



Llywodraeth Cymru  
Welsh Government

OPEN CONSULTATION

# Consultation on local authority power to trade

We are seeking your 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.

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## Introduction: where are we now

This consultation relates to 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).

## General power of competence

Section 24 of the Local Government and Elections (Wales) Act 2021 (“the 2021 Act”) gives “qualifying local authorities” a general power of competence (the “general power”). The general power gives these authorities the power to do anything that an individual can do, thereby allowing these authorities to do things that are unlike anything they, or any other public body, have done before.

Qualifying local authorities are principal councils and eligible community

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councils.

An eligible community council is a community council which meets the criteria set out in section 30 of the 2021 Act, or in regulations made by the Welsh Ministers under section 35 of the 2021 Act, and passes a resolution that it meets the criteria and is an eligible community council. Section 34 of the 2021 Act makes provision in respect of common community councils established after the Act was passed.

The criteria a community council must satisfy in order to resolve themselves an 'eligible community council' are:

- at least two-thirds of the total number of members of the council have been declared to be elected, whether at an ordinary election or at a by-election
- the clerk to the council holds such qualification or description of qualification as may be specified by the Welsh Ministers by regulations. The draft regulations specifying the proposed qualifications will be subject to a separate consultation
- the council has received two unqualified auditor's opinions from the Auditor General for Wales, for two consecutive financial years. The latest unqualified auditor's opinion must have been received during the 12 months preceding the day on which the council's resolution is passed.

The exercise of the general power is constrained by certain limitations, restrictions and conditions as set out in the 2021 Act.

The general power cannot be used where there is any limitation or restriction in existing legislation, or any future legislation which sets out such a limitation. For example, legislation in relation to statutory services, fees and charging, financial prudence or, in respect of principal councils, the form of their executive constrains authorities in various ways and it will not be possible for the general power to be used to circumvent these constraints.

A qualifying local authority may use the general power to do something for a commercial purpose through a company, however they may only do so if they would also rely on the general power to do that thing for a non-commercial purpose. An authority's power to trade in their ordinary functions is provided for

in section 95 of the Local Government Act 2003 (“the 2003 Act”)

A qualifying local authority cannot carry out an activity in respect of someone for a commercial purpose, if it is required by legislation to carry out that activity.

Qualifying local authorities are also required to have regard to guidance issued by the Welsh Ministers about exercising the general power of competence to do anything for a commercial purpose.

The Welsh Ministers may make regulations under the 2021 Act to:

- remove or amend statutory provisions that they think prevent qualifying local authorities from using the general power, or obstruct them when using the general power
- remove overlaps between the general power and other powers (although they cannot achieve this by revising or cutting back the general power itself)
- restrict what a qualifying local authority may do under the general power
- make its use subject to conditions.

## Power to trade in ordinary functions

Section 95 of the 2003 Act enables the Welsh Ministers to make an order authorising certain authorities to trade in any of their ordinary functions through a company.

Section 96(1) of that Act allows the Welsh Ministers to impose conditions on the exercise of this trading power, whilst section 96(2) requires these authorities in Wales to have regard to guidance issued by the Welsh Ministers when exercising the power to trade.

Since sections 95 and 96 came into force there have been a number of changes to how the authorities to whom the provision relate are defined although the authorities captured by the definition have remained unchanged.

These sections originally referred to ‘best value authority’ as defined in the Local Government Act 1999 (“the 1999 Act”). In relation to Wales this meant county or county borough council, community council, FRA or NPA.

The best value regime in the 1999 Act was amended by the Local Government and Public Involvement in Health Act 2007, and as a consequence references to best value authority in section 95 and 96 of the 2003 Act were replaced by ‘relevant authority’, defined in section 95(7). The definition of relevant authority included a best value authority as defined in the 1999 Act (in relation to Wales a county or county borough council, community council, fire and rescue authority or National Park authority) and a community council.

The Local Government Measure 2009 removed Welsh authorities from the definition of best value authority in the 1999 Act and further amended the definition of relevant authority in section 95 of the 2003 Act, adding ‘Welsh Improvement Authority’ as defined in the 2009 Measure (a county or county borough council, fire and rescue authority or National Park authority). The inclusion of community councils in the definition remain unchanged.

As of 1 April 2021 the definition of a relevant authority in section 95 is further amended by the Local Government and Elections (Wales) Act 2021 (Consequential Amendments) Regulations 2021 so as to remove ‘Welsh Improvement Authority’ and insert:

- a county council or county borough council in Wales
- a National Park authority for a National Park in Wales
- a fire and rescue authority in Wales, constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies.

The Welsh Ministers exercised their powers in sections 95, 96(1) and 123 of the 2003 Act to make the Local Government (Best Value Authorities) (Power to Trade) (Wales) Order 2006 (“the trading order”).

At the time the trading order was made section 95 still referred to best value authorities, as such the trading order also refers to the authorised authorities as best value authorities. As part of the implementation of the 2021 Act the trading order will be re-made to refer the authorities as defined in section 95 of the 2003 Act.

The trading order applies to county or county borough councils (primarily

referred to as principal councils in this document), fire and rescue authorities and National Park authorities in Wales and authorises these authorities to do for a commercial purpose, anything which they are authorised (but not required) to do for the purpose of carrying on any of their ordinary functions. This in effect allows trading in all services other than those which the authority is obliged by law to provide.

The trading order does not make any provision in respect of community councils and as such these authorities are not currently authorities able to trade under the power in section 95 of the 2003 Act.

The trading order imposes the following conditions on the exercise of the power to trade:

- before exercising the power, an authority is required to prepare and approve a business case in support of the proposed exercise of the power.
- authorities must recover the costs of any accommodation, goods, services, staff or any other thing they supply to a company in pursuance of any agreement or arrangement to facilitate the exercise of the power.

## **What we propose to do**

This consultation seeks views on two 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 enabling “eligible community councils” to trade in their ordinary functions.

The consultation also seeks views on the proposal to extend the application of these draft Regulations to eligible community councils when the general power of competence is commenced for these authorities in May 2022.

## **Requiring authorities to meet certain conditions when exercising the general power of competence for a**

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## commercial purpose

Under section 28(4) of the 2021 Act, the Welsh Ministers may make regulations making the use of the general power subject to conditions, and it is intended this power be exercised to make regulations specifying conditions a qualifying local authority must satisfy before doing something for a commercial purpose in the exercise of the general power of competence.

Before making such regulations the Welsh Ministers are required to consult the persons set out in section 28(7) of the 2021 Act. This consultation is intended to seek your views on the draft General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2021, (“the draft Regulations”) in accordance with section 28(7) of the 2021 Act.

It is proposed the draft Regulations provide that:

- before exercising the power, an authority must prepare and approve a business case in support of the proposed exercise of the power. The draft regulations set out the requirements for the business case
- where an authority has supplied anything to the company through which the general power is being exercised, the authority must recover its costs from that company

The draft regulations make similar provision, with some minor modifications, to the provisions of the trading order.

The approach taken in developing the draft Regulations has been to ensure that the requirements are:

### Proportionate

It is intended that in preparing the business case authorities will do so in a manner which is proportionate to the investment being considered.

In preparing these draft regulations we are not seeking to implement an overly onerous or prescriptive process.

It is intended to issue guidance setting out expectations to support councils in implementing these requirements.

## **Consistent with other equivalent legislative provision**

In developing the draft regulations consideration has been given to other legislative provisions etc. with which councils are required to comply.

The requirements set out in the draft regulations are harmonious and aligned with other requirements such as the Prudential Code etc.

In addition, principal councils, and other authorities, have been exercising their power to trade under the trading order for numerous year, the requirements set out in the draft regulations are based on the requirements principal councils must satisfy when trading in their ordinary functions.

As currently prepared the draft regulations define an authority as a principal council (county or county borough council in Wales). This is due to the staggered commencement of the general power of competence.

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

Our intention is to analyse the responses to this consultation over the summer and consider whether any changes may be required before laying the draft regulations in the autumn. It is then intended that they be brought into force on 1 November 2021, in line with the commencement of the general power of principal councils.

It is intended to amend the draft regulations between November 2021 and May 2022 so as to extend their application to eligible community councils.

Whilst the trading operations undertaken by community councils are often of lower financial value than those undertaken by principal councils, and therefore could be considered to be of lower risk, the principle of protecting the authority

and public funds from risk remains. Irrespective of the value of the proposal, it is essential any decision to proceed is based on a thorough understanding of the matters prescribed for inclusion in the business case.

The business case will support eligible community councils in considering these key matters, before and when, making a decision as to whether to progress with the proposal and any associated investment. As detailed earlier, the requirement to prepare a business case intended to be proportionate and it is intended to issue statutory guidance setting out how council may approach this requirement.

A draft Regulatory Impact Assessment has been prepared to accompany the draft regulations.

## **Re-making the trading order and enabling eligible community councils to trade in their ordinary functions**

The trading order currently refers to Welsh best value authorities whilst section 95 of the 2003 Act, as amended by the 2021 Act, refers to county and county borough councils, National Park authorities and fire and rescue authorities.

It is necessary to amend the trading order so as to align the drafting of the order with the provisions of the 2003 Act and it is intended this revised trading order is made before the general power of competence is brought into force for all qualifying local authorities.

When making the revised trading order it is proposed the authorisation to trade be extended to community councils that have resolved themselves eligible to exercise the general power of competence.

This will mean the revised trading order will apply to:

- a county council or county borough council in Wales
- a National Park authority for a National Park in Wales
- a fire and rescue authority in Wales (constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies)

- a community council which is an eligible community council for the purposes of Part 2 of the 2021 Act.

To ensure consistency it is also proposed the requirements in respect of the business case set out in the draft regulations be replicated in the revised trading order.

As the revised trading order will also apply to fire and rescue authorities and National Park authorities, these authorities will be subject to the updated requirements. The revisions to the business case requirements are minor and we do not consider that they represent an additional burden on these authorities.

Should a community council resolve they are no longer eligible to exercise the general power, either because they no longer satisfy the criteria or because they no longer wish to be an eligible community council they will no longer be authorised to trade in their ordinary functions.

The 2021 Act provides that a community council which ceases to be an eligible community council can continue to rely on the general power in relation to things it has done in the exercise of that power while it was an eligible community council. For example, a contract entered into in the exercise of the general power may continue, and is not necessarily frustrated, despite the fact that the community council otherwise no longer has the power to enter into that contract and may not start anything new. It is proposed that the revised trading order provide for similar provision.

## **Why we are making this change**

### **Requirement to prepare a business case**

The general power doesn't remove the need for qualifying local authorities to fully consider what they are seeking to achieve, why and how they are going to achieve this and the benefits to their communities. The need for transparent and robust decision making remains.

It is also essential that authorities be prudent about exposing themselves to commercial risk.

The conditions prescribed by the draft regulations are not intended to place additional limits or controls on what an authority uses the general power for. The intended effect of these Regulations is ensuring authorities are taking appropriate and proportional steps to consider the implications of their proposed exercise of the powers rather than prevent them from exercising the power in the manner they wish.

Trading carries obvious and potentially serious risks. Whilst the Welsh Government believes that the advantages of authorities being able to do things for a commercial purpose under the general power are compelling, we recognise that subjecting public money and public services to commercial risk justifies placing careful limitations on whether and how the power is exercised.

The proposed exercise of the general power could entail a major and lasting commitment for any authority, and could have significant financial, operational and structural consequences for the authority. The Welsh Government believes that such a decision should only be made in full recognition of those consequences and after their careful consideration.

We consider that the process of preparing and approving a business case will help ensure authorities take fully-informed decisions that are properly exposed to democratic scrutiny in advance.

There is no prescription in respect of how, or by whom, the business case is approved. This will be at the discretion of the authority. In respect of principal councils, the decision could, for example, be taken at a meeting of the full council or the council may make arrangements under section 101 of the 1972 Act.

There would be no need for the business case to be submitted to, or approved by, the Welsh Government. We consider that would amount to an unjustified intrusion into an authority's affairs and could also have the inadvertent effect of conferring a warranty from the Welsh Government on the future trading operations.

The matters to be set out in the business case are:

1. the aims and objectives of the proposed exercise of the general power
2. the costs, investments and other resources required to achieve those aims and objectives
3. the financial outcomes that are expected to be achieved by the proposed exercise of the general power
4. any other relevant outcomes that are expected to be achieved by the proposed exercise of the general power
5. any risks associated with the proposed exercise of the general power including an assessment of the severity of those risks, and any actions that the authority proposes to take to mitigate those risks.

A critical aspect of preparing the required business case is the identification and consideration of the risks associated with the proposal. Therefore in addition to detailing the risks, the business case must also include an assessment of their severity and any actions that the authority proposes to take to mitigate those risks.

The conditions prescribed in the draft regulations are predominately based on the trading order with some modernisation and minor modifications as detailed earlier in this document.

Requiring authorities to satisfy the same conditions whether they are trading in the ordinary functions or in exercise of the general power will ensure consistency and clarity as to the steps authorities need to take before trading.

Replicating the requirements of the draft regulations in the revised trading order will help maintain this consistency and clarity.

## **Requirement to recover costs**

Many potential authority trading operations would compete openly with other, mostly, private sector businesses.

Such competition could benefit service efficiency and quality generally, could

build links between the two sectors and generate supply and sub-contracting opportunities for local businesses. However, it could operate so as to distort the market, many authorities may have greater capacity than some private sector suppliers and are also supported by public funds rather than by trading income alone.

The impact of qualifying local authority trading on the private sector, and in particular the risk of private sector suppliers losing significant amounts of business, is assessed as being relatively slight. However, there remains at least a theoretical risk that trading operations could have unfair and anti-competitive consequences.

As noted earlier, qualifying local authorities would be required to any trading operations via a company. While an authority might reasonably support the start-up of such a company, it should recover the costs of doing so in due course. Continuing subsidy or funding could both distort the market unfairly and could also lead to public funds being placed at undue commercial risk.

We therefore propose to replicate the provisions of the trading order which require an authority to recover the full costs of any support or services it provides to the company through which the general power is being exercised for a commercial purpose.

## **Enabling eligible community councils to trade in their ordinary functions**

Community councils are an integral part of local government. They are often closest to people and local communities, and therefore uniquely placed to see, and provide, those services which can have a significant impact on an individual's well-being. Making the general power of competence available to community councils who satisfy the eligibility criteria will provide these councils with more freedom to serve their communities.

The 2021 Act sets out criteria a community council must meet in order to be able to resolve itself an eligible community council and exercise the general power of competence. These criteria collectively provide objective and proportionate

measures of a community council's suitability to exercise the general power, covering democratic, governance and professional aspects of a community council.

The Welsh Government considers that if a community council has satisfied the conditions to be able to exercise the general power of competence, which will include the ability to do things for a commercial purpose in the exercise of that power, those councils should also be able to trade in their ordinary functions.

If eligible community councils were not included in the revised trading order it would result in a situation whereby an eligible community council would have the power to trade where they were doing something under the general power of competence but not in relation to their ordinary functions.

This inconsistency could result in confusion and stifle innovation and service improvement.

## Consultation questions

### Question 1

Are the draft regulations clear?

### 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?

### Question 3

Should the regulations specify who should approve the business case? If so, who should?

## Question 4

What are your views on the proposed application of the draft regulations to eligible community councils?

## 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?

## 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?

## 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?

## 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.

## 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?

## 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.

## 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.

## How to respond

Submit your comments by **11 June 2021**, in any of the following ways:

- complete our [online form](#)
- download, complete our [response form](#) and email [LGFPSettlement@gov.wales](mailto:LGFPSettlement@gov.wales)
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Welsh Government  
Cathays Park  
Cardiff  
CF10 3NQ

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Data Protection Officer  
Welsh Government  
Cathays Park  
Cardiff  
CF10 3NQ

E-mail: [data.protectionofficer@gov.wales](mailto:data.protectionofficer@gov.wales)

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Wilmslow  
Cheshire  
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