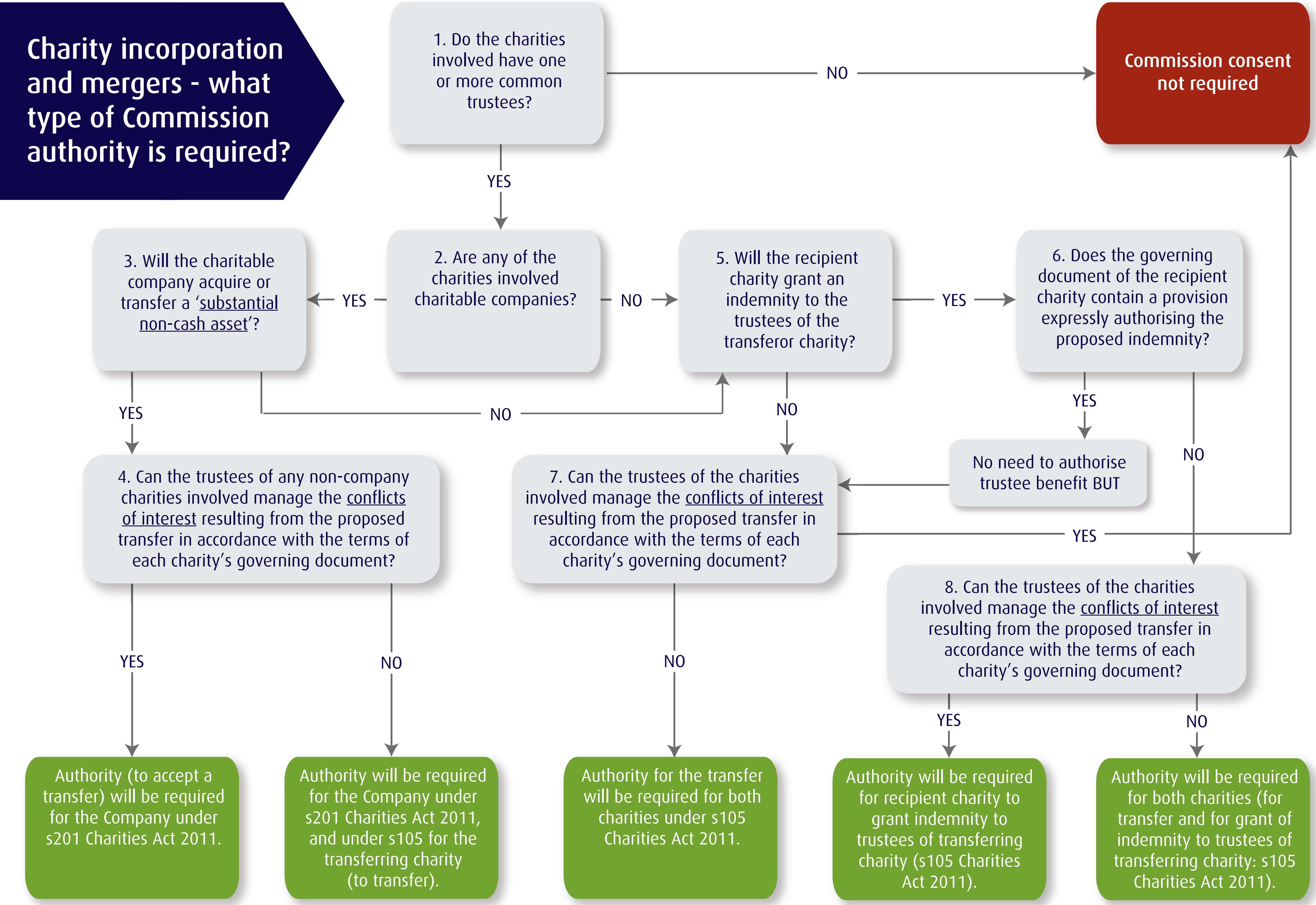
Charity incorporation and mergers - what type of Commission authority is required?
1. Do the charities involved have one or more common trustees?
NO
Commission consent not required
YES
2. Are any of the charities involved charitable companies?
YES
3. Will the charitable company acquire or transfer a 'substantial non-cash asset'?
NO
5. Will the recipient charity grant an indemnity to the trustees of the transferor charity?
YES
6. Does the governing document of the recipient charity contain a provision expressly authorising the proposed indemnity?
YES
NO
NO
YES
No need to authorise trustee benefit BUT
NO
4. Can the trustees of any non-company charities involved manage the conflicts of interest resulting from the proposed transfer in accordance with the terms of each charity's governing document?
7. Can the trustees of the charities involved manage the conflicts of interest resulting from the proposed transfer in accordance with the terms of each charity's governing document?
YES
8. Can the trustees of the charities involved manage the conflicts of interest resulting from the proposed transfer in accordance with the terms of each charity's governing document?
YES
NO
NO
YES
NO
Authority (to accept a transfer) will be required for the Company under s201 Charities Act 2011.
Authority will be required for the Company under s201 Charities Act 2011, and under s105 for the transferring charity (to transfer).
Authority for the transfer will be required for both charities under s105 Charities Act 2011.
Authority will be required for recipient charity to grant indemnity to trustees of transferring charity (s105 Charities Act 2011).
Authority will be required for both charities (for transfer and for grant of indemnity to trustees of transferring charity: s105 Charities Act 2011).

Question 3 "Substantial non-cash asset"

A "non-cash asset" is essentially any form of property (or any interest in such property), other than cash or foreign currency – section 1163 of the Companies Act 2006

A "non-cash asset" is "substantial" if its value either: (a) exceeds 10% of the company's asset value and is more than £5,000; or (b) exceeds £100,000 – section 191 of the Companies Act 2006.

Questions 4, 7 and 8 Conflicts of interest

Conflicts of interest always arise in cases where the transferor and transferee (recipient) charities have common trustees. This is because the duties that the common trustees owe to the transferor charity conflict, or may conflict, with those they owe to the transferee (recipient charity). This could prevent, or be seen to prevent, the common trustees from making a decision to proceed with the transfer in the best interest of each charity individually.

For this reason, the conflict must either be managed in accordance with each charity's governing document or authorised by the Commission. This will ensure that the decision to proceed with the transfer is made in the best interests of each charity involved, and that each charity is able to demonstrate this.

In many cases, the charity's governing document and/or conflicts of interest policy will outline the procedures to be followed to manage the conflicts of interest resulting from the proposed transfer. They usually require the conflicted trustees to:

- declare the nature and extent of their interest before discussion begins on the matter;
- withdraw from and not be counted in the quorum for the part of the meeting dealing with the proposed transfer; and
- refrain from voting on the proposed transfer (or not to be counted in the voting).

Non-company charities that do not have any express provisions dealing with conflicts of interest in their governing document can also manage conflicts of interest by following these procedures. However, charitable companies can only manage conflicts of interest in this way if their governing document expressly permits them to do so.

In some cases, charities will be unable to manage conflicts of interest resulting from a proposed incorporation or merger. This may be because all (or a majority) of the trustees sit on the boards of both charities involved, so it is not possible for either charity to take a quorate decision on the proposed transfer without involving the conflicted trustees. In these cases, the Commission's authority is required.

For further guidance on conflicts of interest, please see CC29: Conflicts of interest – a guide for charity trustees.

Questions 5 and 6 – Trustee indemnities

In incorporation or merger cases, it is common practice for the transferee (recipient) charity to indemnify the trustees of the transferor charity in respect of liabilities they incurred when acting in their capacity as trustees of the transferor charity.

If the transferor and transferee (recipient) charities have common trustees, an indemnity of this kind is a trustee benefit that needs to be authorised, either in the transferee (recipient) charity's governing document or by the Commission.