

Charity mergers

Michael King and **Darren Hooker** look at the processes involved in a charity merger

The Charity Commission encourages charity trustees to look at ways in which they can deliver more efficiently or effectively the services they provide to their beneficiaries. A saving in administrative expenses, the sharing of expertise and being able to make the fullest use of staff, funds, facilities or property are just some of the reasons why a charity might consider a merger with a similar charity.

Of course merging two or more charities which have different histories, management, or staffing structures, is not a straightforward process, nor is it necessarily a complete answer to a problem which the merging parties might be facing. If, in merging, a charity loses its values, the enthusiasm of its staff and volunteers, the support of its friends – in essence its soul – will it really be more effective?

We outline here the process of a charity merger which can be broadly broken into (1) considering structure; (2) performing due-diligence; and (3) implementing the merger. In so doing we hope to highlight the issues that need to be considered by trustees and make them aware of any potential pitfalls.

Structure

Having identified a suitable charity to merge with, initially the most important decision will concern structure going forward. Charity mergers can take many forms, although the three most common are:

- Charity B merging into, or being taken over by, Charity A;
- Charity A and Charity B merging into a new charity, Charity C; or
- Charity A becoming the sole trustee of Charity B.

Trustees of both charities will need to consider whether or not they actually have the power to enter into the merger. This can often be particularly troublesome in the case of unincorporated charities where the trust deed does not include an express power to merge. In these circumstances it will be necessary to obtain a scheme from the Charity Commission. Alternatively, if the objects of the merging charities are not sufficiently similar an application to the Charity Commission will have to be made for a Cy-Pres Scheme.

In the case of charitable companies one would normally expect to see provision, contained within the Articles of Association, allowing for dissolution and the transfer of assets to, or for amalgamation with, another charity with similar objects. Where the merger

is to involve an amendment to the objects of a charitable company then Charity Commission consent will need to be obtained under s64 of the Charities Act 1993 and there will of course be some Companies House filing to carry out.

An additional consideration for all charities contemplating a merger is whether any special trusts of land, restricted trusts or permanent endowment exist. Where they do it will typically be necessary to ensure that they are ring-fenced within the assets of the merged charity.

Due-diligence

With the future structure decided upon and having ascertained that it is legally possible for the merger to take place, the trustees of both charities should carry out a process of due diligence to be sure that it is in the best interests of their charity to merge. The assets of the other charity may be easy to see, but it's important to be aware of its liabilities, or even of its ongoing commitments to its beneficiaries, or to its development.

Whilst it is not desirable, or indeed appropriate, to conduct the kind of rigorous due-diligence akin to a commercial transaction (where the danger is that funds go into entirely different hands), trustees should conduct a sufficient examination to satisfy their duty of care. The Charity Commission suggest that the examination should be "proportionate to the size and nature of the proposal, the amount of income and expenditure involved and the nature of the existing and planned activities". Below is a non-exhaustive list of areas into which trustees should consider enquiring:

- Constitutional and governance arrangements;
- Finances, including tax;
- Staffing;
- Property;
- Operational or reputational risks;
- Pensions; and
- Regulatory issues.

It would be impossible to anticipate all the potential skeletons that may come out following due-diligence enquiries. Trustees should however understand the importance of carrying out these enquiries and assume that they will inevitably take longer and cost more than originally thought.

Implementation

Having carried out all the necessary pre-merger planning, all that remains is the

small matter of implementing the merger!

Whilst good pre-merger planning should enable the process of implementation to run smoothly there will still be a considerable amount of work involved in establishing the new company or making the constitutional changes, transferring assets, transferring staff under the TUPE regulations and harmonising their employment terms and dealing with third parties and liabilities.

It is beyond the scope of this article to consider all of the steps required to implement a merger. However one important step the trustees of both charities need to consider is whether to register the merger with the Charity Commission.

Where a vesting declaration has been used to transfer title to property from one charity to another the merger must be registered with the Charity Commission, in all other circumstances it is at the trustees' discretion.

Registering a merger is considered a necessary step where a pre-existing charity is likely to continue to receive legacies in the future. The effect of registering the merger is that these legacies will be automatically transferred to the newly merged charity.

There are however, some circumstances in which the legacy can be worded so specifically in favour of a particular charity that it will not automatically pass to the new charity. In circumstances where charities are heavily dependent on legacy income and there is a risk of this happening it can be considered prudent not to dissolve the pre-existing charity but to leave it as a shell.

The charity will continue to exist but the governance and administrative arrangements will be simplified such that it is not unduly burdensome to operate. It can then continue to receive legacies that name it and transfer these to the new charity.

Summary

Factors motivating charities to think about merging can vary greatly and the exact steps or processes in a specific merger can also vary. Do not merge simply to grow bigger or to create a larger body on the insistence of funders. Concentrate on how the merged charity will deliver its services and whether it will be more effective in doing so.

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