

Explanatory Memorandum to the General Power of Competence (Commercial Purpose) (Conditions) (Wales) (Amendment) Regulations 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 regulations 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 General Power of Competence (Commercial Purpose) (Conditions) (Wales) (Amendment) Regulations 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 General Power of Competence (Commercial Purpose) (Conditions) (Wales) (Amendment) Regulations 2022 (“the 2022 Regulations”) amend the General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2021 (“the 2021 Regulations”) to extend the meaning of ‘authority’ in the 2021 Regulations to include eligible community councils. The 2021 Regulations prescribe the conditions that must be met by an authority before it can exercise the general power of competence for a commercial purpose.
- 1.2. These provisions come into force on 5 May 2022.

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

- 2.1. None.

3. Legislative background

- 3.1. Section 24 of the Local Government and Elections (Wales) Act 2021 (“the 2021 Act”) confers a general power of competence on qualifying local authorities in Wales. A qualifying local authority is a principal council or an eligible community council. The general power of competence conferred on those authorities includes a power to do certain things for a commercial purpose.
- 3.2. The Local Government and Elections (Wales) Act 2021 (Commencement No. 1 and Saving Provision) Order 2021, which was made on 3 March 2021, brings the general power into force for principal councils on 1 November 2021 and eligible community councils on 5 May 2022.
- 3.3. The powers enabling these Regulations to be made are contained in sections 28(4), (5)(b) and (6)(c) of the 2021 Act.
- 3.4. Section 27 of the 2021 Act prescribes limits on doing things for a commercial purpose in exercise of the general power. Section 27(b) of the 2021 Act provides that the exercise of the general power for a commercial purpose must be done through a company (as defined in section 27(4)).
- 3.5. Under Section 28(4) the Welsh Ministers may by regulations provide for the exercise of the general power to be subject to conditions. Section 28(5)(b) provides that the power to make regulations under section 28(4) may provide that the exercise of the general power for a commercial purpose is subject to conditions in addition to those conditions prescribed in section 27. Section 28(6)(c) provides that the power under subsection 28(4) may be exercised in relation to a particular description of local authority that is a qualifying local authority.

- 3.6. The 2021 regulations initially applied only to principal councils (within the meaning of section 171(1) of the 2021 Act). These regulations extend the application of those regulations to eligible community councils from 5 May 2022.
- 3.7. Section 30 of the 2021 Act sets out the criteria for how a community council may become an eligible community council – namely meeting all the eligibility conditions set out in sections 30(2) to (4) and passing a resolution that it is an eligible community council.
- 3.8. These Regulations are subject to the negative procedure in accordance with section 174(6) of the 2021 Act as these regulations are made only for a purpose described in section 28(8) of the 2021 Act. These regulations come into force on 5 May 2022.

4. Purpose and intended effect of the legislation

- 4.1. The 2021 Regulations came into force on 1 November 2021 and provide for the exercise of the general power to do things for a commercial purpose to be subject to additional conditions. At the time of coming into force, the general power was only available to principal councils.
- 4.2. These Regulations amend the 2021 Regulations to include eligible community councils as defined by section 30 of the 2021 Act. Specifically, regulation 1(2) of the 2021 Regulations is amended to include ‘eligible community councils’ within the definition of “authority”. This has the effect of extending the application of the 2021 Regulations to eligible community councils from 5 May 2022 which is the date from which they may exercise the general power of competence, including for a commercial purpose.

5. Consultation

- 5.1. A 12-week consultation was open between 28 June 2021 and 24 September 2021 on the draft of the 2021 regulations. That consultation also asked respondents if community councils who are eligible to exercise the general power of competence should be authorised to use the general power for a commercial purpose, subject to the same additional conditions as principal councils.
- 5.2. The formal consultation document and the draft regulations were provided in English and Welsh on the Welsh Government website and the link was sent to all community and town councils in Wales, as well as a range of other stakeholders including principal councils, One Voice Wales, The Society for Local Council Clerks, Audit Wales and the National Association of Local Councils.

5.3. The majority of respondents to the consultation agreed for the opportunity for eligible community councils to be able to consider commercial opportunities.

5.4. A summary of the consultation responses is available [here](#).

6. REGULATORY IMPACT ASSESSMENT (RIA)

6.1. A Regulatory Impact Assessment (RIA) was prepared as part of the 2021 Regulations, which assessed the impact on principal councils. This regulatory impact assessment considers the impact on amending the 2021 Regulations to include 'eligible community councils'. Two options were considered:

- Option 1: Maintain the status quo.
- Option 2: Make the General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2022 as presented in the draft Regulations

Option 1: Maintain the status quo

6.2. Under this option, a principal council would be required to:

- before exercising the power, prepare and approve a business case in support of the proposed exercise of the power;
- publish the approved business case as soon as reasonably practicable; and
- where it has supplied anything to the company through which the general power is being exercised, recover its costs from that company

6.3. However, eligible community councils would not be subject to any additional conditions when doing a thing for commercial purpose in the exercise of the general power of competence.

6.4. Instead, eligible community councils would only be required to comply with the limitations, restrictions and conditions prescribed on the face of the 2021 Act (or in any other regulations made by the Welsh Ministers under their powers in the 2021 Act) when using the general power to do something for a commercial purpose. The use of the general power to do something for a commercial purpose would be otherwise unfettered.

Costs

6.5. There are no additional costs associated with this option.

Benefits

6.6. This option would deliver no additional benefits.

Option 2: Make the General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2022 as presented in the draft Regulations

6.7. Under option 2, Regulations would be made to extend the definition of authority in the 2021 Regulations to include eligible community councils, to provide that:

- before exercising the power, qualifying authorities, namely a principal council or an eligible community council, must prepare and approve a business case in support of the proposed exercise of the power;
- the approved business case is published as soon as reasonably practicable; and
- where an authority has supplied anything to the company through which the general power is being exercised, the authority must recover its costs from that company

6.8. The business case would be required to detail, by way of a comprehensive statement:

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

Costs

6.9. It is anticipated that the requirements of the Regulations may result in some additional opportunity and administrative costs for eligible community councils that chose to do something for a commercial purpose.

6.10. It is envisaged that the majority of business cases would be prepared 'in-house' by eligible community councils and as such the costs would be in respect of staff time to complete this work. Where an 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.

- 6.11. The general power is an enabling power, giving authorities 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.
- 6.12. The requirement to recover costs from the company through which the authority is doing something for a commercial purpose may result in some administrative costs to the eligible community council, if a council has chosen to set up a company. It is anticipated these costs would be nugatory as it is expected that eligible community councils will either use existing systems in place to complete this task or create new systems as part of establishing the company. The qualifying conditions for eligible community councils provide assurances that the council is equipped to manage these. This requirement will also result in a financial transfer from the company to the eligible community council, with the value reflecting the costs incurred by the council in support of the commercial activity.
- 6.13. The Welsh Government consulted on the draft regulatory impact assessment for the 2021 Regulations and there was no evidence provided to suggest how the RIA could be further refined regarding estimated costs of preparing a business case. Such costs would be subject to the complexity of the business case involved.

Benefits

- 6.14. The preparation and approval of a business case before eligible community councils exercise the general power of competence for a commercial purpose would help ensure that authorities 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.
- 6.15. The budgets of community councils are much smaller than that of principal councils and the proposal may represent a significant proportion of their budget and this greater risk. Therefore, the requirements of the business case provide extra assurance to the eligible community council and electorate that the proposal is affordable.
- 6.16. While an eligible community council might reasonably support the start-up of 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 the council recover the full costs of any support or services it provides to the company through which the general power is being exercised for a commercial purpose will help ensure this does not occur.