

# Using your legal powers for income generation

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## Introduction

- What are the vision and leadership behind your income generation proposals?
- Who is your market?
- Key issues to consider: procurement, state aid, democratic control, employment



## Powers

- Local authority must act within its powers
  - Must identify a power
  - Must act reasonably in exercise of powers
- There must be a clear audit trail

## Charging and Trading

- Charging by local authorities
  - Income to recover cost of providing discretionary services
- Trading by local authorities
  - Doing something for a commercial purpose

## Powers

- Charging
  - S.93 Local Government Act 2003
  - Charging for discretionary services
  - Income must not exceed cost of provision
    - But full cost of provision can be charged



## Powers

- Charging
  - S.38 Local Government (Miscellaneous Provisions) Act 1976 – Provision of spare capacity of computers
  - S.150 Local Government and Housing Act 1989
    - Power for Welsh Ministers to allow charges
    - eg: Health Protection (Part 2A Orders) (Wales) Regulations 2010 – Charges for costs of applying for orders under Part 2A Public Health (Control of Disease) Act 1984
    - Charge must not exceed cost/must be reasonable

## Powers

- Trading
  - S.1 Local Authorities (Goods and Services) Act 1970
    - Supply of goods and services to public bodies
  - S.95 Local Government Act 2003 and Local Government (Best Value Authorities) (Power to Trade) (Wales) Order 2006 (SI 2006/979) – Power to trade in function-related activities through a company
  - But note out of date reference to “best value authority”

## Other relevant powers

- S.111 Local Government Act 1972
  - Anything calculated to facilitate, conducive or incidental to discharge of functions
- S.2 Local Government Act 2000
  - Anything the authority considers likely to promote or improve economic, social or environmental well-being of the area



## Proposed General Power of Competence

- Draft Local Government (Wales) Bill
  - Power to do anything individuals generally may do
  - Does not enable a local authority to anything it is prevented from doing by another statute
  - Limits on using general power of competence to charge
  - If using general power of competence for a commercial purpose, must use a company

## Proposed General Power of Competence

- Well-being power will be repealed when general power of competence is introduced

## Proposed general power of competence

- What difference would general power of competence make to use of current powers?
- Actions would not need to relate to functions
- But would need to be reasonable
- Audit trail important
- Risk Management Partners v Brent LBC (2009)
  - Challenge pre general power of competence in England
  - But highlighted limitations on incidental power and well-being power

## General Power of Competence in England: Cases

- R (on the application of MK) v Barking and Dagenham LBC
- R (on the application of Savage) v Mansfield District Council

## Avoiding form over substance

- Be clear about objectives before deciding on delivery model – you don't always need a company
- Be clear about the characteristics of delivery models and implications for your objectives

# Demystifying delivery models

Issue	Model
Does the authority want to maximise income generation opportunities from its own provision of services?	Delivery by the authority itself, using charging powers is appropriate
Is a new entity needed?	Corporate entity appropriate
Does the authority intend to award contracts without competitive procurement?	Company limited by shares or guarantee, community interest company, community benefit society, limited liability partnership suitable. Must meet "Teckal" criteria
Does the authority intend to trade commercially outside the public sector?	Must use a company Teckal company not suitable

## Key legal issues when setting up companies and other entities

- Powers
- Democratic Control
- Procurement
- State Aid

## Democratic Control

- Different models have different effects
- Company arrangements with financial advantages may require low level Council control
- Will members accept limitations on control?
- Make members aware and manage expectations



## Public Procurement

- Rules usually apply whenever:
  - A contracting authority
  - Seeks offers for public contracts
  - The value of which exceed the relevant threshold
  - And which are not expressly excluded
- But consider exemptions and exceptions
  - Award of contracts to controlled persons – Teckal
  - Light touch regime for some services

## Public Procurement

- Does your proposed model suit your objectives?
- Teckal company will avoid procurement implications
- But not suitable if you intend to trade widely

## State Aid: The Ingredients

- Economic advantage out of State resources
- Provided to an economic undertaking
- Giving rise to a selective advantage
- Potential to distort competition
- Potential to affect trade between Member States

## State Aid

- How to address your concerns
- Thorough analysis of state aid implications before deciding on arrangements
  - Understanding the scope, exemptions and solutions

## State aid – some illustrations

- Business or assets transfer on below market terms
- Back office support by Council - either at no or reduced cost
- Property use at undervalue

## State aid solutions

- Market terms deal
- *De minimis* aid
- Possible exemptions include:
  - Sports and recreation infrastructure
  - Culture and heritage (including libraries)
- Services of general economic interest (SGEI)

## Employment

- TUPE
- Terms and conditions
- Equal Pay
- Redundancy Costs

## TUPE

- Consideration of whether TUPE will apply
- Is there a transfer of an economic entity?
  - Is there an interruption to service delivery?
  - Is there an organised grouping of employees wholly assigned to the service?
- If NO - TUPE will not apply but:
  - Redundancy implications
  - Threat to service delivery
- Impact on business plan and service provision



## Scope to restructure and change T&Cs

- Restrictions on ability to make changes unless:
  - ETO reason
  - Permitted by terms of contract
- Strategic restructure only way to lawfully achieve changes immediately post transfer
- Variation by collective agreement 12 months post transfer provided no less favourable when considered together

## Equal Pay

- Associated Employers
- *Glasgow City Council & Others v Unison & Others (2014)*
  - Company includes “a body and association of persons”
  - LLPs were associated employers for equal pay purposes
  - Female employee who had transferred to the LLPs could compare with male employees working for the Council
  - Key issue was control - Teckal status was enough to satisfy Court about control
  - A different ADM, e.g. non controlled company may not have been an “associated employer”
  - Non controlled ADM would have required open procurement

## Equal Pay

- Ensure any pay difference can be explained and evidenced by reference to a Material Factor Defence
- Disparate impact in gender terms will require objective justification

## Redundancy Costs

- Framework set by Local Government (Early Termination of Employment) (Discretionary Compensation) England & Wales Regulations 2006
  - 104 weeks full pay
  - Local Authority Policy may provide for less
- Significant changes to Public Sector Exit Payments
  - Recovery of exit payment if re-employed in public sector within 12 months
  - £95,000 cap on exit payments
  - Consultation on limiting public sector exit payment terms

Thank You

