

Local Government & Public Services Committee

LGPS(2)-01-06(p.2)

Date: Thursday 12 January 2006

Venue: Committee Room, National Assembly for Wales

Title: The Local Government (Best Value Authorities) (Power to Trade) (Wales) Order 2006

Purpose

1. To provide the Committee with an opportunity to scrutinise the draft order, in accordance with its request to do so, before it goes to Business and Legislation Committees, and Plenary, for approval.

Summary

2. That the Committee should consider the purpose and content of the draft Order, and to agree that it should proceed to both Business and Legislation Committee then the Plenary under the standard procedure.

Purpose of Draft Order

3. The purpose of this order is to confer on local authorities, fire and rescue authorities and national park authorities in Wales the general power to trade for a profit in services which the authority is not legally obliged to provide.

Summary of what the Draft Order does

4. The draft Order makes provision under sections 95, 96 and 123 of the Local Government Act 2003 that will allow authorities to trade in any of their normal functions for a profit, after a business case has been put before Council for approval. It also imposes certain restrictions on the way in which local authorities may exercise the power.

Timetable for Progressing Draft Order

5. It is intended that Business Committee should consider the Draft Order after Tuesday 28th February 2006, the Legislation Committee after Tuesday 14th March 2006, and in Plenary under the standard procedure after Tuesday 28th March 2006.

Financial Implications

6. There are no financial implications associated with the making of the draft Order.

Action for Subject Committee

7. To consider and scrutinise the purpose and effect of the Draft Order, prior to it passing to Business and Legislation Committees and to Plenary. A copy of the Draft Order, draft Explanatory Memorandum and Regulatory Impact Appraisal are at Annexes A-C respectively.

Sue Essex AM**Minister for Finance, Local Government and Public Services**

Contact point: John Palmer - Local Government Policy Division ex. 3609

NATIONAL ASSEMBLY FOR WALES

S T A T U T O R Y I N S T R U M E N T S

2006 No. (W.)

**LOCAL GOVERNMENT,
WALES**

**The Local Government (Best Value
Authorities) (Power to Trade)
(Wales) Order 2006**

EXPLANATORY NOTE

(This note is not part of the Order)

This Order applies to best value authorities in Wales which are county councils, county borough councils, National Park authorities and fire and rescue authorities.

Article 2 authorises a best value authority to which the Order applies to trade in any of its ordinary functions subject to conditions requiring the prior preparation and approval of a business case, and the recovery of any costs incurred by the authority in anything it supplies, including accommodation, goods, services or staff, to a company through which the trading power is exercised. Under section 95(4) of the Act, the power to trade must be exercised through a company.

2006 No. (W.)

**LOCAL GOVERNMENT,
WALES**

**The Local Government (Best Value
Authorities) (Power to Trade)
(Wales) Order 2006**

Made

2006

Coming into force

1 April 2006

The National Assembly for Wales, in exercise of the powers conferred on it by sections 95, 96 and 123 of the Local Government Act 2003⁽¹⁾, hereby makes the following Order:

Title, commencement and application

1.—(1) The title of this Order is the Local Government (Best Value Authorities) (Power to Trade) (Wales) Order 2006 and it comes into force on 1 April 2006.

(2) This Order applies in relation to best value authorities in Wales⁽²⁾ which are —

- (a) county councils and county borough councils;
- (b) National Park authorities; and
- (c) Fire and rescue authorities constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004⁽³⁾ or a scheme to which section 4 of that Act applies.

Power to trade in function-related activities

2.—(1) Subject to paragraphs (2) and (3), a best value authority is authorised to do for a commercial purpose anything which it is authorised to do for the purpose of carrying on any of its ordinary functions⁽⁴⁾.

⁽¹⁾ 2003 c.26.

⁽²⁾ See section 124 of the Local Government Act 2003 for the definition of “best value authority”.

⁽³⁾ 2004 c.21.

⁽⁴⁾ See section 95(7) of the Local Government Act 2003 for the meaning of “ordinary functions”.

(2) Before exercising the power conferred by paragraph (1), the best value authority must —

- (a) prepare a business case in support of the proposed exercise of that power; and
- (b) approve that business case.

(3) A best value authority must recover the costs of any accommodation, goods, services, staff or any other thing that it supplies to a company⁽⁵⁾ in pursuance of any agreement or arrangement to facilitate the exercise of the power conferred by paragraph (1).

(4) In this article “business case” means a comprehensive statement as to —

- (a) the objectives of the business;
- (b) the investment and other resources required to achieve those objectives;
- (c) any risks the business might face and how significant these risks are; and
- (d) the expected financial results of the business, together with any other relevant outcomes that the business is expected to achieve.

Signed on behalf of the National Assembly for Wales
under section 66(1) of the Government of Wales Act
1998⁽⁶⁾

Date

The Presiding Officer of the National Assembly

⁽⁵⁾ See section 95(4) of the Local Government Act 2003 for the meaning of “company”.

⁽⁶⁾ 1998 c.38.

To: Business Committee

From: Sue Essex AM
Minister for Finance, Local Government and Public Services

EXPLANATORY MEMORANDUM

THE LOCAL GOVERNMENT (BEST VALUE AUTHORITIES)(POWER TO TRADE) (WALES) ORDER 2006

Summary

The purpose of this Order is to confer the power to trade on welsh local authorities, under sections 95, 96 and 123 of the Local Government Act 2003.

1. This Memorandum is submitted to the Assembly's Business Committee in relation to The Local Government (Best Value Authorities)(Power to Trade) (Wales) Order 2006.
2. A copy of the Instrument is submitted with this Memorandum.

Background

3. Local authorities have only limited powers to charge for the services that they provide. In the absence of any power to do so which relates to a specific function or service (such as the power to charge for the collection of commercial waste), they may rely on section 93 of the Local Government Act 2003. Under this provision, local authorities may charge for non-mandatory services (that is, services which the authority is not legally obliged to provide). Authorities must seek to recover costs in doing so, but may not seek to make a profit. This power has been available to all Welsh authorities since the commencement of the Act in 2003

4. Sections 95 and 96 of the same Act allow the Assembly by order to confer on Welsh local authorities the power to provide non-mandatory services on a wholly commercial basis, and to retain any profits which accrue from that. Such 'trading activity' would need to be carried out through an arms-length company, not by the local authority directly. This draft order would confer that power, and subject it to certain restrictions.

Enabling Power

5. The powers enabling this Order to be made are contained in sections 95, 96 and 123 of the Local Government Act 2003. These powers have been conferred on the National Assembly for Wales.

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Effect

6. Article 1 of the order details the bodies, which would receive the power to trade as described above (unitary authorities, fire and rescue authorities and National Park authorities in Wales).

7. Article 2(1) of this order confers on Welsh local authorities (including National Park authorities and fire and rescue authorities) the power to trade as described above.

8. Article 2(2) of the order requires an authority to prepare and approve a business case for the use of trading powers before trading can commence. Unitary authorities would need full Council approval of the business case. Article 2(4) sets out in broad terms the purpose and content of such a business case, although we propose to augment that by means of statutory guidance.

9. Article 2(3) prohibits local authorities from subsidising their trading operations on a continuing basis. While local authorities would be permitted to offer support to local authority companies, which carried out a trading operation, they must recover the full cost of doing so from the company. If an authority were to provide such a subsidy, it could also breach competition law and possibly the law on State aids. That might in turn give grounds for removal of the power to trade from that authority.

Target Implementation

10. It is intended that the proposed order will be made on Tuesday 28th March 2006 to come into force on Saturday 1st April 2006. For budgeting and accounting reasons, it would be convenient, but by no means essential, for the order to come into force at the start of a financial year

Financial Implications

11. There are no additional financial implications for the Assembly Government as a result of passing this order..

12. For local authorities, Fire & Rescue and National Park Authorities, the cost of setting up a trading company and would need to be given careful consideration in the business case.

13. The potential costs to those with whom local authorities might trade is necessarily unquantifiable at this stage. Some responses to the consultation expressed concern that conferring the power to trade might lead local authorities to charge for services that they currently provide free – the example given was of local authorities providing administrative services to voluntary-sector bodies.

14. It is implicit in the power to trade that, if used, it leads to the levying of charges on those with whom the authority chooses to trade. However, it does not appear likely that conferring the power would of itself lead to the levying of charges on those who could not meet them. There are several reasons for this:

- the powers to trade do not and cannot empower a local authority to trade in a service which it is obliged by law to provide. A local authority could not, for instance, trade in school education, provision of council housing or collection of domestic waste:

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- a local authority can already – under powers in s93 of the Local Government Act 2003 – charge for any discretionary service so as to recover the costs of its provision. There is thus no guarantee that such services will continue to be provided free of charge (if they are provided at all), regardless of whether the power to trade is conferred; and
- establishing and running a trading operation would be a major decision for any local authority to take, requiring the formation and running of an arms'-length company and the acceptance a relatively high degree of financial risk. It is not a step that a local authority could take quickly or lightly, and it appears likely that trading would only be justified in cases where there was a reasonable prospect of a significant and reliable revenue stream. It is not an approach that would lend itself to, for instance, the provision of relatively small-scale support services to the voluntary sector.

15. Nonetheless, we would propose to include in statutory guidance on the power to trade a requirement for local authorities to consult those who would be affected by any proposed trading operation as part of the formulation of the business case.

Regulatory Appraisal

16. A Regulatory Appraisal has been carried out in relation to this Instrument and is attached .

Consultation

With Stakeholders

17. A consultation was undertaken between 18 November 2004 and 7 February 2005 containing proposals to confer the power to trade. The majority of the 18 respondents supported the proposal to confer the power.

18. Three organisations, the Transport and General Workers Union (TGWU), The Federation of Small Businesses (FSB) and the Wales Council for Voluntary Action (WCVA), believed that conferring the power could have serious implications for their interests.

19. The TGWU stated their concern that the exercise of trading powers could seriously disadvantage their members, in terms of poorer terms and conditions or less job security. That, again, would depend on the way in which a local authority proposed to exercise the new power: it is by no means certain that this would entail any permanent transfer of staff to a local authority company, let alone any deterioration in terms and conditions. As with anti-competitive behaviour, it is thus not possible or appropriate to respond to such concerns in the making of the order. If, however, they were borne out by local authorities' exercise of the power, the Assembly Government would consider using its direction-making powers in sections 101 and 102 of the Act so as to regulate and protect the terms and conditions of staff transferring to a local authority company.

20. The FSB and the WCVA expressed concerns over what was seen as unfair competition from the public sector. Their concerns are addressed above.

With Subject Committee

21. This Order was notified to the Finance, Local Government and Public Services Committee via the list of forthcoming legislation, paper LGPS-06-05(p2),

D R A F T

Item 2 at it's meeting of 8th June 2005, and has remained ever since. The Committee identified this Order for detailed scrutiny due to take place Thursday 12th January 2006.

Recommended Procedure

22. Subject to the views of the Business Committee I recommend that this Order proceed to Plenary under the Standard Procedure.

Compliance

23. The proposed Order will (as far as is applicable):
- Have due regard to the principle of equality of opportunity for all people (Government of Wales Act 1998, Section 120);
 - be compatible with the Assembly's scheme for sustainable development (Section 121);
 - be compatible with Community law (Section 106);
 - be compatible with the Assembly's Human Rights legislation (Section 107) and
 - be compatible with any international obligations binding the UK Government and the Assembly (Section 108).
24. The information in this memorandum has been cleared with the Directorate of Legal Services (DLS) and the Assembly Compliance Officer (ACO).

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Head of Division: John Palmer, ext. 3609

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REGULATORY APPRAISAL

LOCAL GOVERNMENT, WALES

THE LOCAL GOVERNMENT (BEST VALUE AUTHORITIES)(POWER TO TRADE)(WALES) ORDER 2006

Purpose and Intended effect of the measure

1. The purpose of this Order is to confer on local authorities, fire and rescue authorities and national park authorities in Wales the general power to trade for a profit in services which the authority is not legally obliged to provide.

Background

2. The Local Government Act 2003 contains two new powers for local authorities:
 - a general power to charge for discretionary services⁷ so as to recover the costs of their provision. The Act confers this power on all local authorities without the need for further subordinate legislation;
 - a power to trade for a profit in discretionary services, and to retain any profits accruing from that. This power is only available to those authorities on which it is conferred by order made (in Wales) by the National Assembly for Wales. Such an order may impose limits or conditions as to:
 - the authorities which are to receive the power;
 - the services in respect of which they may trade;
 - the manner in which they must exercise the power to trade.
3. The Act also provides that a local authority must conduct trading operations through a local authority company (as defined in Part V of the Local Government and Housing Act 1989). It cannot do so directly.
4. In England the power to trade has been conferred by Statutory Instrument 2004 No. 1705, which came into force on 29th July 2004. The power was limited to local authorities and excluded fire and national park authorities and was subject to conditions set under section 96 of the Act. It was also exercised within the framework of the annual Comprehensive Performance Assessment (CPA). Authorities classed as being “*excellent*”, “*good*”, or “*fair*” under the CPA would be given the power and those classed as “*weak*” or “*poor*” would not be given the power. Under the Act authorities moving from one of the three higher categories to one of the lower ratings would lose the right to trade if they were unable to regain the higher rating within two years.
5. Trading powers for local authorities in Scotland are governed by devolved legislation passed by the Scottish Parliament and are not directly comparable.

⁷ That is, any service which an authority has the express power to provide, without being under a statutory duty to do so.

Risk Assessment

6. The order does not aim to avert or minimise any positive risk or hazard. However, if it were not made then the trading powers contemplated by the 2003 Act would continue to be unavailable to Welsh local authorities, unlike their equivalents in England. That would deny them a potentially valuable model for local service delivery, which could in turn limit the quality and efficiency of those services. Failure to make the order would also be inconsistent with the Assembly Government's policy of granting appropriate flexibilities and freedoms to local authorities to enable them to respond fully to local needs and priorities.

7. The risks of conferring the power are harder to assess. In many cases, possible risks arise from decisions by local authorities to utilise the powers, which would be conferred, rather than directly from the conferral of those powers. The breadth of uses to which the trading powers could in theory be put makes it difficult, if not impossible, to assess the associated risks with any degree of accuracy at this stage. Nor would it be appropriate in principle for the Assembly Government to be accountable for decisions taken by individual local authorities in pursuance of their powers, or to seek in advance to assess the risks arising from them. Rather, it would be for authorities themselves in each case to be satisfied that the exercise of the power to trade was appropriate and justified. Nonetheless, it is possible to identify two broad areas of concern:

- that a local authority embarks on trading operations without having fully considered the possible costs and benefits to itself and to others;
- that a local authority conducts trading operations in a way which unfairly disadvantages other suppliers and/or distorts the local market.

8. These point clearly to the need for two broad safeguards, which would need to accompany the conferral of the power:

- a duty on local authorities to examine fully the costs and benefits to itself and to others of any proposed trading operation, before it begins, and to encapsulate that analysis in a business case which the authority would need to approve in full Council;
- a bar on local authorities providing continuing subsidies or other support to their trading operations. Local authorities would of course also be subject to competition law and the law on State aids in the usual way.

Options

9. Option 1 – Do nothing

Not legislating at all would avoid all of the possible costs outlined below but would realise none of the benefits. As we believe the benefits significantly outweigh the costs, we do not believe this option is defensible.

10. Option 2 - Confer the power on selected local authorities, as in England

Under this mechanism, Assembly Government would need to develop mechanisms to judge either the broad fitness of local authorities to conduct trading operations, or the specific suitability of individual proposals to do so in order that it could confer the power to trade selectively.

There is no equivalent in Wales to the English Comprehensive Performance Assessment, which rules out adopting the English approach wholesale. Nor do we believe that an overall assessment of a local authority's performance is necessarily any guide as to its fitness to conduct specific trading operations.

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While it might be feasible for the Assembly Government to approve individual proposals to trade, this approach would necessarily be lengthy and bureaucratic. There must also be doubt as to whether approval by the Assembly Government would add any value to local decision-making; and a risk that such approval could confer an effective warranty on individual trading operations, perhaps giving them an unreasonable competitive advantage.

We do not therefore believe that this option is feasible.

11. Option 3 - Make the Legislation

This would entail conferring the power on all Welsh authorities. An authority's broadly-assessed performance would not determine whether it would receive the power to trade.

The WPI would be used as a means to assess the use to which the right to trade had been put, and might provide evidence in extreme cases of the need to withdraw the power.

Benefits

12. The power to trade offers local authorities another option for service delivery and thus potentially improves the quality and range of services offered by authorities. It also opens up the possibility of local authorities raising additional revenue from commercially-sustainable operations, and to avoid having to support from public funds those services which could properly be provided on commercial terms. Conferring the powers will also assist the development of a dynamic and entrepreneurial public sector.

Costs

13. There are no additional financial implications for the Assembly Government as a result of passing these Regulations.

14. For local authorities, Fire & Rescue and National Park Authorities, the cost of setting up a trading company and would need to be given careful consideration in the business case.

15. The potential costs to those with whom local authorities might trade is necessarily unquantifiable at this stage. Some responses to the consultation expressed concern that conferring the power to trade might lead local authorities to charge for services that they currently provide free – the example given was of local authorities providing administrative services to voluntary-sector bodies.

16. It is implicit in the power to trade that, if used, it leads to the levying of charges on those with whom the authority chooses to trade. However, it does not appear likely that conferring the power would of itself lead to the levying of charges on those who could not meet them. There are several reasons for this:

- the powers to trade do not and cannot empower a local authority to trade in a service which it is obliged by law to provide. A local authority could not, for instance, trade in school education, provision of council housing or collection of domestic waste.
- a local authority can already – under powers in s93 of the Local Government Act 2003 – charge for any discretionary service so as to recover

the costs of its provision. There is thus no guarantee that such services will continue to be provided free of charge (if they are provided at all), regardless of whether the power to trade is conferred;

- establishing and running a trading operation would be a major decision for any local authority to take, requiring the formation and running of an arms'-length company and the acceptance a relatively high degree of financial risk. It is not a step that a local authority could take quickly or lightly, and it appears likely that trading would only be justified in cases where there was a reasonable prospect of a significant and reliable revenue stream. It is not an approach that would lend itself to, for instance, the provision of relatively small-scale support services to the voluntary sector.

17. Nonetheless, we would propose to include in statutory guidance on the power to trade a requirement for local authorities to consult those who would be affected by any proposed trading operation as part of the formulation of the business case.

Equity and Fairness

18. There are no issues affecting equity or fairness.

Competition Assessment

19. The results of applying the competition filter indicates that the proposed order would have no adverse effects on competition, and that a full competition assessment is unnecessary.

20. As some responses to our consultation exercise suggested, in contrast, that competition could be adversely and unfairly affected by conferring the power to trade, we set out below in more detail our reasons for arriving at this conclusion:

- It is again important to distinguish between the general conferral of the power on local authorities, and each particular instance of its exercise by local authorities. Only if there were any evidence that local authorities in general would be likely to use the power so as to affect competition adversely could we conclude at this stage that the order would have adverse effects. There is no such evidence, and the further provisions of the order render such a development most unlikely;
 - The order would debar local authorities from providing any continuing subsidy to a local authority company carrying out trading operations: the authority would need to recover from the company the full cost of any support, assistance or resources it chose to provide. The order would also require a local authority to set out the terms of such support, and the proposed means of recovering the cost of it, in its business case for each trading operation;
 - The power to trade would only be exercisable through a local authority company, which will be subject to regulation in the normal way (eg as regards corporate governance, competition law and liability for corporation tax). This will help ensure a level playing field with the private sector;
 - Early evidence from England suggests that the power is unlikely to be used widely. The Local Government Association conducted a survey in 2004 which found that only 2% of eligible local authorities in England were making use of the power, with a further 18% having some plans to do so. Figures for Wales would if anything tend to be lower than these, given the smaller average size of Welsh authorities compared to their English counterparts.

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Low levels of usage of the power would necessarily minimise any adverse competitive effects.

21. On the other hand, there may be a number of beneficial competition effects arising from the order. The new powers could lead to increased contestability and/or increased competition in markets. Greater levels of trading by authorities could lead to efficiency gains through increased economies of scale, and so could benefit consumers through lower prices, better quality, or both.

Consultation With Stakeholders

22. A consultation was undertaken between 18 November 2004 and 7 February 2005 containing proposals to confer the power to trade. The majority of the 18 respondents supported the proposal to confer the power.

23. Three organisations, the Transport and General Workers Union (TGWU), The Federation of Small Businesses (FSB) and the Wales Council for Voluntary Action (WCVA), believed that conferring the power could have serious implications for their interests.

24. The TGWU stated their concern that the exercise of trading powers could seriously disadvantage their members, in terms of poorer terms and conditions or less job security. That, again, would depend on the way in which a local authority proposed to exercise the new power: it is by no means certain that this would entail any permanent transfer of staff to a local authority company, let alone any deterioration in terms and conditions. As with anti-competitive behaviour, it is thus not possible or appropriate to respond to such concerns in the making of the order. If, however, they were borne out by local authorities' exercise of the power, the Assembly Government would consider using its direction-making powers in sections 101 and 102 of the Act so as to regulate and protect the terms and conditions of staff transferring to a local authority company.

25. The FSB and the WCVA expressed concerns over what was seen as unfair competition from the public sector. Their concerns are addressed above.

With Subject Committee

26. This Order was notified to the Finance, Local Government and Public Services Committee via the list of forthcoming legislation paper LGPS-06-05(p2), Item 2 at its meeting of 8th June 2005, and has remained ever since. The Committee identified this Order for detailed scrutiny due to take place Thursday 12th January 2006.

Monitoring and Review

27. The Assembly Government and partners will keep local authorities' use of the power to trade under review. In extreme cases (such as serious mismanagement of a local authority company), the Assembly Government reserves the right to withdraw the power to trade from named authorities, as an option of last resort.

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Summary

28. The proposed amendments to the existing Power to Trade for local authorities will provide local authorities, Fire & Rescue Authorities and National Park Authorities with the opportunity to trade on a commercial basis and improve quality of service provision to the citizen, in keeping with the principles set out in Making the Connections.