



Statistical classification review of Section 38 bodies

Introduction

Under Council Regulation (EC) No. 479/2009¹ (as amended by Council Regulation 679/2010² and Commission Regulation (EU) No 220/2014³), the Central Statistics Office (CSO) is responsible for the official reporting of historic data for the Excessive Deficit Procedure (EDP) notification for Ireland, including the General Government Deficit/Balance (GGB), Debt (GGDebt) and other Government Finance Statistics (GFS) such as government revenue and expenditure. The legally binding accounting rules¹ which must be used by all EU countries for producing these statistics are those of the European System of Accounts 2010 (ESA 2010)². The current Manual on Government Deficit and Debt (MGDD 2019)³ provides further guidance on the implementation of ESA 2010 when reporting GFS.

A key part of the compilation of EDP and GFS data is the definition of the general government sector on which these statistics are based, and the correct classification of transactions by and with government. This classification work is essential to ensure the correct reporting of GFS for Ireland. In its conduct of this work the CSO may review the classification of any institution or any transaction which is considered relevant. Such a review may be either *ex ante* (before the establishment of a new body or before a transaction is carried out), or *ex post* (after the fact). Only *ex post* decisions which have been made on the basis of full information and accepted as valid by Eurostat under the prevailing standards may be considered final. Eurostat are the ultimate arbiters of government accounts classifications decisions. Furthermore, classification reviews may be undertaken by CSO acting on its own initiative, in response to a query from another government department or agency, or following a request by Eurostat. The Section 38 review was part of the work programme for the Governments Accounts Classifications Division. The review of the grant aided bodies (initially Approved Housing Bodies) was a request made by Eurostat at their 2019 dialogue Visit to Ireland. Detailed guidelines on the classification process are available on the CSO website⁴.

This document examines the formal arrangements in place between the Health Service Executive (HSE), and bodies funded under Section 38 of the Health Act, 2004 (Section 38 bodies) to assess whether the conditions of this funding result in these bodies being controlled by the HSE. Should control be established these bodies would then have to be classified to the general government sector (S.13) for statistical purposes to ensure the correct implementation of the Eurostat legal requirements. This document also set out the government funding of the relevant bodies.

Background

The Health Act, 2004 Section 38(1) states that

“The Executive⁵ may, subject to its available resources and any directions issued by the Minister under section 10, enter, on such terms and conditions as it considers appropriate, into an arrangement with a person for the provision of a health or personal social service by that person on behalf of the Executive.”

Bodies funded under this provision comprise mainly not for profit acute hospitals and organisations providing social care such as disability services and elder care services.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0549&from=EN>

² <https://ec.europa.eu/eurostat/web/products-manuals-and-guidelines/-/KS-02-13-269>

³ <https://ec.europa.eu/eurostat/web/products-manuals-and-guidelines/-/KS-GQ-19-007>

⁴ <https://www.cso.ie/en/methods/governmentaccounts/classificationdecisions/>

⁵ The term used in the Act for the Health Service Executive.

The hospitals in this category are already classified in general government sector (S.13) as their funding and operations are considered part of the public health service. Consequently, their entire revenue and expenditure, including own-resource income, is reflected in Government Finance Statistics (GFS) for Ireland. The Government Accounts Classifications Division reviewed the statistical classifications of the non-hospital Section 38 bodies and other grant aided bodies during 2020.

Classifying bodies to the general government sector

The Manual on Government Deficit and Debt, 2019, states (MGDD 1.2.1 para 3)

“In order to decide whether an entity should be classified to the general government, it is necessary to determine whether:

- *it is an institutional unit,*
- *it is a government-controlled institutional unit,*
- *it is a non-market institutional unit.”*

In order to classify the Section 38 bodies, these three criteria are considered below in relation to the service level agreements with the HSE.

Institutional units

The European System of Accounts (ESA) 2010 defines an institutional unit as:

“... an economic entity characterised by decision-making autonomy in the exercise of its principal function. A resident unit is regarded as constituting an institutional unit in the economic territory where it has its centre of predominant economic interest if it has decision-making autonomy and either keeps a complete set of accounts, or is able to compile a complete set of accounts.

To have autonomy of decision in respect of its principal function, an entity must be:

- (a) entitled to own goods and assets in its own right; it will be able to exchange the ownership of goods and assets in transactions with other institutional units;
- (b) *able to take economic decisions and engage in economic activities for which it is responsible and accountable at law;*
- (c) *able to incur liabilities on its own behalf, to take on other obligations or further commitments and to enter into contracts; and*
- (d) *able to draw up a complete set of accounts, comprised of accounting records covering all its transactions carried out during the accounting period, as well as a balance sheet of assets and liabilities.*

ESA 2010 paragraph 2.12

The MGDD notes that in national accounts legal form is often taken as a proxy for institutional unit status (MGDD 1.2.2 para 18). However, it also notes that legal form is not sufficient evidence for the existence of an institutional unit. For public units, in particular, the interaction between control and autonomy must be considered. Therefore, the level of control exerted by government needs to be assessed as to whether it is sufficiently strong as to influence autonomy of decision-making.

All, bar one, of the non-hospital Section 38 bodies are incorporated in one form or another. The only exception is the Cork dental school which is part of University College Cork and does not have its own legal form.

All of the incorporated Section 38 bodies⁶ meet, in a legal sense, the criteria of ESA 2.12 and are currently treated as institutional units. A further review of this status is now being undertaken in parallel with an assessment of their control. This is in accordance with MGDD 1.2.2 paragraph 19 which indicates that an assessment of control may lead to a re-assessment of the decision-making autonomy of a unit. With this in mind, the provisions of the service level agreement entered into between these bodies and the HSE are assessed below in the light of both the institutional unit criteria of ESA 2010 2.12 and the control criteria of ESA 2010.

Government control

ESA 2010 para 20.18 defines control as “*the ability to determine the general policy or programme*” of a unit. A set of indicators of control are provided in ESA 2010 paragraphs 2.38 and 20.309. In summary these indicators are as follows:

- (a) Rights to appoint, veto or remove a majority of officers, board of directors etc.;
- (b) Rights to appoint, veto or remove key personnel;
- (c) Rights to appoint, veto or remove a majority of appointments to key committees;
- (d) Ownership of the majority voting interest;
- (e) Rights under special shares and options (e.g. golden share);
- (f) Right to control via contractual arrangements – usually refers to exclusive use by public sector of goods and services produced by an entity;
- (g) Rights to control from agreements/permission to borrow;
- (h) Control via excessive regulation; and
- (i) Other – such as public sector approval for important decisions such as the development or abandonment of activities.

ESA 2010 paragraph 20.15 provides indicators of control specific to non-profit institutions, namely:

- (a) the appointment of officers;
- (b) other provisions of the enabling instrument, such as the obligations in the statute of the NPI;
- (c) contractual agreements;
- (d) degree of financing;
- (e) risk exposure.

MGDD 2019 states that the indicators (a), (c) or (d) of paragraph 2.39 **are each sufficient in themselves to determine government control**. Where these are inconclusive the remaining criteria must be considered. It may be the case that a number of criteria taken together indicate control or that one single criterion, if of sufficient importance, can indicate control. For non-profit institutions ESA 2010 notes that while one indicator may signify control, often a combination of indicators should be considered.

⁶ The Cork dental school is not treated as a separate unit to its parent and is classified with UCC in the public non-financial corporations sector (S.11). Consequently, it was excluded from this review.

An assessment of the conditions of the service level agreement (SLA) for Section 38 bodies highlights the following points which are relevant to issues of control and of autonomy of decision-making, with particular focus on the control criteria relevant to non-profit institutions. Annex 1 sets out in further detail the control criteria relevant to certain clauses of the SLA and also indicates whether the clauses may impact on autonomy of decision-making.

Policy setting and operational matters: While the SLA states in Clause 3.1 (b) (ii) that the HSE *shall accept the independent identity and the operational autonomy* of the Section 38 body, it makes it clear in other sub-paragraphs of the same clause that it is a condition of the funding supplied that the body is to design its service delivery in line with the HSE's National Service Plan, comply with HSE policies in this regard, and comply with Ministerial policy, objectives and directions. The body is further required to comply with certain operational requirements including the HSE Safety Incident Management Policy, the HSE IT system for management of incidents and claims arising, and with the NTMA in its role as the State Claims Agency. A general statement in relation to compliance with the Health Acts and directions from the HSE relating to these Acts also forms part of this clause.

Employment: The SLA precludes the employment of personnel who have availed of a public sector exit scheme (clause 3.2 (c)). The same clause requires alignment with public sector pay scales and prohibits the employer from providing additional remuneration from their own resources. Clause 2.5 provides for the transfer of employees to the HSE or other service providers funded by the HSE in the event of the Section 38 body ceasing to operate. While staff are not considered HSE employees (Clause 17.13) the Section 38 body must seek the permission of the HSE for any proposed payment in excess of approved pay scales which are aligned to public sector pay scales (Clause 17.5). The HSE must be consulted regarding the remuneration of senior personnel (Clause 17.17).

Procurement: The SLA requires the Section 38 body to co-operate with HSE shared services in procurement processes (Clause 2.3(i)) and, in particular, prohibits expenditure on ICT without prior sanction by the HSE (Clause 9). Also the HSE may organise procurement of additional services and supplies via the Section 38 body (Clause 8.7).

Charging for services: The Section 38 body must seek the consent of the HSE for collecting charges for services. The HSE must be consulted on the level of charges and may appropriate the charges (Clauses 4.4 & 4.5).

Power to act in place of the Section 38 body: Clause 14.5(l) provides for the HSE to act on behalf of the provider where deemed necessary to ensure continuation of service. Under the clause the HSE effectively assumes the legal authority to contract, to direct staff and to take any other legal or contractual actions necessary to ensure resumption of/continuity of service delivery to Service users, in the place of the Provider.

Termination: The SLA may be terminated by either party with written notice of up to 12 months – shorter periods may be agreed bilaterally (Clause 34.3).

Market / non-market test

Section 1.2.4 of MGDD describes the market/non-market criteria - qualitative and quantitative. Qualitative means are economically significant prices being charged; are the bodies selling to government only? Quantitative means that for a market body at least 50% of operating costs are covered by sales over a sustained period (3 years).

Annex 3 sets out the finances of the Section 38 bodies and the bodies that receive grants from multiple government departments. The two tables highlight the significant funding received from government, ranging from 72 to 98%. This clearly indicates that the majority of the bodies' services are provided for government.

Conclusion

The conditions attached to the funding provided to disability and other social care agencies under Section 38 of the Health Act 2004 can be seen to be very stringent. These impact not only the general direction of the bodies but also have a significant impact on their day-to-day operations. In particular, certain decisions around employment and remuneration of personnel, raising of revenues through charging for services, sub-contracting, and procurement (especially in the IT area) are tightly controlled. In addition, in certain circumstances the HSE may take over the operation of the organisation. All of this casts significant doubt on whether bodies so funded retain sufficient autonomy so as to be considered as institutional units in the statistical sense.

Taking these issues, together with the extensive funding provided by the HSE to these bodies, it can be seen that HSE control of these bodies is well established. In addition to the issues already referenced, there is the requirement for the bodies to comply with the direction of the Minister, the limitations of such directions being unspecified. There is also a risk element for the HSE in that there is a responsibility to staff to provide continuation of employment in the event of a cessation of funding to a particular Section 38 body. The Section 38 bodies are essentially treated as part of the public service in requirements such as compliance with Freedom of Information requests, Parliamentary Questions and statutory public health information systems.

Annex 3 sets out the funding of these bodies, which shows that they are significantly funded by government. These bodies provide critical services to the public and are a fundamental part of the provision of services as per the programme for government.

In conclusion, given the control and funding of these bodies, they will be classified in the central government sector. They will be listed under the relevant Departments or as grant aided bodies receiving funds from multiple government departments in the Register of Public Bodies which is due to be published on 21 April 2021.

**Central Statistics Office
Government Accounts Classifications Division
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Annex 1: Section 38 agencies – analysis of standard clauses with respect to autonomy and control criteria of ESA 2010

| Standard SLA clause | ESA 2010 20.15 control criteria | Impact on Autonomy? |
|---|--|----------------------------|
| Clause 2.3(i) – government decision that “Health” shall act as one voice to the market – co-operation with HSE shared services in this regard. | (c) Contractual agreements (d) Degree of financing | Yes |
| 2.5(c) provides for transfer of employees to the HSE or to another provider in the case with a withdrawal of funding results in the cessation or significant reduction of function of the S38 agency. | (c) Contractual agreements (d) Degree of financing (e) Risk exposure | Yes |
| 3.1(b) (ii) – HSE shall accept the independent identity and operational autonomy of the S38 agency. | (d) Degree of financing | No |
| 3.2(b) (ii) – S38 agency shall develop and deliver services consistent with the Executive’s National Service Plan and corporate plan. | (c) Contractual agreements (d) Degree of financing | Yes |
| 3.2(b) (v) – comply with HSE policies and objectives as per the National Service Plan. | (c) Contractual agreements (d) Degree of financing | Yes |
| 3.2(b) (vi) – comply with policy, objectives and directions of the Minister. | (c) Contractual agreements (d) Degree of financing | Yes |
| 3.2(c) (iv) – comply with the requirements of the NTMA (Amendment Act) 2000 in relation to incident reporting, risk management and claims management. | (c) Contractual agreements (d) Degree of financing (e) Risk exposure | Yes |
| 3.2(c) (v) comply with the requirements of the HSE Safety Incident Management Policy as may be amended from time to time and any and all other relevant policies and guidelines. | (c) Contractual agreements (d) Degree of financing | Yes |
| 3.2(c) (vi) use the National Incident Management System (NIMS) as the primary ICT system to report and manage incidents. | (c) Contractual agreements (d) Degree of financing | Yes |
| 3.2(c) (viii) not employ any person who has availed of any public sector exit scheme. | (c) Contractual agreements (d) Degree of financing | Yes |
| 3.2(c) (ix) – (x) adhere to public sector payscales and policies and not subsidise pay out of own resources. | (c) Contractual agreements (d) Degree of financing | Yes |
| 3.2(c) (xxv) comply with the Health Acts and regulations or directions made thereunder concerning charges to be made and any directions of the Executive in this respect, as appropriate. | (c) Contractual agreements (d) Degree of financing | Yes |
| 3.2(c) (xxviii) – comply with the Official Languages Act, 2003 and related secondary legislation. | (c) Contractual agreements (d) Degree of financing | Yes |

| Standard SLA clause | ESA 2010 20.15 control criteria | Impact on Autonomy? |
|--|---|---------------------|
| 4.4-4.5 Consent of HSE required for the provider to collect charges for services, other than those collected on behalf of the HSE under the Health Acts. HSE co-determine rates to be charged with the provider. HSE may appropriate such charges. | (c) Contractual agreements (d) Degree of financing | Yes |
| 8.1 Provider may be subject to public procurement requirements. | (c) Contractual agreements (d) Degree of financing | Yes |
| 8.2-8.3 – Provider indemnifies HSE against costs arising from proceedings relating to awards of contracts, HSE indemnifies the provider likewise. | (d) Degree of financing | No |
| 8.6 Provider will comply with HSE procurement initiatives in the context of ensuring value for money. | (c) Contractual agreements | Yes |
| 9. HSE prior sanction required for procurement of ICT equipment, software and related services. | (c) Contractual agreements (d) Degree of financing | Yes |
| 8.7 HSE may direct provider to procure additional services or supplies for any part of the HSE. | (c) Contractual agreements (d) Degree of financing | Yes |
| 10.6 – Other information obligations. The provider must supply information to the State Claims Agency, the National Parasuicide Register, the national disability databases maintained by the Health Research Board, the Hospital In-Patient Enquiry system and other “authorised sources”. The provider must provide information to the HSE to enable them respond to Parliamentary Questions, Freedom of Information requests, complaints from service users and / or their advocates and for the compilation of statistical data on the service or service users. The information requirements may extend beyond the period of the funding arrangement. | (c) Contractual agreements (d) Degree of financing | Yes |
| 10.7 Funding may be withheld if information required under statute or under the funding arrangement is not supplied to the HSE. | (c) Contractual agreements (d) Degree of financing | Yes |
| 12.2 The HSE may appoint an “Authorised Person” to conduct an inspection of services or documentation including records on service users. | (c) Contractual agreements (d) Degree of financing | Yes |
| 12.3 The HSE may appoint a person at grade National Director to “assist and provide guidance” to the board of the provider in the event that they are of the view that there is a governance or performance issue which “gives rise to a risk to the life, health, safety or welfare of the Service Users or a significant risk to the Funding or the Services or a serious breach of governance”. | (c) Contractual agreements (d) Degree of financing | Yes |
| 14.5 In the event of extreme non-compliance with the provisions of the funding arrangement the chief executive officer or equivalent may be required to report directly to the HSE to address the non-compliance issue. | (c) Contractual agreements (d) Degree of financing | Yes |

| Standard SLA clause | ESA 2010 20.15 control criteria | Impact on Autonomy? |
|--|--|---------------------|
| <p>14.5 (l) "Without prejudice to the Executive's rights under this Clause 14.5, the Provider hereby irrevocably appoints, with effect from the exercise by the Executive of its rights pursuant to this Clause 14.5, the Executive to be the attorney of the Provider (with full power of substitution and delegation), in the Provider's name or otherwise and on its behalf and as its act and deed to generally carry on, manage and ensure the delivery of the Services to Service Users; to manage the Funding and to exercise all rights, powers of entitlements of the Provider in furtherance of those purposes and to do all other acts and things which the Executive may consider desirable or necessary to realise or carry such purposes into effect or incidental or conducive to any of the rights, powers or discretions conferred on the Executive for the duration of the exercise of the Executive's rights pursuant to this Clause 14.5 as shall be determined by the Executive under this Clause 14.5. The Executive's powers under paragraphs (a) to (m) of this Clause 14.5 shall be additional to any powers the Executive may have as an attorney pursuant to this Clause 14.5 or by law."</p> | <p>(b) Other provisions of the enabling instrument (d) Degree of financing</p> | <p>Yes</p> |
| <p>16.1 The provider must implement policies and procedures consistent with the Framework for the Corporate and Financial Governance of the Executive.</p> | <p>(c) Contractual agreements (d) Degree of financing</p> | <p>Yes</p> |
| <p>16.3 – Responsibilities of the Board of the Provider include:</p> <p>(a) leading, directing and setting the strategy for the Provider's activities;</p> <p>(b) compliance by the Provider with all statutory obligations of the Provider;</p> <p>(c) establishing an appropriate structure of board committees to include the functions of an audit, remuneration, risk, quality and safety and, if appropriate, a nomination committee;</p> <p>(d) ensuring that an adequate system for identifying, monitoring and managing risk is in place;</p> <p>(e) establishing and monitoring the effectiveness of the Provider's internal controls;</p> <p>(f) clearly documenting procedures for the appointment and disqualification of members of the Board of the Provider (if not already set out in the Provider's constitutional documentation);</p> <p>(g) ensuring the financial statements present a balanced, true, transparent and complete assessment of the Provider's financial position;</p> <p>(h) annually reviewing the performance of the Board of the Provider to identify ways to improve its effectiveness; and</p> <p>(i) maintaining an appropriate code of conduct applicable to all directors and staff of the Provider setting out standards of integrity, conduct, business ethics and concern for the public interest</p> | <p>(b) Other provisions of the enabling instrument (d) Degree of financing</p> | <p>No</p> |
| <p>17.5 Provider must adhere to government pay policy, align pay scales to public sector pay scales and obtain explicit authorisation from the Department of Health and / or the Department of Public Expenditure and Reform for any payment in excess of the approved scales.</p> | <p>(c) Contractual agreements (d) Degree of financing</p> | <p>Yes</p> |

| Standard SLA clause | ESA 2010 20.15 control criteria | Impact on Autonomy? |
|--|--|----------------------------|
| 17.13 The provider remains the employer and personnel of the provider are not deemed to be HSE employees. | (a) Appointment of officers (d) Degree of financing | No |
| 17.17 Provider will consult with the HSE regarding the appointment and remuneration of the CEO and other senior managers. | (c) Contractual agreements (d) Degree of financing | Yes |
| 19.1 HSE approval for sub-contracting is required. | (c) Contractual agreements (d) Degree of financing | Yes |
| 20.1 The HSE's consent is required for a restructuring of the provider organisation (not to be unreasonably withheld). If this not obtained the agreement may be terminated (20.7) | (c) Contractual agreements (d) Degree of financing | No |
| 34.3 Provides that either party may terminate the SLA by giving 12 months' written notice (or such lesser written notice period as may be agreed) to the other party. This is subject to Clause 35 which sets out the termination/handover arrangements so as to minimise disruption to service users. | (c) Contractual agreements | No |

Annex 2: Generic Schedules: Overview of content

Schedule 1 - Contact Details

- Basic organisational information for both the HSE and the provider.

Schedule 2 - Quality and Safety

- Mission Statement of both HSE and provider.
- Details of the Corporate, Clinical/Social Care Governance Structure in place in the provider organisation.
- Composition of Quality and Safety Board – specified in funding documents, as are roles and responsibilities (this is a change in 2018 – previously only required that appropriate structures were in place).
- Details of quality and standards codes of practice and quality assurance and monitoring processes.

Schedule 3 – Service Delivery Specification

- Service Overview including relevant care group.
- Details of service provision, including location, number of users, staffing, costs.
- Anticipated outcomes of service.
- Access, referral, admission and discharge procedures.
- Performance indicators linked to Service Plan targets and metrics.
- Details of third party contracts – which must be pre-approved by HSE.
- Details of any additional services proposed.

Schedule 4 - Performance Monitoring

- Reporting requirements and performance management requirements – linked to PIs set out in schedule 3.

Schedule 5 - Information Requirements

- Minimum standard for annual report to HSE.
- Audited accounts along with customised financial reporting linking service related funding to AFS.
- Details of audits, evaluations etc. carried out.
- Service specific information.
- Annual compliance statement.
- List of required reporting including AFS, auditors report, annual report, business plan, code of governance, constitution, policies and procedures, incident management process.

Schedule 6 – Funding

- Details of all funding – completed by HSE.
- Procedure for charges to service users.
- Procedures for dealing with patients' private property.
- Relevant requirements as specified in DPER letter of sanction for DOH/HSE Vote.
- Procurement processes. NB: All section 38 orgs in scope of the National Single Financial Management and Procurement System.
- Financial governance – includes requirement to conform to DPER circular 13/2014 <https://govacc.per.gov.ie/wp-content/uploads/DPER-Circular-13-14-Guidance-Note-and-Reporting-Requirements-1.pdf> and alignment with HSE and DOH circulars on pay scales.

- Requirement to adhere to the provisions of Department of Finance Circular No. 3/2011 (Control of Secured Borrowings by General Government) and General Government Secured Borrowings Order 2011 (S.I. No. 40 of 2011);”.

Schedule 7 – Insurance

- Sets out insurance requirements. Personal liability and third party property cover can be demonstrated as covered by the State Claims Agency if the provider is a Delegated State Authority under the General Indemnity Scheme of the SCA.
- Providers may apply to SCA for cover under Clinical Indemnity Scheme.
- Other insurance is the responsibility of the service provider.
- The NIMS must be used to make reports to the SCA where available.

Schedule 8 – Complaints

- Details of provider complaints policy to be provided to HSE.
- NIMS to be used to manage complaints where available.
- Report on complaints received to be provided to HSE.

Schedule 9 – Staffing

- Employment numbers and pay costs as approved by the HSE. Salaries aligned with public sector pay provisions.
- HSE control pay budget. FEMPI (Financial Emergency Measures in the Public Interest) legislation applies.
- Employment Monitoring Returns to be made to HSE.
- Provider to comply with actions and reporting requirements of the National HR Balanced Scorecard of the HSE.
- Details of all staff above a specified grade/pay level to be provided to HSE.
- Staff recruitment and selection to be in line with CPSA and HSE HR policies.
- Code of conduct and adherence to Children First guidelines

Schedule 10 - Change Control

- Change control process automated through a HSE system.

Annex 3: Overview of Funding

Information removed due to confidentiality requirements.