

International expansion

One of the most complex decisions a charity's leaders may face is whether overseas expansion is necessary to further the charity's objectives.

Ben Thomas and Augustus Della-Porta look at some of the important considerations involved in that decision.



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Do we really need a presence overseas?

The first thing for a charity to consider when looking to expand internationally is whether it really needs to establish its own base overseas. It may not always be necessary to go this far.

It could, for example, fund overseas activity via an existing local organisation, rather than setting up its own overseas presence.

In some cases, the drive behind establishing a base abroad is to enable individuals situated in the relevant jurisdiction to donate to the organisation tax-efficiently. In these situations, rather than setting up a new overseas entity, some charities encourage overseas donors to use donor-advised funds such as Charities Aid Foundation's international network. Here the donor gives to the locally registered fund to obtain local tax relief and that fund makes a grant to the UK charity.

Structures

If the charity does need a presence in another jurisdiction, the options will depend on the laws of the country concerned. Some jurisdictions allow UK charities to register a 'branch' of the UK charity without incorporating a separate local entity. This is helpful, as it avoids the expense of setting up a completely separate legal entity and the risk that the 'mission' of the foreign entity becomes divorced from that of the UK charity.

In other cases, the UK charity may need to establish a separate local entity. A common solution is to set up a local subsidiary with the UK charity as sole member. This usually allows the UK charity to appoint and remove trustees and to require those trustees to take or not to take certain decisions.

However, it may not always be possible for the UK charity to exert such a significant degree of constitutional control. Some jurisdictions require more than one

member (and sometimes these must be residents of the jurisdiction). Some only afford tax-exempt status to organisations that are not a mere conduit of funds to the UK charity; the UK charity's level of control over the foreign entity will be relevant in deciding whether this is the case.

It is also possible to set up group structures, involving the establishment of a new international body that has relationships with both the UK charity and one or more foreign entities. The new body may be the sole member of the UK and foreign entities (a 'federal' model), or the UK and foreign entities may be the members of the international organisation (often referred to as a 'social franchise' structure).

Sometimes it is necessary to consider the peculiarities of an individual donor's situation. For example, a US citizen (or taxpayer) resident in the UK who wishes to donate to a charity that is registered in either the US or the UK will find it difficult to claim tax breaks in both jurisdictions. It might be necessary to adopt what is known as a 'dual registered' US/UK structure to cater for this.

Local law

Complications in the relevant foreign jurisdiction can dictate the viability and structure of a charity's operations there. Charities shouldn't assume that even the fundamentals of English company or charity law apply, particularly if the jurisdiction doesn't have a legal system based on the common law.

For example, different countries may have:

- different interpretations of what it means to be a charitable organisation;
- only unincorporated charitable structures;
- a requirement for a significant start-up endowment;
- a one-tier rather than two-tier governance structure; or



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- restrictions on foreign control.

Governance

It will invariably be a good idea to put in place an affiliation agreement between the UK charity and the local entity, particularly where the UK charity does not have sufficient constitutional control. The agreement will likely cover areas such as:

- the licensing of intellectual property and the conditions upon which it may be used;
- strategies, standards and policies each party will adhere to; and
- how data will be shared.

Conflicts of interest should be addressed either in the affiliation agreement or in the constitutional documents of each entity. This is particularly important if the entities are to have trustees in common.

The UK charity should read the Charity Commission's recent guidance on charities with a connection to a non-charity which sets out what the regulator expects in relation to arrangements with overseas entities.

FIND OUT MORE

The Charity Commission's guidance for charities with a connection to a non-charity is at <https://www.gov.uk/guidance/guidance-for-charities-with-a-connection-to-a-non-charity>

There is a summary of the key points of the guidance in our Summer 2019 Update at <https://bateswells.co.uk/2019/07/charity-social-enterprise-update-summer-2019/>

Grants and policies

It will often be necessary for entities to grant funds to other entities within the group. Note that the Charity Commission will regard foreign-registered entities as non-charities. UK tax legislation also imposes specific requirements – backed up by HMRC guidance – where UK

charities make payments to overseas bodies, which will apply where a UK charity is granting funds to a local entity (even within the same corporate structure). Proportionate due diligence and monitoring need to be undertaken and an appropriately robust grant agreement should be entered into.

If the foreign entities will pay funds to third parties by way of grant it can be advisable to have an overarching grant-making policy spelling out what is expected of each entity in terms of the grant-making process. This will include requiring a due diligence exercise to be carried out for each grant, proportionate to the risk profile of the grant in question.

Be aware that anti-bribery and terrorism legislation is extremely broad in scope and it is therefore common practice to have anti-bribery and other policies (often referred to in the affiliation agreement) to ensure a consistent approach in these areas.

Safeguarding

The recent focus on safeguarding – particularly at international NGOs – means that it goes without saying that charities working with children or vulnerable adults must be wary of the safeguarding risks of operating internationally. The trustees should not think that creating a foreign entity significantly reduces the need for the UK charity to ensure that robust safeguarding procedures are in place (see our Charity Commission update on page 22).

Conclusion

International expansion is a significant step requiring consideration of a number of issues. This article outlines just some of them. We have significant experience of the options available and of advising on overseas operations, including investigations into charities working overseas. We would be happy to advise on your charity's particular situation.