

What are the Legal Issues Surrounding Charity Mergers?

The addition of the Buffett billions to those of the Bill & Melinda Gates Foundation represented merger on a massive scale. Trustees and chief executives of more humble charities who might be considering a similar move need to address some key issues before taking the plunge.

Is merger the best option?

Before pursuing this route, it is important to explore alternative options and to ensure that a merger is the most appropriate means of meeting the needs of beneficiaries or service users. For example it might be possible to obtain many of the advantages of a merger by pursuing a form of collaborative working that falls short of full merger.

By retaining two or more separate charities instead of forming a new one, it could be easier to retain their distinctive characters and avoid the costs and risk of disruption associated with an attempt to merge groups that have very different organisational styles. Options might include a partnership agreement under which the organisations share back-office functions, or a joint venture in which a new organisation is created to pursue new projects.

What form should the merger take?

The precise process of a merger will depend on the types of legal structure involved and the legal powers of the merging organisations. The process will generally involve one of the following three forms:

- > Transferring the assets and resources of two or more existing charities to a new legal structure;
- > One or more charities dissolving and transferring their assets to an existing charity;
- > The construction of a group of charities so that one charity or its trustees assumes control of the other charity or charities involved.

What information is needed to begin with?

The exact range of information required will vary, but key elements include the governing document of each organisation and a review of the legal powers of each organisation, whether in its governing document or as provided for by law.

A central issue here will be the identification of special trusts, restricted funds or permanent endowment. None of these classes of funds presents an absolute obstacle to a merger. However, they might make the procedure of a merger more complex. It is

certainly necessary to ensure that each class of funds is identified so that it can be dealt with in accordance with the rules governing its use following the merger.

What legal powers are necessary for a merger?

The charity trustees will need to ensure that the charity has the necessary legal powers to achieve merger. There might be an express power to merge, or a power to dissolve and pass the charity's assets to another charity. In some cases, there might be both.

How involved should the members of the charity be?

It is often assumed that the members' consent will be required before merging. In practice, this might not be necessary as a matter of law. However, the charity trustees are likely to want to involve members, and it is often appropriate to consult members even where there is no obligation to do so.

What form of due diligence is required?

The charity trustees will need to investigate the affairs of the charity with which they intend to merge. The extent of that investigation varies widely. At one extreme, a merger between two charities that have been working together for some time might take place after a brief investigation performed by the trustees themselves and focusing on financial issues. A larger merger may involve a formal process of due diligence involving accountants, lawyers and other professionals.

It is easy for the due diligence procedure to mushroom as unanticipated issues emerge. The charity trustees should consider at an early stage the nature of the due diligence procedure required. They will wish to ensure that they have fulfilled their legal duty to act prudently as well as complying with Charity Commission guidance, which says: "The nature of the checks used 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."

The legal issues addressed during due diligence will include the choice of merger method and legal structure of any new organisation. Organisations currently in the early stages of planning a merger might be able to take advantage of the charitable incorporated organisation form. Other issues are whether the powers of each organisation are adequate and, where appropriate, whether the members of each charity can be accurately identified. The Charities Bill is expected to provide some assistance with this by enabling the Charity Commission to determine the identity of the members of charitable companies.

Advice on employment issues, such as whether the transfer of staff is governed by the Tupe Regulations should also be considered, as should a review of the terms on which assets are held, including, for example, any permanent endowment. There might also be property issues - considering, for example, the process for the transfer of freehold property and the assignment of leases - and commercial issues, including the examination of significant contracts, arrangements for transferring data while complying with the Data Protection Act and obtaining any relevant regulatory consents.

If you would like any more information in this, or indeed any other matter, then please contact;

James Sinclair Taylor

020 8394 6480

james.sinclairtaylor@russell-cooke.co.uk