

Charity Mergers

For charities considering merger, there will be many things to consider. The most important aspects of a merger to get right are the people issues. These will be handled more effectively if you keep talking to all involved. The 10-second soundbite would say:

“Communicate, communicate, communicate.”

You cannot over-communicate in a merger situation. But remember, communication is about listening as well.

What about confidentiality issues?

It is important to have clear decisions and so it will frequently be necessary in the early stages of negotiations to maintain some secrecy about the proposals. Staff, in particular, will feel very vulnerable about their position. However, they will frequently assume the worst. So if they even vaguely aware of talks going on about something, they will probably assume that they will be losing their jobs. This could cause you huge problems as you may find that your best staff leave.

It is almost impossible to maintain total secrecy, so it is probably wiser to communicate something, even at the early stages. Ensure that you think about any communication from the staff point of view (or volunteers, trustees or users), so that you can give sufficient assurances. It may also help if you make it clear that there will be consultation before the final details are agreed.

There may be sensitive financial issues. If one organisation is in a shaky financial position, this is not something that should leak out. You need to manage the communication of this and ensure that funders and other stakeholders hear of the problems and suggested solutions from you, rather than from someone else.

It is a wise precaution to exchange letters of intent once you are serious about merger, which set out the requirement to maintain confidentiality of the information received from the other party.

Legal framework

If two or more organisations wish to merge, they need to have similar objects. There are several options for the legal means of creating one organisation:

- Create a new holding company, with the existing organisations continuing as subsidiaries.
- Create a new company and transfer activities, assets and liabilities from the existing organisations to the new company.
- One of the existing organisations transfers its activities, assets and liabilities to the other.
- One of the existing organisations become a subsidiary of the other.

There are advantages and disadvantages to all routes, so trustees will need to agree on the best approach for the merger. Whichever route is chosen, you will need to get legal advice at an early stage:

- Do the governing documents give you the necessary legal authority to proceed?
- Check the objects – are they similar?
- Ask the Charity Commission if they consider the objects to be sufficiently similar. Will they need to approve the transfer(s)?
- Decide on the approach for the legal transfer and merger.

- If a new organisation has to be set up, you will need to start the process early. It can take time to agree the constitution of the new organisation and obtain charity registration.
- As part of agreeing the new constitution, you will need to consider and agree:
 - Who will be the trustees?
 - How will they be appointed?
 - How long should their term of office be?
 - What officers should the new charity have? (e.g. Chair, Treasurer, Secretary)

Financial framework

Part of the early talks will need to identify the financial framework for the new organisation. You will need to consider the following:

- Which activities will be continued in the merged organisation?
- How are those activities funded?
- Will the merged organisation undertake new activities or discontinue existing activities and what are the financial implications?
- What will the overhead costs be? Are there savings to be made?
- The financial strengths and weaknesses of each party to the merger need to be identified and shared. Openness and honesty is absolutely essential.
- Detailed financial information should be prepared by each party to the merger and included in the merger pack.

Merger pack for due diligence

Each party should prepare a merger memorandum summarising key information, and draw together various documents for inclusion in a pack to be shared with the prospective merger partner.

Trustees must ensure the merger is in the best interest of their charity's beneficiaries and should therefore investigate the merger partners to be able to decide this. This process is called due diligence. A charity may have the skills in house to carry out some of the due diligence but professional advice from accountants and solicitors is likely to be needed for at least some of the areas.

The information required for the due diligence report is likely to cover the following:

- Executive Summary - maximum of 2 pages, highlighting the features in the pack which follows.
- History and Description
 - History and development of the charity and its activities.
 - How activities are funded.
 - Description of current projects and services.
 - Overview of external environment, such as future opportunities, other organisations offering similar services, trends and changes.
 - The case for merger, explaining why merger is an appropriate option at this stage.
- Management and People
 - Organisational structure.
 - Details of all staff in post, giving nature of employment (permanent or temporary), rate of pay, job title, gross pay, pension contributions, length of service and any entitlements, if applicable.
 - Summary of terms in contracts of employment
 - Copy contracts of employment

- Details of staff policies, such as recruitment, training, equal opportunities, sick leave and other.
- Copy of staff manual if available.
- Staff relations and details of any trade union representation.
- Details of pension scheme and indication of funding position.
- Details of volunteer base, how organised and policies, such as payment of expenses.
- Financial Information and Systems
 - Copies of the audited accounts for the past three years.
 - Copy of the budget for the current financial year.
 - Copies of management accounts for the current financial year.
 - Copy of the current cashflow forecast.
 - List of current funders (at least, previous year additionally useful) and projects being funded and for how long.
 - A description and assessment of the systems of internal control.
- Premises
 - Details of occupied premises to include location, form and terms of tenure, site area, current usage, date of acquisition, costs and subsequent expenditure.
 - Lease terms and length of lease where applicable.
 - Details of last professional valuations, if any.
 - Details of impending or deferred repairs if material.
 - In the case of any let properties, details of the tenants, terms of lease, rental income etc.
- Contracts
 - Details of other contracts in existence, such as leased equipment
 - Details of contracts for services where organisation has a commitment to provide a service, such as service level agreements.
- Assets and Liabilities
 - An analysis of and comments on the main assets and liabilities.
 - Details of any current, pending or threatened litigation or legal proceedings.
 - Details of any material long term and/or onerous contracts.
 - Details of any contingent liabilities.
 - Details of major items of capital expenditure over the period and estimates of outstanding commitments.
 - Details of banking facilities available.
 - Details of insurance cover.
 - Details of staff pension arrangements and any deficits, surpluses and guarantees on pension schemes.
- General
 - Any other factors which might materially affect merger prospects and any other matters which are relevant in the context of a merger.

Timetable

Views on how the process should be managed vary enormously. The timetable for merger will depend on the culture of the organisations and practical considerations. Very often, the speed of the transfer will depend on it having one or more “champions”. This is likely to be the prospective chair or chief executive of the merged organisation or the chair and/or chief executives of the merging charities.

Achieving merger

The merger will usually be achieved by transfer deeds. These deeds need to specify the activities, assets and liabilities being transferred. This will include existing contracts if they are capable of being transferred.

Staff being transferred are covered by Transfer of Undertakings (Protection of Employment) legislation, known as TUPE. They should be consulted well in advance of the date of transfer and should be offered equivalent employment. This is a complex area and proper legal advice should be obtained.

Staff not being transferred are entitled to redundancy, the terms of which will depend on whether it is covered in the particular contract of employment or whether they are only covered by statutory requirements. Again legal advice is required for this area.

Once you have got this far, there is still along way to go. The merged organisation has to feel as one, which will take work and effort.

Trustees' role

The trustees need to be very active during the whole period, and to continue their involvement after the newly merged organisation embarks on its new life. The trustees must hold the interests of the beneficiaries or users paramount – it is the trustees' job to ensure that the beneficiaries of the charities are better off in the merged organisation. This has to be the overall purpose from be.