

Enterprising councils

Getting the most from trading and charging
2012 edition



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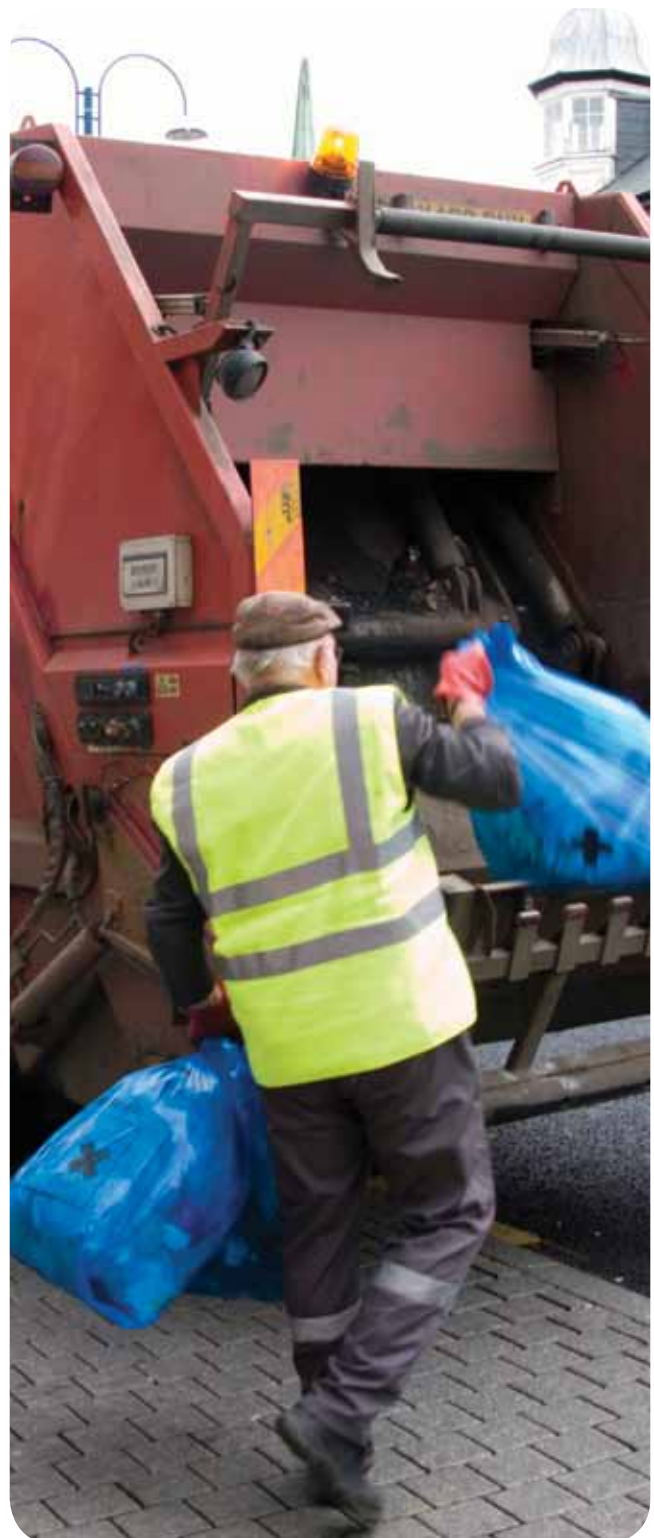
What is an enterprising council?

Every council is an enterprising council in one way or another. Councils have led the way in the public sector, demonstrating initiative and resourcefulness to rise to the social, economic and environmental challenges that our communities are facing.

It is this willingness to not just think about doing things differently but to actually take action that has made local government the most efficient part of the public sector.

The Localism Act 2011 introduces a new General Power of Competence (GPC), which explicitly gives councils the power to do anything that an individual can do which is not expressly prohibited by other legislation. This activity can include charging or it can be undertaken for a commercial purpose, and could be aimed at benefiting the authority, the area or its local communities.

By giving councils the flexibility to act in their own financial interests, the GPC will allow councils to do more than was previously sanctioned under wellbeing powers. This guide will focus on how councils, on their own or working with other public bodies, can be enterprising by increasingly trading and charging.



Why does this matter to councillors and senior officers?

We all know that in the decade ahead public services will need to adjust to significantly lower levels of central funding than in the past. The Chancellor of the Exchequer confirmed in Budget 2012 that significant cuts to departmental spending can be expected at least through to 2016/17. As it is, local authorities are absorbing a 28 per cent cut to their core funding while facing mounting pressures across service areas like adult social care, safeguarding children and waste management. Cuts to Government grant have been further exacerbated by a loss of revenue from existing fees and charges.

At the same time, councils are facing tough decisions about their council tax rates. Given that all services are effectively paid for by the taxpayer, the service user or both, it makes sense to consider whether it would provide more fairness to the taxpayer to ask those who benefit from a service to cover part or even all of its costs.

Across councils, officers and members are becoming more and more commercial in their acumen, outlook and skills to meet future funding challenges. **Trading (ie to generate efficiencies, surpluses and profits) and charging (ie to recover the costs of providing a discretionary service)** are important options on the menu of innovative ways of working to meet local needs through delivering value for money, sustaining communities and providing choice.

Councillors are playing a critical role, providing leadership to their councils and local partners during these much tougher times. In this context, there are no easy choices. But where choices have to be made they are best made locally by elected representatives who are in daily contact with the people they serve.

How can this guide help?

This guide is designed to help councillors and senior officers work together to navigate their way through difficult choices to be made about engagement in trading activities and charging for services.

In this updated version we will look at:

- The legal options councils currently have for trading and charging including the most recent rule changes introduced by the GPC under the Localism Act 2011.
- Examples of good practice from councils across the country to help your authority prepare to introduce new trading or charging arrangements.

We need to point out that this short guide is not intended to be a definitive statement of the law and, as ever, councils need to **take their own legal and financial advice**.

The contents of this guide apply only to **England**; different arrangements are in force in Wales, Scotland and Northern Ireland.



Preparing to trade or charge

Whether your council is thinking about generating income through trading or charging, you will need to consider:

What are you trying to achieve?

Delivering value for money

Keeping pace with local citizens' expectations is an uphill struggle when central funding is reducing. Exploring new and more efficient ways of working through collaboration between public bodies may be one approach. Generating additional income is another choice available to councils and other public sector partners. That is why it is important to consider all the options for trading and charging.

Profits and surpluses generated through trading activities can be used to help hold down council tax and/or can be directed into frontline services. Income generated from charging for the costs of supplying discretionary services can also help the council's financial position.

Sustaining communities

In some parts of the country communities struggle to thrive because the market does not supply the services local people need at a price they can afford to pay. The recent recession showed this in sharp relief. Market failure of this kind needs to be addressed if communities are to be kept viable.

In many areas, enterprising councils have stepped in to correct market failure of this kind by providing services themselves. For example, Essex Cares Limited, a trading company owned by Essex County Council, provides support for over 100,000 Essex citizens every year. The business, formed in July 2009, provides services supporting people to live active lives and remain independent at home.

By entering the market the council may be seeking to moderate prices for essential services. This may be necessary where the absence of competition means that price rises are not being kept in check. The Localism Act 2011 now supplements and strengthens the statutory powers of councils to offer alternative solutions.

The delivery of discretionary services, charged for on a cost-recovery basis, is an option for councils faced with a challenge of this kind. Charges may be subsidised where this is merited. Establishing a local authority commercial trading company primarily to make profits is another option although the commercial purpose of this type of trading entity means that it would not suit every situation.

Providing choice

Individual citizens and local communities vary widely in their needs and aspirations. Councils seek to be responsive by tailoring services and offering choice where appropriate.

For example, a council might decide to provide a new discretionary service, that is an addition to or enhancement of a statutory service, and then charge for it. The additional service could be requested by an individual or collectively by a neighbourhood. Using powers in this way, it is possible to make a discretionary service pay for itself through usage and demand. This approach will not be suitable for all services. Statutory duties arising from pre-existing legislation govern the provision of services and how their costs should be met. If such duties exist, they must continue to be observed.

Some councils are looking at establishing a trading enterprise to exploit existing skills and expertise to a wider market. Through a commercial trading company these councils hope to extend and improve the range of services offered and introduce new players into the market - for example other councils and businesses not necessarily based in the authority's area. Often the council will be exploring trading in a market or sector it already operates in (eg trading standards or social care). Sometimes it will seek to fill a gap in the market where it believes there is untapped demand for a particular service e.g. translation services offered to other public bodies or offering library transcription services for the blind and extending such service offers to banks, utility companies and other agencies so they can send out bills and statements in tape (or other suitable) format.

How will you involve relevant service users, communities and staff?

This is particularly important when charging for a service, where the costs previously have been met by council tax or other income. Charging for a discretionary service could be controversial and unpopular. Similarly increasing charges for existing services must be handled with care to prevent perceptions and accusations of taxation by stealth and potential legal challenge from interest groups and affected individuals.

Taking the time to adequately consult with the market and users of the service who are most likely to be affected by charging can help to mitigate some of these problems and avoid damage to relations with local communities. In some cases, there may also be a statutory requirement to consult if the activity is covered by a separate statutory code.

The following measures will help to meet concerns and opposition to charging and income generating initiatives:

- providing proper transparency and accountability of the charging regime
- explaining the context of the charges, how they have been assessed and the basis upon which charges have been calculated
- setting out the context within which the new (or additional) charges are being considered and what the income will be used for (eg to enhance a particular service such as libraries, leisure and recreational facilities or other discretionary services)

- demonstrate you have considered the impact of charges on different sections of the community
- undertaking thorough market research on what other councils are doing, what they are charging and what other private and voluntary bodies are doing in the same or similar markets
- being able to demonstrate that the end user is getting value for money despite the introduction of charges.

In 2007 Ipsos MORI completed research for the Audit Commission to explore residents' views towards service-specific charges: <http://tinyurl.com/dyhxhxa>

Meanwhile if you are looking to move staff from the council to form part of a local authority trading vehicle make sure you:

- consult early with staff, sell them the vision, listen to their suggestions and adapt proposals accordingly
- develop trust and commitment to the new organisation and take employees with you on the journey
- research and explain all issues relating to terms and conditions of employment, specifically pensions and other areas covered by the Transfer of Undertakings (Protection of Employment) Regulations (TUPE)
- ensure that staff who transfer to the new enterprise want to be there and are committed to its objectives.

From a workforce perspective the key to success when any organisation spins out of local government is effective employee engagement.

How does the law help you to achieve your objective?

Trading and charging for services has been a feature of local government for a considerable time. For example:

- **Specific powers** to charge for services are contained in a variety of local government statutes.
- Under the **Local Authorities (Goods and Services) Act 1970** councils were given powers to enter into agreements with each other and with a long list of other designated public bodies.
- The **Local Government Act 2003** added further possibilities. It enables councils to trade in activities related to their functions on a commercial basis with a view to profit through a company. In addition, the 2003 Act empowers councils to charge for any discretionary services on a cost recovery basis. Originally, trading through a company was confined to certain categories of councils but a Trading Order, in force since October 2009, removed such restrictions.
- The new **General Power of Competence (GPC) contained in the Localism Act 2011** now sits alongside local government's existing powers to trade and charge. Under the Localism Act 2011 commercial trading through a special purpose trading company is now an option open to many more public bodies including eligible parish councils, fire and rescue authorities, integrated transport authorities, passenger transport executives and economic prosperity boards in England. New powers contained in the Localism Act also provide the ability to charge for discretionary services on a cost recovery basis.

What is the General Power of Competence?

The Localism Act 2011 will repeal and replace wellbeing powers **in England but not in Wales**. The wellbeing powers, introduced in 2000, provided councils with powers to do anything they considered likely to promote or improve the economic, social or environmental wellbeing of the area. Whilst these powers were very widely drafted, litigation as to the proper scope of wellbeing caused some uncertainty.

The General Power of Competence (GPC) within the Localism Act 2011 removes these uncertainties. It simply states that: “A local authority has power to do anything that individuals generally may do”. It is worth noting that while the definition of a ‘local authority’ in the Act doesn’t explicitly reference unitary authorities and metropolitan borough councils these are captured by this definition by the references to district and county councils.

Through the GPC Parliament has expressly granted local authorities all the powers to do anything that an individual of full capacity generally may do (unless expressly prohibited by another statutory provision). Parliament has recognised the important indirect benefits to communities of giving councils the freedom and flexibility to act in innovative and resourceful ways. Consequently, the GPC effectively removes many of the unhelpful boundaries that have constrained their activities in the past (eg preventing a group of councils creating a

mutual insurance company) to enable local authorities to do things:

- anywhere in the UK or elsewhere
- for a commercial purpose or otherwise, or for a charge or without charge
- for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.

There are provisos to these new freedoms. For example, the GPC will not:

- provide local authorities with any new power to raise tax or precepts, or to borrow
- enable councils to set charges for mandatory services, impose fines or create offences or byelaws affecting the rights of others, over and above existing powers to do so.

Councils will need to determine whether any overlapping powers exist in other legislation. Overlapping powers enacted before the GPC may place ‘pre-commencement limitations’ on the GPC, but powers enacted after commencement will only apply to the general power if expressed to do so.

Despite these limitations, GPC is clearly designed to allow councils to get on with the job of working innovatively with others to drive down costs and meet local people’s needs. The Secretary of State retains a power within the Localism Act to make orders amending, repealing, revoking or dis-applying any statutory provision that prevents the GPC being used in this way. It is essential that local authorities are pro-active in helping Government identify any remaining unhelpful restrictions.

The remainder of this guide explores opportunities for trading and charging in

more detail to help you identify the best powers to achieve your objective.

Charging

There are **specific powers** to charge for services scattered throughout local government legislation. For example:

- section 19 of the Local Government (Miscellaneous Provisions) Act 1976 permits charging for the use of leisure and recreational facilities
- section 38 of the 1976 Act permits entering into agreements with other persons to make full use of local authority computers and equipment
- the Civic Restaurants Act 1947 permits district councils and London boroughs to run restaurants and otherwise provide for the supply to the public of meals and refreshments and use best endeavours to ensure its income is sufficient to cover its expenditure.

The **Local Government Act 2003** introduced a general power to charge for the provision of any discretionary service. The charging power is available to all 'best value authorities'. This includes all counties, unitary authorities, London boroughs, metropolitan boroughs, and districts councils alongside a number of other local authorities.

The charging powers do not apply to services which an authority is mandated or has a duty to provide. However, councils can charge for discretionary services (that is, services they have power to provide but are not obliged or have a duty to provide by law).

The recipient of the discretionary service must have agreed to pay for the provision of such services.

The 2003 Act power cannot be used where charging is prohibited or where another specific charging regime applies. Charging is limited to cost recovery and statutory guidance published in 2003 outlines how costs and charges should be established and that guidance remains in force (see Further Reading).

The charging provisions contained in the **Localism Act 2011** follow, very closely, the requirements of the 2003 Act to allow local authorities to charge up to full cost recovery for discretionary services. These provisions will continue side-by-side rather than replace the Local Government Act 2003 powers. The general power to charge is subject to a duty to secure that, taking one financial year with another, the income from charges does not exceed the costs of provision.

As with the 2003 Act powers, charging for things done in exercise of the GPC is not a power to make a profit from those activities. So authorities wishing to engage in commercial trading for profit will need to rely on other powers to trade, which are explored in the next section of this guide.

Rushcliffe Borough Council, Nottinghamshire

Rushcliffe, in common with many other councils, is faced with making significant cost savings. Charging for green waste was one of the many income generation projects that they hope will help with these challenging targets. The council had provided green bin collections as a free discretionary service to residents for many years but noticed they were also collecting a lot of nearly empty bins which was very inefficient. They decided to explore introducing a cost recovery charging scheme for customers who use the service frequently and who opt to pay for it.

They recognised that it was a challenge to introduce a charge for a previously free service. After researching the legal powers to charge for this service (in this case the Environmental Protection Act 1990 and the Controlled Waste Regulations 1992 Schedule 2) and examples of what some other Councils were doing in this area,

the council conducted Rushcliffe's largest ever customer contact exercise. The call centre was 'hot', proactive and non-stop. It received 17,500 calls in just four months – a 50 per cent increase over normal volumes. Rushcliffe received significant take up of the scheme with over 40 per cent of residents who agreed to the service opting to pay online, which is secure, efficient and fast.

The outcome: To date, performance has far exceeded Rushcliffe's expectations. The original target was set to get 15,000 homes signed up to the services based on experience from other councils however currently:

- 26,000 households have joined (over two-thirds of homes)
- many customers opted to buy extra bins as they are such good value for money
- expected target income has doubled to £670,000.

As the Rushcliffe example shows, one important consideration when introducing new charges is to find the most cost effective way to recover those charges – for example charging at the point of use and using online systems – to avoid additional administrative costs associated with recovering debts.

Trading

The legislation relevant to local authority trading uses the term ‘commercial purpose’ to describe trading activities. Government guidance suggests ‘commercial purpose’ means having a primary objective to make a profit from the trading activities in question.

In this guide, the term ‘trading’ is used much more broadly to cover a range of arrangements that councils might wish to enter into to make efficiencies through reducing costs; improving services for the benefit of users and, potentially, to generate profits. These may involve establishing new business relationships with other councils and public bodies or with the private sector, voluntary and community sector and individuals.

For councils considering a new trading venture it will be essential to first determine whether it is acting pursuant to a ‘commercial purpose’. If so, the law requires councils to pursue that commercial purpose via a company. If not, alternative arrangements to establishing a company are also explored below.

Trading within the public sector

The term ‘shared services’ in this guide means the provision of services from one public body to one or more others. The very important distinguishing feature of shared service arrangements is that such an enterprise will usually be exclusively comprised of public bodies who will not be seeking to sell services or goods to the general public or to any other party such as a private sector entity. In this way the market is contained, easily identified and limited in range and potential risk. The partners to such an arrangement will all be likely to be sharing the risk and rewards of the venture.

Shared service arrangements can be achieved either:

1. directly through a lead authority and joint committee arrangement, and/or
2. by agreement or contract, or
3. via a delivery vehicle such as a company.

1. The Local Government Act 1972, Section 101 permits local authorities to arrange for the discharge of their functions by a committee, sub-committee, an officer or by another local authority.

Many shared service arrangements are set up under these public administrative arrangements, usually with one of the authorities involved taking the lead.

The South West Audit Partnership

The South West Audit Partnership or 'SWAP' was formed in 2005 as a Joint Committee under the provisions of Section 101 of the Local Government Act 1972. The Partnership started with only two councils, although it was planned from the start for two more local authorities to join later in its first year of operation. The model chosen for the joint service delivery was originally intended for a relatively small partnership, for which the Joint Committee model is particularly well suited.

By working in partnership, SWAP aims to:

- provide a cost effective, high quality internal audit service to its partners
- strive to reduce costs without any negative impact on service delivery
- continually improve the quality of internal audit services to the partners
- share best practice ideas observed during the internal audit process
- ensure continuity of internal audit services to the partners in an equitable manner
- continually seek to improve the standard of corporate governance, risk management and internal control systems for all partners
- reduce net costs year-on-year.
- complete 95 per cent of planned audits on time and on budget
- attract new partners where it is beneficial both to the partnership and the prospective partner

- obtain non-partner contracted internal audit work that represents 10 per cent to 20 per cent of the total partnership budget.

Changing environment

The world in which SWAP operates is changing rapidly and will continue to do so. The 2010 Comprehensive Spending Review cuts across government departments required savings averaging 20 per cent over four years. SWAP has expanded significantly over its six year existence and has 12 partner authorities spanning four county council areas. SWAP Management Board members are considering the appropriateness of the current governance model and the options for incorporating the undertaking by way of a 'Teckal exempt' in-house trading vehicle owned by the participating members of the partnership.

Local Partnerships' options appraisal

Local Partnerships was commissioned by SWAP to assist with exploring the key options and issues, particularly in the light of the new powers and opportunities offered by the Localism Act 2011, to enable SWAP stakeholders and member local authorities to identify an option which most appropriately fits SWAP's requirements. In the light of the full options appraisal carried out, SWAP are conducting a member review to determine whether the partnership should continue its business through the current joint committee structure or alternatively, whether it should establish a Teckal compliant, wholly owned corporate vehicle to conduct future business by and between its public sector clients.

2. The Local Authorities (Goods and Services) Act 1970 remains the bedrock for establishing shared service or joint arrangements between two or more public bodies through an agreement or contract. It permits councils to enter into ‘agreements’ with other local authorities or other designated public bodies, for the provision of goods, materials and administrative, professional and technical services, for the use of vehicles, plant and apparatus and associated staff, and for the carrying out of maintenance. These powers remain particularly useful where authorities are seeking to provide goods or services of a relatively modest value to each other, and the costs and time associated with setting up a commercial trading company would be disproportionate.

The 1970 Act leaves it to the public bodies concerned to use an ‘agreement’ to set out payment terms or otherwise that the parties consider appropriate. This offers flexibility and does not limit arrangements to simply cost recovery. Some councils have established shared services enterprises through a combination of public administrative arrangement such as a joint committee under section 101 of the Local Government Act 1972 and an agreement using 1970 Act powers.

Local authorities (and indeed other public bodies) can use these powers to ‘test the waters’ and explore whether collaborative arrangements can be established which make for more effective and efficient working.

Tax and fiscal considerations will also be paramount here, as setting up a company creates a new statutory body which may (depending on the type of company established and the trading activities it carries out) be subject to the corporation tax regime and will be treated separately for VAT, National Non-Domestic Rates (NNDR) and stamp duty land tax purposes.

Using an agreement or joint committee structure where the arrangements are established for the better performance of public administration may also provide a better fit with the limited exceptions from EU procurement rules, known as the Teckal exemption, which is briefly outlined below.

Overall this approach provides time for joint enterprises in the public sector to evolve through a joint committee arrangement and/or by agreement whilst retaining the option to establish a company structure at some later date, if desired.

What is a Teckal exemption? In simple terms the Teckal exemption means where an authority or authorities set up arrangements, including wholly owned companies to supply services back to those authorities, in the same manner as an in-house arrangement. In these cases the EU procurement rules do not apply to those arrangements.

3. Setting up a company is another route by which public bodies can establish shared services arrangements. Public bodies could, for example, establish a company to perform a trading function of a specific and limited nature to provide services to its member/owners. 'Teckal' compliance features would need to be built into the constitution of the company to ensure its operations and management remain in the control of the owner/members and that the company supplies the significant proportion of its business to those owner/members.

This type of 'Teckal' company would not be expected (or permitted) to trade commercially with the public at large. Local authorities creating a Teckal company need to very clearly articulate what sort of enterprise they are intending to establish and what sort of custom or 'trade' that company would undertake to distinguish it from a more market orientated commercial trading undertaking.

Commercial trading companies, unlike companies set up for trading by and between local authority members would be outward facing and would seek to attract business from any source.

The GPC powers might be used to establish a company which is set up for non-commercial public administrative functions and which is to be wholly under the control of its member local authorities/ public bodies. The members should be able to engage with the company without going through a procurement exercise provided these arrangements are akin to 'in-house' arrangements to comply with the 'Teckal' exemption.



How do European Union procurement, state aid and competition laws impact on trading activities between public bodies?

EU Procurement issues

In brief, the EU procurement rules, (as implemented in the UK by the Public Contracts Regulations 2006) require a procurement process to be followed for the award of certain public works, supplies and services contracts. There is no exception from the rules simply because public bodies wish to supply services to one another.

The EU case of Teckal (C-107/98) does however, provide an exemption from the application of the procurement rules for so called 'in house' arrangements, where:

- the contracting authority exercises a control over the goods, services or works provider which is similar to that which it exercises over its own departments (the '**control test**') and
- at the same time, the provider carries out the essential part of its activities with the controlling contracting authority or authorities (the '**function test**').

In *Brent London Borough Council v Risk Management Partners Limited* [2011] ('Brent') the Supreme Court held that insurance contracts could be placed with a shared services company jointly owned and controlled by a group of local authorities and that, following the Teckal case, those contracts did not need to be tendered via the Official Journal of the European Union (OJEU).

The Teckal exemption is likely to be very relevant to arrangements involving two or more public bodies which are set up to promote more effective or efficient public administration. However, the Teckal exemption is not likely to be applicable where a local authority establishes a commercial trading company (under the Localism Act or under the Local Government Act 2003 Section 95) to trade with the wider market. This is because the entity's market orientation will cause it to not meet the function test referred to above. Such an entity will need to be operated at 'arms length' of the authority, with support costs or other assistance being recovered from the trading entity by the authority concerned.

State aid

If a local authority establishes a separate entity, namely a company, it may wish to consider providing financial assistance to that entity. In doing so, the local authority must have regard to state aid rules. This is a specialist area, where external advice is likely to be necessary. In outline, the State Aid rules are intended to ensure that market forces may operate freely across Europe with no unwarranted interference through the State (national government) or an 'organ of the State' such as a local authority. The following criteria must be met in order for State Aid issues to arise:

- the aid must have the potential of affecting competition and trade between Member States
- the measure granting aid must be capable of or have the effect of distorting competition by conferring an advantage or benefit on a selective basis

- the aid must be paid through (directly or indirectly) state resources, and this can take a variety of forms such as grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or the provision of goods and services on preferential terms, and
- the aid favours certain undertakings, or the production of certain goods.

To avoid conferring a benefit, the authority must ensure that it does not indirectly subsidise the undertaking, and treats it at arm's length in the same way as any other third party contractor. If a State Aid issue arises, the assistance proposed must be approved in advance by the European Commission through:

- the Commission approving a formal notification
- the assistance being compatible with an existing approved notified scheme, or
- the assistance being compatible with one of the State Aid block exemptions issued by the Commission.

The consequences of unlawful State Aid are potentially serious, including damages payable by the authority to any third parties who can show they have suffered a loss as a result of the aid, and recovery of the aid (plus interest) from the recipient.

Competition law

The requirement to use companies for trading under section 95 of the LGA 2003 and the Localism Act Section 4, places local authorities in the same position as any other commercial undertaking as to the need to meet costs and make a profit.

If a local authority trading operation were to prove successful, there could be some impact on local markets especially small businesses. The successful development of larger trading operations by local authorities however, could reasonably be expected to lead to new economic opportunities as well as possible disadvantages for small businesses, as suppliers or in specialist markets.

Authorities should consider any proposed charging and trading activities very carefully against the requirements of competition law, consulting their own lawyers as necessary. Trading by local authorities may be subject to the provisions in the Competition Act 1998 and/or Articles 101 and 102 of the Treaty on the Functioning of the EU (formerly Articles 81 and 82 of the EC Treaty). These articles set out rules on anti competitive practices and the abuse of a dominant position.

New partners in the public sector

It is worth noting that the Localism Act has an impact not only on councils but also provides new powers for:

- **Parish and town councils:** 'Eligible' parish and town councils will also be able to use the General Power of Competence, which means these neighbourhood councils will have access to wider trading and charging powers.
 - **Fire and Rescue Authorities (FRAs):** Principal local authorities, including county councils will have access to the GPC. This includes the 15 county councils who are also fire and rescue authorities, as they are the principal local authority for the county and exercise significantly wider functions than stand-alone fire and rescue authorities. The Act also introduces a general power for single-purpose fire and rescue authorities (FRAs) and simplifies the existing charging regime for FRAs. This will allow them the freedom to do whatever they consider appropriate, where the outcome is intended to be beneficial to the delivery of their functions, integrate functions with other emergency services, and charge for non-core discretionary services. They can also exercise these new powers for a commercial purpose
- but if so doing, they must pursue such commercial purpose through a company or an industrial and provident society (as per principal authorities) (Sections 9 and 10 Localism Act 2011). Section 19 of the Fire and Rescue Service Act 2004 enables FRAs to charge and the Localism Act introduces some revisions to these provisions.
- **Integrated Transport Authorities (ITAs) and Passenger Transport Executives (PTAs):** general purpose powers have been made available to these authorities under the Localism Act which include powers to trade through companies etc (Part 1 Chapter 3, Section 12 Localism Act 2011).
 - **Economic Prosperity Boards and combined authorities:** again new general purpose powers and powers to trade through companies etc (Part 1 Chapter 3, Section 13 Localism Act 2011).

The General Power of Competence and new general powers for other types of authorities offer opportunities for innovative arrangements to develop between public sector agencies or with private sector providers or not-for-profit organisations to deliver more integrated, economical services leading to better outcomes for citizens.

Trading beyond the public sector

After many years of experience trading between public bodies, the Local Government Act 2003 added new possibilities for councils to extend their trading activities to provide services to other users beyond the ‘defined public bodies’ listed in the 1970 Act. This includes the wider market, private individuals and other bodies or organisations. In 2009 the Government permitted all best value authorities¹ in England “to do for a commercial purpose” anything which they are authorised to do for the purpose of carrying on their ordinary functions.

The Localism Act 2011 has extended opportunities to trade for a commercial purpose much further. For example the General Power of Competence (GPC) does not require councils to identify a statutory function upon which to ‘hang’ their trading activity. In other words, local authorities are allowed to expand their trading activities into areas not related to their existing functions. It also effectively removes geographical boundaries to local authority activity so that they can set up trading company that can trade anywhere in the UK or elsewhere. But the law continues to prevent councils trading with individuals where they have a statutory duty to provide that service to them already.

GPC also extend trading powers to ‘eligible parish councils’. These are defined by the Secretary of State in secondary legislation as parish councils who have:

- two-thirds or more of members of the council who have been elected at ordinary elections or at a by-election, as opposed to being co-opted or appointed
- a clerk to the parish council who holds one of the listed qualifications and has completed relevant training in the exercise of the GPC, provided in accordance with the National Association of Local Council’s national training strategy, and
- passed a resolution that it meets the other conditions of eligibility.

Under both the Local Government Act 2003 and Localism Act 2011, the power to trade must be exercised through a company. There are different definitions of ‘company’ in the relevant legislation but there appears to be no substantive difference between the types of entity permitted as trading companies, namely companies limited by shares, companies limited by guarantee or industrial and provident societies:

- Local Government Act 2003: refers to Part V of Local Government and Housing Act 1989
- Localism Act 2011: refers to the Companies Act 2006 s 1(1) or society registered or deemed registered under Co-operative and Community Benefit Societies and Credit Unions Act 1965.

¹ Which did not include parish councils.

With trading companies wholly owned by a council, any profits generated may go back to the council through dividends or service charges. These can then be used to hold down council tax and/or can be invested into frontline services.

Local authorities may also consider participating in someone else's trading venture through a company, such as a social enterprise, as long as that entity is a company within the relevant definitions. A limited partnership or limited liability partnerships do not fall within the permitted categories for local authority commercial trading.

Commercial trading and risk

All commercial activity involves risk and potential losses as well as the potential to make profits. These risks and opportunities must be fully understood and scoped before embarking upon such enterprises, with the potential to mitigate and manage these risks explored. A key part of this is the development of a business case. The 2009 Trading Order requires that a business case ('a comprehensive statement') be prepared and approved before exercising the trading powers. This covers objectives and associated investment and other resources required, business risks with an indication of their significance, and the expected financial results and any other relevant outcomes expected. It also places an obligation on the authority concerned to recover the costs of any accommodation, goods, services, staff or any other thing that it supplies to a company in pursuance of any agreement or arrangement to facilitate the exercise of the trading power. No similar requirement is currently contained in the Localism Act. In any event the rules on State Aid would need to be considered in this respect.

Other important **legal, commercial and financial considerations** for councils setting up a trading company include company law issues, the cost of bidding for contracts, tax liability (corporation tax and VAT), EU procurement law and state aid rules and employment law (TUPE and pensions). There also needs to be a business plan for the operation of the company.

The Norse Group is a holding company owned by Norfolk County Council and has a combined turnover in excess of £250 million. The Group brings together three local authority trading companies providing services to councils, the NHS, the emergency services, housing associations, and numerous private sector organisations. Its three operating companies are:

- Norse Commercial Services Ltd providing facilities management
- NPS Group Ltd providing property design and management consultancy, and
- Norse Care Ltd.

Norse Care, the newest of the companies, provides 26 residential care homes and 13 'housing with care' schemes across Norfolk and employs 2000 staff. Over the next 15 years, it will invest in and undertake a programme of re-provision of the Council's current care accommodation, as part of the County's pledge to meet the changing needs of its older population and the increasing demands on social care services.

The Norse Group, in partnership with Norfolk County Council, opted to form Norse Care Ltd to achieve a number of key outcomes including:

- **Revenue generation:** to find a more locally responsive and efficient way of delivering care to the elderly to meet their needs, whilst also generating income.
- **Employment flexibility:** recruiting and employing staff via the company provides the opportunity to introduce different terms and conditions that better meet modern business and employee needs.
- **Market moderation:** the trading vehicle provides an alternative to either in-house

delivery of care services or outsourcing to a single large private sector provider.

- **Correct market failure:** creating the opportunity for occupational therapy, for which there were no local providers, to be delivered as part of social care services.

The arrangements have allowed the council to concentrate on its strategic commissioning role to assess local needs, design and procure appropriate services and monitor outcomes, whilst Norse Care concentrates on the delivery of a high quality public service.

The Norse Group expects the pay back to Norfolk County Council to grow to £5-£6 million over the next five years in the form of a profit share, and is a major employer in the region with over 10,000 staff.

The Norse Group and Norfolk County Council's experience of starting to trade in this way has highlighted a number of key lessons including the need for:

- full political backing to provide both strategic and financial support to the venture
- sufficient cash flow to keep operating and the Council putting real money into the initial venture, and
- awareness that pension liabilities can potentially create a significant deficit on the opening balance sheet, which may make bidding for further work tricky.

These aren't, however, insurmountable issues and the fact that the Norse Group is now made up of three companies illustrates this point, as well as highlighting opportunities for existing business infrastructure to make it easier to start local authority trading companies in the future.

Other examples include:

Essex Cares was the first local authority trading company to offer social care services in the county. The company specialises in delivering support to adults across Essex providing:

1. community support: such as helping someone with a learning disability to improve their job prospects and independence
2. home support: such as installing grab rails to help them get in and out of the house.

In 2009 some 850 county staff were transferred to this business. During 2010/11 Essex Cares made a profit of £3.5million and within the same period over 115,000 people across Essex had contact and support from the company to enable them to maintain and improve their independence with services designed to meet their needs and choices. Key impacts included using individual outcome-focused support programmes to help 80 per cent of those referred to their Crisis Response service avoid being admitted to hospital.

Solutions SK is wholly-owned by Stockport Council. It provides a wide range of services ranging from facilities management, including catering, to highways and waste management. It was formed in 2006 from the council's direct services department when some 1,000 staff transferred. Today, turnover is around £40 million.

Swindon Commercial Services has followed a similar path and provides a parallel range of services, including most recently the survey, design, installation and maintenance of domestic solar panels. It was established as a trading company early in 2010 and now employs over 850 dedicated and skilled employees with a turnover in excess of £65 million p.a. It provides services to a wide range of clients including local government, housing associations and private businesses in Wiltshire and beyond.

Kent County Council (KCC) has a significant track record of undertaking trading activities including:

KCC Commercial Services: Commercial Services is the trading arm of Kent County Council, which sells and brokers in excess of £780 million per annum, supplying a range of goods and services to a wide customer base comprising local authorities and other publicly funded bodies. Commercial Services is a non-budget funded organisation providing a significant and growing financial return to Kent County Council. It provides a wide range of services including Kent County Supplies, Kent Fleet, Passenger Services, County Print and Design and LASER (energy buying group). Operating independently of Commercial Services, KCC supplies private and public sector customers with a range of services via Kent Top Travel and Kent Top Temps. Commercial Services is also exploring potential opportunities through the General Power of Competence.

KCC Legal: The 'Kent Model' of legal services delivery is nationally recognised as the leading exemplar and most successful trading operation of its kind anywhere in the country, with a significant revenue of more than £1million per year. It already supplies legal services direct (without a company structure) to any organisation to which KCC is statutorily empowered to provide services. That currently effectively means the whole of the public sector except central government.

KCC Schools Personnel Service: The Schools Personnel Service provides specialist advice and support on a range of personnel issues relating to both teaching and support staff, specifically tailored for the education sector. The service was established as a trading arm three years ago, providing personnel services to over 570 schools in Kent, charging a competitive market rate. It has since produced a surplus every year.

Moreover, it has created a model to expand for other schools support services; **EduKent** is a trading company that now provides a 'one stop shop' for schools and academies to buy all of the support services they need to run a school effectively. It has been developed in response to the rapidly changing educational environment, to meet the needs of schools and academies for high quality, competitively priced services delivered by experienced staff, to assist them in improving outcomes for their pupils.

Checklist for councils

Has your council:

- Carried out a **fundamental review** of its activities – in conjunction with local partners – and as part of that looked at use of trading and charging powers?
- Adopted a **policy** on trading and charging that is aligned to council strategy and a delivery plan?
- Considered how a move to greater commercialism will impact on the current and future workforce of the council and what **training and development** may be needed?

If you are considering introducing a new charging scheme or trading in a new way, have you:

- Carried out **option appraisals** (including early legal, financial, tax, HR advice and market research)?
- **Consulted** with service users and the wider community where the council proposes to introduce new charges (particularly for services that have previously been provided for free)?
- **Effectively engaged employees** where new trading activities are likely to involve transferring existing council employees to a company?
- Approved a **business case** for selected options (especially where this is a statutory requirement) and an operational **business plan**?

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Further reading

'General Power for Best Value Authorities to Charge for Discretionary Services', ODPM, 2003

'General Power for Local Authorities to Trade in Function Related Activities Through a Company', ODPM, 2004

And the Addendum to that Guidance issued in April 2007, [NB. To be read in light of 2009 Trading Order]

'Using the New Powers to Trade and Charge: Local Authority Case Studies', LGA, 2005

'Local Authority Trading: Research Report', CLG (INLOGOV), 2007

'Positively Charged: Maximising the Benefits of Local Public Service Charges', Audit Commission, 2008

'SI 2009/2393, The Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009' [2009 Trading Order]

'Joint Ventures: A Guidance Note for Public Sector Bodies Forming Joint Ventures with the Private Sector', HM Treasury, 2010

Capital investment, regeneration and joint ventures – Local Partnerships Guidance for Local Authorities 2011

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