

EXPLANATORY MEMORANDUM TO
THE LOCAL GOVERNMENT (BEST VALUE AUTHORITIES) (POWER TO
TRADE) (ENGLAND) (AMENDMENT NO.2) ORDER 2007

2007 No. 2543

1. This explanatory memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This Order ensures that the transitional power to trade for fire and rescue authorities provided under the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2004 (“the 2004 Order”), as amended¹, which is due to expire on 30th September 2007 continues until 30th September 2009.

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

3.1 None

4. Legislative Background

4.1 Under section 95 of the Local Government Act 2003 (“the 2003 Act”) the Secretary of State may, by Order, enable Best Value Authorities² to do for a commercial purpose anything which they are authorised to do for the purpose of carrying on any of their ordinary functions subject to certain conditions. This is commonly known as the power to trade³. The primary conditions are that the power to trade only applies in respect of functions which the authority is not required to provide in relation to the person in question, must be exercised through a company and does not apply where another power enables the authority to trade in that respect.

4.2 The first Order made under this power was the 2004 Order which provided for certain local authorities in England to exercise the power to trade, namely those authorities who were categorised by order under section 99 of the 2003 Act at certain levels⁴. The 2004 Order set out additional conditions on the exercise of the power, including requiring an authority to recover the costs of any accommodation, services, staff, goods etc that it supplies to a company. The 2004 Order did not apply to fire

¹ S.I. 2004/1705, the relevant amending instruments are S.I. 2004/2307, 2004/2573 and 2007/385

² For the purposes of section 95 Best Value Authorities are local authorities (namely county councils, district councils, parish councils, parish meetings, London borough councils, the Council of the Isles of Scilly, the Greater London Authority as it exercises its functions through the London Mayor, county borough councils and community councils) and national park authorities, the broads authority, fire and rescue authorities, the London Fire and Emergency Planning Authority, waste disposal authorities, metropolitan county passenger transport authorities and Transport for London.

³ This can be distinguished from charging under section 93 of the 2003 Act which is limited to cost recovery.

⁴ Now those local authorities categorised as 4*, 3*, 2*, 1* or excellent, good or fair.

and rescue authorities (FRAs) (i.e. those local authorities acting in their capacity as a fire and rescue authority, fire and rescue authorities created by a scheme under section 2 of the Fire and Rescue Services Act 2004 (“the 2004 Act”), a scheme to which section 4 of the 2004 Act applies, or a metropolitan county fire and civil defence authority).

4.3 The 2004 Order was amended by the Local Government (Best Value Authorities) (Power to Trade) (England) (Amendment) Order 2004 (“the amending Order”)⁵. The amending Order enabled those FRAs that had interpreted the Fire and Services Act 1947 (“the 1947 Act”) as giving them a power to trade to continue to be able to so, through a company. The 1947 Act was repealed by the 2004 Act. The trading power for FRAs provided in the 2004 Order (as amended) was limited in duration until 30th September 2007.

4.4 The amending Order specifies the particular FRA and the service which that authority can provide for a commercial purpose. The effect of the amending Order is that the FRAs able to trade are, amongst other things, required to trade through a company, and recover the costs of any accommodation, services, staff, goods etc that it supplies to its trading company.

4.5 The 2004 Order has been further amended, in relation to FRAs, to add an additional category for one FRA⁶ and to provide for the combination of two FRAs⁷.

5. Territorial Extent and Application

5.1 This instrument applies to England only by virtue of the application of the 2004 Order.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The *Local Authorities (Goods and Services) Act 1970* sets out the way in which local authorities are allowed to ‘trade’ with other public bodies. It authorises local authorities to enter into agreements with public bodies for the provision of goods, materials, and administrative, professional and technical services, for the use of vehicles, plant and apparatus, and for the carrying out of maintenance. There is also a power for the Secretary of State to designate by order that any person(s) exercising functions of a public nature shall be a public body for the purposes of the Act.

⁵ S.I. 2004/2307

⁶ The 2004 Order was subsequently amended (by Local Government (Best Value Authorities) (Power to Trade) (England) (Amendment) (No.2) Order 2004 (S.I. 2004/2573) to include a category of service for Essex Fire Authority. This came into force on 27th October 2004.

⁷ See S.I. 2007/385 which makes changes as a result of the creation of Devon and Somerset Fire and Rescue Authority.

7.2 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 to provide 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. The Local Government White Paper, *'Strong Local Leadership – Quality Public Services'* (DTLR, December 2001) went further than the earlier Consultation Paper, proposing to provide wider powers to trade for all best value authorities where this helps achieve best value and the delivery of public services. These powers were provided in the 2003 Act.

7.3 The Local Government White Paper “Strong Local leadership – Quality Public Services” (2001) announced a new Comprehensive Performance Assessment (CPA) framework to assess local authorities' delivery of national and local priorities. The White Paper promised that the highest performing local authorities would be given greater freedom and flexibilities including more freedom from requirements to produce plans than other authorities. It recognised that such high performing authorities had the capacity to plan their services without the need for centrally prescribed plan requirements.

7.4 The 2004 Order, which came into force on 29th July 2004, authorises local authorities that have been categorised by Comprehensive Performance Assessment (CPA) on the basis of their performance as reaching a certain level to trade⁸ in any of their ordinary functions.

7.5 The power to trade for FRAs subsequently inserted in the 2004 Order is transitional as it was intended, in future, to link this power to trade to the Comprehensive Performance Assessment (CPA) system for FRAs. However the Local Government White Paper, *Strong and Prosperous Communities*⁹ (October 2006), has indicated that the system of CPA will cease in 2009 and it would serve a limited purpose to attempt to link FRA trading to this system.

7.6 The trading powers enable local authorities to trade with private bodies and persons for profit (i.e. charges fixed at more than cost recovery). Trading is intended to help create a dynamic and entrepreneurial public sector that will increase diversity and choice in the delivery of public services. The power to trade is only exercisable through a company. This will help to ensure a level playing field with the private sector.

7.7 As the power to trade for FRAs expires on 30th September 2007 the Department for Communities and Local Government launched a consultation exercise exploring potential options for future trading arrangements for FRAs. This was published on 27th April 2007. The consultation paper, which included a Regulatory Impact Assessment (RIA)¹⁰, was sent to over 300 stakeholders including all English FRAs, certain charities and lobby groups, businesses and suppliers of fire and rescue

⁸ Those authorities categorised as ‘excellent’, ‘good’ or ‘fair’.

⁹ <http://www.communities.gov.uk/index.asp?id=1503999>

¹⁰ <http://www.communities.gov.uk/index.asp?id=1510045>

equipment including Small & Medium sized Enterprises. The consultation exercise closed on 20th July 2007.

7.8 A total of 35 responses were received to the consultation, with 27 responses from FRAs, 7 from industry, and 1 from a Government Department. From the 35 responses received, 27 (77%) favoured the Government's preferred option which was to extend the transitional trading powers until 30th September 2009.

7.9 Generally, the respondents who favoured the Government's preferred option saw it as the most practical solution in that it gave adequate time to both FRAs and businesses to fully understand the impact of trading without FRAs losing a potential income stream. Further details of the findings of the consultation will be published at: www.communities.gov.uk.

7.10 5 respondents (14%) favoured providing all FRAs with a power to trade in any of their functions until 30th September 2009. Two respondents (6%) did not indicate their preference.

7.11 The one respondent (3%) who favoured the cessation of the trading powers for FRAs was opposed to the principle of trading by FRAs. The respondent had concerns about FRAs offering competing services in fire protection, consultancy and training services.

7.12 The Government's view is that currently there is not enough evidence to demonstrate that the power to trade causes problems for industry competitors, as referred to in Para 7.11. When exercising the power to trade, usual public law rules in relation to acting within the authority's powers and reasonableness apply as well as its acting in compliance with its fiduciary duty¹¹. FRAs must trade through a company and meet the conditions in the 2004 Order on recovery of costs for services and other things supplied to the company and also comply with the requirements of competition legislation¹².

7.13 Those respondents that favoured the option to provide all FRAs with a power to trade in any of their functions felt that this option appeared to better embrace the concept of freedoms and flexibilities. However respondents from industry had concerns that the powers in this option would preclude any element of control on the activities of FRAs. Our view is that it would be sensible to consider the possibility of extending trading powers in 2009 when a new system of freedom and flexibilities for local authorities will be known.

7.14 On the basis and balance of the findings of the consultation, transitional trading powers will be extended until 30th September 2009 since this will maintain the status quo, without any detriment to the tax payer, until trading powers are reviewed in the light of the removal of the Comprehensive Performance Assessment (CPA).

¹¹ See for example *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768

¹² As provided in the Competition Act 1998 and/or Articles 81 and 82 of the EC Treaty

7.15 The RIA will be reviewed before 2009 to allow for any new evidence of benefits, costs and risks of trading gathered from FRAs and businesses during the period of the extension of the transitional period.

8. Impact

8.1 A Regulatory Impact Assessment is annexed to this memorandum.

9. Contact

Anna Wadsworth at the Department for Communities and Local Government Tel: 0207 944 5672 or email: anna.wadsworth@communities.gsi.gov.uk can answer any queries regarding the instrument.

Revision of Local Government (Best Value
Authorities) (Power to Trade) (England)
Order 2004

Consultation Findings & Final
Regulatory Impact Assessment

1	FINDINGS ON THE CONSULTATION EXERCISE ON TRADING.....	8
1.1	Background	8
1.2	Consultation.....	9
1.3	Question 1 – Which of the three options (A, B or C) do you consider to be the most appropriate choice?	10
1.4	Question 2 – Please explain the reasons for your preference?	10
1.5	Question 3 – Are there any alternative options that have not been considered?.....	12
1.6	Question 4 – Is there any information that you can supply on the benefits and costs of each option?	12
1.7	Question 5 – Is there any information that you can supply on the risks of each option?	13
1.8	Other comments	13
1.9	Recommendations.....	13
2	FINAL REGULATORY IMPACT ASSESSMENT	15
2.1	Purpose and Intended Effect of Measure	15
2.2	Consultation.....	17
2.3	Options	17
2.4	Costs and Benefits	18
2.5	Small Firms’ Impact Test (SFIT)	21
2.6	Competition Assessment	22
2.7	Enforcement, Sanctions and Monitoring	24
2.8	Implementation and Delivery Plan	24
2.9	Post-Implementation Review	24
2.10	Summary and Recommendation	24
2.11	Declaration and Publication	25

1 FINDINGS ON THE CONSULTATION EXERCISE ON TRADING

1.1 Background

- 1.1.1 The Local Government White Paper, *Strong Local Leadership - Quality Public Services* (DTLR, December 2001)¹³, proposed powers to trade for authorities by giving the best performers the widest freedom and flexibility to trade. 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.
- 1.1.2 The Local Government Act 2003 provides powers for the Secretary of State to make an order enabling best value authorities in England¹⁴ to trade in any of their ordinary functions, provided they are functions which they are not obliged to provide¹⁵. Trading is charging beyond full cost recovery and the power must be exercised through a company. The power was made available to better performing local authorities by linking the power to Comprehensive Performance Assessment¹⁶. However, the power did not apply to local authorities when acting in their capacity as a Fire and Rescue Authority (FRA).
- 1.1.3 An amending Trading Order, (Statutory Instrument 2004 No 2307) came into effect on 1st October 2004 to provide transitional provisions for those English FRAs that had interpreted the Fire Services Act 1947 as including a power to trade. It names the FRA and the specific service that the FRA was trading in on or before 1 April 2004.
- 1.1.4 The Trading Order was amended in 2004 (Statutory Instrument 2004 No 2573) in order to correct an error. It was subsequently amended in 2007 (Statutory Instrument 2007 No 385) to allow for the combination of two Fire & Rescue Authorities.
- 1.1.5 The power to trade in relation to Fire & Rescue functions is only transitional and will cease to have effect at midnight on 29 September 2007. It was originally intended that after this date that FRA trading

¹³ http://www.communities.gov.uk/pub/215/StronglocalleadershipQualitypublicservicesDTLR2001PartOne_id1165215.pdf

¹⁴ For the purposes of the Secretary of State's powers under section 95 Best Value Authorities are local authorities (namely county councils, district councils, parish councils, parish meetings, London borough councils, the Council of the Isles of Scilly, the Greater London Authority as it exercises its functions through the Mayor, county borough councils and community councils) and national park authorities, the broads authority, fire and rescue authorities, the London Fire and Emergency Planning Authority, waste disposal authorities, metropolitan county passenger transport authorities, and Transport for London.

¹⁵ And provided that the authority does not have other powers to carry out the function for a commercial purpose.

¹⁶ By virtue of the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2004 (Statutory Instrument 2004 No 1705) ("the Trading Order").

powers should be linked to Comprehensive Performance Assessment (CPA). However, the Local Government White Paper, *Strong and Prosperous Communities*¹⁷, has indicated that the current system of CPA will cease in 2009 and it would serve only a limited purpose to link FRA trading to this system.

1.2 Consultation

1.2.1 As the power to trade for FRAs expires on 30 September 2007 a consultation exploring potential options for future trading arrangements for FRAs was published on 27 April 2007. The consultation paper, which included the Regulatory Impact Assessment (RIA)¹⁸, was sent out to over 300 stakeholders including all English FRAs, certain charities and lobby groups, businesses and suppliers of fire and rescue equipment including Small & Medium sized Enterprises. The consultation was distributed by e-mail and made available on the Department's web site. It closed on 20 July 2007.

1.2.1 Three options were considered in the consultation:-

- Option A - Do nothing
- Option B - Extend transitional powers until 2009
- Option C - Provide all Fire and Rescue Authorities with a power to trade in any of their functions.

1.2.2 Option A – Do nothing: this would cease the powers for FRAs to trade as from 30 September 2007.

1.2.3 Option B – Extend transitional powers until 2009: this would maintain the status quo by continuing the existing powers for specified FRAs to trade in certain powers until 30 September 2009. In 2009 the approach to trading powers for local authorities will also need to be considered in the light of revised freedoms and flexibilities following the removal of CPA. Trading powers for FRAs would then be considered in the context of this broader review. Any requests for new specified trading powers for a FRA before 2009 would have to be supported by a business case which would have to be approved by the Department.

1.2.4 Option C – Provide all Fire and Rescue Authorities with a power to trade in any of their functions: this would allow all Fire and Rescue Authorities to trade in any of their ordinary functions rather than limiting the power to specified activities. It would be similar to Option B in that it would be reviewed in the light of the changes in 2009. A business case and risk analysis would be required to be prepared and approved by

¹⁷ www.communities.gov.uk/strongprosperouscommunities

¹⁸ <http://www.communities.gov.uk/index.asp?id=1510045>

the authority to trade in functions case which would have to be approved by the Department.

1.2.5 35 responses were received with 33 answering the questions posed in the consultation.

1.2.6 The breakdown of responses is as follows:

Fire & Rescue Authorities (FRAs)	27	(77%)
Industry	7	(20%)
Government Body	1	(3%)

1.3 Question 1 – Which of the three options (A, B or C) do you consider to be the most appropriate choice?

1.3.1 From the 35 responses received:

- 27 favoured Option B (77%)- this was supported by both FRAs and industry
- 5 favoured Option C (14%) – only FRAs supported this option
- 2 declined to give a preference for their option (6%)
- 1 respondent supported Option A (3%)

1.4 Question 2 – Please explain the reasons for your preference?

1.4.1 Those respondents that favoured Option B saw it as the most practical solution in that it gave adequate time to both FRA and businesses to fully understand the impact of trading without FRAs losing a potential income stream.

1.4.2 Further comments to support Option B included:

- It will enable evidence based decisions to be made
- Maintains status quo
- Allows time for performance monitoring structures that will replace CPA in 2009 to be developed and tested
- With the need for a business case to extend trading it gives a measure of control to FRA activities.

1.4.3 One respondent noted that though their preferred choice was Option A they had actually supported Option B in the consultation since they recognised that ceasing trading powers immediately could have a negative impact on income streams and this could have a knock-on effect on the tax payer.

1.4.4 Four who preferred Option B stated that they would have equally supported Option C and that this option may have to be considered in the longer term once the new freedoms and flexibilities system is known.

- 1.4.5 Only FRAs (5) supported Option C since they believed it gave greater scope and promoted greater innovation in service delivery. One felt that FRAs were responsible public bodies which should be trusted to act responsibly.
- 1.4.6 One respondent believed that this option would not require the business case to be approved by a stakeholder forum but by the authority alone. This in their view would better embrace the concept of freedoms and flexibilities.
- 1.4.7 However respondents from industry had concerns that the powers in this option would preclude any element of control on the activities of FRAs. Further research into the benefits, costs and risks of trading on both FRAs and businesses was seen to be needed before any extension of trading powers was given.
- 1.4.8 Our view is that it would be sensible to consider the possibility of extending trading powers in 2009 when a new system of freedoms and flexibilities for local authorities will be known.
- 1.4.9 The one respondent who favoured option A was opposed to the principle of trading by FRAs. The respondent had concerns about FRAs offering competing services in fire protection, consultancy and training services. They did note that if trading needed to continue that Option B would at least provide opportunity for safeguards to be put in place and give time to gain information on the likely take up by FRAs.
- 1.4.10 They believed that there were currently no mechanisms in place to ensure trading services from FRAs were being offered at market rates and that the public perceived FRAs as the experts in certain areas which could lead to an unfair advantage in the market. They believed that there was still potential conflict of roles with the FRAs acting as both the giver of advice and the enforcer.
- 1.4.11 FRAs have responded to these questions in the past in that they are taking steps to separate their roles and since they have to set up a trading company they are subject to competition law.
- 1.4.12 Concerns over Option A from other respondents were that such removal of powers would have a detrimental impact on potential income streams for FRAs and ultimately have a knock on impact on the tax payer. It was seen as impractical given the time it would take to wind down existing companies.
- 1.4.13 Two FRAs indicated that they currently did not use the trading powers and they did not indicate a preference for their option.
- 1.4.14 On the basis and balance of the findings of the consultation, we have recommended that the transitional trading powers will be extended until

30 September 2009 since this will maintain the status quo, without any detriment to the tax payer, until trading powers are reviewed in the light of the removal of the Comprehensive Performance Assessment (CPA).

- 1.4.15 The Regulatory Impact Assessment (RIA) will be reviewed before 2009 to allow for any new evidence of benefits, costs and risks of trading gathered from FRAs and businesses during the period of the extension of the transitional period.

1.5 Question 3 – Are there any alternative options that have not been considered?

- 1.5.1 The majority of the respondents believed that the options detailed covered all the possible choices however there were some suggestions for alternatives.
- 1.5.2 A robust audit process could be established for FRAs that offer charge-only services. This might ensure consistent charging methodology with codes produced by the Chartered Institute of Public Finance and Accountancy (CIPFA).
- 1.5.3 Charging and trading to be undertaken as a membership of a partnership or shared service facility with other local authorities, public bodies and or commercial partners.
- 1.5.4 FRAs not to trade outside of the normal and recognisable services they traditionally provide. Instead they could monitor and ensure that services offered from outside were by reputable and competent providers.
- 1.5.5 Government could ensure that FRAs were adequately funded so that they did not have to resort to such commercial interests.

1.6 Question 4 – Is there any information that you can supply on the benefits and costs of each option?

- 1.6.1 There were comments that there would be significant resource and financial burdens to FRAs if Option A were implemented. It had taken 10 months for one FRS to establish a trading company and there would be costs incurred in winding it down as well as the reduction of income generated. The profit generated was being distributed to help fund community fire safety projects.
- 1.6.2 An alternative view was that Option A would enable dynamism and entrepreneurial spirit within the private sector. It would also ensure that there was no risk that public money is spent, directly or indirectly, on the setting up and on-going running of trading companies by FRAs.
- 1.6.3 Several respondents stated that they did not have such information at present but would make it available at a later date. We will be sending

out questionnaires and surveys to both suppliers and FRAs to gather any new evidence on the impact of the trading powers by 2009.

1.7 Question 5 – Is there any information that you can supply on the risks of each option?

- 1.7.1 For FRAs Option A was seen as having the greatest risk of limiting flexibilities and potential revenue streams. This was viewed as particularly relevant given the anticipated funding settlements arising from the Comprehensive Spending Review (CSR) 2007.
- 1.7.2 One respondent noted that there was a risk of FRAs being inconsistent in how they approached trading which could lead to the blurring of lines between charging and trading with potential accounting and auditing difficulties.
- 1.7.3 There are normal business risks of any commercial operation especially the quantum and sustainability of demand for services.
- 1.7.4 Industry suggested was that the options B or C could deflect FRAs from core activities and lead to increased costs if trading did not prove to be commercially viable. Trading by FRAs could also lead to inequity between public and private sectors.
- 1.7.5 They considered that whatever arrangements were in place in either of these sectors that there must be a means by which the competence of the trading company and its employees was established and maintained, with appropriate third party accreditation.
- 1.7.6 It was proposed that FRAs identify any likely risks and means of reducing these through their Integrated Risk Management Plans (IRMPs).
- 1.7.7 One respondent felt that it was important to ensure that appropriate arrangements are in place for Regional Control Centres (RCCs) and Local Authority Controlled Companies (LACCs) prior to 2009 to minimise any risks in emerging regional arrangements.

1.8 Other comments

- 1.8.1 It was felt by one respondent that there was a need to revisit the rationale for continuing or extending trading powers and prove that this is best value. They believed that there should be independent analysis of the market place and the impact of trading on this.
- 1.8.2 One industry respondent thought that the issue of trading needed to be viewed in the wider context of the management of municipal fire risk.

1.9 Recommendations

- 1.9.1 On the basis and balance of the findings of the consultation, we have recommended that the transitional trading powers will be extended until 30 September 2009 since this will maintain the status quo, without any detriment to the tax payer, until trading powers are reviewed in the light of the removal of the Comprehensive Performance Assessment (CPA).
- 1.9.2 The Regulatory Impact Assessment (RIA) will be reviewed before 2009 to allow for any new evidence of benefits, costs and risks of trading gathered from FRAs and businesses during the period of the extension of the transitional period.

2 FINAL REGULATORY IMPACT ASSESSMENT REVISION OF LOCAL GOVERNMENT (BEST VALUE AUTHORITIES) (POWER TO TRADE) (ENGLAND) ORDER 2004

This Regulatory Impact Assessment has been completed under the previous RIA process, as the work underpinning this was completed prior to the introduction of the new Impact Assessment format. However, the Impact Assessment Communities and Local Government are committed to produce before 2009, which will assess any new evidence, will be completed using the new format.

2.1 Purpose and Intended Effect of Measure

Objective

- 2.1.1 To examine the options to replace the current transitory trading powers for English Fire & Rescue Authorities under the Local Government (Best Value Authorities) (Power to Trade) (England) (Amendment) Order 2004.

Background

Trading Powers

- 2.1.2 The Local Authorities (Goods and Services) Act 1970 governs the way in which local authorities are allowed to 'trade' with each other and with other public bodies. It authorises local authorities to enter into agreements with public bodies (which by definition includes local authorities) for the provision by local authorities to those bodies, of goods, materials and administrative, professional and technical services, for the use of vehicles, plant and apparatus, and for the carrying out of maintenance. A Fire and Rescue Authority is a local authority for the purposes of the 1970 Act. This is public to public trading. There is also a power for the Secretary of State to designate by Order that any person(s) exercising functions of a public nature shall be a public body for the purposes of the Act (NB this is solely for the purposes of designation under the 1970 Act – it has no wider implication).
- 2.1.3 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 to provide 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. The Local Government White Paper, 'Strong Local Leadership – Quality Public Services' (DTLR, December 2001) went further than the earlier Consultation Paper, proposing to provide wider powers to trade for all

authorities where this helps achieve best value and the delivery of public services.

- 2.1.4 The Local Government Act 2003 (“the 2003 Act”) provides power for the Secretary of State to make an Order enabling Best Value authorities to trade for a commercial purpose in any of their ordinary functions (with certain important exceptions). The powers contained in the Trading Order are primarily concerned with *public to private* trading.

Trading Orders

- 2.1.5 The Local Government (Best Value Authorities) (Power to Trade) (England) Order 2004 (S.I. 2004/No1705) (as amended), (“the Principal Order”) which came into force on 29 July 2004, authorises local authorities that have been categorised by Comprehensive Performance Assessment (CPA) on the basis of their performance as “excellent”, “good”, or “fair” to trade in any of their ordinary functions. This is subject to conditions requiring the approval of a business case, and the recovery of any costs incurred in anything the local authority supplies to a company through which the trading power is exercised. Where a local authority’s performance is re-categorised as below “fair” a transitional provision permits an authority to complete anything started in exercise of the power to trade (any agreements or arrangements which have been entered into are allowed to continue for a period of 2 years). The Order did not apply to local authorities when acting in their capacity as a Fire and Rescue Authority.
- 2.1.6 The Principal Order was amended by The Local Government (Best Value Authorities) (Power to Trade) (Amendment) (England) Order 2006 (S.I. 2006/3102)¹⁹ to extend the power to trade to those local authorities whose performance has been categorised by an order, made under section 99(4) of the 2003 Act, as “4 stars” “3 stars” “2 stars” and “1 star” under CPA 2005.
- 2.1.7 The Principle Order was amended by the Local Government (Best Value Authorities) (Power to Trade) (Amendment) (England) Order 2006 (S.I. 2004/2307)²⁰ to provide the power to trade to:
- certain named local authorities in England, when acting in their capacity as a fire and rescue authority
 - certain named metropolitan county fire and rescue authorities in England and
 - certain named fire and rescue authorities in England constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 (“the 2004 Act”) or to which section 4 of that Act applies.

¹⁹ <http://www.opsi.gov.uk/si/si2006/20063102.htm>

²⁰ <http://www.opsi.gov.uk/si/si2004/20042307.htm>

- 2.1.8 For FRAs, the power to trade only applied in respect of certain named functions, namely those functions which authorities had been trading in previously using powers in the Fire Services Act 1947 which was repealed by the 2004 Act. The power to trade in relation to fire and rescue functions is only transitional and ceases to have effect on 30 September 2007.
- 2.1.9 The Local Government (Best Value Authorities) (Power to Trade) (Amendment No.2) (England) Order 2004 (S.I. 2004/2573)²¹ was made to correct an error in respect of the functions for which Essex County Council was authorised to trade in. The Local Government (Best Value Authorities) (Power to Trade) (Amendment) (England) Order 2007 (S.I. 2007/385)²² was made to allow for the combination of Devon and Somerset Fire and Rescue Authorities.
- 2.1.10 The terms of any future trading order for Fire & Rescue Authorities will not differ from those that apply to local authorities, the trading order is subject to conditions requiring the approval of a business case, and the recovery of any costs incurred in anything the local authority supplies to a company through which the trading power is exercised.

Rationale for government intervention

- 2.1.11 The transitional Order for existing powers to trade for Fire & Rescue Authorities (FRAs) ceases at midnight on 29 September 2007.

2.2 Consultation

- 2.2.1 Information was sought from previous RIAs produced in relation to the trading powers in the 2003 Act and findings are included in the Competition Assessment (section 3.6 of this RIA).
- 2.2.2 Information was also sought from previous charging and trading consultations that had been undertaken since 2004.
- 2.2.3 The results of the public consultation are detailed in Section 1.

2.3 Options

Three options have been identified:

- Option A – Do nothing
- Option B – Extend transitional powers until 2009

²¹ <http://www.opsi.gov.uk/si/si2004/20042573.htm>

²² http://www.opsi.gov.uk/si/si2007/uksi_20070385_en.pdf

- Option C – Provide all Fire and Rescue Authorities with a power to trade in any of their functions

Option A – Do nothing

2.3.1 This would cease the powers for Fire and Rescue Authorities to trade as from 30 September 2007. This option would mean that FRAs would be deprived of existing income streams and thereby possibly increase the burden on tax payers. Some FRAs are already trading and they would need time to plan the winding down of any existing schemes.

Option B – Extend transitional powers until 2009

2.3.2 This would maintain the status quo by continuing the existing powers for FRAs to trade in specified powers until 30 September 2009. In 2009 trading powers will need to be amended in the light of revised freedoms and flexibilities following removal of CPA. Trading powers for FRAs would then be considered in the context of this broader review. Any requests for new specified trading powers for a FRA before 2009 would have to be supported by a business case.

Option C – Provide all Fire and Rescue Authorities with a power to trade in any of their functions

2.3.3 This would allow all Fire and Rescue Authorities to trade in any of their ordinary functions rather than limiting the power to specified activities. It would be similar to Option B in that it would be reviewed in the light of the changes in 2009 to CPA. A business case and risk analysis would be required to be prepared and approved by the authority to trade in functions.

Alternative approach considered but rejected

Linking to Comprehensive Performance Assessment (CPA)

2.3.4 The FRA Trading powers were originally set as transitional as it was intended after 2007 to be linked to CPA. The Local Government White Paper has indicated that the system of CPA will cease in 2009 and it would serve no purpose to attempt to link FRA trading to the CPA system for such a time limited purpose.

2.4 Costs and Benefits

Sectors and groups affected

2.4.1 Businesses (including Small and Medium sized Enterprises), consumers, public and voluntary sectors.

2.4.2 The powers allow FRAs to engage in activities which are also undertaken by the private sector; however, it is not necessary to assume that Fire & Rescue Authorities will necessarily be displacing business from the private sector. The trading powers may be used to improve competition and contestability or to fill a gap in the market in the provision of services to the public.

Race equality assessment

2.4.3 The trading power is a non-prescriptive enabling power and should not in itself have an adverse impact on race equality. FRAs are under a legal duty to eliminate race discrimination and to promote equality of opportunity and good race relations in carrying out their functions. When making use of the trading powers, as part of their legal duty, FRAs should consider whether there are any race equality considerations that need to be addressed.

Health impact assessment

2.4.4 The trading power is a non-prescriptive enabling power and should not in itself have an adverse impact on health issues. When making use of the trading powers FRAs should consider whether there are any adverse health impact considerations that need to be addressed.

Rural considerations

2.4.5 The trading power is a non-prescriptive enabling power and should not in itself have an adverse impact on rural issues. When making use of the trading powers FRAs should consider whether there are any adverse rural considerations that need to be addressed.

Breakdown of costs and benefits

2.4.6 Below are the most likely range of outcomes and likely impacts from both suppliers and FRAs points of view:

2.4.7 Option A – Do nothing

Economic	
Benefits	Suppliers –Potential to increase business for suppliers due to FRAs not eligible to compete in the market
	FRAs – None
Costs	Suppliers – Not known – further information is required
	FRAs - Loss of existing and potential income Costs for winding down trading companies

Environmental	
Benefits	Suppliers – None

	FRAs – None
Costs	Suppliers – None
	FRAs – None

Social	
Benefits	Suppliers - Dissipation of concerns over competition issues
	FRAs – Not subject to risk inherent in undertaking trading activities
Costs	Suppliers - Not known – further information is required
	FRAs – Diversity and choice of markets restricted Prevented from competing in market Loss of resource to the community should FRA companies provide fire safety services to sections of the community at below cost (i.e. a tiered costing approach to different sections of the community).

2.4.8 Option B – Extend transitional powers until 2009

Economic	
Benefits	Suppliers - Not known – further information is required
	FRAs – Potential to continue income generation
Costs	Suppliers – Potential loss of business through greater competition
	FRAs – Administration of trading arm Uncertainty in post 2009 arrangements Costs for preparing and considering business cases

Environmental	
Benefits	Suppliers - None
	FRAs - None
Costs	Suppliers - None
	FRAs - None

Social	
Benefits	Suppliers - Not known – further information is required
	FRAs – Wider diversity and choice of markets
Costs	Suppliers - Not known – further information is required
	FRAs – Concentration of resources away from core business

2.4.9 Option C- Provide all Fire and Rescue Authorities with a power to trade in any of their functions

Economic	
Benefits	Suppliers - Not known – further information is required
	FRAs – Potential to continue current income generation and explore new trading options
Costs	Suppliers – Potential loss of business through greater competition than Option B
	FRAs - Similar to Option B

Environmental	
Benefits	Suppliers - None
	FRAs - None
Costs	Suppliers - None
	FRAs - None

Social	
Benefits	Suppliers - Not known – further information is required
	FRAs – Wider diversity and choice of markets
Costs	Suppliers - Not known – further information is required
	FRAs - Greater concentration of resources way from core business than Option B

2.4.10 Given that more information on costs and benefits are needed the Government's current preferred option is Option B.

2.5 Small Firms' Impact Test (SFIT)

2.5.1 Whilst the trading powers mean that FRAs are potentially trading in competition with the private sector, various safeguards have been built in to the use of the powers. Safeguards include requiring authorities to adopt a genuinely risk-based approach, based on a sound business case prepared for the proposed trading activity and cleared by the authorities' executive.

2.5.2 The arrangements secure that FRAs are not able to distort markets through the provision of inappropriate subsidies to trading companies. In order to maintain a level playing field with local businesses, the powers to trade are subject to a requirement that trading must take place through a company within the meaning of Part V of the Local Government and Housing Act 1989. This means that surpluses on commercial operations under the power will be subject to taxation in the same way as other companies. FRAs like other bodies are subject to and must abide by competition law.

2.5.3 A Small Firms Impact Test (SFIT) was sent to over 300 businesses. We received one direct response to the questionnaire from a Small &

Medium sized Enterprise (SME). They concluded that there was no impact to their business from current trading practices by FRAs and they did not perceive that extending the order would have any relevant costs or savings to them.

2.5.4 Further information will be sought from SMEs before 2009 to allow for any new evidence of benefits, costs and risks gathered during the extension of the transitional period.

2.5.5 The Small Business Service and other representative bodies for small businesses have been contacted concerning this.

2.6 Competition Assessment

2.6.1 A full Competition Assessment was carried out for the Regulatory Impact Assessment published to coincide with the introduction of the Local Government Bill 2003.

2.6.2 Though this assessment looked at Local Authorities, some of the findings would equally apply to Fire & Rescue Authorities.

2.6.3 The conclusions of the 2003 Bill Competition Assessment were:

- deducing the effects on competition was difficult due to the "enabling" nature of the powers and the inevitable uncertainty about the extent to which local authorities will seek to use them
- the powers could lead to increased contestability and/or increased competition in markets (especially those which are currently inefficient or less active)
- greater levels of trading by local authorities could lead to efficiency gains through increased economies of scale, and so could benefit consumers through lower prices, better quality, or both
- there could however be a number of adverse effects arising from certain advantages that local authorities may possess, with consequent potential for the abuse of market power
 - conflicts of interest may arise for local authorities in cases where they both regulate markets and participate in them (for example where withholding planning consents would create barriers to entry)
 - the legislation could potentially facilitate collusion between local authorities, thereby adversely affecting private sector businesses, either through increased information asymmetry or affecting bidding outcomes

- in terms of existing markets, local authorities may be able to exploit the benefits of an existing customer base and crowd out the private sector
 - the legislation may alter the competitive process through increased consolidation and the possible exclusion of small businesses from particular markets.
- The power to trade is only exercisable through a company structure, which is subject to regulation in the same way as other commercial bodies (e.g. taxation). This helps ensure a level playing field with the private sector.
- 2.6.4 The consultations on charging carried out in 2004 and 2006 and other related correspondence were also looked at to gain any information on trading issues that was received from both Suppliers and Fire & Rescue Services.
- 2.6.5 Suppliers were concerned about FRAs offering competing services in fire protection, consultancy and training services. It was felt that there were no current mechanisms in place to ensure such services were being offered at the market rate. The public perceive FRAs as the experts in certain areas and this could lead to an unfair advantage in the market. There were also issues over the potential conflict of role with FRAs acting as both the giver of advice and the enforcer.
- 2.6.6 Many of the issues raised above, in relation to a local authority's assistance to a company, transparency, state aid and competition law, are addressed in the Trading Guidance. Such considerations would apply equally to a FRA as to a local authority.
- 2.6.7 From April to July 2006 the Chief Fire Officers' Association sent out a survey to all the English FRAs. This asked for information about what services they were currently trading in, how much revenue this generated, what impact setting up a company would have and if they were likely to require expansion for their trading activities.
- 2.6.8 Information gained from this was inconclusive though some FRAs indicated that they were unlikely to carry on with trading activities in the future.
- 2.6.9 A response to the 2004 consultation noted that in the past there had been a tendency to underestimate the full costs to industry and commerce and so suppliers, through the Business & Community Safety Forum and the Fire & Rescue Suppliers Association, were contacted in January 2007 to help complete the Competition Assessment.
- 2.6.10 The Office of Fair Trading and other representative have been contacted concerning this.

2.7 Enforcement, Sanctions and Monitoring

Enforcement

2.7.1 The trading power is an enabling power therefore there are no non-compliance issues.

Sanctions

2.7.2 As above there are no sanction requirements for the trading powers. Any sanctions for non-compliance with the legislative duties under the trading legislation, or under any other legislation, will be a matter for the courts if necessary.

Monitoring and review

2.7.3 Requests for extending trading powers for named FRAs in specified functions will have to be submitted to Communities and Local Government as a business case to extend the trading powers by Order. A forum will be set up to review these and would involve key stakeholders.

2.7.4 Future questionnaires and surveys to both suppliers and FRAs will be sent out to benchmark current costs and benefits. These will be used to monitor potential developments.

2.8 Implementation and Delivery Plan

2.8.1 An amending Statutory Instrument extending the transitional period until 30th September 2009 will come into force on 1st October 2007.

2.9 Post-Implementation Review

2.9.1 The RIA will be reviewed before 2009 to allow for any new evidence of benefits, costs and risks of trading gathered from FRAs and businesses during the period of the extension of the transitional period.

2.9.2 Draft guidance on FRA trading was issued for comment in January 2007 and this will be updated and reissued to include comments received from that exercise and the consultation.

2.10 Summary and Recommendation

Option	Total cost per annum Economic, environmental, social	Total benefit per annum Economic, environmental, social
A - Do nothing	Likely to have negative impact on tax payer if FRA income stream	Likely to improve market share for suppliers

	reduced	
B - Extend transitional powers until 2009	Retains status quo and continues income generation for FRAs	Income generated for community safety and other FRA projects
C - Provide all Fire and Rescue Authorities with a power to trade in any of their functions	Likely to have greater cost impact on both FRAs and suppliers with higher risks	Potential for FRAs to generate further income Impact on suppliers unknown

2.10.1 On the basis and balance of the findings of the consultation, we recommend Option B since this will maintain the status quo, without any detriment to the tax payer, until trading powers are reviewed in the light of the removal of the Comprehensive Performance Assessment.

2.11 Declaration and Publication

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

Signed ...Iain Wright.....

Date 28th August 2007

Iain Wright

Parliamentary Under Secretary of State – Department for Communities and Local Government

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