

Director of Legal Services

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BRIEFING

CHARGING AND TRADING UNDER THE LOCAL GOVERNMENT ACT 2003

EXECUTIVE SUMMARY

1. The Local Government Act 2003 (“**LGA 2003**”) as amended contains significant new charging and trading powers for local authorities.
2. The purpose of this briefing is to outline for client officers key considerations in determining whether or not the Council can charge for a service or trade with another organisation. Paragraph 46 below summarises the practical distinctions between charging and trading.

Difference between charging and trading

3. LGA 2003 does not define charging and trading or indicate how they interrelate. In order to understand the distinction it is necessary to apply public law and commercial law principles having regard to the statutory guidance that has been issued.
4. The distinction between charging and trading can be summarised as follows:-
 - Who has the essential control of the relationship i.e. is it the Council which is setting out its charges to a wide range of service users for a particular

service (charging) or is it the Council itself bidding/tendering/negotiating for the provision of a service to a third party (trading)?

- Is the relationship commercial i.e. is it undocumented or alternatively on basic terms and conditions (charging), or is it detailed in contractual terms which effectively allocate risk (trading)?
5. It is important to understand the breadth of the distinction between the two. At one end of the spectrum a Council may charge for a single piece of advice to an applicant (charging). At the other the Council may enter into a business relationship with a contractor (through an intermediary company) to provide services to support a PPP contract for a 20 year term (trading).

CHARGING

The law before LGA 2003

6. Prior to LGA 2003 a local authority could only charge for the provision of a service where: -
 - it had an express statutory power to charge for such a service; or

- by necessary implication it could charge for its provision. (This will only apply in limited circumstances.)

7. A local authority will in certain cases be under a statutory duty to charge e.g. Town and Country Plannings (Fees for Applications and Deemed Applications) Regulations 1989 SI 1989 No. 193. In other cases it will have a discretionary power as to whether it does impose a charge e.g. power to provide recreational facilities under Section 19 Local Government (Miscellaneous Provisions) Act 1976.

The Section 93 power

8. Section 93 LGA 2003 gives the power to local authorities to charge for discretionary services. An authority may charge a person for providing a service to him / her if: -

- the authority is authorised, but not required, by an enactment to provide the service to him / her; and
- he / she has agreed to its provision.

9. It is therefore necessary to identify that there is a statutory power to provide that service. This may include the well-being powers under Section 2 Local Government Act 2000 (“**the 2000 Act**”).

10. A local authority cannot use the Section 93 power if: -

- the authority has another statutory power to charge for the provision of the service (since the other charging

regime may set out a detailed scheme of how the charge is to operate); or

- the authority is expressly prohibited from charging for this service.

The amount of the charge

11. An authority is under a duty to secure that taking one year with another, the income from charges cannot exceed the cost of provision. The authority cannot use the power to make a profit. The aim is, therefore, not to provide a new source of income for authorities but to allow them to recover their costs.

12. Charges are essentially limited to cost recovery. Any under or over recovery that results in a surplus or deficit of income in relation to costs in one period should be addressed by an authority when setting its charges for future periods so that over time income equates to costs.

13. The duty to ensure that income does not exceed costs applies separately in relation to each kind of service. An authority cannot, therefore, cross subsidise services, or operate a pooled account.

14. An authority can, however, determine to charge only some persons for the provision of a service.

15. An authority can charge different persons different amounts for the provision of a service. An authority may wish to offer certain services at a reduced charge or even for free e.g. to the disabled, the elderly, the unemployed or those in receipt of benefits.

16. Any Cabinet Member / Cabinet report that formulated a charging policy would need to give careful consideration to the charging options available and their likely financial impact. It would also be useful to follow established principles set out in the CIPFA Best Value Accounting Code of Practice.

17. An authority is under a duty to have regard to such guidance as the Secretary of State may give concerning the use of this power. (Section 93 (6) LGA 2003). This is contained in a circular entitled "General Power for Best Value Authorities to Charge for Discretionary Services – Guidance on the Power in Local Government Act 2003" dated November 2003 published by the Office of the Deputy Prime Minister ("ODPM").

18. The statutory guidance states that any capital and investment costs necessary to establish a new service or to improve or extend an existing service are legitimate costs of providing the service.

19. The period over which charges should be calculated is left to authorities to determine.

20. In putting together a business plan charging policy for service provision it would be effective to consider:-

- the anticipated costs of providing a service;
- the projected take up of that service;
- the charge that should be made;
- any differential charging;

- whether certain categories of user should have a free service;
- the capital investment required;
- the period over which the charge is to be recouped. The more substantial the capital investment the longer the period;
- the date when the charge would be reviewed;
- the outcome of any consultation with stakeholders and service users.

Disapplication of charging powers

21. The Secretary of State can determine to disapply the new powers i.e. to preclude particular descriptions of local authority from using them.

Example of new charging power

22. Prior to the 2003 Act local planning authorities were unable to charge for advice given to applicants prior to their submission of a planning application. (McCarthy and Stone (Developments) Ltd – v – Richmond upon Thames LBC (1992)). Local planning authorities could however provide such advice free of charging using their planning function together with Section 111 Local Government Act 1972. The new Section 93 power enables a charge to be made for the giving of such advice.

TRADING

The law before LGA 2003

23. A local authority's principal trading powers with other **public bodies** are set out in the Local Authorities (Goods and Services) Act 1970 ("**the 1970 Act**"). This is the subject of a separate detailed briefing note
24. A local authority's trading powers under the 1970 Act are unaffected by the new trading powers in LGA 2003. The new trading powers are considered by ODPM to be the main facilitating power for local authority trading. Designations under the 1970 Act are expected in the future to be the exception rather than the rule.
25. The trading powers under the 1970 Act were enhanced by the well-being powers contained in Section 2 of the 2000 Act.

The Section 95 power

26. LGA 2003 provides a power to trade in function related activities. This is primarily concerned with **public to private** trading.
27. The Section power:-
- authorises local authorities to do for a commercial purpose anything which they are authorised to do for the purpose of carrying out any of their ordinary functions. Essentially this grants a power to trade in lawful activities; and
 - make provision about the persons in relation to whom this power is exercisable.
28. Initially the trading powers were restricted to authorities with an excellent, good or fair CPA score. As from 1 October 2009 all local authorities can exercise the

powers.

29. An authority which wishes to use the new trading power has to be able to identify a statutory function in which it wishes to trade. This again may be the well-being powers in Section 2 of the 2000 Act.

Limitations on power to trade

30. A Section 95 order: -
- cannot affect the performance of a statutory duty. Therefore the performance of a statutory duty cannot be made into a trading contract;
 - will not affect any other power that authorises the trading activity. Therefore if an authority can trade with another designated public body under the 1970 Act it does not need to rely on the Section 95 powers. However if it wishes to go beyond the 1970 Act powers and it cannot identify another statutory power, e.g. to trade with a private organisation, then it will need to be able to use Section 95 powers;
 - may also regulate the scope of the activity. Therefore it could limit whether for instance a local authority could provide training activities.

Trading Order and Guidance

31. The Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009 ("**the Trading Order**") came into force on 1 October 2009 and applies to all local authorities. The Order repealed the various previous Local Government (Best Value Authorities) (Power to Trade) (England) Orders which applied to

best value authorities within the CPA categories of excellent, good or fair.

32. ODPM in July 2004 issued statutory guidance under Section 96 (2) LGA 2003 on the general power for local authorities to trade in function related activities (“**the Trading Guidance**”).

33. Best value local authorities are authorised to do for a commercial purpose anything which they are authorised to do for the purpose of carrying out of their ordinary functions.

34. Before a best value authority uses the trading power it must first prepare and approve a business case which is essentially a comprehensive statement as to:-

- The objectives of the business;
- The investment and other resources required to achieve those objectives;
- Any risks the business might face and how significant those risks are; and
- The expected financial results of the business, together with any other relevant outcomes that the business is expected to achieve.

35. Further guidance on preparing to trade and preparing a business case and business plan are set out in Annexes A and B to the Trading Guidance.

Use of a company

36. Section 95 powers can only be exercisable through a company within the meaning of Part 5 Local Government & Housing Act 1989

(“**the 1989 Act**”). A local authority can either set up a new company or alternatively use an existing company that it has previously constituted.

37. The Trading Order requires that a best value authority recovers 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 new trading power.

38. However it is likely that external clients who wish to trade with the authority may request the authority to guarantee the performance of the trading company if it has limited assets / track record. Two or more authorities with may choose to jointly establish a company.

39. The establishment of a company requires careful legal and financial consideration of a number of issues including: -

- the company’s objects – is it trading for a particular statutory function of the authority or might it have wider objects?
- is it to be a company limited by guarantee or a company with shares?
- who are to be its members and directors?
- is it to be a regulated company under the 1989 Act or a company in which the authority has a minority interest?
- are local authority staff to be seconded to the company to manage it or will the company directly recruit its own staff?

- how is the company to be financed to avoid issues of state aid in so far as financial assistance is given from a local authority?

40. Further practical guidance on company issues is set out in the Trading Guidance.

Content of trading contracts

41. A local authority before entering into a trading contract needs to properly consider a range of commercial risks:-

- does it have the expertise / resources to deliver the service?
- is its potential risk indemnified by professional indemnity insurance and capped by limits on liability?
- does the authority's charge provide an adequate return? There is no restriction on the authority's ability to make a profit.
- can the scope of the service be changed by the client (either unilaterally / subject to consultation / or with agreement)? How is service improvement through Best Value to be delivered?
- will TUPE apply at the outset or on termination / expiry?
- how significant is the contract compared to the financial turnover of the service currently undertaken by the authority?
- who are the competitors to the local authority and how different

is their pricing structure / the quality of their service?

- are the dispute resolution procedures consistent with latest best practice including mediation?
- how are partnering principles to be included into the contract?
- how will the authority's performance impact upon their key performance indicators?

Regulation of trading powers

42. Under Section 96 the Secretary of State may by order impose conditions in relation to the exercise by a local authority of: -

- a power to do anything for a commercial purpose; or
- a power to do anything for a commercial purpose through a company.

43. The Secretary of State will have due regard to the affect of the new trading powers on the market. A reason for requiring that local authorities could only trade through companies was the perception that otherwise authorities would have a significant financial advantage over their private sector competitors by virtue of their not being subject to corporation tax.

44. The ODPM have stated that they intend to ensure that authorities do not distort markets through provision of inappropriate subsidies to trading companies or the arrangement of preferential terms and other forms of unfair competition.

CONCLUSIONS

Modification of enactments

45. If the Secretary of State determines an enactment prevents or obstructs a local authority: -

- charging by agreement for the provision of a discretionary service; or
- doing for a commercial purpose anything in which they are authorised to do for the purpose of carrying out any of their ordinary functions;

he may by order amend, repeal, revoke or disapply that enactment. Any such order may be made in relation to all or certain categories or particular local authorities.

Differences between charging and trading under LGA 2003

46. This table sets out the broad practical distinctions between charging and trading.

DATE: October 2010

	CHARGING	TRADING
Amount of Charge	Cost Recovery	Profit
Review of Charge	Likely to be annual	Price is fixed (not at large) (even if price fluctuation clause)
Authorities Benefiting	All local authorities	All local authorities
Use of Company as Intermediary	No	Yes
Business Relationship With service User /client	No formal contract	Formal contract
Other party	Service User (General Community Relationship)	Likely to be another business/ public body (Individualised)
Scope	Provision of service	Anything within their ordinary functions
Preparation Of a Business Plan/case	Method of assessing cost is required	Approval of business case is required

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