



Welsh Government
Consultation – summary of response

Views on the draft General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations and the proposal that community councils that meet certain criteria be provided a power to trade.

September 2021

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.
This document is also available in Welsh.

Consultation – summary of responses: *General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2021 and local authority power to trade.*

1. Introduction

This Consultation

On 22 March the then Minister for Housing and Local Government launched a consultation on proposals in respect of the powers under which local authorities in Wales may do things for a commercial purpose (also referred to as a power to trade).

The consultation ran for 12 weeks from 22 March 2021 to 11 June 2021 and was published on the Welsh Government website. Online versions of the formal consultation document, draft Regulations and response form were provided in English and Welsh on the Welsh Government website. The link to the consultation was emailed to all principal councils and community and town councils as well as a range of other stakeholders.

The consultation sought views on three proposals:

- prescribing conditions qualifying local authorities must meet when exercising the general power of competence for a commercial purpose;
- re-making the trading order; and
- extending the application of these draft Regulations to eligible community councils when the general power of competence is commenced for these authorities in May 2022.

2. Consultation process

Who responded?

A total of 18 responses were received by the deadline. A further 6 responses were received after the deadline but have been included in this analysis and taken into account for the purpose of next steps. Responses were received from:

7 Community and town councils
5 Principal councils
5 Anonymous
2 Representative bodies, professional bodies or associations
2 Audit/Inspection/Regulator
1 Trade Union
1 Private Company
1 Other

A full list of respondents, other than those who requested anonymity, can be found at **Annex A**.

3. Summary of responses

This document is intended as a summary of the responses received. It does not aim to capture in detail every point raised by respondents. The consultation asked 11 open ended questions and the responses to each is summarised below. Not all questions were answered by all respondents.

Consultation Question 1 – Are the draft regulations clear?

All respondents answered this question. Of the 24 responses 23 agreed that the draft Regulations are clear or broadly clear, setting out what is expected of local authorities, including all principal councils and community councils which replied to the consultation.

Some key points raised include:

- Some respondents added that the regulations could be extended further to address governance issues such as conflict of interests, particularly in relation to community councils;
- Two respondents specified the regulations could go further to include the use of powers to borrow, with one noting that *“the consultation should make it clear that authorities should not borrow to support revenue expenditure incurred by companies they establish through the new General Power of Competence arrangements”*.

One respondent disagreed and stated that “Regulation 2(2) is not sufficiently specific to ensure that business cases are fit for the purpose of ensuring appropriate protection of public money when trading using the power of general competence.

Consultation Question 2 – **Do the requirements in the draft regulations, in respect of the business case, cover the right things? Are there any other matters the business case should be required to capture?**

There were a total of 24 responses to this question, of which the majority of respondents confirmed that the regulations cover the right things. Several added comments stating that the regulations should cover broader more practical issues.

One response added that the requirements for the business case do not seem sufficiently developed in the regulations.

Some key points raised include:

- Several community council respondents called for guidance and templates to be made available with examples of issues/areas to consider when preparing a business case for community councils.
- Many respondents asked for further guidance on specific matters which the business case should address, this included:
 - specifying review periods,
 - using the HM Treasury business case [checklist](#) as a starting point,
 - capturing the benefits of the need to exercise the GPoC,
 - identifying the advantages compared to the existing or no action positions,
 - specify the risks and where they lay,
 - what mitigating actions would be in place in the event of income not being delivered,
 - why the benefits outweighs the risks with an understanding of the financial impact under different scenarios,
 - specifying company structure and whether professional and expert advice is required or received.
- Some suggestions were also made in relation to clarity within the business case. For example one respondent commented that the business case should outline who is responsible if a company becomes insolvent, the structure of the company (i.e. charity,

trust, company etc), and that those with conflicts of interest should be avoided within the decision making process.

- One respondent noted that business cases should be proportionate, so the regulations should allow a scheme of delegation to reflect this at an appropriate officer level.
- Another respondent added that the business case should make reference to staff protections, making sure there is union recognition, and employees within local authority trading companies are admitted into the Local Government pension scheme.
- It was felt that any guidance should make reference to the Welsh language standards particularly for community councils as they are not subject to the Welsh language standards, although some operate Welsh language schemes.
- One response commented that the business case should refer to the skills required, value for money, keeping performance under review and a summary of information on statutory assessments. The respondent added that the commercial strategy should be a separate, additional, requirement to the business case to meet Regulation 2.

Consultation Question 3 – Should the regulations specify who should approve the business case? If so, who should?

There were 22 responses to this question with no overall consensus. The majority of respondents from community councils want the regulations to specify who approves the business case. On the other hand eight respondents, mainly principal councils, disagreed commenting that the regulations should not be too prescriptive and decided locally.

Some key points raised about who should approve the business case include:

- Some principal councils queried whether the function is an executive function or a council (elected) function, and it would be helpful to clarify.
- One respondent noted the decision should be taken by elected members.
- Another respondent suggested it should be the body funding the business case that should be the one approving it.
- One principal council respondent suggested that as this sort of activity would fall under a council's budget setting process it should then be included within the revenue and capital budget setting process which is approved by full council.
- Most community councils suggested that full council should approve the business case, although one response noted it should be a neutral person, not employed within an authority or a community council; another disagreed stating that the regulations shouldn't be too prescriptive.
- Two respondents felt One Voice Wales would be a suitable reference point for comment on business cases, although taking on this additional activity for the sector would have resource implications for One Voice Wales.
- One respondent noted: *"The approval of the business case must, as a minimum, be carried out by a local authority's executive or cabinet (subject to arrangements under section 101 of the Local Government Act 1972). For more significant proposals (perhaps above a locally determined threshold) it is preferable that this is a matter for a full council."*
- One respondent suggested that those with conflicts of interest should not be part of the decision making process.

Consultation Question 4 - **What are your views on the proposed application of the draft regulations to eligible community councils?**

Of the 22 responses to this question, the majority expressed positive views of the opportunity for eligible community councils to be able to consider commercial opportunities, stating *"step in the right direction"* and *"It gives them a great opportunity"*.

Some key points of qualification in the responses include:

- One respondent was in agreement but was concerned that the gateway to being able to exercise the general power of competence and do things for a commercial purpose would be dependent of becoming an eligible community council; and part of this relied on having an appropriately qualified clerk in post.
- Some of those in favour queried whether community councils had the expertise to be able to develop business cases for commercial purposes.
- Others agreed, subject to sufficient safeguards and assurance being in place.
- One respondent noted another potential, related, risk because community councils are able to raise funds through annual precepts and so have the ability to increase the precept level, without a cap, to fund new areas of work.

Two of the respondents disagreed with the application of the draft regulations to community councils and made the following comments:

- one respondent re-iterated that more robust regulations around business cases should be required prior to community councils undertaking this type of activity.
- the other respondent suggested that *"Community Councils should not have the same powers as principal councils"* because of examples of some being *"unable to manage their own accounts resulting in Audit Wales public interest reports"*. The respondent qualified this by adding that one size does not fit all, some safeguarding measures would be needed, such as balancing accounts in the case of small councils with limited funds, whereas this would not be the case for large community councils.

Consultation Question 5 - **Do you agree that community councils who are eligible to exercise the general power of competence should also be authorised to trade in their ordinary functions. If not, why not?**

There were 22 responses to this question. Not all respondents provided a response to the question itself but, where they did, 15 broadly agreed.

Of those that agreed, the following points were made:

- Several respondents agreed, subject to community councils having the financial capability and staff expertise to scrutinise and apply stringent governance.
- Others stated if a community council satisfied the requirements then they had no issues.

Those who disagreed with question 4 re-iterated their concerns, and the following point were also made:

- *"Community council powers to trade are not extended unless and until the management expertise and capabilities of community councils is strengthened."*
- Another respondent suggested potential of *"competing position with county councils, and whether Community councils could come together to share service?"*

- Two respondents noted that these trading powers did not come without risk and one added that Welsh Government should consider a requirement that councils do not become involved in activities which are disproportionate to their resources.

Consultation Question 6 - Do you agree that principal councils and eligible community councils should be subject to the same conditions when trading in their ordinary functions and exercising the general power for a commercial purpose?

There were 21 responses to this question, of which 19 broadly agreed that the same conditions should apply to principal councils and eligible community councils both when trading in their ordinary functions and exercising the general power.

Some key points raised include:

- The conditions should be the same to avoid confusion.
- One respondent suggested that *“general power activities will often require a greater level of diligence in terms of market analysis, risk management and having or obtaining sufficient expertise. It would be appropriate for regulations to reflect this.”*
- Another respondent noted that *“strong eligibility criteria and a rigorous assurance process should ensure that those Councils who are likely to make a success of any proposed ventures will also be able to demonstrate a good record of successful governance and financial stability.”*

One respondent, outside the community council sector, did not agree that principal councils and community councils should be subject to the same conditions when trading in their ordinary functions but this was on the basis that community councils should have neither the power to trade for commercial purpose or to trade in their ordinary functions. This was qualified by adding that there could be some consideration for community councils that met certain budget thresholds.

Consultation Question 7 – Are there any consequences we’ve not considered of subjecting FRAs and NPAs to the updated conditions set out in the draft regulations when they’re exercising their power to trade in their ordinary functions?

There were much fewer comments in answer to this question than for the majority of questions. Some responses stated there were no consequences that had not been considered in relation to subjecting FRAs and NPAs to the updated conditions. Others simply stated ‘not known’ or did not offer a comment.

One specific response stated that NPAs and FRAs should be treated the same as principal councils, with a level playing field for these bodies to exercise the GPOC.

Two respondents commented on delivery with other areas to avoid duplication, with one adding “It would be an unfortunate outcome of the ability to trade in ordinary functions if it introduced an element of unnecessary friction between the wider family of public services if they pursue commercial objectives in the same markets”

Consultation Question 8 - In order to refine the Regulatory Impact Assessment, the Welsh Government would welcome views on the estimated costs to authorities of preparing a business case. An estimation of any costs which may result from the requirement to recover costs from the company would also be welcomed?

There were fewer responses to this question than for the majority of questions. Views on the type of cost were included but estimate of any costs was unanswered by the majority of respondents.

The majority of responses from the community council sector indicated some degree of qualification on the costs because such cost would be subject to the complexity of the business case.

Similar points were raised from those outside the community council sector, commenting that costs would be dependent on the level of detail required for a particular business case. The view of these respondents is that overall preparation of a business case will be costly and take up considerable officer time including legal and financial officer advice.

Some key points raised on costs include:

- The views expressed on costs by the community councils that responded ranged from costs being nugatory and mainly associated with opportunity and administrative costs to requiring a business consultant, staffing costs, legal and auditing costs to establish the company.
- There was a call for guidance specific to the community and town council sector on costs that should be considered.
- One respondent added that costs will be incurred by exploring options and developing proposals alongside business cases, but the recovery costs should be stated and open to verification through established accounting procedures.

Consultation Question 9 – We would like to know your views on the effects that the draft regulations or the proposal in respect of the revised trading order would have on the Welsh language, specifically on opportunities for people to use Welsh and on treating the Welsh language no less favourably than English. What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

Three respondents from the community council sector confirmed that the Welsh language should be a consideration within each business case. Comments included a call for a statutory requirement to carry out an impact assessment as part of the business case, which looks at effects on the Welsh language, local heritage, and any effects on other local businesses.

It was also noted that as community councils are not currently subject to the Welsh Language Standards (although they are open to that), it would be important to include an appropriate reference to the Welsh language in any statutory guidance for the preparation of a business case.

Apart from the community council responses, a further 6 respondents commented that the Welsh Language Standards apply as normal.

Consultation Question 10 - Please also explain how you believe the proposed draft regulations or the proposal in respect of the revised trading order could be formulated or changed so as to have positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language, and no adverse effects on

opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.

Many respondents referred to their answer to Q 9 and some did not comment at all. Of the additional comments provided by responses from the community council sector there was a call for guidance on preparing a business case to "*stipulate that implementation should be in line with the community council and principal council's language policy and that Welsh and English should be treated equally*". Another added that Welsh Government should make specific reference to the Welsh language within the "Conditions to be met before exercising the general power to do things for a commercial purpose".

Consultation Question 11 - We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

A number of issues were raised in response to this question, and they have been summarised and grouped below by sector: community councils; principal councils and 'other'.

Community Council Sector:

- There was call for guidance on implementing the general power of competence for a commercial purpose within the community council sector.
- There were some concerns about creating a trading arm to a community council: what happens should there be financial loss and where liability would fall; would there be a swift mechanism available to reverse the position and take the matter back into the ordinary functions of the authority; what audit arrangements would be necessary; and would there be any time limits on these trading companies?
- One respondent expressed concern that exercising the power could lead the way to the future rundown in core functions for the sector with councils acting as enablers only.
- There were other questions around satisfying the three conditions before a community council may pass a resolution to become an 'eligible community, and falling out of eligibility at a future point.

Principal councils:

There were more comments from respondents from principal councils, and again these were quite specific and technical in content. They include the following:

- The sector calls for guidance for councils in the use of the new powers and the limitations, particularly the distinction between an authority trading in the ordinary functions or in exercise of the general power of competence.
- Several comments called for clarity on the benefits of the general power of competence; how the public and private organisations could link together; further clarity on the restrictions/limits to the general power; governance issues; accountability; structure of the companies (including insolvency/responsibility for debt); and information on the governance arrangements to apply when councils enter into partnership with local stakeholders/other bodies.
- Clarity on whether limited companies will be permissible.
- What arrangements will be required in the preparation of the company's accounts and independent audit of accounts?

- How will VAT be treated?
- Reference should be included to the recent consultation and proposed changes by CIPFA to the Treasury Management Code and Prudential Code which restricts the use of loans for any debt for yield projects. In addition Local Authorities must not use private borrowing/internal borrowing to support such investments and then refinance with PWLB loans.
- Can Local Authority Members or Chief Officers hold roles of Company directors and/or company secretary?
- What about staff undertaking tasks for the company – are they employed by the council or the company. Would TUPE need to be considered?
- A call for arrangements, in addition the existing Code of Conduct, to manage conflicts of interest/positions between principal councils and community councils.
- One response called for business cases prepared by community councils to be considered and endorsed by the appropriate principal council.
- Overall there was comment that in risk assurance terms, any fall out or financial losses caused by councils will cause reputational damage at both local and national level.

Comments from Other Bodies

- One respondent called for secondment of staff to be considered rather than TUPE arrangements; transparency of impact, on seconded and new staff, regarding areas such as pension, sickness, and potential job losses should the company fail.
- The response also called for consideration of the company board composition including how the council will be represented, and staff and service user involvement.
- The respondent also raised questions about the Welsh Government's expectations on the length of time expected for a company to cover its costs or become profitable, how would the costs to the council then be recouped; and what is the potential impact of UK procurement legislation on the local authority power to trade.
- Another respondent drew attention to the CIPFA - Prudential Code and changes to Public Works Loan Board lending arrangements.
- A respondent called for a clear understanding of when, and if, a local authority should step in if a company it sets up fails. The response acknowledged that there may be no legal obligation to step in but a failure to act may be a reputational and service continuity risk. It was noted that this may be something for inclusion in the risk assessment process.
- A respondent noted that there was the possibility of inadequate audit and scrutiny of the use of public money for some activities, should the companies fall within the Companies Act 2006 small company audit exemption.
- This respondent also noted that where companies are sufficiently large they will fall under a duty to appoint auditors and it would fall to the councils to ensure that appropriate audit appointments are made. The respondent expressed concern that some councils may not be sufficiently equipped to operate effective auditor appointment processes.
- The third comment from this respondent focussed on the consolidation of subsidiary company accounts into the accounts of community councils. The respondent expressed concern that this requirement may be beyond the knowledge and skills of community council Responsible Financial Officers. It is likely that some councils may need to pay for additional accounting services. It was proposed that such issues may need consideration to be addressed by either regulations or other legislation.

4. Government response to views expressed

The Welsh Government values all the responses received to the consultation. Whilst this report will not be providing a response to each of the issues raised, the responses have been carefully considered and taken into account when considering both the final draft version of the Regulations and the support for implementation moving forward, including issuing any guidance in due course.

It is noted that there is broad support for the regulations as drafted, with comments concurring that the draft regulations cover broadly the right things; and proposing that the regulations should go further to extend the scope of them to be more prescriptive.

There was no consensus on whether the regulations should specify who should approve the business case. The majority expressed positive views of the opportunity the regulations would offer to eligible community councils, and broad agreement that that eligible community councils should also be authorised to trade in their ordinary functions. Similarly there was broad agreement that principal councils and eligible community councils should be subject to the same conditions when trading in their ordinary functions and exercising the general power for a commercial purpose.

There was little commentary to draw on about subjecting FRAs and NPAs to the updated conditions set out in the draft regulations when they're exercising their power to trade in their ordinary functions. Those who offered a view were broadly of the view that NPAs and FRAs should be treated the same as principal councils, with a level playing field for these bodies to exercise the general power of competence.

There was little evidence provided to suggest how the Regulatory Impact Assessment could be refined regarding estimated costs of preparing a business case. The majority of responses indicated some degree of qualification on the costs because such cost would be subject to the complexity of the business case; noting some complex business cases could be costly when factoring in officer time, and legal and financial officer advice.

Respondents commenting on the question regarding the Welsh language either responded to confirm Welsh Language Standards apply as normal, for those not falling under the Standards there was the recognition that Welsh language should be a consideration within each business case. These views were further supported by the comment that it would be important to include an appropriate reference to the Welsh language in any statutory guidance for the preparation of a business case.

Another response proposed that the Welsh Government should make specific reference to the Welsh language within the conditions to meet before exercising the general power to do things for a commercial purpose.

The final question about any related issues which were not specifically addressed in the consultation resulted in a range of points. The comments and questions included by respondents provide a useful indicator about the key information important to be addressed in preparing business cases.

5. Next steps

Two main changes to the draft regulations are proposed in light of responses to the consultation: requiring the business case to be published as soon as practicable following the council decision to approve it, and for the business case to include impacts on staff.

Many comments called for the regulations to cover broader more practical issues in developing business cases. Predominantly these comments are more appropriate for potential guidance to provide advice, options, and examples. Any guidance would need to allow for the different approaches to be taken in response to the complexity and risk profile of each proposal. Providing templates and examples may lead to over reliance on the information provided rather than fuller consideration being given to all pertinent facts which will vary on a case by case basis. There is a lot of generic advice and guidance on business case planning widely available which would be appropriate for the local government sector to access.

Where the Welsh Government provides tailored guidance, we will of course work with stakeholders to produce it. The first opportunity arises in the statutory guidance for community and town councils to help them prepare for the number of legislative changes affecting this sector, due to come into force on 5 May 2022. This draft guidance will be issued for consultation later this calendar year and will provide a steer on business case planning as part of the guidance on exercising the general power of competence.

It is intended that the draft Regulations be laid following the summer recess and, subject to their being agreed by the Senedd, they will be made during October 2021 with a coming into force date of 1 November 2021 to coincide with the bringing into force of the general power for principal councils.

The Welsh Government is committed to continuing to work with principal councils, community and town councils, appropriate regulatory bodies, and other partners who have contributed to this consultation, following the regulations coming into force to ensure successful implementation.

Annex A – List of respondents to the consultation

Principal councils

Ceredigion County Council
Conwy County Borough Council
Swansea City Council
Pembrokeshire Council – two separate responses

Community and Town Councils

Abergele Town Council
Clydach Community Council
Llandough Community Council
Llanelli Rural Council
Mold Town Council
Penarth Town Council
Rhayadar Town Council

Audit/Inspection/Regulator

Auditor General for Wales
Welsh Language Commissioner

Representative bodies, Professional bodies or Associations

One Voice Wales
Welsh Local Government Association

Trade Union

UNISON Cymru Wales

Private Companies

The Link Group

Other

Federation of Small Business

Anonymous

Five submissions