

Explanatory Memorandum to the Local Government (Relevant Authorities) (Power to Trade) (Wales) Order 2022

This Explanatory Memorandum has been prepared by the Local Government Department of the Welsh Government and is laid before Senedd Cymru in conjunction with the above Order and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Local Government (Relevant Authorities) (Power to Trade) (Wales) Order 2022. I am satisfied that the benefits justify the likely costs.

Rebecca Evans MS
Minister for Finance and Local Government

6 April 2022

1. Description

- 1.1. The Local Government (Relevant Authorities) (Power to Trade) (Wales) Order 2022 authorises relevant authorities to do for a commercial purpose anything which they are authorised to do for the purpose of carrying on any of their ordinary functions and makes further provision in relation to a relevant authority's exercise of the power to trade. The Local Government (Relevant Authorities) (Power to Trade) (Wales) Order 2022 also revokes the Local Government (Best Value Authorities) (Power to Trade) (Wales) Order 2006.
- 1.2. These provisions come into force on the 5 of May 2022.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

- 2.1. None.

3. Legislative background

- 3.1. This Order is made under sections 95(1)(a) and (3), 96(1), (3)(b) and (c), and 123(1) of the Local Government Act 2003 ("the Act").
- 3.2. Section 95 of the Act (power to trade in function-related activities through a company) confers a power on the appropriate person, by Order, to authorise relevant authorities to do for a commercial purpose anything which they are authorised to do for the purpose of carrying on any of their ordinary functions ("the power to trade") and to make further provision in relation to a relevant authority's exercise of the power to trade.
- 3.3. Under section 95(4) of the Act, the power conferred by an Order under section 95 must only be exercisable through a company.
- 3.4. Section 96 of the Act confers a power on the appropriate person to impose conditions on the exercise of the power to trade.
- 3.5. Section 123 of the Act provides that any power to make orders or regulations under (this Act) includes power to make different provision for different cases or areas as well as a power to make incidental, supplementary, consequential or transitional provision or savings. That power includes power to repeal any enactment or any instrument made under any enactment.
- 3.6. Section 124 of the Act defines the appropriate person, in relation to Wales, as the National Assembly for Wales. The functions of the National Assembly for Wales were transferred to the Welsh Ministers by virtue of section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006. The powers in sections 95 and 96 are therefore powers of the Welsh Ministers.

3.7. This Order is subject to the negative procedure.

4. Purpose and intended effect of the legislation

4.1. The Local Government (Relevant Authorities) (Power to Trade) (Wales) Order 2022 (“the 2022 Order”) authorises relevant authorities to do for a commercial purpose anything which they are authorised to do for the purpose of carrying on any of their ordinary functions and makes further provision in relation to a relevant authority’s exercise of the power to trade. Under section 95(4) of the Act, the power conferred by the 2022 Order must only be exercisable through a company.

4.2. The relevant authorities authorised to exercise the power to trade, are those relevant authorities in Wales which are:

- a) county councils or county borough councils
- b) eligible community councils (that is those community councils which meet the conditions to exercise the General Power of Competence under section 30 of the Local Government and Elections (Wales) Act 2021) (“the 2021 Act”)
- c) National Park authorities
- d) fire and rescue authorities, constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies
- e) corporate joint committees established by regulations made under Part 5 of the 2021 Act

4.3. The 2022 Order requires that, before it can exercise the power, a relevant authority must prepare and approve a business case in support of the proposed exercise of the power. The business case must be published as soon as reasonably practicable.

4.4. The 2022 Order requires that the business case includes:

- the aims and objectives of the proposed exercise of the power;
- the costs, investments and other resources required to achieve those aims and objectives;
- the financial outcomes that are expected to be achieved by the proposed exercise of the power;
- any other relevant outcomes that are expected to be achieved by the proposed exercise of the power;
- any risks associated with the proposed exercise of the power including an assessment of the severity of those risks, and any actions that the authority proposes to take to mitigate those risks;
- the impact (including on the terms and conditions of employment) on any staff that it intends to supply to a company through which it proposes to exercise the power;
- the intended arrangements for the staffing of the company through which it proposes to exercise the power, including the proposed terms and conditions of employment of any staff to be employed.

- 4.5. The 2022 Order also requires that the relevant authority must recover the costs of any accommodation, goods, services, staff or any other thing it supplies to a company, through which it is exercising the power to trade, from that company.
- 4.6. The 2022 Order also revokes and replaces the Local Government (Best Value Authorities) (Power to Trade) (Wales) Order 2006 (“the 2006 Order”).
- 4.7. At the time the 2006 Order was made, section 95 of the Act referred to ‘best value authorities’.
- 4.8. Section 95 of the Act originally referred to ‘best value authority’ as defined in the Local Government Act 1999. The best value regime in the Local Government Act 1999 was amended by the Local Government and Public Involvement in Health Act 2007 and, as a consequence, references to ‘best value authority’ in section 95 and 96 of the Local Government Act 2003 were replaced by ‘relevant authority’, defined in section 95(7) (of the Act).
- 4.9. The definition of relevant authority included a best value authority as defined in the Local Government Act 1999 (in relation to Wales a county or county borough council, community council, fire and rescue authority or National Park authority) and a community council.
- 4.10. The Local Government Measure 2009 removed Welsh authorities from the definition of best value authority in the Local Government Act 1999 and further amended the definition of relevant authority in section 95 of the Act, adding ‘Welsh Improvement Authority’ as defined in the Local Government Measure 2009. The inclusion of community councils in the definition in section 95 of the Act remained unchanged.
- 4.11. On 1 April 2021 the definition of a relevant authority in section 95 of the Act was further amended by the Local Government and Elections (Wales) Act 2021 (Consequential Amendments) Regulations 2021 so as to remove ‘Welsh Improvement Authority’ and insert:
 - a county council or county borough council in Wales
 - a National Park authority for a National Park in Wales
 - a fire and rescue authority in Wales, constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies.
- 4.12. As part of the implementation of the Local Government and Elections (Wales) Act 2021 (“the 2021 Act”) the 2022 Order replaces the 2006 Order so as to refer to the Welsh authorities currently defined in section 95 of the Act.
- 4.13. The power to trade extends to those community councils that are eligible community councils within section 30 of the 2021 Act, i.e. those community councils that may exercise the general power of competence under Part 2 of that Act. It also extends to corporate joint committees established by regulations made under part 5 of that Act by virtue of amendments made to

section 95 of the Act by the Corporate Joint Committee (General) (Wales) Regulations 2022.

5. Consultation

- 5.1. The Welsh Government recently consulted on proposals in respect of the conditions which local authorities in Wales have to meet to do things for a commercial purpose using the General Power of Competence (GPoC), which was made available to qualifying local authorities by the Local Government and Elections Wales Act 2021.
- 5.2. As part of that consultation the Welsh Government consulted on their intention to re-make the 2006 Order in order to reflect the changes to the definitions of 'relevant authorities' in s95 of the Act, to extend the Order to further relevant authorities and to reflect the conditions proposed in the General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2021.
- 5.3. The Consultation also asked respondents if community councils who are eligible to exercise the general power of competence should also be authorised to trade in their ordinary functions.
- 5.4. In addition, the Welsh Ministers, as part of the consultation on the draft Corporate Joint Committee (General) (Wales) Regulations 2022, consulted on the intention to include CJs in the Power to Trade Order.

6. Regulatory Impact Assessment (RIA)

- 6.1. The 2022 Order is required to be made in order to replace the 2006 Order, add further relevant authorities, and to address the various amendments to the definitions of relevant authorities in section 95 of the Act under which the 2006 Order was made, as discussed in section 4 above.
- 6.2. Whilst there are some technical changes to the conditions required of the business case within the 2022 Order, county councils, or county or borough councils, National Park authorities and fire and rescue authorities constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004(2) or a scheme to which section 4 of that Act applies are currently required, under the 2006 Order, to prepare and approve a business case before exercising the power to trade authorised by that order.
- 6.3. County councils, or county or borough councils, National Park authorities and fire and rescue authorities constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004(2) or a scheme to which section 4 of that Act applies have been trading (or had the ability to trade) under the 2006 Order since 2006 and will have the systems in place so as to provide for the preparation of a business case if they wish to exercise that power. As such it is not anticipated that the 2022 Order would give rise to any costs to these authorities.

- 6.4. In effect the 2022 Order re-states the position for county councils, or county or borough councils, National Park authorities and fire and rescue authorities constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004(2) or a scheme to which section 4 of that Act applies are required. Therefore, it is considered that there are no additional costs or benefits to these authorities in making the 2022 Order.
- 6.5. However, following the inclusion of community councils and corporate joint committees in the 2022 Order, it is necessary to consider the costs to these authorities as a result of their inclusion
- 6.6. In considering the costs to corporate joint committees and eligible community councils this regulatory impact assessment considers two options:
- Option 1: not to include corporate joint committees and eligible community councils in the 2022 Order.
 - Option 2: to include corporate joint committees and eligible community councils in the 2022 Order.
- 6.7. It is worth noting that this is the same approach taken in the RIA for the Local Government and Elections Act 2021 in reference to the General Power of Competence and the General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2021 which provides for certain limitations (similar to those of the Local Government (Relevant Authorities) (Power to Trade) (Wales) Order 2022) to local authorities when doing a thing for commercial purpose in the exercise of the general power of competence).

Option 1: Not to include corporate joint committees and eligible community councils in the 2022 Order

- 6.8. Section 95 of the Act provides the power for Welsh Ministers to make an order to authorise a relevant authority to do for commercial purposes anything which they are authorised to do for the purpose of carrying out their ordinary functions. Under this option corporate joint committees and eligible community councils would not be included in the 2022 Order and would therefore not see a change in their current status and therefore no additional costs.

Costs

- 6.9. There are no additional costs associated with this option.

Benefits

- 6.10. This option would deliver no additional benefits and eligible community councils and corporate joint committees would not be authorised to trade in their ordinary functions.

Option 2: to include corporate joint committees and eligible community councils in the 2022 Order

- 6.11. Under option 2 the 2022 Order would provide that corporate joint committees and eligible community councils would be able to do for commercial purposes anything which they are authorised to do for the purpose of carrying out their ordinary functions (provided this was undertaken through a company.)
- 6.12. Before exercising the power, a corporate joint committee or eligible community council would be also required to prepare and approve a business case in support of the proposed exercise of the power.
- 6.13. The business case would be required to detail the matters outlined at section 4 above.

Costs

- 6.14. It is anticipated that the requirements of the 2022 Order may result in some additional opportunity and administrative costs for corporate joint committees and eligible community councils if they were to choose to exercise the power to trade commercially
- 6.15. It is envisaged that the majority of business cases would be prepared 'in-house' by corporate joint committees and eligible community councils and as such the costs would be in respect of staff time to complete this work. Where a corporate joint committee or eligible community council was considering doing a particularly large or complex thing for a commercial purpose, they may consider engaging external contractors which would involve additional costs.
- 6.16. A key factor in calculating the costs to corporate joint committees and eligible community councils of complying with these requirements will be the frequency at which they seek to exercise the power to trade and the complexity of what they were seeking to do.
- 6.17. The power to do for commercial purposes anything which a corporate joint committee or eligible community council are authorised to do for the purpose of carrying out their ordinary functions under the 2022 Order is an enabling power, giving corporate joint committees and eligible community councils the discretion to use the power if they wish to do so. As such the frequency with which the power would be exercised in this manner is uncertain and it is therefore not possible to calculate these costs to any degree of certainty.
- 6.18. As corporate joint committees or eligible community councils are currently not included in the 2006 Order there is not considered to be any transitional costs in including these bodies in the 2022 Order.

6.19. The requirement to recover costs from the company through which the corporate joint committee or eligible community councils is doing something for a commercial purpose may result in some administrative costs to the authority. It is anticipated these costs would be nugatory and could be accommodated within the existing financial management systems of the authorities. This requirement will also result in a transfer from the company to the corporate joint committee or eligible community council, with the value reflecting the costs incurred by the corporate joint committee or eligible community council in support of the commercial activity.

Benefits

6.20. The preparation and approval of a business case before corporate joint committee or eligible community council exercise the general power of competence for a commercial purpose would help ensure that they fully consider what they are seeking to achieve, why and how they are going to achieve this, the likely financial implications and the benefits to their communities. This will support transparent and robust decision making, enabling decisions to be made in recognition of the potential consequences or risks and after their careful consideration.

6.21. While an authority might reasonably support the start-up of such a company, continuing subsidy or funding could both distort the market unfairly to the detriment of any existing businesses or potential entrants to the market. The requirement that an authority recover the full costs of any support or services it provides to the company through which the power to trade is being exercised for a commercial purpose will help ensure this does not occur.

6.22. Eligible community councils will have parity with principal councils in terms of the powers and expectations when exercising the general power of competence. The RIA to accompany the 2021 Act considered the costs of providing qualifying authorities with this power.