



**GUIDANCE NOTES & STANDARD FORMS OF AGREEMENT
BETWEEN
CHARITIES, TRADING COMPANIES & COMMERCIAL
PARTICIPANTS**

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INTRODUCTION

These Guidance Notes and the Standard Forms of Agreement between a charity and a commercial participator and/or another charity, its trading company and a commercial participator have been produced to help safeguard the interests of all parties, and comply with the Charities Act 1992 and the Charitable Institutions (Fundraising) Regulations 1994 (SI No. 3024).

1. LEGAL BACKGROUND

1.1 What is a Commercial Participator?

The Government White Paper 1989 *'Charities; A Framework for the Future'* referred to the commercial partner of a charity as a *'co-venturer'*. When drafting the 1992 Charities Act, the Government invented a new term to add to the vocabulary of the voluntary sector *"the commercial participator"*. In essence, a commercial participator is someone who encourages the purchase of goods or services on the grounds that some of the proceeds will go to a charitable institution.

Section 58(1) of the Charities Act 1992 defines a commercial participator as:

"In relation to any charitable institution.....any person who:

- (a) carries on for gain a business other than a fundraising business, but:*
- (b) in the course of that business, engages in any promotional venture in the course of which it is represented that the charitable contributions are to be given to or applied for the benefit of the institution".*

A charitable institution is defined as:

"A charity or an institution (other than a charity) which is established for charitable, benevolent or philanthropic purposes".

A promotional venture is defined as:

"Any advertising or sales campaign or any other venture undertaken for promotional purposes".

Venture has not been defined in any statute or, remarkably enough, considered in any legal judgement. However the Oxford English Dictionary defines *"Venture"* as *"That which is ventured or risked in a commercial enterprise or speculation"*.

“To represent” is defined extraordinarily widely by Section 58(6) as meaning to represent:

“In any manner whatever, whether expressly or implied, whether done by speaking directly... ..or means by a statement published in any newspaper, film or radio or television programme or otherwise”.

“Charitable contributions” are defined by Section 58 (1):

“In relation to any representation made by any commercial participator or other person, means:

- (a) the whole or part of:*
 - (i) the consideration given for goods or services sold or supplied by him,*
or
 - (ii) any proceeds (other than such consideration) of a promotional venture undertaken by him,*
or
- (b) sums given by him by way of donation in connection with the sale or supply of any such goods or services (whether the amount of such sums is determined by reference to the value of any such goods or services or otherwise)”.*

“Services” is defined by Section 58(9) as including facilities and in particular:

- (a) access to any premises or events*
- (b) the membership of any organisation*
- (c) the provision of any advertising space*
- (d) the provision of any financial facilities”.*

1.2 Examples of Commercial Participators

a) Affinity Card Companies

Banks or financial institutions who issue credit cards in conjunction with a charitable institution and donate an agreed percentage of the customers’ total expenditure on the card to the charitable institution are commercial participators and subject to the Act.

b) Catalogues

Some commercial organisations distribute catalogues of merchandising coupled with the inducement that part of the profits from the activity or part of the price per item will be passed to a named charity. In this case, the catalogue company is running a commercial business (selling goods by mail order), and in the course of

that business is representing that part of the profits or part of the price paid for each good (the situation will vary) will be given to a named charity.

c) Promotional Sales of Goods

Many leading retailers now agree to “give” a fixed price per product in return for the use of the charity’s logo on their products.

1.3 Charities’ Trading Companies

A trading company owned by a charitable institution is not a commercial participator, although the Home Office has requested that such trading companies should abide by the Act as if they were subject to it.

2. REQUIREMENTS UNDER THE CHARITIES ACT 1992

2.1 Section 59 (2) Statements

Section 59 (2) of the Charities Act 1992, provides that it shall be unlawful for the commercial participator to represent that charitable contributions are to be given to or applied for the benefit of a charitable institution unless it does so in accordance with an agreement with the institution, satisfying the prescribed requirements. The prescribed requirements are laid down in a statutory instrument, the Charitable Institutions (Fundraising) Regulations 1994, which states the prescribed requirements. In particular:

- (i) the agreement has to be in writing and signed by or on behalf of the charitable institution and the commercial participator
- (ii) the agreement has to specify certain key provisions, all of which are set out in the attached standard contracts.

It is worth noting that by regulation 5 a commercial participator must:

“On request, and at all reasonable times, make available to any charitable institution which is a party to that agreement any books, documents or other records (howsoever kept) which relate to that institution and are kept for the purposes of the agreement”.

By regulation 5 (2) those records have to be kept in a legible form.

Breach of regulation 5 is a criminal offence, giving rise to a maximum fine of £500.

By regulation 6, any money or other property acquired by a commercial participator for the benefit of a charitable institution must be paid to the charitable institution as soon as is reasonably practicable after its receipt and, in any event, not later than the expiration of 28 days from that receipt, or:

“Such other period that may be agreed with the institution”.

The monies concerned have to be paid to the person or persons having the general control and management of the administration of the charitable institution, or paid into an account held by a bank or building society in the name of, or on behalf of, the charitable institution which is under the control and management of the administration of the institution. A commercial participator is under an obligation to hold all property of the charitable institution securely. Breach of regulation 6 (2) is a criminal offence, giving rise to a potential maximum fine of £500.

2.2 Section 60 (3) Statements

Section 60 (3) of the Charities Act 1992 provides that, where any representation is made by a commercial participator to the effect that charitable contributions are to be given to, or applied for, the benefit of one or more particular charitable institutions, the representation shall be accompanied by a statement clearly indicating:

- “(a) the name or names of the institution or institutions concerned*
- (b) if there is more than one institution, the proportions in which the institutions are respectively to benefit*
- (c) (in general terms) the method by which it is to be determined:*
 - (i) what proportion of the consideration given for goods or services sold or supplied by him, or of any other proceeds of a promotional venture undertaken by him, is to be given to or applied for the benefit of the institution or institutions concerned*
or
 - (ii) what sums, by way of donations by him in connection with the sale or supply of any such goods or services are to be so given or applied as the case may require.”*

The following particular points should be noted:

- (a) Any representation made by a commercial participator has to be accompanied by the required statement.
- (b) A representation can be made expressly or implied. In the case of an oral representation, this means the statement has to be made at the same time or is clearly visible at the same time. In shops it should be sufficient that the statement is made clear by a legible sign, provided it is readily visible when the representation

is made e.g. near the point of sale. In the case of a newspaper advertisement, the advertisement must contain the statement.

- (c) As can be seen there are two different ways in which the statement can be made “as the case may require” and this will depend on the particular circumstances of the arrangements with the commercial participator.
- (d) Breach of Section 60 (3) is a criminal offence, giving rise to a potential maximum fine of £500 per offence.

3. CHARITIES ACT 1992 AND TAXATION

3.1 There are Three Forms of Agreement Attached

- (a) an agreement between a charity and a commercial participator
- (b) version A is between a charity, its trading company and a commercial participator, where the agreement will last for more than one year
- (c) version B is between a charity, its trading company and a commercial participator, where the agreement will last for less than one year

The reason for having the three types of agreement is that the Charities Act 1992 throws up problems relating to direct taxation. As has been seen, the Charities Act 1992 requires that an agreement should be in place between the commercial participator and the charity. However, the activity of regularly licensing a charity’s name may constitute trading and consequently such activities have traditionally been undertaken not by charities but, where they amount to trading, by the charity’s trading company. However, the 1992 Act makes no provision for an agreement between a commercial participator and a charity’s trading company. Hence, depending upon the type of agreement that is reached, it may be necessary to enter into a simple agreement (between the charity and the commercial participator) of either version A or B of the tripartite agreement (involving the charity’s trading company).

3.2 When to Use the Two Party Agreement

- (a) When the agreement is capable of lasting more than one year, the payment to the charity may be constructed as an annual payment (see the draft), and the income received by the charity effectively free of tax from the licence fees paid by the commercial participator. Charities are advised to take professional advice on the question of how the annual payment is to be set up and the recovery of tax deducted thereon achieved.
- (b) This will apply only where the charity is licensing its name and/or logo and doing nothing else.

- (c) Note that VAT will have to be charged on the licence fee, (if the charity is registered for VAT) even if the services are rendered by the charity, or, as a result of the licensing arrangements, will become liable to register for VAT (because its taxable turnover exceeds £46,000 (1995 figure)).

3.3 When to Use the Tripartite Agreement – Version A

The tripartite agreement Version A combines an annual payment to the charity for the use of the charity's name and logo and a payment to the charity's trading company for the use of the databases, joint marketing activities etc. This can only be used where the agreement is capable of lasting for more than a year (see 7.1). A good example is an agreement for an affinity card with a financial institution.

In terms of the Section 60 (3) statement, it is best to have most of the monies paid to the charity rather than to the trading company, although the payment to the trading company for its services must be realistic and at appropriate market rates.

3.4 When to Use the Tripartite Agreement – Version B

When the agreement is not capable of lasting for more than one year, which will be the case with most agreements with commercial participators, Version B should be used.

The purpose of using the trading company in these circumstances is that the income from these activities, if received by the charity, will be treated as trading income and any profits thereon will be likely to be taxed. If, on the other hand, the monies are received by the charity's trading company, if it has tangible profits at the end of the financial year (i.e. these derived from the arrangement with the commercial participator and other sources net of costs, expenses etc.), those profits can be paid to the charity effectively free of tax under gift aid or deed of covenant.

The problem with this arrangement is that monies will flow to the trading company rather than to the charity and therefore the wording of Section 60 (3) is strained considerably, because the requirement under that Section is that the statement should relate to payments being made to a charitable institution, and a trading company owned by a charity is not a charitable institution as defined. However, it is considered that the tripartite arrangement is the best that can be done in the circumstances in order to enable a charity to receive the profits from the arrangements with the commercial participator in a tax efficient manner and to comply with the requirement of the Act.

4. NEGOTIATING WITH THIRD PARTIES

The following practical notes may be of assistance in determining what sort of relationship to enter into with a commercial participator:

- a) Consult other charities known to you that have engaged recently in the kind of operation that you have in mind. Ask what the results of their activities were and whether there are any valuable lessons that can be gained from their experience.
- b) Consider the activities of the commercial participator. Do not be content merely with discussing the range of products or services with which the charity will be involved, but discuss in broader terms the activities of the proposed commercial participator and its subsidiaries and associate companies. Many modern day groups of companies have a very large number of subsidiaries and the charity should be satisfied that it is happy with the activities of the group as a whole. A charity's reputation is precious and could all too easily be damaged by revelations in the media that the company with which it is associated through a joint promotion activity, is also engaged, via a separate company, in some sort of unsavoury dealings. Hence the need for the charity to be able to terminate the agreement quickly so that its name or reputation should not be brought into disrepute.
- c) Ask for an estimate of the likely turnover from the particular product line or service that is to be the subject matter of the agreement.
- d) Be very clear as to what the precise arrangement is in terms of the activities being requested from the charity's side. Is it the mere licensing of the charity's name or logo (in which case the charity itself can probably participate depending on the length of the agreement), or are there other activities to be undertaken e.g. joint marketing?
- e) What is the period of the agreement?
- f) Go through these draft agreements with the commercial participator and with your professional advisers and adapt them as appropriate for the particular needs of the charity's circumstances.
- g) Set up an internal system for monitoring the contract and the payment of monies thereunder, to ensure that all the contractual obligations on the part of the commercial participator are abided by and the charity/trading company has an effective internal method of monitoring the contract.
- h) The contract should be signed by a trustee and if appropriate a director of the charity's trading company.