

Mergers and collaborative working – how do we do it?

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Context

- Current environment
- Trustee duties and setting the strategy to achieve the objectives
- Spectrum of collaborative working arrangements
- Increase in competitive tendering and larger contracts
 - Lead/subcontractor model
 - Joint ventures
 - Partnerships
 - Bidding costs
- Payments by result – cash flow consequences and risk

Authority

- Memorandum and articles/trust deed/rules*
 - Objects
 - Powers
 - Trading or fundraising?
 - Primary purpose?
 - Appropriate use of resources
 - Private benefit
 - Trustees
 - Reputation management
 - Charity commission guide
- *note own structure and impact on liability

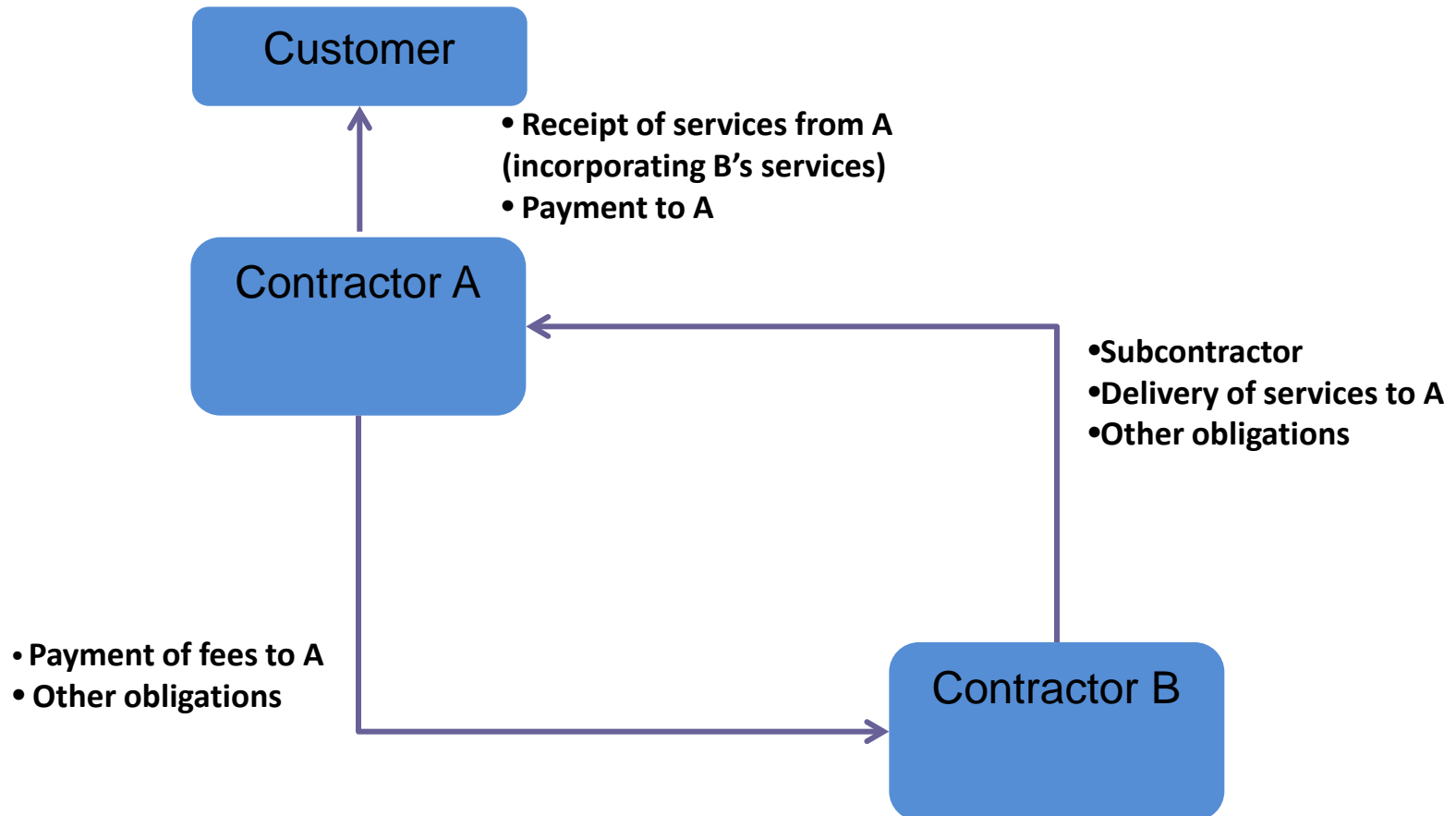
Key Legal Issues

- Assumption and management of risk – structures and contracts
- Identifiable benefits, outputs or cost reduction?
- Due diligence:
 - Viability and motivation of partner
 - Employees, TUPE and Pensions
 - VAT/Tax/Accounting
 - Legal and Financial
 - Culture?

Key Legal Issues

- Management and decision making
 - What process? And who by?
- Control
- Communication – a living relationship
- Dispute resolution
- Exit

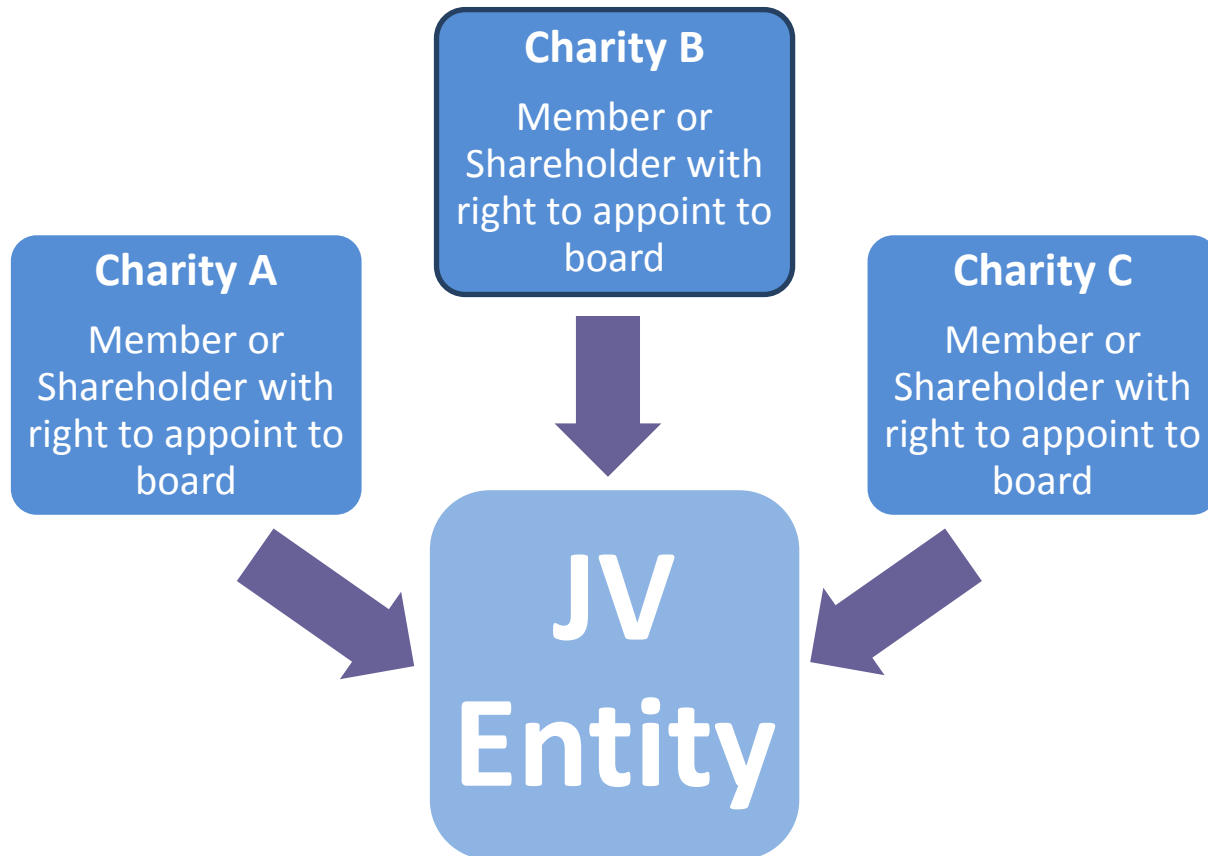
Contract



Contract

- Accountable Body and Sub Contractor model
- Contractual joint venture
 - Primary responsibility remains
 - Apportion:
 - Service responsibility
 - Payments, clear and measurable triggers
- Risk of default by subcontractor?
- Liability for non performance – what are the real remedies?
 - Termination?
 - Re-perform?
 - Service credits?
- VAT

New Entity



New Entity

- “Corporate” joint venture or “SPV”
- New entity
 - limited liability members or shareholders
 - Charity? CIO?
 - Company? LLP? LP?
- Governance issues
 - Board appointment
 - Other controls – shareholder agreement

New Entity

- Capital provision and cashflow
- Operative organisation or “virtual”
 - TUPE
 - VAT
 - Business rates

Merger - Structures

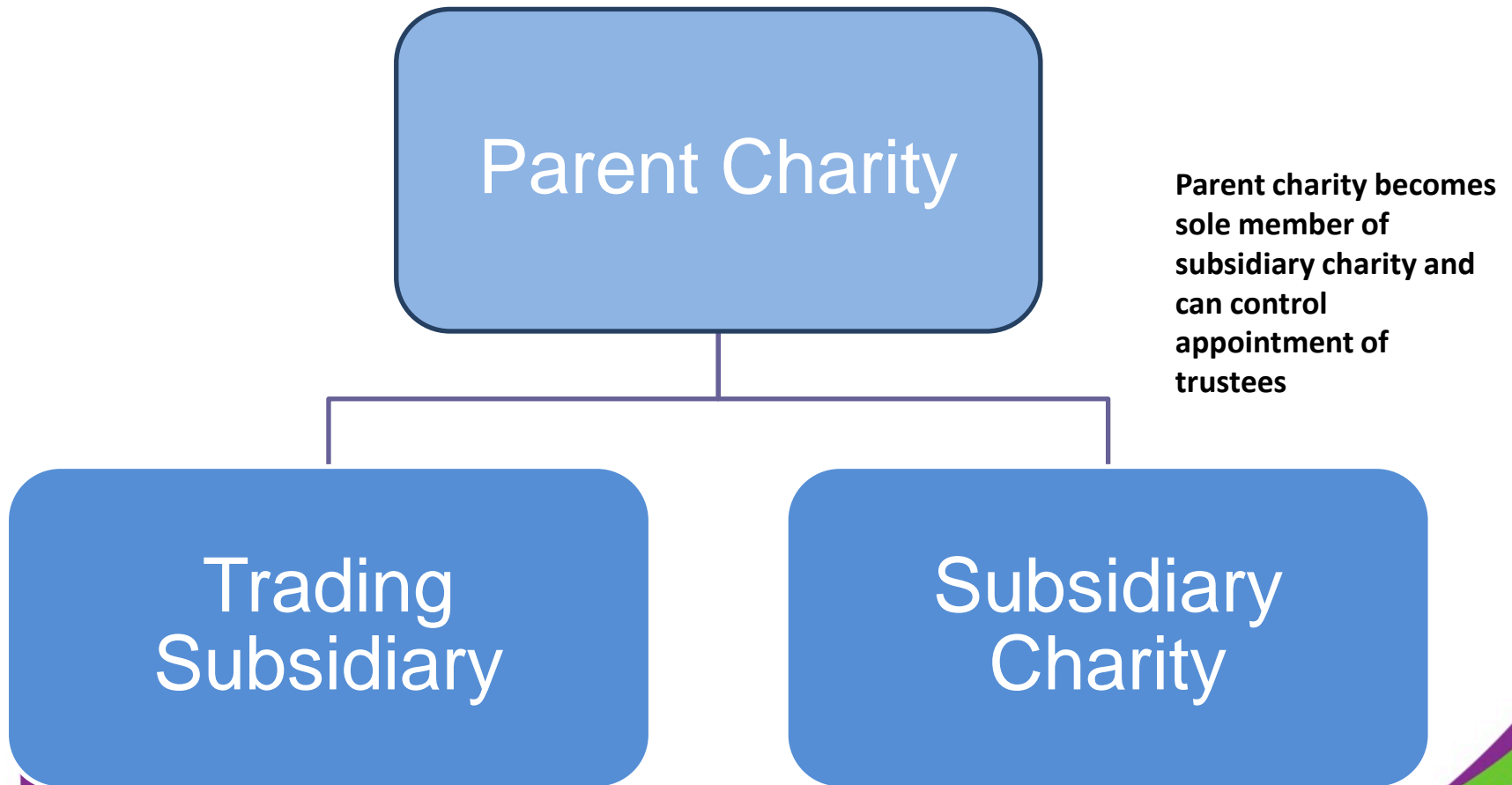
- Group structure
 - Parent /subsidiary
 - Grouping agreement setting out control issues
 - VAT
- Full merger
 - One into another
 - New organisation
- Combination
- Other options – function swap

Risk Management

- Building trust and confidence and timing
- Deal breakers (DB pensions are usually a problem!)
- Due diligence is key
- Confidentiality agreement
- Heads of terms/MOU
- Role of structure
 - Acts as a firewall
 - Timing
- Role of the transfer agreement
 - Transfer of assets (and liabilities)
 - Warranties
 - Indemnities

Group Structure*

*assumes corporate structure

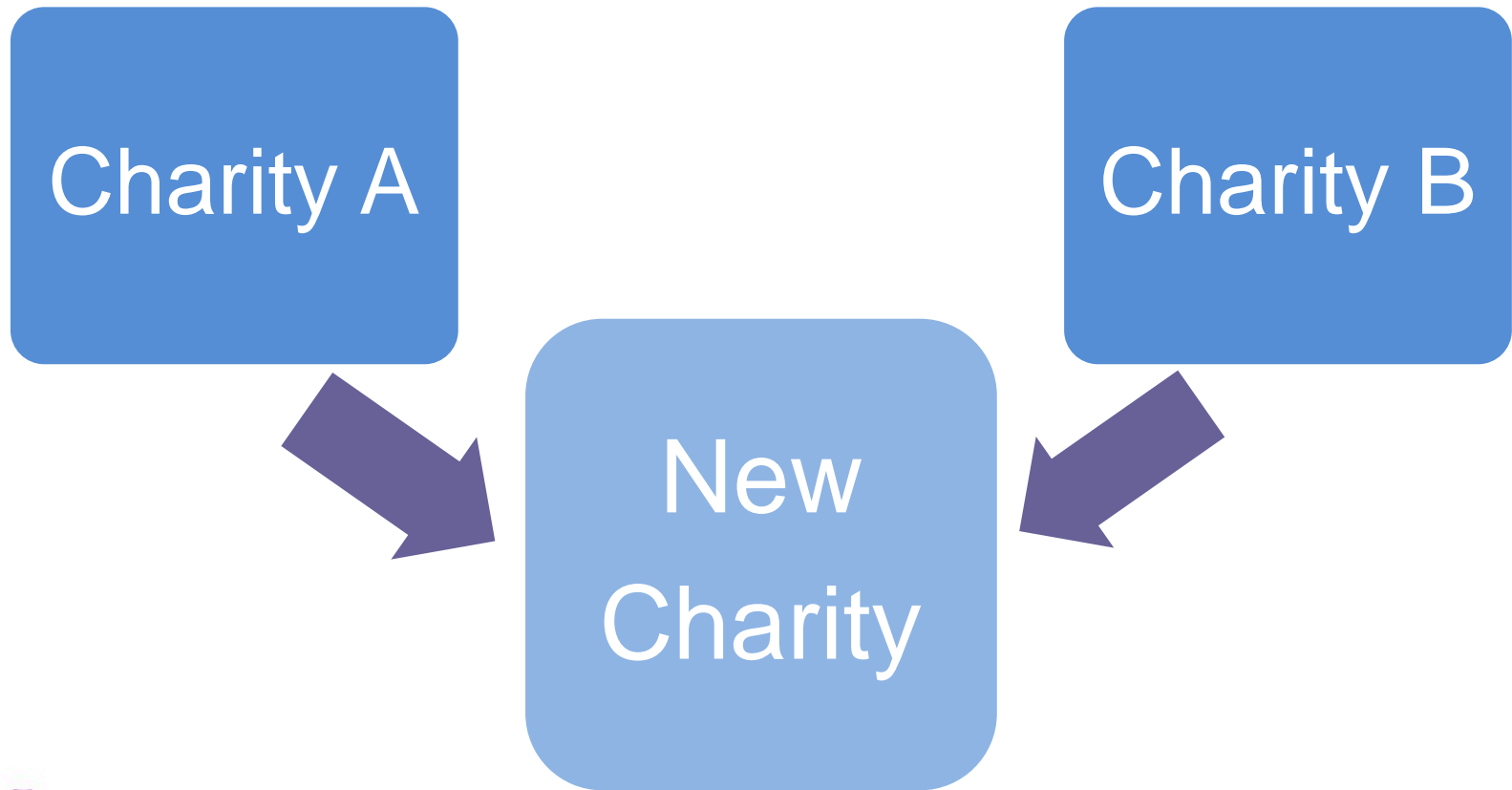


Parent charity becomes sole member of subsidiary charity and can control appointment of trustees

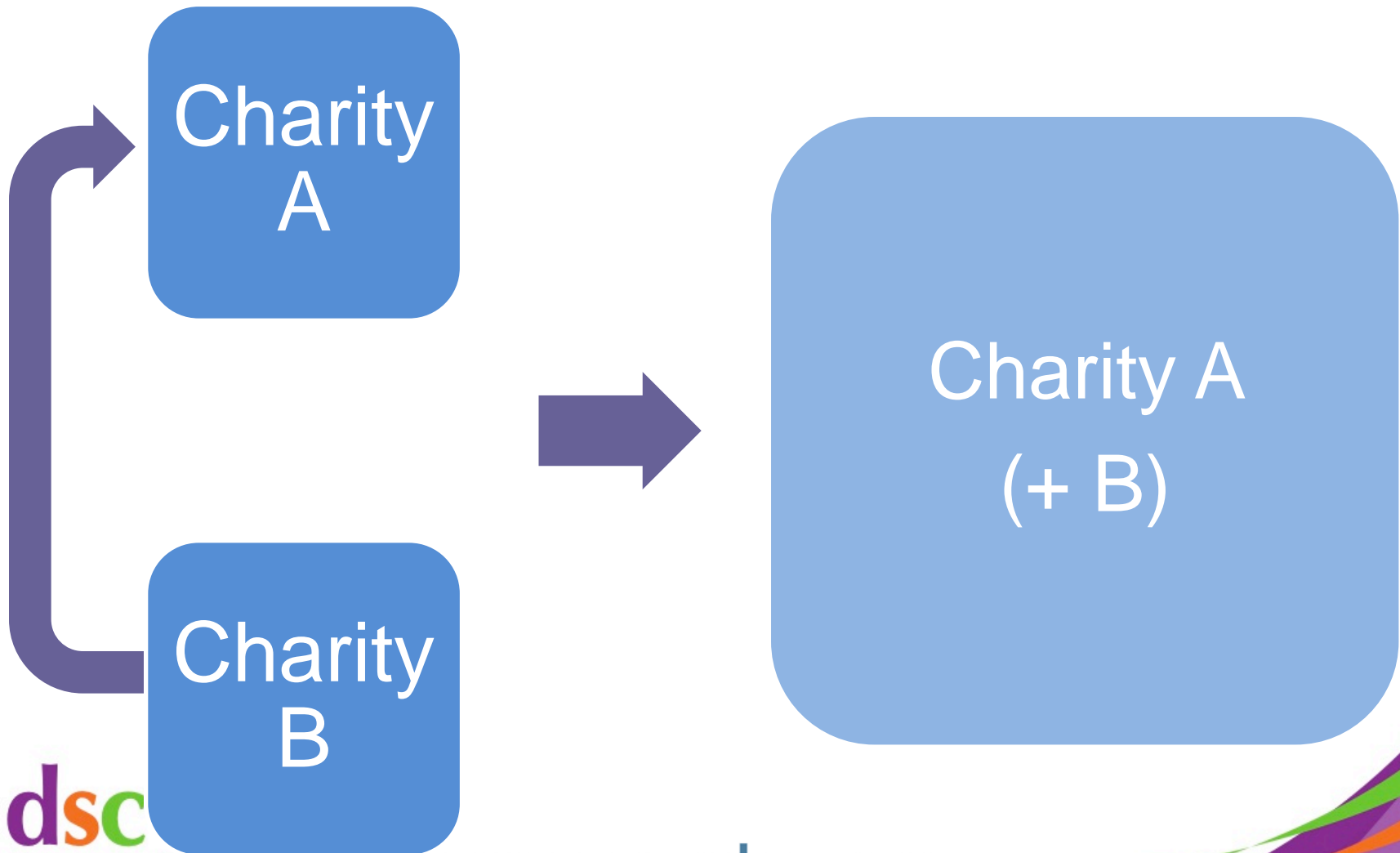
Group Structure

- Key Benefits:
 - Isolation of risk within limited liability entity
 - Benefit of simplicity
 - members resolution
 - less extensive due diligence
 - Governance/Grouping Agreement
- Issues
 - Benefits of integration
 - Confused reporting lines
 - “independent” trustee board
- Doesn't “work” for unincorporated charities

Merge into new charity



One merges in to another



Structures – Full Merger

- Benefits
 - Full integration?
 - Branding
 - Competitive environment
- Issues
 - More extensive due diligence
 - Cost
 - Legal issues principally around assumption of liabilities
 - TUPE and pensions
 - Leases
 - Finance leases

Combination

- Group structure followed by full merger or “hive up”
- Control
- Timing
- Flexibility
- “Independent” trustee board and managing conflicts of interest

Due Diligence

- Asset risks
 - Consents? Landlords and other third parties
- Income risks
 - Contracts – ability to assign?
 - Consent of funders
 - New funders
 - Old funders – clawback?
- Past risks
- Reputational risks
- Data protection

Due Diligence – Staff Issues

- TUPE
- Varying the employment contract
- Compromise agreements
- Pensions
- Union recognition and national terms
- Self-employed, casuals and volunteers

Transfer Agreement

- Transfer of Assets
- Warranties and letters of representation
- Indemnities
- Intellectual property
- Land
- Assignment/Novation of contracts

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