



Consultancy on Private Sector Partnerships for Non- Governmental Organisations

**Norwegian Church Aid
Report**

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1. Summary and recommendations

The **purpose** of this consultancy assignment is to better equip Norwegian Non-Governmental Organisations (NGOs) to professionalise partnerships with the private sector, including on humanitarian innovation.

The **outputs** under the assignment include:

- ✓ **Overall report:** A review of potential business models for NCA and recommendations, based on experiences and Best Practice from similar cooperation between NGOs and business partners, contained in this document.
- ✓ **Checklist:** An integrated checklist and a key risk analyses tool for steps needed to be taken from initial contact to the establishment of a collaboration between the NGO and business partners, including patenting and intellectual property rights. See separate document.
- ✓ **Model partnership contract:** A contract template for cooperation between humanitarian organisations and business partners. This agreement template is intended for use by NCA when concluding an agreement with private parties to ensure that all general ethical and legal aspects are included in the Agreement. The general agreement is intended to be used for all agreements (adjusted for the specific partner relationship) and then appropriate agreement documents (Schedules) should be attached. See separate document.

1.1 Recommendations

- ✓ NCA should carefully consider what kind of partnerships are needed, wanted and strategically important. When entering into a dialogue with a prospective partner, NCA should be clear on objectives, roles and responsibilities within the partnerships, as well as understanding how both parties may benefit from the partnership.
- ✓ Strategic partnerships should be considered in view of upsides and potential downsides. It is crucial to have a critical knowledge of the territorial, political and societal context in which they operate, both in terms of development impact outcomes (what can be achieved) and credibility (what can go wrong). Such partnerships are highly complex by nature, and in order to cater for a successful developmental impact, NGOs and their partners have to deal with this complexity. It is recommended to go through the KPMG's checklist when considering such partnerships, and to undertake a thorough Due diligence of the partner before committing the organisation.
- ✓ Depending on the motivations for entering into a business partnership, different models may be relevant to consider. In most partnerships, NCA is likely to maintain its legal form as an NGO. However, there may be instances where NCA may want to consider investing in a local company, provide risk capital and take a more active role in the early phase of setting up a new business venture, for instance relating to stimulating local cooperatives or small-holders, establish accelerators or incubators and foster private sector development locally. However, in the long run, it is probably more sustainable to exit such ventures and let a commercial business venture run its due course. NCA should carefully consider if an intervention may contribute to an unhealthy distortion of the local market.
- ✓ NCA may want to consider establishing a separate commercial entity, as many other NGOs have done. This could potentially provide additional revenues, as well as fostering investments and local private sector development. The risk of doing so is that NCA will not necessarily be able to influence investment decisions, and there is also a certain reputational risk associated with commercialising NCA's operations. There may also be tax regulations to consider.
- ✓ For humanitarian innovations, it is likely to be few instances when it would be reasonable for NCA to take active ownership or share royalties with a company. However, it depends entirely on the level of input and resources allocated by NCA, and be subject to negotiations with the company in questions. An alternative could be to negotiate something in return, such as free licenses, a certain percentage of the sales for development purposes, etc.

2. Background

The Humanitarian Innovation Platform (HIP) is a collaborative effort between four key humanitarian organizations in Norway: Save the Children Norway (SCN), Norwegian Church Aid (NCA), Norwegian Refugee Council (NRC) and Norwegian Red Cross (NorCross). Funded by Innovation Norway, Phase I of HIP was implemented in 2017. It created substantial momentum for innovation in the four participating organisations. With the ambition to building on the momentum, organisational innovation audits and learning outcomes of the first phase, the participating organisations entered into a new 6 months agreement with Innovation Norway on November 21st, 2017 on Phase II of the initiative: HIP 2.0.

The focus of HIP 2.0 is to use the competencies gained in 2017 on problem areas identified in the first phase, linking research and collaborative opportunities with ongoing innovation projects in the field. A cross-organisational project group is ensuring systematic follow up and information flow both between organisations and between HO and field projects.

NGOs such as NCA are increasingly entering into partnerships with the private sector, where the promotion of commercial actors and market based services could be an aspect. NCA has identified several areas where they typically partner with a commercial enterprise: (i) through grants; (ii) pro-bono expertise and technical know-how; (iii) collaboration on advocacy and awareness raising; (iv) delivery of products and technical solutions; and (v) collaboration on developing new products and technical solutions.

Partnering with a business partner constitutes both an opportunity, as well as a potential risk for NCA. Being closely associated with a business partner could potentially have negative repercussions on the perceived neutrality of an NGO in a given context. In addition, the partnership may also entail substantial joint investments and active participation in market access and/or product development/innovation. An analytical distinction can be made between partnerships that involve core business of the commercial partner, so-called "**Strategic partnerships**", as opposed to "**Transactional partnerships**" such as Corporate Social Responsibility (CSR) or donations, which do not involve the business partner's core business. In transactional partnerships, firms only donate funds to NGOs or participate in reciprocal advocacy and marketing, but do not engage further with them. In strategic partnerships, partners combine the complementary strengths such as the productive capacity of business and the social organising capacity of civil society. Such partnerships are complex by nature, but with a potential higher developmental impact if structured properly. This report focuses on strategic partnerships, although many partnerships may consist of characteristics of both forms.

In order to professionalize partnerships between Norwegian NGOs and the private sector, KPMG has been commissioned to undertake a consultancy to deliver NCA's HIP 2.0 work-stream: *Legal implications of private sector partnerships*. Outputs under the assignment were defined in the Terms of Reference (ToR). However, in dialogue with NCA, it was agreed to slightly revise the deliveries from the original ToR, to also include a mapping/assessment of potential business models for NCA, and to include the risk analysis tool as part of the checklist. Further, it was clarified that the review will not directly encompass procurement procedures (which are already well developed), but rather to clarify the distinction between procurement vs. other forms for private sector collaboration. The agreed deliveries are therefore:

1. A review of potential business models for NCA and recommendations, based on experiences and Best Practice from similar cooperation between NGOs and business partners.
2. One contract template for cooperation between humanitarian organisations and business partners.
3. An integrated checklist and a key risk analyses tool for steps needed to be taken from initial contact to established collaboration between the NGO and business partners, including patenting and intellectual property rights.
4. Deliver a presentation of findings for HIP 2.0 steering committee; NCA steering committee and at a HIP 2.0 learning event.

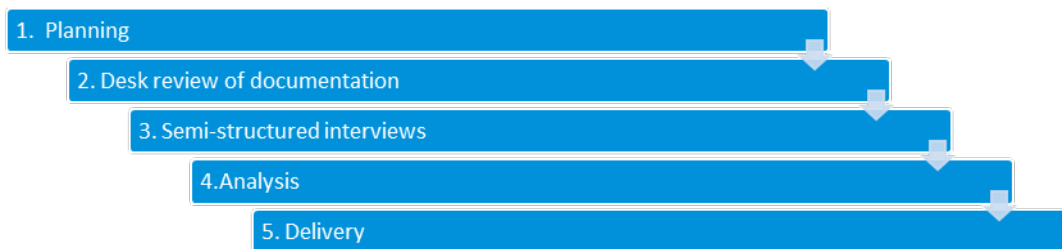
3. Methodology

The **purpose** of the consultancy assignment is to better equip Norwegian NGOs to professionalise partnerships with the private sector, including on humanitarian innovation.

The tools requested by NCA shall contribute to:

- ✓ Good processes for selecting and entering into partnerships with companies that have social and environmental responsibility as a top priority.
- ✓ Capacity on legal implications and considerations with regards to patenting and intellectual property rights of products and services developed through collaboration.

The assignment was carried out in five stages:



The Team used existing documentation such as current contracts, guidelines and procedures on private sector collaboration, as well as interviews with relevant NCA staff, Innovation Norway, existing business partners and other NGOs. No additional research was performed by the Team given the approved timeframe and available resources.

4. Partnership models

Multi-stakeholder partnerships involving the collaboration between the private sector and NGOs are gaining increased attention internationally, mainly due to the 2030 Agenda commitments. Investments, job creation and economic growth cannot be realised without private sector participation, and transfer of technology, skills and innovation is an important part of this.

Whether as workers, subsistence farmers or entrepreneurs, most poor people already participate in markets. Strengthening these markets in ways that secure higher incomes for the poor is therefore seen as a fair and efficient way to fight poverty. Private sector engagements is a common term to describe how the public sector engages or try to stimulate private sector participation in development programs, a term that also covers Public Private Development Partnerships (PPDPs). Collaboration between NGOs and the private sector can also be regarded as a PPDP (with partial funding from public sector), and can – if structured properly – constitute a valuable partnership for both NGOs and the Business partner.

Private sector can be defined as:

- ✓ For-profit and commercial enterprises of any size,
- ✓ Corporate foundations (independent grant-making organizations that have close ties to the corporation providing funds, such as the Coca-Cola Foundation, MasterCard Foundation, etc.),
- ✓ Business associations, coalitions and alliances (e.g. chambers of commerce, employers' associations, cooperatives, etc.).
- ✓ State-owned enterprises.

In humanitarian responses, more attention is given towards the need for innovative solutions and cost-effective solutions to emergency situations. Donors are therefore increasingly focusing on financial support to foster such partnerships between private sector entities and NGOs. However, brokering, promoting, supporting and maintaining effective partnerships is a complex and resource consuming process. The practical approaches, drivers and constraints of such partnerships are generally less understood, and there are different approaches to this. There are a number of potential pitfalls, and it is highly recommended to undertake some level of due diligence before formalising a collaboration with a commercial partner.¹

4.1 NGOs and commercial enterprises – two different world views

An important reason why private sector engagements are challenging is because NGOs and private sector entities operate out of a fundamentally different rationale and/or world view. NGOs are generally concerned with common goods, and receive grant funding and donations based on this. The staff are professional in dealing with donor bureaucracy, campaigning, networking, implementing effective measures on the ground and monitoring of results. Many NGO employees have a highly idealistic view on their work.

Private sector entities on the other hand, largely depend on sales of their products and services. Even though more companies today are concerned with "the triple bottom line" that include concerns such as social standards, responsible business conduct and the Sustainable Development Goals (SDGs), few companies have allocated a separate budget line purely for CSR and "doing good." Simply put, efforts that do not maximize profits are not efficient use of resource for an enterprise (from a strict commercial point of view). Of course, many enterprises have real intentions of achieving more than pure profits, and are increasingly focusing on responsible business conduct and to "make a difference." Still, an enterprise that do not pay attention to profit, is soon out of business.

This is especially true for Small and Medium-Sized Enterprises (SMEs) that have limited resources and need to keep a strict focus on core-activities. On the other hand, SMEs are often more innovative and entrepreneurial, and more cost-efficient than larger companies. Many entrepreneurs and start-ups are highly idealistic, but still depend, obviously, on profits. They cannot afford to waste much time on efforts that

¹ See KPMG's checklist for private sector engagements (2018).

will not lead to profit – or invest in high risk projects that are unlikely to lead to profit. Donor funding can de-risk the early phase of an investment project (for instance in a joint project with an NGO), but the business partner still has to focus on how the project may lead to new market opportunities.

Hence, the aim of the partnership need to be carefully considered by the NGO. If donations and access to CSR funding, as well as large scale impact, is the main priority of the NGO, then larger companies are the answer. Large companies may see a reputational benefit from donating non-core funds to a NGO. They may also see an advantage in engaging in other collaborations as well and providing products, technical competence or pro-bono staff-time to the NGO. Still, the NGO has to be fully aware that there is no such thing as a free lunch, and to understand the motivations of its commercial partner.

Having said so, there are also enterprises with a clear vision and mission to solve social or environmental challenges. The Norwegian Fretex is one such company, with a social mission to assist people with employment and to remain employed, as well as contributing to the environment through reuse and recycling. There are also other companies that have not-for profit purposes, or companies that focuses on social impact investments, such as Voxtra. The company invests for profit, but only in companies whose success is tightly linked to improving the livelihoods of smallholder farmers.² Such companies could potentially be a better fit with NCA's social purpose and mandate, however, not necessarily be the key provider of needed competencies and technology. It depends on the purpose and need for a private sector partnership.

If innovation, new approaches, testing pilots etc., is the goal of the NGO, then a SME or start-up might be a more fitting partner. But smaller SMEs do not have the same opportunity to invest in pure "do good" projects, and need to maintain a strict focus on core-business. Hence, the first questions for the NGO before entering into a partnership should be: what is the market of the Business partner? How will the collaboration lead to profits for the Business Partner? And is this compatible with the goals of the NGO?

That does not mean that both parties cannot mutually benefit from the partnership. It simply means that NGOs need to be fully aware of the interests of a prospective commercial partner, and that expectations, roles and responsibilities from both parties need to be communicated in an early phase. It should also be formalised in a legally binding contract. Non-binding "letter of intent" or "MoUs" can be used in an early phase of the partnership, however, it will not commit the company. If there is a change of ownership, or the market changes, etc., the company may make decision contrary to the interest of the NGOs.

Private Public Development Partnership - «the sweet spot»

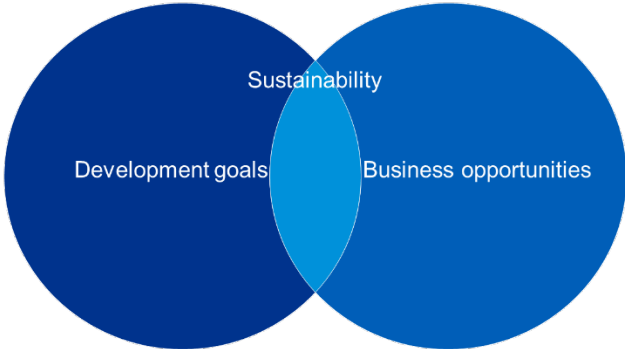


Figure 1

No matter what the size and type of partnership, it is important to understand the partner's motivation and to identify the "sweet spot" between development goals and business opportunities (Figure 1).

² <http://voextra.org/about-us/>

4.2 Type of partnerships

An analytical distinction can be made between partnerships that involve core business of the commercial partner, so-called "Strategic partnerships", as opposed to "Transactional partnerships" such as CSR or donations, which do not involve the business partners' core business.³ In transactional partnerships, firms only donate funds to NGOs, but do not engage further with them. In strategic partnerships, partners combine the complementary strengths such as the productive capacity of business and the social organising capacity of civil society. Strategic partnerships is generally acknowledged to generate greater developmental effect.

In a study from Danish Red Cross⁴, a similar distinction is made between what is referred to as *transactional* and *strategic*⁵ partnerships:

1. **Transactional partnerships** are characterised by transactions of funds or competencies, from the business partner to the NGO, and realised by activities such as donations, pro-bono contributions, marketing activities, communication campaigns and projects not directly linked to the core competencies or strategic focus of the business involved.
2. **Strategic partnerships** are characterised by projects built upon the core competencies and strategic focus of all the parties involved in the partnership. This kind of partnership has a joint value creation, a joint definition of purpose and is often focused on collaboration within the value chain of the business partners. This form of partnership entails that the parties engage in solving shared challenges or realising common opportunities, that they share the value being created and have a joint definition of purpose.

Strategic partnerships entail a rather innovative approach to reaching beneficiaries, in which resources, competencies and know-how is pooled in order to create something new. In order to solve complex challenges, such partnerships are essentially more potent when it comes to solving such challenges. These partnerships can be further divided into four sub-categories, as described in the table below:

Figure 1: characteristics of the NGO-Business partnership⁶

Transactional Partnerships		Strategic Partnerships	
PHILANTROPIC PARTNERSHIPS	PARTNERSHIPS OF RECIPROCAL EXCHANGE	PARTNERSHIPS OF INDEPENDENT VALUE CREATION	INTEGRATIVE PARTNERSHIPS
Partnerships where businesses directly or indirectly (through e.g. a foundation) donates financial assets, services, products, manpower or other resources to NGOs.	Partnerships where businesses and NGOs engage in mutual or reciprocal marketing and / or campaigning activities.	Partnerships where businesses and NGOs collaboratively cater to each of their individual similar, but not identical, goals. The partnership creates value for both businesses and NGOs but in different ways.	Partnerships where businesses and NGOs engage to solve shared challenges or realise common opportunities. The creation of value to the business equals the creation of value to the NGO

Many partnerships entail combinations of these characteristics from the different types. In some instances, the commercial entity may want to fund the NGO to be associated with the brand globally (usually CSR funding from larger companies), or to be associated with the NGO in a particular country context – thereby attaining credibility and trust from potential customers at local level. The Business Partner may see a commercial potential in partnering with the NGO to access its network, credibility and contextual competence. This contributes to de-risking a potential investment into a high-risk market, which could

³ See ECDPM (2015): *From looking good to doing good: Mapping NGO-business partnerships*

⁴ Danish Red Cross (2016): *Not Business as Usual – Partnerships between NGOs and Business*

⁵ Red Cross calls them *transformational* partnerships, but we call them *Strategic* Partnerships to maintain consistency in language.

⁶ Ibid

further stimulate local private sector and job creation – thereby also contributing to development goals of the NGO.

In some partnerships, the NGOs is in itself regarded as a potential customer, and a "non-procurement" NGO-Business partnership is a way of tailor-making the product to the needs of the (potential) client, the NGO. It could also be an approach to get an advantage in the NGO market, or to ensure dependency of one supplier only ("first time's for free"). This is especially the case when it comes to humanitarian innovations, as the market is essentially humanitarian actors such as NGOs, UN and others.

However, there is often a mutual interest for innovation. The NGO's desire is typically to improve efficiency and impact of its operations, whereas the commercial partner wants to do R&D of new products, increase customer base and satisfaction, thereby profits. In some instances, the business partner may want to test a pilot product pro-bono, after which the product will be commercialised in the humanitarian sector – or other sectors.

Sometimes the company may want to strategically engage with a NGO simply to silence public scrutiny or criticism of its operations. Depending on the issues, this does not have to be entirely negative (for instance if the NGO gets access to more accurate information, or is able to influence investors from the inside). Still, this highlights the importance of knowing your partner and the intentions well before entering into any kind of NGO/Business partnership.

The question then is, what kind of partnership is possible? And how should the NGO choose to formalise such a partnership with the business partner?

4.3 Process and challenges

A partnership should always be based on a thorough analysis and scoping of the partnership. The partnerships process can be divided into the following steps:

1. **Initialisation:** where the NGO and Business Partner identify opportunities for collaboration, and the project scope and an initial plan is formulated. It is important to undertake a proper Due Diligence of the partner at this stage.
2. **Implementation:** design and implementation of the project.
3. **Assessment:** impacts are assessed and evaluated.
4. **Continuation:** decision to continue, or scale up a pilot.

Although these steps may seem obvious, there are many risks and challenges identified from previous experiences of such partnerships, and there is for instance a tendency to overlook involvement of local beneficiaries and partners as well as continuation and scaling up beyond a pilot initiative.

Strategic partnerships will usually involve co-creation of value, or the introduction of new products or services that require a high degree of collaboration to achieve success. This requires more frequent interaction between the partners over a longer period of time. Such partnerships also involve more human and financial resources from both parties. The level of interaction and complexity also entails more challenges in terms of 1) identifying shared goals and interests, and 2) different cultural, organisational and communicational barriers.

Transactional partnerships mainly involve donations and pro-bono contributions, thereby a lower degree of engagement. However, as already mentioned, many partnership constitute a hybrid form of several characteristics. Hence, it is vital to assess the strategic importance of the partnership, understand the motivations of the counterpart and to plan well to mitigate potential conflicts. Based on literature⁷, the following constitutes the most common challenges facing a NGO-Business partnership:

⁷ Ibid

Table 1: Challenges in NGO-Business partnerships

Challenges	Mitigation and considerations
<p><i>1. Strategic fit</i> Link between the partnership and the involved organisation's core business</p>	<ul style="list-style-type: none"> ✓ Support of organisational goals and purposes ✓ Integration into organisational strategy, budget and action plans
<p><i>2. Project Structure</i> Governance structure and legal framework of the partnership</p>	<ul style="list-style-type: none"> ✓ Management involvement and commitment ✓ Contracts and non-compliance/violation agreements ✓ Exit strategies
<p><i>3. Roles and responsibilities</i> Unclear responsibility for allocation of resources and mandate in the partnership</p>	<ul style="list-style-type: none"> ✓ Designated project manager ✓ Authority and mandate ✓ Allocation and distribution of resources, competencies, risks, etc.
<p><i>4. Finance</i> Financial resources allocated to the partnership and the financial framework of the partnership</p>	<ul style="list-style-type: none"> ✓ Budget and control instruments ✓ Financial agreements ✓ Financial disclosure
<p><i>5. Implementation</i> The scope and elements in the implementation of the partnership</p>	<ul style="list-style-type: none"> ✓ Implementation plans ✓ Milestones and execution ✓ Risk mitigation
<p><i>6. Communication</i> Communication and collaboration between the partners involved</p>	<ul style="list-style-type: none"> ✓ Communication plan ✓ Reliable and constructive dialogue ✓ Communication with external stakeholders
<p><i>7. Monitoring and evaluation</i> Degree of monitoring and evaluation of the partnership</p>	<ul style="list-style-type: none"> ✓ Monitoring and evaluation routines ✓ Outcomes ✓ Impacts

Strategic partnerships may have greater developmental benefits. Many such partnerships are however dominated by the business partner, as it often provides the necessary financial resources, and have more capacity and better access to resources and networks. This is often the case with multinational companies and in capital-intensive sectors such as mining, energy and agribusiness. The challenge for the NGO would be to cater for such power imbalances, maintain independence and defend the position of vulnerable partners and beneficiaries at local level.

Reference is made to the KPMG's checklist for private sector engagements, which addresses most of the abovementioned issues. The next chapter will focus on potential business models for the NGO when engaging with the private sector.

4.4 Models of NGO engagement with business

The governance model of a partnership should be decided on the basis of the scope and purpose of the partnership as well as an assessment of the NGO's and the Business Partner's interest in the partnership. The following chart shows some of the main dimensions of the two main categories of partnerships, as well as considerations the NGO needs to take into account:

Figure 2: main partnership dimensions⁸

Dimension	Transactional (Philanthropic) Partnerships	Strategic Partnerships	Considerations by the NGO
Type of resources involved	Money	Competence, technology	Does the partnership involve innovations of new products? Will the NGO take active part in product development or piloting?
Magnitude of resources involved	Small	Significant	Are sufficient resources allocated by the NGO, and is there a fair deal in terms of input from both parties?
Strategic value	Modest	Significant	Is the partnership in line with strategic priorities, and how will it deliver on development goals of the NGO?
Level of organisational participation	Low	High	Are the right staff and departments involved? Is there a need to involve local partners and/or beneficiaries?
Organisational interaction	Low	High	What is the governance structure of the partnership?
Managerial complexity	Simple	Complex	Are all roles and responsibilities clearly defined? Is there a need to legally formalise the partnership?
Scope of activities	Narrow	Broad	Are clear deliverables identified? How can a pilot be scaled up? Is there a need for procurement?
Type of value flow	One-way	Shared value	Is the profit of the business partner reasonable? Is there any reason to negotiate sharing of profits, or consider partnering on commercial terms?

In most cases, interacting with private sector entities will be a normal NGO-Business relation, in which the NGO maintains its operational and legal status. However, there are also hybrid models, in which the NGO engages with the private sector on commercial basis. Obviously, before doing so, careful considerations has to be made regarding the legal and operational risks by doing so. Still, many NGOs has chosen to do so, enabling the NGO to take an active part in mobilising the private sector and investments. Many NGOs also see commercialization as a way of shifting financial dependence from charitable donations to self-generated income through social entrepreneurial ventures and sale of their services.

However, a risk is that by doing so is that the NGO may side-line its social mission and purpose. And a growing resemblance between NGOs and commercial companies may cast doubt in the public whether the NGO remain truly committed to its social mission, as further described below.⁹

Procurement innovation

Existing procurement procedures have proven difficult for NGO-Business innovation partnerships as NGOs often face procurement compliance issues when entering into dialogue with a Business Partner. Two ways

⁸ Adapted from Danish Red Cross (2015, p. 14) and ECDPM (2016, p. 5)

⁹ Pierre-Emmanuel LY (2006): *The Commercialisation of NGOs: a theoretical analysis*
<http://www.geocities.ws/pierremly/banglaDec7.pdf>

of encouraging innovation partnerships while ensuring transparency and competition within existing procurement frameworks are emerging:

- ✓ **Innovation/ challenge calls.** Several humanitarian organization are using innovation or challenge calls to enter into partnerships with the private sector. In these processes, the NGO defines specific problems that it want to solve, and organize competitive processes where the private sector can compete based on solutions they put forward. This approach reduces the burden of the NGOs to have to deal with ad hoc collaboration requests by the private sector, while it allows for a more transparent and competitive way of engaging the private sector.
- ✓ **New EU procurement procedures for innovation partnerships.**¹⁰ New EU public procurement rules have opened up new options to encourage innovation without hampering competition and transparency. This came in recognition of the fact that if purchasers (NGOs in this case) remain conservative, businesses are not encouraged, or even allowed, to innovate.

Innovation partnerships are collaborative processes between the buyer (NGO) and the provider (Business Partner) to develop products and/or services. The procedure can be used for procurement of solutions that do not exist in the market. An innovation partnership combines the R&D phase and potential later purchases (commercialization phase) in one procurement and contract. Innovation partnership allows for the combination of research and procurement. The purpose of innovation partnership is to solve specific problems met by the NGO. Key characteristics of the innovation partnership procurement procedure are:

- ✓ The procedure can only be used for procurement of goods and services that are not currently available in the market
- ✓ It is a negotiated partnership
- ✓ The NGO can enter into partnership with one or more providers
- ✓ The development of the product and/ or services are carried out in phases with associated objectives and targets
- ✓ After each phase, the purchasers (NGO) can end the innovation partnership.

Innovation Norway has piloted this procedure in Norway. The municipality of Stavanger is the first purchaser (health and welfare services) to have tried this out in Norway. Innovation Norway is planning to pilot the innovation partnership procedure with NGOs in the coming months.

Norwegian NGOs like NCA are generally exempt from taxation on gifts, charity and pro-bono contributions, as long as the organisation or individuals are not profiting. In terms of VAT, the organisation is as a general principle taxable if it undertakes sales of goods and services above NOK 140.000.¹¹

The following two sections describe two different models of NGO commercialisation:

4.4.1 The NGO-business hybrid model

Many NGOs are involved in both development projects as well as business ventures. The NGO may invest in development work – public goods – while simultaneously be involved in business activities that yields certain net profits to the organisation. In addition, the NGO continuous to receive donations for its development work.

An example is BRAC, the largest NGO in Bangladesh, which owns and run a four-star hotel with conference facilities and a panoramic restaurant.¹² The commercial wing of the NGO contributes to financing the development wing of the NGO, thereby providing a higher degree of financial sustainability to its work. Although this may provide some useful inputs to the development wing of the NGO, it is mostly a business model that contributes to cover fixed costs of the NGO and mitigate lack of donor funding. Many NGOs also engage in small income generating activities such as selling t-shirts or handicraft products, or use their staff member to sell various consulting services to governments and international organisations.

¹⁰ <https://www.anskaffelser.no/prosess/innovasjonspartnerskap>

¹¹ See www.skatteetaten.no for further details.

¹² Ibid

Depending on the jurisdiction, NGOs may have a favourable taxation level compared to companies, and may actually contribute to distorting the local market. In Bangladesh, for instance, several businesses have complained that they face unfair competition from NGOs.¹³

Although this does not necessarily entail a decrease in donations, an inherent risk is to lose legitimacy in public opinion as well as remaining committed to the social mission of the NGO. An example is the International Human Movement from People to People and its Teachers Group global network, that claim to fund many of its programs through collection of second hand clothing in Europe and the US and selling it in development countries. According to the BBC, the teacher group also includes offshore companies and commercial ventures, and the Danish founder is currently wanted by the Interpol for fraud accusations and has fled to Mexico.¹⁴ Obviously, this has severely undermined the reputational credibility of the organisation.

Commercial development projects

In some cases, the NGO may want to invest on commercial basis in a risky investment project, with the purpose of stimulating private sector development locally. As an example, many NGOs are working with small-holders and cooperative models, and may want to stimulate the establishment of a company owned and run by small-holders farmers. The NGO then invests and becomes a main shareholder of the company, but without taking a profit from the venture and usually with a long-term perspective to transfer ownership to the cooperative. It is more a way to provide technical assistance and investments in the early phase, but potential profits remain with the beneficiaries and potential private investors. Hence, it is a way of both contribute public goods as well as generating private profits.

In some cases, the NGO may invest in a start-up, but without taking ownership of the company. The Norwegian NGO, Norges Vel, has for instance invested in several commercial incubators, providing soft loans or grants in the early phase as well as technical assistance. Norges Vel has also been a board member, and taken an active role in the management of the companies in the early phase, but later exited once the company is considered sufficiently mature and self-reliant. The impact of the incubators in stimulating start-ups and local entrepreneurs have then contributed to achieving development goals of Norges Vel. The model has, according to Norges Vel, proven highly efficient in creating a market for renewable energy in development countries.

Norges Vel has also worked to link local small-holders to global value chains, by connecting local producers to potential buyers. In one such example, Norges Vel negotiated the establishment and set-up of a development fund for the project, in which the buyer agreed to invest a certain percentage of the profit from sales. The terms and purpose of the fund was jointly agreed between Norges Vel, local stakeholders and the buyer, whereas management of the fund is done by Norges Vel. This model is interesting, as the NGO has achieved some level of royalties of sales to fund development work, but without ownership or having to deal with the commercialisation and sales of the final product.

Legal/ Tax implications

While non-profit organizations are generally tax-exempt under the Norwegian Tax Act (NTA) section 3-32, business activities that are carried out by the organization are taxable. Although circumstances may vary, engaging in commercial partnerships will therefore generally require a delineation between the non-profit activities of the organization, which are tax-exempt, and taxable commercial activities. The taxable activity will entail tax reporting and payment requirements, and may also entail, inter alia, a requirement to prepare and file financial accounts and have accounts audited. Such aspects should be considered in more detail on a project-by-project basis.

Engaging in commercial activities in other jurisdictions will also generally have more far-reaching local tax implications than engaging in non-profit activities, and as a general rule, local corporate income taxes are likely to accrue.

Humanitarian innovations

Within the humanitarian field, the NGO may want to stimulate local innovation processes in order to improve the effectiveness of its operations. The ICRC has for instance developed a practical step-by-step approach to identifying local entrepreneurs and stimulate innovations of technology and approaches to be utilised in

¹³ Ibid

¹⁴ <http://www.bbc.com/news/magazine-36940384>

humanitarian operations, the Lead User Method.¹⁵ The method is designed to identify lead users that face general needs in a market place, and to come up with product concepts in a collaborative process. The products can then be commercialised. Such innovation projects can either be funded through grants awarded through an Innovation Challenge, or through procurement. The use of Innovation Challenge calls are used by several humanitarian actors to promote innovation, for instance through the Humanitarian Innovation Fund¹⁶ the USAID/DFID Humanitarian Innovation Initiative¹⁷, the UNICEF¹⁸ and UNHCR¹⁹ Innovation funds, WFP Cooperating Partners Innovation Fund, OCHA Humanitarian Research and Innovation Grant²⁰, and others.

IP rights

In most cases, ownership and IP rights remain with the commercial entity that have developed the product. However, there may be instances in which the NGO may take such an active part of the innovation that sharing of IP rights should be discussed. It may be that the NGO can have user-rights to the product, limited licenses, etc., whereby the commercial entity retain ownership. This must be carefully considered, and is subject to negotiations between the company and the NGO. For many companies, the idea of sharing ownership with an NGO would be considered unreasonable, as the NGO is usually not part of product development per se – but rather providing input and trial testing of the product after which the company will do the actual development and commercialisation of the product.

Legal aspects to consider regarding IP rights. Firstly, IP rights can generally be divided into two categories:

- ✓ Copyright and related rights, pertaining to literary, artistic and scientific works and related rights,
- ✓ Industrial property rights, which gives the proprietor the exclusive right to exploit his invention, trademark or design.

Whereas copyright occurs when someone create a work i.e. without registration, industrial legal protection provides protection primarily in the form of patent, trademark or design registration.

In NGO-commercial entity partnerships, the commercial entity usually delivers the knowledge, while the NGO contributes partially funding of the projects. However, regardless of the form of cooperation, it is crucial to agree who will retain the rights to the results of the new technology that could be patented, or registered as a design or trademark.

When considering involvement in humanitarian innovations there are a number of circumstances related to IP rights, which the NGO should take into consideration.

Firstly, the NGO and the commercial entity that will develop the right/product should have a mutual understanding of the distribution of responsibility as regards to the IP rights. This should primarily be accomplished through negotiations between the commercial entity and the NGO, and included in the contract between the parties.

Further on, the NGO could take into consideration whether full/partially ownership is to be desired. Depending on the degree of involvement from the NGO, partial ownership could be an option. However, it can be difficult to reach an agreement with the commercial entity for ownership in the right/product. A limited license to use the IP right / product may however, be within what can be agreed upon – depending on the degree of involvement from the NGO.

Furthermore, a mutual understanding is essential in regards to which potential IP Rights that may arise during the collaboration between the commercial entity and the NGO.

¹⁵ Developed for ICRC by the Technology and Innovation Management at Hamburg University of Technology.

¹⁶ <http://www.elrha.org/hif/home/>

¹⁷ <https://humanitariangrandchallenge.org/>

¹⁸ https://www.unicef.org/innovation/innovation_90879.html

¹⁹ www.unhcr.org/innovation/tag/innovation-fund/

²⁰ <http://www.unocha.org/legacy/what-we-do/policy/humanitarian-research-and-innovation-grant-programme>

Also note that licence to use the IP rights, e.g. a trademark or design, could represent a value for the NGO, in their work to realize their vision and project, by marketing their contribution to humanitarian innovation. Utilization of an IP right through a limited license can also represent a source of income for the NGO.

Industrial rights constitute an increasingly important part of the foundation for innovation and value creation. Internationalization in research, industry and technology means that such rights are under greater pressure than before.

A contractual regulation between the parties are crucial for a cooperation. Which right or limited licence, the NGO can achieve, depends on the terms of the contract between the NGO and the commercial entity undertaking the development. This agreement may require the commercial entity to agree to assign partial ownership of arising IP rights to the NGO, with a royalty-sharing provision. Alternatively, the commercial entity retains the ownership, but signs off a limited license to use to the NGO.

With a license, the licensee is provided with an exclusive or non-exclusive use of the intellectual property rights for a defined period and in a defined geographical area, but the ownership remains with the provider.

4.4.2 Separate entity model

The hybrid model ensures that the NGO has full control of both development and business investment decisions. However, many large NGOs also set up their business ventures as separate entities (subsidiaries). Such a company would then operate like any other business, but share its profits with the NGO – and/or other shareholders. The ventures often take the form of the NGO being a major shareholder of the company. For instance, the Bangladeshi tele-company, Grameen Phone, is partly owned by the non-profit, Grameen Telecom, which operates the Grameen Village phone program.²¹

Similarly, the Norwegian NGO Salvation Army has a fully owned enterprise, Fretex. It is organised as a group, Fretex Norge AS, with various subsidiaries. The company has itself focus on social impact, such as environment, recycling, job creation, etc., whereas 10% of the profit is allocated back to the Norwegian NGO Salvation Army for other social work.²² In this example, the business wing has itself a social purpose, as well as providing a revenue source for the NGO.

ICRC and many of the IRC members have separate commercial entities running hotels, private hospitals etc., in order to provide revenue for its humanitarian activities. As a result, they can maintain a higher pool of doctors and specialists, which can easily be mobilised for humanitarian operations.

The Norwegian Mission Alliance has established a holding company, Alliance Microfinance AS (AMAS), acknowledging that microfinance is an efficient tool for leveraging the potential of economically poor but entrepreneurial people. Although fully owned by the Mission Alliance as a Private Limited Liability Company, the company is non-profit and reinvests profits into new projects.

Use of a for-profit subsidiary can be an effective strategy for a variety of reasons, from shielding a NGO from liability or the tax consequences of conducting an unrelated business activity, to attracting outside investment and scaling a business beyond what might be possible if conducted inside the NGO parent.

However, it is important to note that such subsidiaries (limited liability companies) is thoroughly regulated by numerous acts and regulations, most importantly the Companies Act²³. A limited liability company must fulfil a number of requirements, and has running obligations. On the other hand, the owners' liability is restricted to the capital contributed into the company (share capital), which opens up a more risk-oriented profile.

Please see annex 2 for more detailed information about company management.

Tax implications – separate entity

While corporate entities such as limited liability companies may qualify for tax exemption under the NTA section 2-32, an incorporated company engaging in commercial, profit-driven activities will be fully taxable. The company will also have full reporting requirements such as tax return filings obligations, financial

²¹ Pierre-Emmanuel LY (2006)

²² <https://www.fretex.no/om-fretex/om-fretex-norge>

²³ Act of 13 June 1997 No. 44, the Norwegian Private Limited Liability Companies Act ("Companies Act").

accounts, and similar. To the extent the company is incorporated – or carries out activities – in other jurisdictions than Norway, local tax implications in that jurisdiction must also be taken into consideration.

The tax-exemption in section 3-32 of the NTA covers both capital gains and income. For Norwegian tax purposes, dividends paid or gains on shares should be tax-exempt at the level the NGO. Establishing a limited liability company therefore creates a natural ring-fencing of the taxable activity, where the subsidiary is fully taxable while capital income derived from the subsidiary is tax-exempt. For entities outside of Norwegian tax jurisdictions, other taxes such as dividend withholding taxes may however apply. We note in that respect that tax-exempt organizations may in some jurisdictions be considered non-qualifying for any tax treaty relief because they are not tax-paying entities.

It should be noted that other types of entities – partnerships, limited partnerships – are generally transparent for Norwegian tax purposes, and may have other types of tax implications. In general, we recommend that the tax implications of an investment or incorporation is considered in detail beforehand.

Appendix 1 List of people met

NCA

Institution	Name	Title
NCA	Eivind Archer	Head of Partnerships and Strategic Solutions
NCA	Siv Øystese	International Grants Advisor
NCA	Oda Thune	Procurement and logistics advisor
NCA	Camilla Grøtta	Adviser, fundraising
NCA	Gunn Inger Røkke Ruud	Adviser, fundraising
NCA	Kalina Sharp Bergersen	Senior advisor Programme Communication and Innovation
NCA	Corinna Schüttler-Kvarme	Section leader Global Logistics
NCA	Kirsten Engbak	Regional representative Eastern Africa
NCA	Linda Nordby	Humanitarian section
NCA	Martha Kristine Syversen	Advisor, System Development
NCA	Zalmai Hameedi	Partnership & Communication Coordinator
NCA	Hamayoon Shaheem	Economic Empowerment Programme Coordinator
NCA	Trond Are Utle	Advisor, Digitalisation
NCA	Haldis Karstad	Senior advisor health
NCA	Eivind Aalborg	Country Director Ethiopia
NCA	Yemane Salih	Climate resilience coordinator, Ethiopia
NCA	Jakob Fagerland	
NCA	Anders Østeby	Head of finance
NCA	Alexander Klein	Advisor, Data Collection and Management
NCA	Rabia Waqr	International Grants Adviser

Other NGOs, government and private sector

Institution	Name	Title
Norwegian Red Cross	Ole Kristoffer Bjelland	Advisor, Innovation
Save the Children	Ina Bøe	Advisor, Innovation
Norges Vel	Reinart Pretorius	
Norwegian Refugee Council	Sophia Kousiakis	Youth Specialist, Global Education Team
Ministry of Foreign Affairs	Jon Hansen	Director, Section for trade and commerce
Ministry of Foreign Affairs	Kjersti Sommerset	Senior Adviser, Section for Humanitarian Affairs
Innovation Norway	Elisabeth Fosseli Olsen	Senior advisor. Head of humanitarian innovation initiatives, programs and grants
Differ Group	Ketil Røine	Partner
Pangea Accelerator	Jonas Tesfu	CEO
Diwala	Snorre Lothar	Co-funder and CTO
Bright Products	Ingunn Berget	CEO
Bright Products	Lars Ingvar Hoff	
Yara	Pål Øystein Stormorken	Head of Partnership Strategy
AMAS	Sven Arne Lende	CEO
Storebrand	Matthew Smith	Head of Sustainable Investment
Leap Learning	Marit Linnebo Olderheim	CEO
Giertsen	Davis Bond	Sales Manager
Statoil	Liv-Inga Valenza	Project leader Water Ethiopia

Appendix 2 Company management

Shareholders and share capital

There are no restrictions on the number of people who can own shares in a private limited liability company. Shares can be owned by private individuals, legal persons and jointly between many shareholders. The general rule is that all shares give equal rights in the company, but exceptions from this rule can be stipulated in the articles of association (and/or in a shareholders agreement). For example, the company can divide its shares into A and B shares, in which the B shares has limited rights. This is something that is important to take into consideration if the NGO invites partners into the company as shareholders in order to ensure that the NGO has control over the company's financial, administrative and commercial development.

The minimum share capital of a limited liability company is NOK 30 000. The share capital can subsequently be altered through a capital increase or capital reduction.

Audit/ accounting

In general, all limited liability companies is obligated to audit the annual accounts. Exemption is given to smaller limited liability companies, meeting certain criteria. Further, All limited liability companies are required to keep books (i.e. they are required to register and document revenue and expenses), and to file year-end accounts.

Leadership

The number of members in the board of directors shall be stated in the company's Articles of Association. The board of directors is elected by the general meeting (the shareholders) and has to consist of minimum one person. A General Manger / CEO is optional. As a main rule a shareholder controlling the majority of the votes at a general meeting will be entitled to elect all the directors to the board.

It is not required that the General Manager or the directors are Norwegian citizens. However, the General Manager (if elected) and at least 50% of the directors has to be EEA-resident. Thus, it is not the General Manager's / directors' citizenship that is relevant – it is their residency. If it is preferential with non-EEA resident directors or General Manger, one can apply the Ministry of Trade, Industry and Fisheries for an exemption.

Resolutions in the company

The management is generally effected through the board of directors. If not otherwise stated in the Articles of Association, a resolution of the board of directors requires the supporting vote of a majority of the directors who participate in the consideration of a matter. In the event of a tie, the chairman of the board has the casting vote. It is therefore important to evaluate if the NGO has sufficient influence in the board of directors. Given that the board of directors is elected by the general meeting, the NGO should ensure that 1) they hold sufficient amount of shares/votes or 2) that a shareholders agreement is in place, regulating the appointment of board members and/or the chairman of the board.

A general meeting (shareholders meeting) must be held at least once a year, but extraordinary general meetings can be held whenever required²⁴. On the general meeting, the general rule in connection with voting is that each share gives entitlement to one vote. This means that the shareholders cast votes according to the number of shares they own. General meetings generally reach decisions through a simple majority, i.e. more than half of the votes cast. In the event of a tied vote, e.g. 50-50, the chairman of the meeting will have the casting vote.

Different decisions have different requirements as regards the majority that is required. For example, amendments to the article of association require a qualified majority, i.e. a majority of more than two thirds of the votes cast.

Thus, it is important for the NGO to evaluate if they have sufficient influence in the general meeting (in order to not be in a minority position). A shareholders agreement can rectify a formal minority position, as well as a division between A and B shares.

²⁴ Necessary e.g. when conducting capital increase/decrease, electing board members or altering the Articles of Association

Representation - signatory rights

Signature right is an authority to act and sign on behalf of the entity in any situation.

Under the Companies Act, it is the board (collectively) which represents the company externally, if not otherwise stated in the Articles of Association. It is important to note that also the general manager (if elected) has the right to represent the company regarding matters which falls within the area of responsibility referred to as the "general / daily management". This signatory right is generally accepted to be rather extensive.

Power of procuration is an authority to act and sign on behalf of the entity in connection with the day-to-day running of the business. Power of procuration may be given to any person, in which the person must (when signing contracts etc.) add the term "p.p" or "procurist" by his signature.

Notification of the registration or alteration of signature rights and power of procuration must be filed to the Register of Business Enterprises, and registered on their website.

Regulating the company - Shareholders relations

Shareholders' agreement

Given that the Companies Act extensively regulates the management, the resolutions and the rights and obligations in limited liability companies, shareholders' agreements are used frequently in both small, medium and large companies. Shareholder's agreement is important to consider where there is several shareholders, and where the shareholders may have different intentions or business profiles.

Norwegian law is based on the principle of freedom to contract, subject only to limited restrictions. Thus, a shareholders' agreements gives the shareholders the opportunity to regulate the company as they prefer. Norwegian law does not prevent shareholders' agreements from regulating non-company matters, in addition to customary corporate issues.

There are no particular requirements of form, and both written and verbal shareholders' agreements are binding (though the latter is not to recommend, as it will introduce a "he said – she said" situation).

As a general rule, shareholders' agreements are only binding upon their signatories. It is therefore important to ensure that new shareholders commit to signing the shareholders' agreement. The parties to a shareholders' agreement can agree that a third party shall have certain (defined) rights. Third parties can also be part of the agreement, and so can the company as such.

Norwegian law does not as such put limits on shareholders' ability to regulate actions by directors in the company. It is frequently agreed in Norwegian shareholders' agreements that certain decisions to be made by the board of directors shall require a majority of the votes among the directors or even unanimity at board level. Such agreements will, however, as a starting point only be binding on the shareholders in their capacity as parties to the shareholders' agreement and not the directors who have been appointed by the parties to look after their interests.

Shareholders' agreements are more flexible documents than Article of Association. In such agreements the shareholders generally feel more comfortable in regulating conditions for their business and their influence on the business, including how to vote in certain matters, that they do not want to be in the public domain.

Shareholders' agreements tend to have a variety of clauses, among others:

- ✓ The activities in which the company will engage, with certain types of activities requiring agreement by all shareholders,
- ✓ Agreement as to corporate governance (voting at shareholders' meetings, election of board of directors, voting at board of directors),
- ✓ Regulations for share transfers, including restrictions, put/call options,
- ✓ Methods for share valuation in the event of transfer,
- ✓ Policies for dividends distribution, pledges over shares and/or financing of the company.

The company's Articles of Association set out how the company is run, governed and owned. The articles can put restrictions on the company's powers – which may be useful if shareholders want comfort that the directors will not pursue certain courses of action, at least without shareholder approval.

Several matters can be regulated through the Articles of Association, e.g. the signatory rights, share classes (A and B shares) and their rights to e.g. cast votes and dividends. It is also possible to remove the shareholders' pre-emptive rights, and to regulate that e.g. one share class shall not be freely transferable, or that transfer of shares do not require acceptance from the board.

Agreements and transactions

If a limited company is to enter into an agreement with a shareholder, parent company (the NGO) or certain other affiliates, the Companies Act contains separate requirements for the adoption procedure for the agreement to be valid.

In general, all agreements between the company and its shareholders or other affiliates is subject to the arms-length principle, meaning that the terms and conditions should be the same as if the agreement was entered into with a third party. In addition, any transactions between the parent NGO and its for-profit subsidiary, including licenses, leases, and loans, need to be at fair market value or better for the parent.

Certain agreements will require a statement from the board stating that the transaction is on arms-length, and this statement (and the agreement) must be audited. It is also often required to notify the Register of Business Enterprises of such agreements.

Note that in many cases, agreements between the company and the parties as stated above is except for the processing requirements. The exceptions usually concern agreements where the values are low, there are other rules that ensure proper pricing or otherwise it is unthinkable to exempt the agreements from the processing requirements.

An agreement that should have been processed under the provisions in the Companies Act but which has not been properly adopted is invalid. If the company has fully or partially fulfilled its agreement, the received shall be returned.

Responsibilities and Liability

The shareholders is not liable to the creditors for the company's obligations and creditors must direct its claims to the company.

However, it is important to be aware that the directors can be personally liable to the company, the shareholders or other parties if they are considered to neglect their responsibilities. This liability follows directly from the Companies Act, chapter 17.

With regard to the more detailed content of the board responsibility, the board has a general responsibility for the company to operate properly and within the framework of laws and regulations. In addition, they are subject to a number of explicit tasks under the Companies Act.

As an example, the directors might be liable if the board enters into a complicated financial transaction on behalf of the company, which causes the company loss, without understanding the risks stipulated in the contractual terms.

The boards' responsibility is an expression of the legislator's view that the board must pay special attention to specific areas. This applies, for example, to the Companies Act sections 3-4 and 3-5 that the board must ensure that the business must be adapted to the capital base, section 8-1 (4) that the distribution of dividends must be in accordance with good business practice and section 6-12 on the proper organization of the business, determination of plans and budgets and that the business, the accounting and asset management are under satisfactory control.

Furthermore, the provision in section 6-13 is particularly important as the board is obliged to supervise the day-to-day management and operations in general. If the general manager is not capable of his or hers

tasks, the board must take the necessary steps. In order to safeguard accountability, it is not uncommon to subscribe to board liability insurance.



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