

<b>Meeting:</b>	Executive
<b>Meeting date:</b>	18 July 2024
<b>Report of:</b>	Helen Whiting Chief People and Support Services Officer
<b>Portfolio of:</b>	Cllr Katie Lomas Executive Member of Finance, Performance, Major Projects, Human Rights, Equality and Inclusion

## **Decision Report: City of York Trading Limited - Creation of a New Company for the Provision of Agency Workers**

### **Subject of Report**

1. Executive are asked to consider the establishment of a brand new *Teckal* company, for the continued provision of agency workers to the Council of the City of York (“**CYC**”).
2. The current *Teckal* company, City of York Trading Limited (“**CYT**”), is likely to cease meeting the *Teckal* requirements set out in Reg. 12(1) of the Public Contract Regulations 2015 (the “**Procurement Regs**”) and Schedule 2, Part 1, Para 2 of the Procurement Act 2023 (once this comes into force later in 2024) in early 2025 and needs to change its current structure to retain *Teckal* status and to remain competitive.
3. CYT have provided a business case for the proposed restructure, attached to this document as **Confidential Annex A**, which has been summarised in the remainder of this report.
4. **The contents of the Background Documents annexed here to are to be treated as exempt under Section 100I and paragraphs 3 and 4 of Schedule 12A of the Local Government Act 1972.**

This is due to commercial sensitivities relating to the financial or business affairs of any of CYT and CYC, and due to information relating to any consultations or negotiations, or contemplated consultations or negotiations, in connection with any labour relations matter arising in relation to the proposals discussed here.

## Benefits and Challenges

5. A full breakdown of the benefits and challenges for the formation of the New Company and the other options presented in this report is set out in “Options Analysis and Evidential Basis” below, and in Sections 16 and 24 of Confidential Annex A attached.

## Policy Basis for Decision

6. In December 2022, Full Council approved a 10-Year Plan, known as “York 2032”, and 10-Year Strategies. The Council Plan 2023-2027 was approved by Full Council in September 2023, and contributes to delivery of the 10-Year Strategies. The Council Plan has four core commitments, that define the outcomes the council will deliver over the current administrative term:

- Affordability;
- Environment;
- Equalities and Human Rights; and
- Health Inequalities.

The proposals within this report are consistent with these four key pledges as follows:

- a) **Affordability** – The recommendations of this report will secure continuing employment for a number of staff in York and wider region. It will also look to retain a cost-effective service which supports CYC in the efficient and effective delivery of its services to the residents of York and will provide CYC with resilience and support CYC in meeting the financial challenges ahead.
- b) **Environment** - The new company would adopt CYC’s policy and strategy, aligning with the net zero and climate ready ambition for 2030. The existing company (i.e., CYT) will produce a Sustainability Statement demonstrating commitment to the Climate Change Strategy and ambitions.

## Financial Strategy Implications

7. The proposal to create a new *Teckal* company does not have any longer-term implications for CYC's Financial Strategy. It does however ensure continued provision of a high quality, value for money service for sourcing and recruiting Candidates for Direct Engagement and Agency Workers. The recommended option set out within this report promotes resilience and will support CYC in meeting the financial challenges ahead.

## Recommendation and Reasons

8. **Executive are asked to approve the following recommendations:**
  - a. Further to Article 12 of the Council of the City of York's Constitution, approve the formation of a new *Teckal* compliant company for the Introduction of Candidates for Direct Engagement and the Provision of Agency Workers to Council of the City of York.
  - b. Approve the novation of the Council of the City of York's current Contract dated 7<sup>th</sup> September 2023 for the Introduction of Candidates for Direct Engagement and the Provision of Agency Workers with the current *Teckal* company, City of York Trading Limited, to the New Company.
  - c. Approve City of York Trading Limited making an Inter-Company Loan to the New Company of up to £500,000 to cover the initial licensing, the first month payroll and HMRC costs for the New Company, pending payment of the initial invoice under the Contract for the Introduction of Candidates for Direct Engagement and the Provision of Agency Workers by Council.
  - d. Delegate authority to the Director of Governance to negotiate, draft and conclude with City of York Trading Limited all necessary documentation linked to the formation of the New Company including (but not limited to) the New Company's Articles of Association, Shareholder's Agreement, the

Novation of the Contract dated 7<sup>th</sup> September 2023 for the Introduction of Candidates for Direct Engagement and the Provision of Agency Workers between the Council of the City of York and the City of York Trading Limited to the New Company, and the Inter-Company Loan between City of York Trading Limited and the New Company.

## 9. Reasons:

- a) To ensure that the *Teckal* compliant New Company can deliver candidates for direct engagement and agency workers to CYC in compliance with Reg. 12(1) of the Procurement Regs (and Schedule 2, Part 1, Para 2 of the Procurement Act 2023 once this comes into force later in 2024).
- b) To ensure that CYT can continue to support CYC, whilst enabling the expansion of Work with Schools, Work with Yorkshire, and Williams & Anthony to maximise commercial opportunities and the potential dividend to CYC .

## Background

10. The full background and context to this paper is set out in full in **Confidential Annex A** but has been summarised for Executive members below.
11. CYT was established in 2011 by CYC. CYC is the sole shareholder, with profits made by CYT either being reinvested back into the operation of the company or coming back to CYC in the form of dividends. CYT provide recruitment services for temporary, permanent, and seasonal jobs to both the public and private sector on an ad-hoc, part and full-time basis for clients based in and around York, filling a wide range of vacancies including admin, customer service, ICT, technical and finance to social work, events, and manual work. It has four recruitment divisions Work with York, Work with Schools, Work with Yorkshire, and Williams & Anthony (“**W&A**”).
12. A decision was made by the Executive in June 2013 that all requests for agency staff or casual work for CYC would be made through Work with York (“**WwY**”).

13. This contract was extended for a further five years (with an option 2-year extension period available) on 7<sup>th</sup> September 2023 following an Executive Decision on 15<sup>th</sup> June 2023.
14. The Executive agreed these arrangements because of a clear business case which demonstrated that there were advantages to CYC using CYT over external agencies, and the following benefits and flexibilities by:
  - i. keeping agency staff costs to a cost-effective level for CYC whilst maintaining quality of service;
  - ii. ensuring that we meet our commitments of paying a Living Wage; and
  - iii. growing a successful commercial business and profits that can be returned to CYC.
15. CYT was established as a *Teckal* company. This enabled CYC to take advantage of the exemption contained under Reg 12(1) of the Procurement Regs and Schedule 2, Part 1, Para. 2 of the Procurement Act 2023 (also called “**Vertical Arrangements**”) to award long-term contracts to the company for the supply of services without the requirement to undertake a public procurement exercise, **PROVIDED THAT all** of the following three conditions are met:
  - i. CYC, either on its own or jointly with other contracting authorities, exercises a similar degree of control over CYT as it does over its own departments (in other words, CYC exercises a decisive influence over both strategic objectives and significant decisions of CYT) (the “**Control Test**”);
  - ii. CYT must be inwardly, not outwardly focussed, in that more than 80% of the work undertaken by CYT is for the benefit of CYC or for other organisations controlled by CYC (averaged over 3-years) (the “**Function Test**”); and
  - iii. there is no direct private capital participation in CYT except for no controlling and non-blocking forms of private capital participation required by national legislative provisions, which do not exert a decisive influence on CYT.

16. CYT currently has four recruitment divisions:
- i. **WorkwithYork (WwY)** provide temporary, casual, and interim staff to CYC and also recruit candidates for hard-to-fill permanent roles
  - ii. **WorkwithSchools (WwS)** provide education supply staff to local schools, nurseries, and colleges. This includes York maintained schools. Maintained schools are able to choose their agency provider who are charged directly for any costs. This will remain with CYT and not transfer to the New Company.
  - iii. **WorkwithYorkshire (WwYorkshire)** are generalist recruiters targeting commercial, charity and public organisations in and around York and West, North & East Yorkshire. This will remain with CYT and not transfer to the New Company
  - iv. **Williams & Anthony (“W&A”)** following shareholder approval, the Company acquired the assets of W&A a York-based Civil Engineering recruiter in February 2024. This will remain with CYT and not transfer to the New Company
17. This diversification has so far enabled CYT to maintain operating capacity during periods of fluctuating demand from CYC, avoiding the need for widescale redundancies, delivering some economies of scale, and generating profits.
18. The governance arrangements for CYT are set out in the articles and a shareholders’ agreement, dated 1<sup>st</sup> April 2021. These are drafted to reflect local authority control and the *Teckal* provisions. The shareholders’ agreement includes a number of provisions including the appointment of directors and the chair, the frequency of board meetings, and the requirement to prepare an annual business plan and budget. The agreement also includes a number of reserved matters which require prior approval of CYC as CYT’s sole shareholder. These reserved matters include any proposed changes to the company’s name, the articles, the establishment of any subsidiaries, the admission of any new shareholders and any changes to the authorised or issued share capital.

19. The CYT board of directors currently comprises:

Name	Position
Cllr Ian Cuthbertson	Chair and Non-Executive Director
Cllr Kallum Taylor	Non-Executive Director
Cllr Jason Rose	Non-Executive Director
Ann Vickers	Non-Executive Director
Lisa Wood	Non-Executive Director
Chloe Kerridge-Phipps	Non-Executive Director
Karen Bull	Managing Director

20. CYC also has arrangements in place to maintain oversight over the strategic direction and performance of CYT. They also ensure that CYT's purpose and aims continue to be aligned to their own priorities. This involves the approval of the CYT business plan and annual budget by the CYC Shareholder Committee and the periodic reporting of performance including the submission of audited financial statements and an annual report. Together with the articles and shareholders' agreement, these arrangements help CYC to demonstrate the degree of control required to satisfy the *Teckal* exemption.
21. Owing to budget challenges within CYC, demand for and spend on WwY agency staff from CYT has reduced by two-thirds over the last two years, with a large drop over the previous six months. The number of live non-shift-based assignments has dropped from 363 in February 2022 to 78 in February 2024. CYC's weekly billings have dropped from an average £151k in February 2022 to £89k in August 2023 and down again to £53k in February 2024.
22. At the same time as a reduction in the value of services provided to CYC, the commercial offer has increased which means that CYT is not expected to be *Teckal* compliant by January 2025, due to the company no longer being able to meet the 80% activity threshold required under the Function Test under the *Teckal* exemption .

**Confidential Annex A para 12 to 15** provides more financial information.

## Consultation Analysis

23. The Executive Member for Finance, Performance, Major Projects, Human Rights, Equality, and Inclusion was briefed on 25<sup>th</sup> April 2024 by the Head of HR.

## Options Analysis and Evidential Basis

24. A full options analysis in respect of this paper is set out in full in **paragraph 16 and 24 of Confidential Annex A** but has been summarised below.
25. In order to address the issues facing the group as described in the **Background** to this paper above, Executive are asked to consider the following four options:

- a. ***Option 1 - Do Nothing***

This option is not viable as legal advice has indicated that CYT will not be *Teckal* compliant in January 2025 due to the current value of external fee work exceeding the 20% limit (see **Background** above and **Legal Implications** below).

This could open up CYC to possible legal challenge and would result in CYT losing its contract with CYC.

- b. ***Option 2 - Keep the existing business structure but take immediate steps to reduce external work to return to Teckal compliance***

This would involve reducing the value of non-CYC work with WwS, WwYorkshire and W&A to below 20% of total turnover. This would have an impact on CYT's financial viability due to the loss of profitable non-CYC work and further reductions in the value of other client income might be needed to match any reductions in the value of income from services to CYC as a consequence of the need to deliver more budget savings.



There would also be additional costs due to the need to make staff redundancies.

Overall, this option is not considered to be sustainable in the long-term and can therefore be discounted.

**c. Option 3 – Create an in-house bank of agency workers**

A further option would be to create an in-house bank of agency workers.

Setting up an internal bank would require additional CYC resource to be allocated to manage the bank and source candidates.

Additional resource would also be required in Business Support to manage adding and removing agency workers from the payroll. A new weekly payroll system would need to be set up as it is unlikely that agency workers would want to be paid monthly in line with other CYC employees.

There would also be pension implications and auto-enrolment of temporary staff to the Local Government Pension Scheme.

A timesheet facility would also need to be set up managed alongside a resourcing database of agreed terms, in addition IT costs associated with additional licences would be required for iTrent (HR and payroll system) as they are charged based on the number of active employees/workers on the payroll. A team would also need to ensure that references and qualifications are checked (WwY currently do this on CYC's behalf) and DBS check costs would also increase as CYC would need to pay for the checks.

To undertake this option, it is anticipated that there would need to be a 12-to-18-month project implementation plan. There would also be TUPE implications if this option were agreed.

This option is not viable due to the additional costs and the timeline as current advice has indicated that CYT will not be

*Teckal* compliant in January 2025 due to the current value of external work exceeding the 20% limit.

***Option 4 - Form a brand new Teckal compliant company***

This option would involve the purchase and creation of a new standalone company wholly owned by CYC.

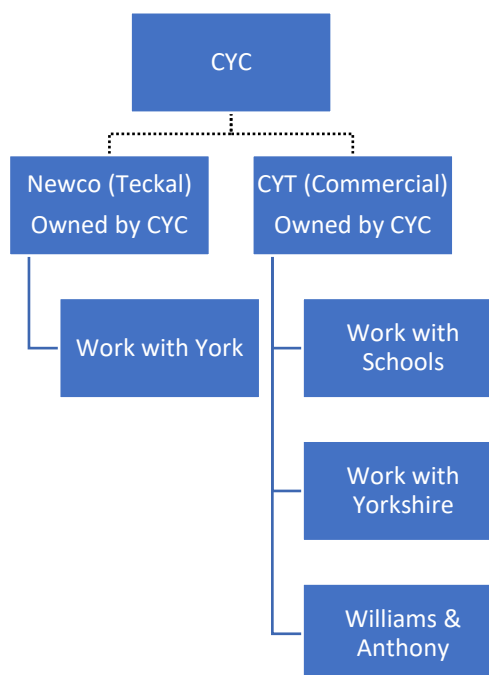
The existing contracts for the direct engagement of candidates and the supply of agency worker services to CYC would then be novated to the new company.

All the existing commercial contracts would remain with CYT and CYT would become a non-*Teckal* company providing services to external clients. CYT would continue to be a company owned by CYC. To the extent that CYT make a surplus in respect of any services it provides externally, this would either be reinvested in its business operations or returned to CYC in the form of a dividend as has been the case in previous years.

After setting up of the New Company, the transfer of WwY candidates to new terms and conditions, the set-up of separate accounts and payroll, separate candidate and client records on CYT's CRM and changes to other systems and websites will be required.

An Inter-Company Loan from CYT to the New Company of up to £500,000 will be required to cover the initial licensing, the first month payroll and HMRC costs for the New Company, pending payment of the initial invoice under the Contract for the Introduction of Candidates for Direct Engagement and the Provision of Agency Workers by Council.

The CYT structure would be as follows:



There may be an opportunity to review of the Articles of Association, Shareholders Agreement and board membership of the commercial company, CYT, in the future to maximise the commercial opportunities, as CYT, being a non-*Teckal* company will not be subject to the same rules and considerations. However, under Article 12 of the Council of the City of York’s Constitution, any changes to CYT’s constitutional documents would still be subject to Executive approval, so any such changes would be brought to Executive under a separate report if necessary.

CYC Legal Services have confirmed that the above corporate structure would satisfy the *Teckal* Exemption. It is anticipated that the first pay date under the New Company would be in November 2024.

26. **Option 4 is therefore the preferred recommended option.**
27. The full details of the proposals under Option 4 can be find in **Sections 18 to 25 and Confidential Annex A.**
28. A further report would be taken to Executive at the proper time to approve and ratify the Articles of Association, Shareholders Agreement, Service Contract and any other governance documents and arrangements underpinning the New Company (as well as any necessary changes required to the governance documents and arrangements currently underpinning CYT).

## Organisational Impact and Implications

### 29. **Financial**

The creation of a new company will involve costs to CYT through set up and administration although these are likely to be small. The recommended option provides opportunity for CYT to expand external business and continue to provide dividends to the council. By introducing a new company, the monthly costs which were incurred by CYT limited will be split between CYT Commercial and CYT Newco. It will be necessary therefore for the working capital that funds the cash flow of the company (payments to staff in advance of reimbursement from the council) to be passed to CYC Newco in the form of a loan. This does not in itself increase the costs of the companies.

### 30. **Human Resources (HR)**

There are no HR implications to this report.

### 31. **Legal**

#### **a) Vires**

CYC would rely on their general trading powers as set out in Section 95 of the Local Government Act 2003 and Section 4 of the Localism Act 2011 to set up a new company.

Section 95 of the Local Government Act 2003 allows relevant authorities to undertake any commercial activities which they would otherwise be authorised to undertake for the purpose of performing their ordinary functions.

Section 4 of the Localism Act 2011 confers a general power on local authorities to undertake any commercial activities which they would be authorised to do in the exercise of their general power of competence. Where a local authority relies on these general trading powers then they must do so through a company.

The Section 95 and Section 4 General Trading Powers also prescribe which company structures may be used. These include companies limited by shares and by guarantee.

A local authority must also prepare a business case supporting the exercise of the Section 95 power, which the authority must approve (Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009). The business case attached to this paper as **Confidential Annex A** is deemed to satisfy this requirement.

#### ***b) CYC Constitution and Reserved Matters for Shareholders***

The Leader and Executive are responsible for all of CYC's functions (including local area functions), except those which are required by the law or CYC's Constitution, to be the responsibility of CYC itself, or any other non-Executive part of CYC.

The decision to form a new company under the provisions of the Local Government Act 2003 and the Localism Act 2011 referred to above, subject to input and advice from officers, is an Executive function.

In any event, as per the information in this paper and **Confidential Annex A**, as the budgeted turnover for services to be provided by CYT (including the New Company if the Executive approve Option 4 under this paper) to CYC in 2024/25 is likely to exceed £500,000 any decision relating to this service is arguably a Key Decision reserved to Executive.

Article 12 of the CYC Constitution reserves certain matters relating to *Teckal* and *Non-Teckal* companies to the Executive. For example, approval of the New Company's company governance documents, and approval any changes to CYT's company governance following the establishment of the New Company e.g., including amending a company's Articles of Association or its Shareholder Agreement in due course, and any intra-company loans between CYT and the New Company (including but not limited to the initial loan recommended under this paper) specifically require Executive approval further to paragraph 5 of Article 12 of the CYC Constitution.

Article 12 of the CYC Constitution also delegates authority from the Executive on other certain matters relating to *Teckal* and Non-*Teckal* companies to the Shareholder Committee. However, the Executive as the parent committee still has authority to take decisions that would otherwise be delegated to the Shareholder Committee under Article 12 if necessary in the future.

### **c) Commercial and Procurement Law Implications**

CYC Legal Services have been consulted already with regards to the proposals this paper.

The proposed new corporate structure under recommended Option 4 of this paper will satisfy both the Control and Function tests set out in Reg 12(1) of the Procurement Regs, and also meet the requirements of Schedule 2, Part 1, Para. 2 under the Procurement Act 2023 when this comes into force. The *Teckal* exemption would therefore apply for the award of contracts to the New Company under Option 4 without the need to go through a procurement process.

CYC's control over the New Company will be ensured principally through its status as the sole shareholder and the prescription of "Reserved Matters" either within the New Company's Articles or Shareholders Agreement as has been the case historically with CYT (both of which require the input of Legal Services) and by the corresponding Scheme of Delegation – requiring the "owners" to approve key aspects of the business.

CYC will need to actively participate in the governance and management of New Company and contribute to financing its activities. A *Teckal* arrangement must operate as a shared and controlled "in-house" department rather than as a purchasing arrangement. Services provided by the New Company to CYC must be provided on a non-commercial basis, as is currently the practice with CYT. This does not preclude the New Company from establishing a surplus as an operational buffer, provided that this is either used in operation of the cooperative arrangements and/or periodically "reconciled" in the form of a dividend to CYC.

The Procurement Act 2023 introduces slightly different tests for *Teckal* (under the Act referred to as “vertical arrangements”) but in practice the Control Test contained in Schedule 2 of the Act is not that fundamentally different from the test currently contained under Reg 12(1) of the Procurement Regs. There is, however, a new component of the test under the Procurement Act, requiring that any controlling or member entity fulfils the requirement of “parent undertaking” as defined under section 1162, Companies Act 2006. It is worth noting that, whilst on its face this section appears relatively straightforward to apply, the fact that it is a test under the Companies Act 2006 rather than procurement legislation means that company law considerations will need to be considered. Further Government guidance is to be published on the Act and the scope of the Vertical Arrangement exemption and Legal Service’s advice on this topic remains subject to any changes that may be introduced as part of those or any other future amendments.

All documentation relating to the New Company, including (but not limited to) the Articles, any Shareholders Agreement, and novation of the existing contract dated 7<sup>th</sup> September 2023 between CYC and CYT for Direct Engagement of Candidates and the Provision of Agency Workers, will require the input of CYC Legal Services.

In terms of novating the Contract dated 7<sup>th</sup> September 2023, both Legal Services and colleagues in Commercial Procurement must be consulted to ensure that:

1. The CYC Service Agreement is properly novated with a Deed of Novation in accordance with Rule 19.3.2(i) of CYC’s Contract Procedure Rules under Appendix 11 of the CYC Constitution.
2. The CYC Service Agreement is properly novated in compliance with Reg. 72(1)(d) of the Procurement Regs.
3. That the handover of the Services from CYT to the New Company is done so in accordance with terms and conditions of the Contract, including any indemnities from CYT to CYC in relation to any employment matters

and/or claims as result of the transfer of Services from CYT to the New Company (colleagues in HR and Finance should also be engaged with on any TUPE/Pension related matters).

Finally, as historically with CYT, the New Company's own procurement activities will be bound by the Procurement Regs and later the Procurement Act 2023, and, as wholly owned local authority trading companies, both CYT and the New Company will also be covered by the provisions of the Freedom of Information Act 2000.

32. ***Procurement***

Option 4 of this paper will satisfy both the Control and Function tests set out in Reg 12(1) of the Procurement Regs, and meet the requirements of Schedule 2, Part 1, Para. 2 under the Procurement Act 2023 when this comes into force. The Teckal exemption would therefore apply for the award of contracts to the New Company under Option 4 without the need to go through a procurement process. However, should any changes arise, both Commercial Procurement and Legal Services must be consulted prior to any agreements being entered into.

33. ***Health and Wellbeing***

There are no direct health implications of this decision

34. ***Environment and Climate action***

No Carbon Reduction or Climate Change Implications have been identified.

35. ***Affordability***

As outlined in the report the recommendations of this report will secure continuing employment for a number of staff in York and wider region.

36. ***Equalities and Human Rights***

CYC recognises, and needs to take into account its Public Sector Equality Duty under Section 149 of the Equality Act 2010 (to have due regard to the need to eliminate discrimination, harassment, victimisation and any other prohibited conduct; advance equality of opportunity between persons who share a relevant protected



characteristic and persons who do not share it and foster good relations between persons who share a relevant protected characteristic and persons who do not share it in the exercise of a public authority's functions).

At the time of writing, it is believed that there are no Equalities or Human Rights implications in respect of the matters discussed in this report. However, an Equalities Impact Assessment ("EIA") will be carried out in due course and the process of consulting on the recommendations in this report will identify any equalities implications on a case-by-case basis, and these will be addressed in future reports.

### 37. ***Data Protection and Privacy***

Data protection impact assessments ("**DPIAs**") are an essential part of our accountability obligations and is a legal requirement for any type of processing under UK data protection and privacy legislation. Failure to carry out a DPIA when required may leave CYC open to enforcement action, including monetary penalties or fines.

DPIAs helps us to assess and demonstrate how we comply with all of our data protection obligations. It does not have to eradicate all risks but should help to minimise and determine whether the level of risk is acceptable in the circumstances, considering the benefits of what CYC wants to achieve.

The DPIA screening questions were completed for this report and as there is no personal data being processed for the options set out in this decision report, there is no requirement to complete a DPIA at this point. However, this will be reviewed where required, on the approved options from this report

### 38. ***Communications***

There are unlikely to be any implications for the Communications Service of this report, except to deal reactively with any media enquiries which may result.

### 39. ***Economy***

No Economy implications have been identified.

## Risks and Mitigations

40. Please refer to **Background, Option Analysis Evidential Basis and Organisational Impact and Implications** above, and **Sections 16 to 24 and Appendix A of Confidential Annex A.**

## Wards Impacted

41. All Wards.

## Contact details

For further information please contact the authors of this Decision Report.

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<b>Report approved:</b>	Yes
<b>Date:</b>	03/05/2023

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<b>Date:</b>	03/05/2023

## Background papers

N/A

## Annexes

- Confidential Annex A - Business Case for formation of Newco submitted by CYT on 1<sup>st</sup> May 2024.