

Merger: Not a last resort but a great opportunity....

Merger is not an end in itself: it is one of a series of tools available to charities to enable them to further their mission. It brings with it the opportunity to:

- Make charity assets, including brands and intellectual property, work harder;
- Develop and deepen services to beneficiary groups;
- Improve cost-effectiveness of delivery;
- Address succession, service development and other longer-term issues.

The view of an increasing number of charities, and organisations involved in guiding and developing standards of governance, is that merger is more than just a tool to be used when you must. It is an option against which strategy should be consistently reviewed: can we; should we; what gain would it bring?

So, if you should be considering it, what are the key points you need to know?



Looking a bit further at these.....

Understand: What is a merger?

- Technically two or more charities coming together into a single entity: either using one of the existing ones, or forming a new one;
- Which will entail a transfer of assets including land, staff and money;
- However, the term is also frequently used to describe a coming together to form a legal group, where the entities remain separate, but come under common control. This generally avoids wholesale asset transfer.

Think: Why merge?

A number of the potential areas of benefit are listed in the introduction to this note. The key reason however must be: the better to meet the needs of the beneficiaries.

In any decision to merge it is essential that the respective boards' deliberations lead logically to the conclusions that this is in the interests of beneficiaries.

How: Getting the approach right

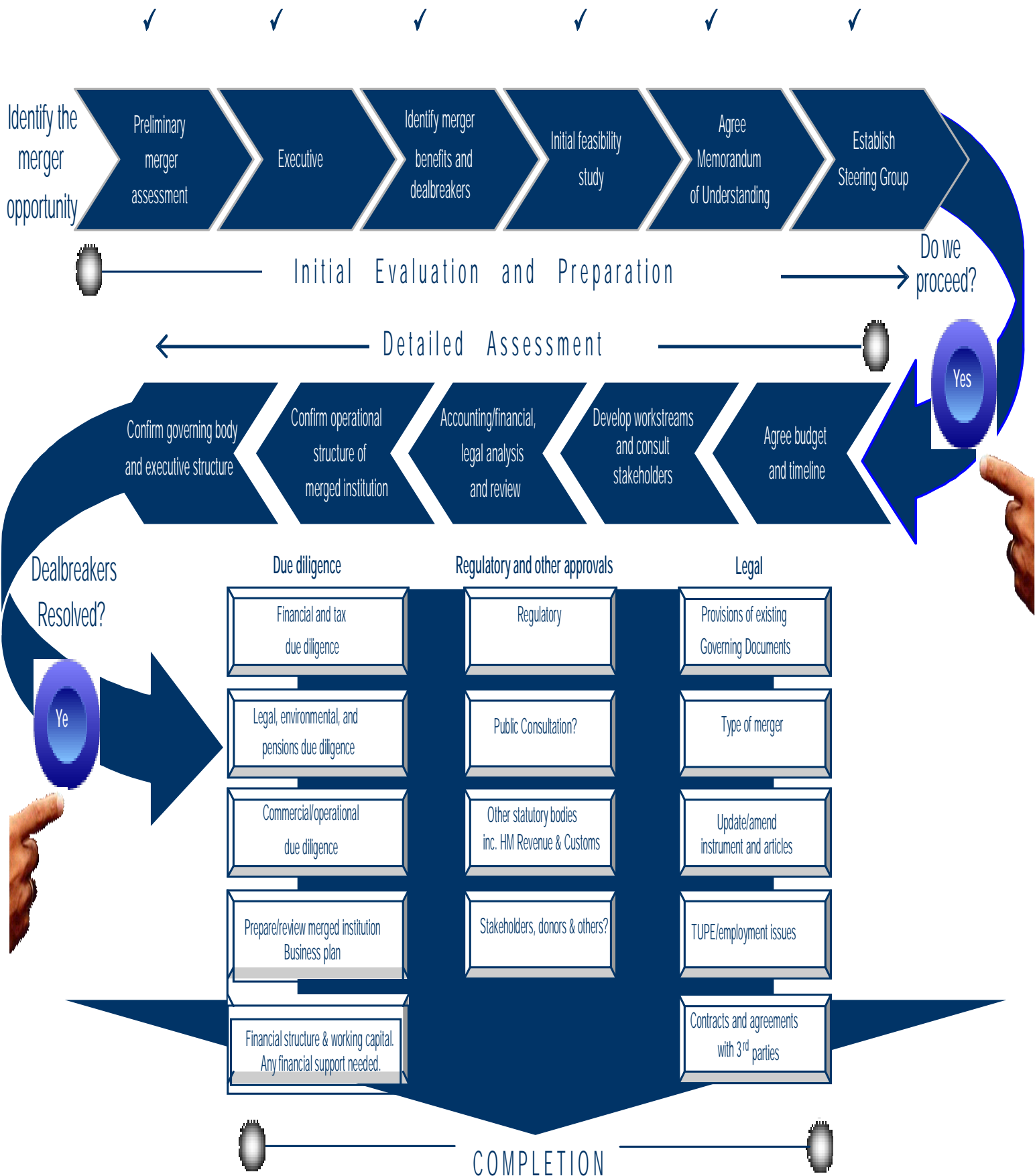
The approach needs to be organised and logical and linked back to the reasons for doing it.

Essentially this should involve:

- finding the right merger party;
- planning how to do it and how the benefits will be delivered;
- getting the right decisions and approvals;
- assessing the risk of not delivering those benefits;
- doing the deal;
- working to realise these benefits after the deal is done.

An outline process diagram looks like this:

Overview of the process



One particular area of focus needs to be the question of whether, and in what form, you can merge.

A process diagram for this question is given at the end of this note.

Due Care: Good risk management and avoiding pitfalls

Two areas require particularly careful attention: due diligence (“look before you jump”) and potential pitfalls.

The Due Diligence Exercise

- This is the investigation of another organisation in advance of completion of a merger, in order that the charity obtains full knowledge of the organisation with which they choose to merge.
- Charity trustees are legally responsible for taking any decision to effect a merger proposal; trustees need to be prudent and ensure that an appropriate due diligence exercise is carried out before a merger takes place to ensure the merger is in the best interests of the charities, and is capable of delivering the envisaged benefits.
- There are three main types of due diligence: Commercial, the business elements; Financial, the monetary side; and Legal, the constitutional, contractual and regulatory elements.

Key Decisions and Considerations for the Trustees: potential pitfalls

- The similarity of culture, ethos and values, and vision for the future.
- The structure of the merged charity: This must be fit for purpose.
- The new trustee board: The new board must be able to take the merged organisation forward, and must have the will to do so.
- The name of the new merged charity: Reputation, culture and history must be considered.

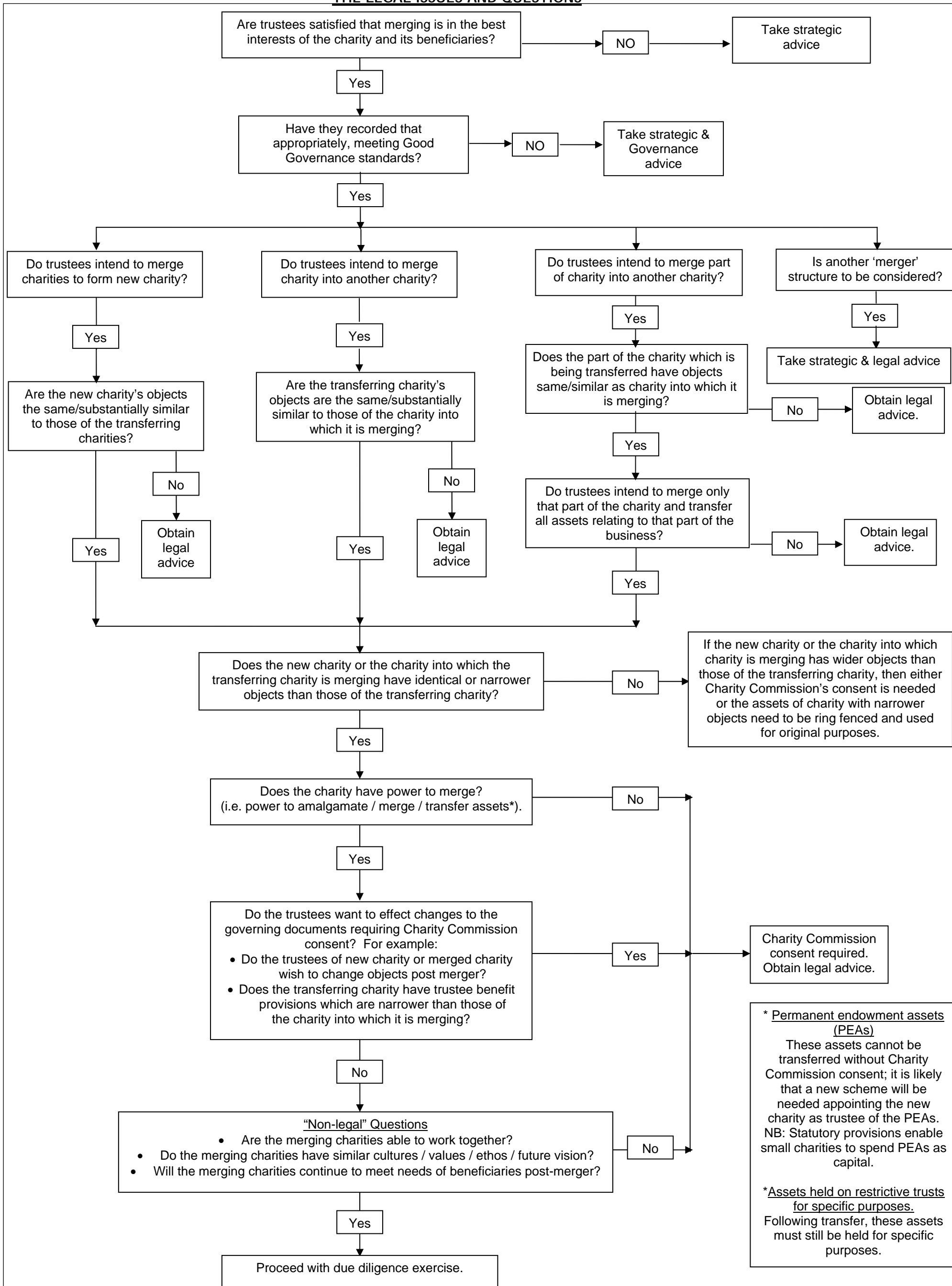
- Consulting and informing members: In membership organisations, a consultation and information providing process should be carried out with members prior to the merger.
- PR: As well as members, staff and any third party contractors will need to be consulted in advance.
- Confidentiality agreements: These may be required if information being passed to others is confidential.
- Delegation: Some merger tasks may need to be delegated to members of staff or merger committees.
- Involvement of other regulators: For example the Privy Council; Companies House; HMLR.
- Timing - draw up a timetable to which you are working and adhere to it. Consider tying merger in with y/e.

The most frequent impediments are not legal issues, or even financial risks. Clashes of culture, ethos and values, and perhaps even more so, perceived clashes of such actually making personality clashes and troubled egos amongst trustees or management are the biggest problems. The answer is clear: tackle these early and keep working on them throughout and beyond the process itself.

In summary, a merger, grouping or other collaboration is a great way of furthering the mission. However, what can be a huge success if handled well can become a source of pain and angst damaging both organisations if not handled well.

Take heart, take advice and look and see if it's for you....

**CAN CHARITIES MERGE?
THE LEGAL ISSUES AND QUESTIONS**



If the new charity or the charity into which charity is merging has wider objects than those of the transferring charity, then either Charity Commission's consent is needed or the assets of charity with narrower objects need to be ring fenced and used for original purposes.

*** Permanent endowment assets (PEAs)**
 These assets cannot be transferred without Charity Commission consent; it is likely that a new scheme will be needed appointing the new charity as trustee of the PEAs. NB: Statutory provisions enable small charities to spend PEAs as capital.

*** Assets held on restrictive trusts for specific purposes.**
 Following transfer, these assets must still be held for specific purposes.

Authors

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