

**EXPLANATORY MEMORANDUM TO
THE LOCAL GOVERNMENT (BEST VALUE AUTHORITIES) (POWER TO TRADE)
(ENGLAND) ORDER 2004**

2004 No.1705

1. This explanatory memorandum has been prepared by the Office of the Deputy Prime Minister (“the ODPM”) and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

The effect of this Order is to enable local authorities which are “best value” authorities and are classified as “excellent”, “good” or “fair” under the Local Authorities (Categorisation) (England) Order 2004 (S.I. 2004/1704) to trade in activities that are related to their functions. If they wish to trade they must do so through a trading company.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None.

4. Legislative Background

4.1 This instrument is related to one other Order which is being laid at the same time as this Order. That other Order is the Local Authorities (Categorisation)(England) Order 2004 (S.I.2004/1704)(“the categorisation Order”).

4.2 The power to trade that is conferred by the Order to which this Memorandum relates is contingent upon a local authority being categorised as “excellent”, “good” or “fair”, under the categorisation Order.

4.3 The categorisation Order which is made under section 99 (4) of the Act, categorises local authorities in England into five categories according to performance, (the three categories mentioned above, and “weak” and “poor”). This follows a report of the Audit Commission which it is required to produce under section 99(1) of the Act, about the performance of English local authorities in exercising their functions.

4.4 The Order to which this Memorandum relates is made under sections 95 and 96 of the Act (these provisions having come into force on 18th November 2003 by virtue of section 128(2) of the Act) and represents the first use of those powers.

4.5 The Order applies to best value authorities that are local authorities and that are within one of the categories mentioned above. Best value authorities are defined in section 1 of the Local Government Act 1999 which specifies

those authorities that are subject to the duty of best value under section 3 of that Act. Under section 3, a best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.

4.6 The power conferred by the Order does not apply to certain specified local authorities when acting in their capacity as fire authorities.

4.7 Section 95(4) of the Act imposes a requirement that the power to trade is only exercisable through a company.

5. Extent

This Order applies to local authorities in England that are best value authorities.

6. European Convention on Human Rights

This instrument is subject to the negative resolution procedure and does not amend primary legislation. Therefore no statement as to compatibility is required.

7. Policy background

7.1 The Local Authorities (Goods and Services) Act 1970 governs the way in which local authorities are allowed to “trade” with other public bodies. The Consultation Paper, *Working with Others to Achieve Best Value: Section 16 of the Local Government Act 1999 - A Consultation Paper on Changes to the Legal Framework to Facilitate Partnership Working* (DETR, March 2001), proposed the provision of a new power alongside existing powers to enable best value authorities to provide a full range of goods and services to others working in partnership with them.

7.2 The Local Government White Paper, *Strong Local Leadership - Quality Public Services* (DTLR, December 2001), went further than the earlier Consultation Paper in proposing the provision of wider powers to trade for those authorities, by giving the best performers the widest freedom and flexibility to use the new powers. It expressed the view that the Government wished to see a dynamic and entrepreneurial public sector, which would increase diversity and choice in the delivery of public services and that councils should be able to trade in any service in which they have a strong performance on delivery.

7.3 The intention was that a new power for local authorities to trade would be introduced as part of a new package of freedoms and flexibilities following Comprehensive Performance Assessment ("CPA"). The new power would be available to councils judged 'fair', 'good' and 'excellent' in the CPA. It would not be available to councils judged 'weak' or 'poor' in the CPA.

7.4 A number of commitments were made during the passage of the Bill in relation to cross-subsidisation of trading companies by local authorities and

transitional arrangements following re-categorisation of a local authority under the categorisation Order. Accordingly, in order to prevent inappropriate cross-subsidisation, under the conditions provided in article 2(3) of the Order, a local authority must recover the cost of anything it supplies to a company in pursuance of any agreement or arrangement to facilitate the exercise of the power conferred by the Order. The transitional provisions in article 3 of the Order provide that existing trading by local authorities re-categorised under the categorisation Order as 'poor' or 'weak' may continue for a maximum of a further two years after which trading shall cease if the authority fails to regain 'fair', 'good' or excellent' status.

7.5 The Office consulted widely on the trading proposals. The draft Local Government Bill that gave effect to the proposals in the White Paper was published on 12 June 2002 and the consultation period ran until 23 August 2002. During this period 326 responses were received, 134 of which respondents specifically addressed the proposed charging and trading powers. These 134 responses included a wide range of authorities, professional organisations, small businesses representative bodies and trade unions. The majority of the respondents, whilst welcoming the proposed charging and trading powers, expressed concerns on the linking of the new trading powers to performance categorisation. The ODPM website has information on how the consultation responses were analysed and how members of the public can access the consultation responses. ODPM Website: www.odpm.gov.uk, see;

http://www.odpm.gov.uk/stellent/groups/odpm_localgov/documents/page/odpm_locgov_605121.hcsp

7.6 A local authority trading working group, comprising authorities understood to be already interested or already involved in trading, has assisted the ODPM in drafting guidance to accompany the Order. This is statutory guidance to be issued under section 96(2) of the Act. The group was sent copies of the draft Order and guidance and, in some cases, they made it available to a wider audience. The Office received 17 written responses. These were generally supportive although concerns were expressed about the requirement to trade through a company (which is on the face of the Act), the link to CPA performance categorisation (a policy which has been clear since the White Paper) and the transitional arrangements following re-categorisation into a category that no longer permits trading activity (where Ministers have conceded a period of 2 years in which to conclude existing trading activity).

7.7 The draft guidance- "General Power For Local Authorities to Trade In Function Related Activities Through A Company – Guidance On the Power In The Local Government Act 2003" is available from the ODPM (LGEM Division), Zone 3/J6, Eland House, Bressenden Place, London, SW1E 5DU (telephone number: 020-7944-8766). The final version will be issued when the Order comes into force on 29th July.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 The impact on the public sector is not expected to be significant. The powers being made available are enabling powers and local authorities are not required to use them. Thus no direct costs are imposed on local authorities. As the RIA makes clear (see paragraph 13.2), the requirement to trade through a company will result in a degree of additional expense and administration in the formation and running of the company. The cost of establishing these mechanisms form part of the overall charge for the service concerned. Any ongoing costs will be a function of the market and will not represent a direct increase in local authority costs.

9. Contact

Melvin Hughes at the Office of the Deputy Prime Minister (tel: 020-7944-4147) or e-mail: melvin.hughes@odpm.gsi.gov.uk can answer any queries regarding the instrument.