

Cui bono?

A new corporate vehicle for the public sector

by Philip Goldenberg

The author puts the case for the creation of a new corporate structure – the public benefit organisation (PBO) – to provide a vehicle for the decentralisation of public services. This article follows on from Philip Goldenberg's Editorial in this issue which looks at issues relating to the private finance initiative and the public/private partnership.

THE PROBLEM

All three main political parties are looking seriously at the decentralisation of public services and, in this context, at forms of corporate vehicle which might be suitable for this purpose. Indeed, a number of think tanks and individuals have had a stab at this, with varying degrees of accuracy and penetration.

The problem is that no existing corporate structure exactly matches what is required. Those requirements are as follows.

- (i) A body which has a separate legal personality.
- (ii) A body which can provide services and (where applicable) charge for them, and indeed make a profit.
- (iii) A body whose members do not have an economic interest in the outcome of its activities (with no power to its members to change this), and which accordingly has a 'stewardship' ethos.
- (iv) A body which can be substantial in a financial sense, and accordingly can (a) be founded with core capital and (b) raise loan capital from the public.
- (v) A body whose sphere of activity, while having social objectives, is not necessarily charitable (and indeed whose activities might not sit comfortably within the framework of charity law even if the scope of charitable activity was extended – e.g. a railway company).

(vi) A body which can remunerate not only its executive management but also (to a reasonable extent) its non-executive directors.

(vii) A body which can be accountable to a number of 'stakeholders' and whose non-executive directors can be nominated by particular stakeholders while remaining accountable to the body for their conduct of its affairs.

Figure 1 shows the various existing structures and their respective incompatibilities with the features set out above.

A SOLUTION

The opportunity should be taken in the forthcoming Companies Bill to give effect to the proposals of the recent Company Law Review to create, within the broad structure of company legislation, a public benefit organisation (PBO) structure with the following features (each of which is separately explained below).

(1) A PBO should be a form of company limited by guarantee.

In order that a PBO can be easily formed by those concerned (without the need for complex Parliamentary or administrative processes), it must be capable of incorporation by registration; this means it must be a Companies Act company. The members of the PBO will have no economic interest in it, and accordingly a shareholding structure would be inappropriate.

(2) A PBO should be subject to the present régime for

charitable companies, namely have no power to distribute dividends or capital to its members, and be able to transfer its assets only to another PBO (except by special permission of the regulator).

A PBO should not be a charity, as it may well be carrying on commercial activities; however, any profit it makes will be available for re-investment but not for distribution. In the event of its liquidation, its assets should not be freely transferable into the private sector. The regulator is described in paragraph 9.

- (3) Unlike a normal company limited by guarantee, a PBO should have power to make an offer to the public for debt (but not equity) capital.

Only a public company may make an offer of securities to the public, and by definition a company limited by guarantee cannot be a public company. It is, however, desirable that a PBO should be able to raise public debt capital outside Treasury control, even though the compromise recently announced between the Secretary of State for Health and the Chancellor of the Exchequer would seem sadly to rule this out.

- (4) A PBO may not create fixed charges over specific assets.

This obviates one of the Treasury objections to a PBO-type vehicle which can raise public debt capital. In the event of insolvency, no mortgagee will be able to claim fixed assets, such as property or machinery.

- (5) The only form of permitted insolvency for a PBO will be administration; this is to facilitate the transfer of its assets to another PBO. Following such transfer, the normal liquidation provisions will apply.

Any such administration would take priority over the ability of a floating chargee to crystallise its charge into a fixed charge. Effectively, the Administrator would be able to transfer the PBO's assets and undertaking to another PBO free and clear of any charges (but obviously on an arm's-length basis), while of course the proceeds of such transfer would first be available to the floating chargee. This would enable a hospital, for example, to carry on without disturbance.

- (6) Any other form of Companies Act company may be

converted into a PBO, but not vice versa.

This is obviously to facilitate the creation of PBOs, while preventing their effective privatisation.

- (7) Any transfer of an undertaking to a PBO will be exempt from stamp duty.

It would seem strange for monies to pass to the Treasury when assets are being transferred into the public sector.

- (8) A public body (e.g. an NHS Trust) will be able to transfer its undertaking to a PBO, subject to Parliamentary approval by positive instrument. In due course, a similar procedure will apply to tiers of Regional Government.

At the moment the route is primary legislation or Executive action. It would seem sensible to have a standard procedure which requires Parliamentary approval without the need for a full legislative process.

- (9) In administrative terms, PBOs would need regulatory supervision, which could best be provided by a dedicated unit within Companies House, with ultimate supervision by the High Court. PBOs would also need a discrete set of accounting standards.

Because the PBO will be a Companies Act company, this seems the logical solution.

CONCLUSION

While this is not a topic where there is a single right answer, it is hoped that the foregoing will be a useful starting-point as civil servants and Parliamentary draftspersons begin to wrestle with the task of converting a political concept into coherent legislation. [ⓐ]

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Figure 1
Existing Corporate Structures

Existing Structure	Can make trading profit	Can be unalterably prohibited from distributing profit	Can raise debt finance from the public	Can remunerate non-executive directors	Can be accountable to multiple stakeholders
Company limited by shares	YES	NO	YES	YES	NO
Company limited by guarantee	YES	YES	NO	YES	YES
Charity	NO	YES	NO	NO	NO
Industrial/Provident Society	YES	NO	NO	YES	YES