

Explanatory Memorandum to the General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2021

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 subordinate legislation 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 General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2021. I am satisfied that the benefits justify the likely costs.

Rebecca Evans MS

Minister for Finance and Local Government

28 September 2021

PART 1

1. Description

These regulations prescribe additional conditions that a principal council must meet before exercising the general power of competence to do things for a commercial purpose.

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

None.

3. Legislative background

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.

The Local Government and Elections (Wales) Act 2021 (Commencement No. 1 and Saving Provision) Order 2021, which was made on 3 March, brings the general power into force for principal councils on 1 November 2021 and eligible community councils on 5 May 2022.

The powers enabling these Regulations to be made are contained in sections 28(4), 28(5)(b) and 28(6)(c) of the 2021 Act.

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)). 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 description of a particular local authority that is a qualifying local authority. These regulations apply only to principal councils (within the meaning of section 171(1) of the 2021 Act). It is the intention of the Welsh Government to amend these regulations prior to 5th May 2022 to extend them to eligible community councils.

In accordance with section 28(7) of the 2021 Act, the Welsh Ministers have consulted with such organisations and persons that are likely to be affected by these Regulations.

These Regulations are subject to the affirmative procedure by a resolution of Senedd Cymru in accordance with section 174(5)(b) of the 2021 Act, and come into force on 1 November 2021.

4. Purpose and intended effect of the legislation

Requiring additional conditions to be met before qualifying authorities exercise the general power for a commercial purpose is intended to ensure they take appropriate steps to consider the implications and risks of their proposed exercise of the general power.

Before exercising the general power for a commercial purpose, a qualifying authority must:

- Prepare and approve a business case in support of the proposed exercise of the power. The Regulations set out the requirements for the business case.
- Publish the business case as soon as reasonably practicable following its approval.
- 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.

The intention is for the Regulations to provide an appropriate level of definition whilst maintaining flexibility for business cases to be proportionate relative to the complexity of each case.

5. Consultation

A 12 week consultation ran from 22 March to 11 June 2021 on the draft Regulations. The consultation was drawn to the attention of a wide audience of key stakeholders including principal councils; community and town councils; representative bodies; audit, inspection, and regulatory bodies; and Trade Unions. There is broad support for the regulations as drafted, with comments concurring that the draft regulations cover broadly the right things, although there was some concern that regulation 2.2 was not sufficiently specific.

Two amendments to the regulations have been drafted following analysis of the responses. They are:

- To publish any business case approved in accordance with regulation 2(1)(b) as soon as reasonably practicable.
- The business case is also to include:
 - 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
 - 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..

The consultation documents and a summary of the responses are available at: <https://gov.wales/local-authority-power-trade>

PART 2 – REGULATORY IMPACT ASSESSMENT

6. Options, costs and benefits

This regulatory impact assessment considers two options:

- Option 1: Maintain the status quo.
- Option 2: Make the General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2021 as presented in the draft Regulations

Option 1: Maintain the status quo

Under this option the authorities would not be subject to any additional conditions when doing a thing for commercial purpose in the exercise of the general power of competence.

Authorities would 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.

Costs

There are no additional costs associated with this option.

Benefits

This option would deliver no additional benefits

Option 2: Make the General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2021 as presented in the draft Regulations

Under option 2 Regulations would be made to provide that:

- before exercising the power, an authority, namely a principal council, must 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 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

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

It is anticipated that the requirements of the Regulations may result in some additional opportunity and administrative costs for local authorities.

It is envisaged that the majority of business cases would be prepared 'in-house' by authorities and as such the costs would be in respect of staff time to complete this work. Where an authority was considering doing a particularly large or complex thing for a commercial purpose they may consider engaging external contractors which would involve additional costs.

A key factor in calculating the costs to authorities of complying with these requirements will be the frequency at which they seek to exercise the general power to do something for a commercial purpose and the complexity of what they were seeking to do.

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.

Currently principal councils are required, under the Local Government (Best Value Authorities) (Power to Trade) (Wales) Order 2006 ("the trading order"), to prepare and approve a business case before exercising the power to trade provided to them in that order.

Principal councils have been able to trade under the trading 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 these Regulations would give rise to any transitional costs (such as familiarisation or training costs) to authorities.

These Regulations will require principal councils to comply with the same requirements whether they are undertaking a trading operation under the power to trade provided in the trading order or in exercise of the general power of competence. Where an authority wishes to trade in relation any of their ordinary functions they would be subject to the requirements of the trading order.

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 authority. It is anticipated these costs would be nugatory as it is expected that authorities would already have the relevant systems in place to complete this task. This requirement will also result in a transfer from the company to the local authority, with the value reflecting the costs incurred by the authority in support of the commercial activity.

The Welsh Government consulted on the draft regulatory impact assessment 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

The preparation and approval of a business case before authorities 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.

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 general power is being exercised for a commercial purpose will help ensure this does not occur.