, EFA, HEFCE etc. contracts/allocation letters; financial standing assessments
- Approximate latest cash balance(s) and latest cash / borrowing position(s)
- Last three years full audited report and accounts; current year original budget and any revision(s); three year forward budget (SFA or other format); cash flow; audit management letter for most recent two financial years
- Latest available management accounts and year to date financials;
- Summary of any accounts receivable more than 6 months old
- Tax issues, if any (including Lennartz etc.)
- All debt & loan agreements & review of covenants & change of control provisions
- Details of all banking relationships and all debt, loans and overdrafts to show amounts outstanding together with key terms such as repayment terms and interest as at end 2015/most recent available (identifying key covenants with any key covenants that have been or may be breached, or remain in breach, in the current year)
- Review of debt change of control provisions
- Summary of any capital commitments and current, future and intended capital projects and any or all applications to LEP / others for funding and/or capital projects

- Analysis of likely areas for synergy, “strategic fit”, cost saving and integration and revenue enhancement
- Details of any interventions current or expected by any party (e.g. SFA, FE Commissioner)

STUDENTS

- Fundamental statistics on student numbers, courses etc. (format/detail to be agreed by Principals)
- Student travel to work patterns and catchment areas
- Analysis of skills and employment needs (and related to LEP / Local or Combined / other plans)

POLICIES / GOVERNANCE / CORPORATION

- Current full Risk Register and Board / GB Assurance Framework, if any
- Articles/Standing Orders, Terms of Reference, all key Policies, authorities etc.
- Related party / conflict of interest matters, if any, in current or last two financial years
- List of Governors and brief CVs
- Latest Governor Skills Assessments

ESTATES/ASSETS

- Details of all properties and sites and their nature of title, terms, rental arrangements etc.; brief commentary on building / site condition and on curriculum areas within each
- Analysis of site utilisation
- Review of property / lease change of control provisions / permissions required
- Assessment of possible site synergies and/or improvements or potential disposals

LEGAL

- Key pension arrangements;- identify any possible pension issues that might arise & compatibilities / savings
- Key insurance arrangements; compatibilities / savings
- Significant actual, pending, threatened or expected litigation / disputes (if any); Intellectual Property (if any); indemnities, guarantees or other significant legal arrangements entered into
- Analysis of third party consents (principally likely to be landlord/freeholder or banks) that may be required in any (1) collaborations short of merger (2) merger (latter e.g. being change of control or assignment provisions)
- Environmental issues, if any
- List (and, if possible, brief details) of all material business contracts

INFRASTRUCTURE / IT

- Security, cleaning, catering, maintenance etc. arrangements
- Details of all ICT arrangements and all mission-critical programmes and arrangements

and high level identification of possible compatibility or integration issues;

- Business continuity plans and disaster recovery arrangements

STAFFING

- Senior Mgt. and staff organisation charts & reporting lines
- Staff Terms & Conditions / standard contracts
- Any unusual employment agreements or severance arrangements (since 31 July 2014)
- Brief individual details of all senior/key staff (to be defined – down to heads of school/ dept[?]) – names, experience, qualifications, length of service, salary
- Last 2 years IPRs (Individual Performance Reviews) of SPHs/senior team

PARTNERSHIPS / COMMUNICATIONS / STAKEHOLDERS

- Summary details of all key (or significant) agreements, contracts, joint ventures, leases, relationships with other Colleges or providers
- Summary of all third party contracting / BDU activities
- Details of all key apprenticeship relationships – employer, numbers, value, third party/ sub-contracted arrangements
- Summary of procurement arrangements and expenditure; payroll arrangements etc.
- Press releases by the Colleges since 1st January, 2015
- Community Engagement Policy

GENERAL

- Business organisation charts including any subsidiaries or joint ventures
- Current and last year staff, student and employer surveys; and any benchmarking reports or external consultant reviews
- Summary of career and employment advice services, alumni arrangements (if any), charitable activities, hardship funds etc.
- Plans for consultation
- Any other relevant matters

APPENDIX E

TUPE CONSIDERATIONS

The legal position

In the context of mergers and acquisitions a TUPE (Transfer of Undertakings (Protection of Employment) Regulations 2006) situation is created. Staff from one entity will usually transfer employment to another entity, with the transfer taking place at the point of the effective merger date.

So, as part of a Model B merger process, D, the dissolving College's staff will transfer their employment to the continuing College, C, under TUPE regulations. Consultation on this is required considerably ahead of such a merger becoming effective.

The TUPE regulations require that C declare ahead of the consultation any proposed changes (known as 'measures') that they intend to make at the point of transfer or shortly after. Under TUPE, the rights that staff have prior to the transfer date will transfer with them. This includes:

- Contracts of employment, including all terms and conditions
- Continuity of service
- Accrual of service related benefits e.g. contractual sick pay, or holiday entitlement linked to service
- Pension rights

The only circumstances under which changes may be made as part of the transfer, are where an 'economical, technical or organisational' (ETO) reason exists. Legal advice may need to be taken.

Practical Considerations

In the event of any anticipated redundancies as a result of the merger, these must clearly be part of the ETO criteria. Otherwise the dismissal will be automatically 'unfair', if the sole or principle reason for redundancy is the transfer. In the event that there is the potential for redundancies that are not directly associated with the merger, it is therefore essential that these are positioned / communicated as a separate consultation exercise to that related to the TUPE consultation.

The receiving employer (College C) will need to provide the outgoing employer (College D) with a 'measures letter' to confirm details of any changes being made for ETO reasons. The proposed measures are presented at the start of the consultation process, consulted upon and then finalised at the conclusion of the consultation.

TUPE regulations do not allow for the alignment of terms and conditions at the point of transfer. Changes to terms will be void if the sole or principal reason is the transfer itself, and not an ETO reason. TUPE protection is indefinite – there is no fixed time after which protection ends and terms and conditions can be freely changed.

Equally, the employer has an associated defence against equal pay challenges, so long as the

difference relates to the TUPE transfer. For this reason, organisations tend to look to solutions that provide for the alignment of terms and conditions **over time**, and not via association to the act of the merger or TUPE transfer. Nonetheless, if alignment at the point of transfer is in an ‘upwards’ direction and appropriately consulted upon, this is unlikely to result in any challenge from staff and their representatives.

New Staff

Consideration would need to be given to the terms and conditions of new staff appointed after the point of transfer. Equal pay challenges could arise if appointments were made on terms and conditions which are different to those currently in place (as the TUPE defence would not stand). Therefore, it is recommended that newly appointed staff be appointed on the same terms and conditions as the receiving employer (the continuing College, College C).

Consideration of Proposed measures

At the start of the consultation process, College C as the receiving employer has to declare (usually by letter) to the Trade Unions and staff any proposed measures which they intend to implement at the point of transfer or any proposed measured which they intend to implement after the transfer (if such changes are known at the point of declaring the measures).

A sample/example check-list around proposed measures is shown below that can be used or modified by colleges:

	Proposed change	Rationale for change	[Proposed date for implementation]
1	Annual leave – support staff	May e.g. bring D support staff in line with C for increases in leave based on e.g. years of service completed.	Possibly start of Academic
2	Maternity pay	May be differences	Academic year start or effective date of merger
3	Shared Services (if relevant e.g. IT, HR, Finance, Marketing & Sales, Estates)	Check: certain functions that transfer as part of the merger, may be (or have been) subject to a further or past transfer as part of Shared Services. (IT, HR, Finance, Marketing and Sales, Estates.)	N/A or when shared services implemented
4	Clerks	Likely that there will be a requirement for only one ongoing Clerk for (C+D).	Effective date of merger
5	Cleaners / Caterers / Security	Are these via third part suppliers. Will this be re-negotiated/when? Or might these staff be subject to a further transfer to a 3rd party supplier.	Check

6	Sales and Business Development	May need to align between D & C.	
7	Pensions	Issues can be considerable. Will staff remain in existing schemes or one College transfer staff to the other Colleges scheme? Note the employer may be different which can force difficult discussions. Need to be no change to the pension benefits for the individual staff.	Effective date of merger
8	HR policies	Will C College's policies apply; have policies already been harmonised or is there no substantive difference.	Effective date of merger.

Formal approval of the proposed measures

The continuing college, C, as the incoming employer, will need formally to approve the proposed measures. If the colleges are 'equal partners' in the merger plans, it may be advisable for D to agree the proposed measures (though this is not a legal requirement). The letter outlining the proposed measures can be discussed with the Trade Unions.

Supplementary information

It is advisable to look in detail at the respective comparative terms and conditions of the two colleges. It may be, for example, that one College, say D, operates the minimum living wage, whereas the other does not. It might then be recommended that C adopts the minimum living wage at the point of the merger. This need not be declared as a measure as it does not impact on the transferring D staff, however, it will be directly communicated to the staff at college C.

Further information on Senior Postholders and college mergers is available from the AoC Employment Team.

APPENDIX F

THE MERGER FORMAL CONSULTATION DOCUMENT SOME KEY ASPECTS TO CONSIDER

Legal Rules/Requirements applying

Formal consultation is a statutory requirement, so legal advice, while not necessarily essential, may well be advisable. Such consultation has to take place at least four months ahead of the proposed date of dissolution / merger.

The consultation must be supported by formal publication of notices in the local and national press and such notices and, in particular, the consultation document itself, need to be carefully prepared and considered by Governing Bodies. Their content must comply with the statutory requirements.

Governing Bodies will also need to give careful consideration to those to whom the consultation document is despatched. They should prepare a list of stakeholders for consultation, with the list being compliant with the statutory requirements as to who should be consulted.

Other legal requirements (such as Secretary of State approval) may apply if e.g. a new college is formed or to approve a change in name.

Practical considerations

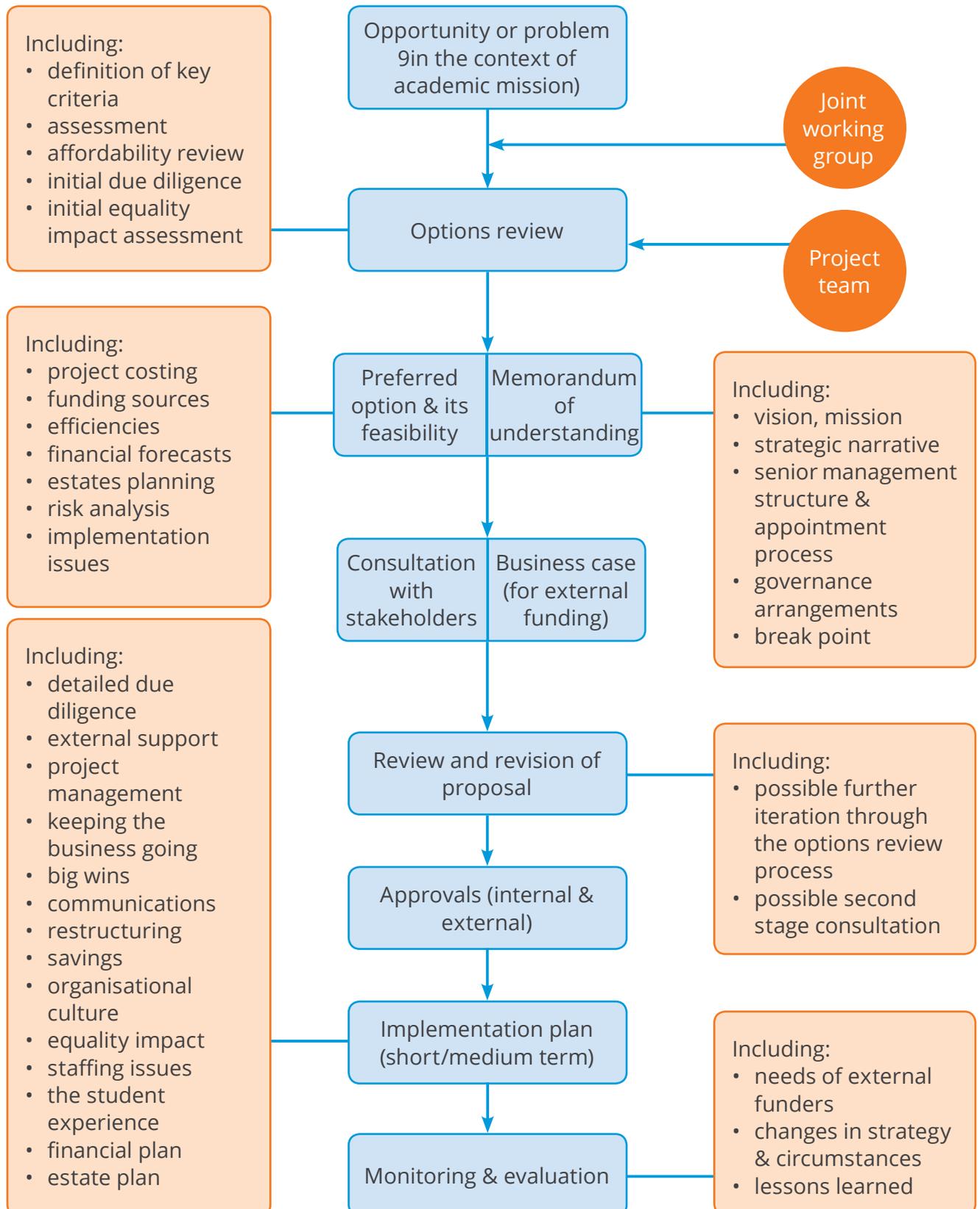
Matters needing consideration may include the following:-

- Appointment of lead /team/steering group responsible for the process.
- The extent and nature of groups to be consulted. Corporation members and the SLT should be involved in this consideration. There is no requirement to publish the consultation list.
- Colleges may wish to consider follow –up calls/alerts to certain key stakeholders and to consider availability of time to discuss, if required (though consultation usually seeks a written or online response to certain specific questions).
- Desire for a short foreword from the Corporation Chairs.
- Areas served by both Colleges should be described and include a full definition of those areas.
- Colleges may wish to check any included pictures to ensure they are accurate, recent and appropriately represent the Colleges, their activities and their diversity.
- Providing the opportunity for comments from the steering group and/or all Corporation members , before final sign off / approval by such duly delegated steering group or the Governing Body.
- This is a public document and so it is advisable for the wording to be carefully proof-read to ensure correct messages, tone and grammar.

APPENDIX G

An Example from the HE Guidance: Outline of a process for developing collaboration, federation or merger activity

A simplified presentation of what is likely to be a complex, iterative and non-linear process





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