

## Cyngor Sir CEREDIGION County Council

**REPORT TO:** Governance and Audit Committee

**DATE:** 3 June 2021

**LOCATION:** Remotely via Video-conference

**TITLE:** Update on Council's General Power of Competence

**PURPOSE OF REPORT:** To provide the Governance and Audit Committee with an update on the Council's General Power of Competence under the Local Government and Elections (Wales) Act 2021 and update regarding the Council's response to the Welsh Government's Consultation Questions regarding the draft General Power of Competence (Commercial Purpose) (Condition) (Wales) Regulations 2021

### **BACKGROUND:**

The Local Government and Elections (Wales) Act 2021 ('the 2021 Act'), which received Royal Assent on 20 January 2021, gives qualifying local authorities a general power of competence ('GPOC'). Authorities may use the GPOC to do things for a commercial purpose and the Welsh Government is consulting on Regulations, which require authorities to prepare a business case before using the GPOC in this way, as well as on the proposal that community councils eligible to exercise the GPOC be provide for a power to trade in their ordinary functions. (2021 Act available at <https://www.legislation.gov.uk/asc/2021/1/introduction/enacted>).

The Local Government and Elections (Wales) Act 2021 (Commencement No. 1 and Saving Provision) Order 2021 ('1<sup>st</sup> Commencement Order'), which was made on 3 March 2021, provides for the bringing into force of the GPOC for principal councils on 1 November 2021 and community and town councils on 5 May 2022. (1<sup>st</sup> Commencement Order available at <https://www.legislation.gov.uk/wsi/2021/231/contents/made>).

### **Local Authorities and the GPOC – ss24-29, Chapter 1, Part 2, 2021 Act**

**Section 24 of the 2021 Act:** the GPOC allows '*qualifying local authorities*' (principal councils i.e. county councils, and eligible community councils etc) to do anything that an individual can do, and which they have likely never done before, including:

- (a) Anywhere in Wales or elsewhere;
- (b) For a commercial purpose or otherwise for/without a charge; and
- (c) For, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.

It is also worth noting that under s.95 of the Local Government Act 2003 ('2003 Act') (the Power to trade in ordinary functions) the Welsh Ministers may make an order authorising certain

authorities to trade in any of their ordinary functions through a company. Under S.96 (1) 2003 Act, Welsh Ministers may impose conditions on exercising the power to trade and authorities in Wales must have regard to related guidance by Welsh Ministers (S. 96(2) 2003 Act). The definitions as to which types of authorities that these sections relate to have seen several changes, but community councils remain included in the definition and, since 1 April 2021, the Local Government and Elections (Wales) Act 2021 (Consequential Amendments) Regulations 2021 states that the following are also included:

- 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.

### **Boundaries/limitations of the GPOC**

These include that:

- (a) **S.25 2021 Act:** The GPOC cannot be used where there is any limitation or restriction in existing legislation, or any future legislation which sets out such a limitation e.g. 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 GPOC to be used to circumvent these constraints.
- (b) **S.26 2021 Act:** includes conditions on charging in exercise of the GPOC.
- (c) **S.27(1) 2021 Act:** Although authorities may use the GPOC to do something for a commercial purpose through a company, this can only be done if the authority would also rely on the GPOC to do that thing for a non-commercial purpose (see S.95 2003 Act above, which sets out an authority's power to trade in their ordinary functions).
- (d) **S.27(2) 2021 Act:** Where the GPOC is used by a qualifying local authority for a commercial purpose, this must be done through a company.
- (e) **S.27(3) 2021 Act:** The 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.
- (f) **S.27(5) 2021 Act:** Guidance issued by the Welsh Ministers about exercising the GPOC to do anything for a commercial purpose must also be adhered to.

**S.28 2021 Act:** provides for the Welsh Ministers to make regulations to:

1. Remove/amend statutory provisions they think prevent qualifying local authorities from using the GPOC, or obstruct them when using the GPOC;
2. Remove overlaps between the GPOC and other powers (but not by revising or cutting back the GPOC);
3. Restrict what a qualifying local authority may do under the GPOC; and
4. Make the GPOC's use subject to conditions.

### **Eligible Community Councils - ss30-37, Chapter 2, Part 2, 2021 Act**

**S.30 of the 2021 Act:** provides criteria for a community council to be '*eligible*', including that:

- At least 2/3 of the total council members are elected, whether at ordinary or by-election;
- The community council's clerk holds such qualification/description of qualification as may be specified by Welsh Ministers by regulations (the draft regulations specifying the proposed qualifications will be subject to a separate consultation); and

- The community council has received 2 unqualified auditor's opinions from the Auditor General for Wales, for two consecutive financial years and 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.

**S.34 of the 2021 Act:** makes provision in respect of common community councils established after the Act was passed.

**Section 35 of the 2021 Act:** provides that eligibility conditions can be added, removed, changed and, in some circumstances, make provision for a community council to cease to be eligible.

**The Local Government (Best Value Authorities) (Power to Trade) (Wales) Order 2006** ('the 2006 Order') shall, under the implementation of the 2021 Act, be re-made to correctly update the reference to authorities, a technical change. Practically, the Order authorises the authorities (apart from community councils) 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. Consequently, they may trade in all services other than those which the authority is obliged by law to provide.

Conditions of the 2006 Order include that:

- Before exercising the power, the authority is required to prepare and approve a business case (see below) in support of the proposed exercise of the power.
- The authority 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.

The 2006 Order also defines a 'business case' as '*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 these risks are; and*
- the expected financial results of the business, together with any other relevant outcomes that the business is expected to achieve'*

### Welsh Government Consultation

On 22 March 2021 the Welsh Government launched a Consultation, which seeks views on:

- 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; and
- 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.

(Consultation available at: <https://gov.wales/consultation-local-authority-power-trade-html>  
Draft Regulations available at: [https://gov.wales/sites/default/files/consultations/2021-03/annex-a-draft-general-power-of-competence-regulations-2021\\_0.pdf](https://gov.wales/sites/default/files/consultations/2021-03/annex-a-draft-general-power-of-competence-regulations-2021_0.pdf)).

A Draft Regulatory Impact Statement has also been developed following consideration of two options:

- Option 1: Maintain the status quo.
- Option 2: Make the General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2021 as presented in the draft Regulations.

(Draft Regulatory Impact Statement available at:  
[https://gov.wales/sites/default/files/consultations/2021-03/annex-b-general-draft-regulatory-impact-assessment\\_0.pdf](https://gov.wales/sites/default/files/consultations/2021-03/annex-b-general-draft-regulatory-impact-assessment_0.pdf)).

There is also an intention to issue guidance setting out expectations to support councils in implementing requirements when exercising the GPOC for a commercial purpose.

## **Current Position**

The Consultation documents were circulated to all Council Political Group Leaders and to the members of the Council's Governance and Audit Committee on 13 April 2021, with an opportunity provide comments. A Workshop was also held for the Council's Governance and Audit Committee on 27 April 2021 to provide the Committee with an opportunity to comment.

The Corporate Lead Officer – Legal and Governance/Monitoring Officer informed the Leadership Group of the Consultation on 14 April 2021.

The Council's Response to the Consultation is being prepared (the Consultation period ends on 11 June 2021) and the Council's Response, which shall be submitted by the deadline, is attached (see **Appendix 1**).

The intention of the Welsh Government is to analyse the responses to the 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 GPOC for 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.

**Has an Integrated Impact Assessment been completed? No  
If, not, please state why**

**Summary:** *This report does not represent a change in policy or strategy.*

## **WELLBEING OF FUTURE GENERATIONS:**

### **Long term:**

Opportunity to comment on the draft General Power of Competence (Commercial Purpose) (Condition) (Wales) Regulations 2021, since Part 2 of the Local Government and Elections (Wales) Act 2021 relates to the General Power of Competence for Local Authorities and Part 2 Chapter 2 of the Act relates to the General Power of Competence for qualifying Community Councils. Performance and governance will have an effect on short and long-term needs.

<b>Integration:</b>	Encouraging global responsibility in opportunity to comment on draft Regulations (economic wellbeing in improving performance and governance under Part 2 of the local Government and Elections (Wales) Act).
<b>Collaboration:</b>	With Welsh Government and Stakeholders.
<b>Involvement:</b>	N/A from Council perspective but potentially from Welsh Government perspective of involving persons with an interest in Well-being goals in the Consultation.
<b>Prevention:</b>	Opportunity to comment on draft Regulations may make positive changes to governance, prevent problems getting worse and help public bodies meet Well-being objectives through improvement of performance and governance.

## RECOMMENDATIONS:

For information: to provide the Committee with an update on the Consultation on the draft General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations regarding Part 2 of the Local Government and Elections (Wales) Act 2021 and provide the Committee with the Council's Response to the Consultation.

**REASON FOR RECOMMENDATIONS:** Monitoring of the governance of the Local Authority in line with legislative changes.

<b>Contact Name:</b>	Elin Prysor
<b>Designation:</b>	Corporate Lead Officer: Legal & Governance & Monitoring Officer
<b>Acronyms:</b>	N/A
<b>Date of Report:</b>	12/05/2021
<b>Appendices:</b>	<b>Appendix 1:</b> Ceredigion County Council Response to Consultation
<b>Background papers</b>	Local Government and Elections (Wales) Act 2021: <a href="https://www.legislation.gov.uk/asc/2021/1/introduction/enacted">https://www.legislation.gov.uk/asc/2021/1/introduction/enacted</a> Local Government and Elections (Wales) Act 2021 (Commencement No. 1 and Saving Provision) Order 2021: <a href="https://www.legislation.gov.uk/wsi/2021/231/contents/made">https://www.legislation.gov.uk/wsi/2021/231/contents/made</a> . Consultation 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):

<https://gov.wales/consultation-local-authority-power-trade-html>  
Draft General Power of Competence (Commercial Purpose)  
(Conditions) (Wales) Regulations 2021:  
[https://gov.wales/sites/default/files/consultations/2021-03/annex-a-draft-general-power-of-competence-regulations-2021\\_0.pdf](https://gov.wales/sites/default/files/consultations/2021-03/annex-a-draft-general-power-of-competence-regulations-2021_0.pdf).  
Draft Regulatory Impact Statement:  
([https://gov.wales/sites/default/files/consultations/2021-03/annex-b-general-draft-regulatory-impact-assessment\\_0.pdf](https://gov.wales/sites/default/files/consultations/2021-03/annex-b-general-draft-regulatory-impact-assessment_0.pdf)).

**Statutory powers:**

## Appendix 1

### Consultation Response Form

Your name: Ceredigion County Council

Organisation (if applicable): Ceredigion County Council

Email / telephone number: Care of: Hannah.Rees@ceredigion.gov.uk  
01545 572468 (Ext: 2468)

Address: Ceredigion County Council  
C/o Hannah Rees  
Governance Officer  
Ceredigion County Council  
Neuadd Cyngor Ceredigion  
Penmorfa  
Aberaeron  
SA46 0PA

### Consultation questions

#### 1. Are the draft regulations clear?

Yes, in relation to what they cover, but are not comprehensive enough.

The draft regulations are not clear as to their driving aims, for example, whether the future aim is to provide further powers to community councils. There is also no reference to the benefits of the GPOC, which could be included. Some services are already not provided by the private sector, so is it envisaged that public and private organisations work together?

There is potential value in the draft regulations, but they are also unclear as to restrictions/limits to the GPOC e.g. if the community councils had governance issues.

Giving too much scope to Community Councils could cause issues, but Community Councils and Principal Councils deal with public money in some form, so a level of responsibility and accountability is required, and should be set out in the draft regulations.

There will likely be less money from governance, going forward, so the GPOC may be seen as mechanism for trading in order to raise funds locally, which provides opportunities to keep facilities going (although community enterprises have always been present, so there is, in a way, almost a reversion to historic

periods where community councils were expected to do more). It is, however, difficult to understand, from the current draft regulations, how Community Councils would use the GPOC in practice.

The draft regulations should also address, for example, governance issues, such as if the Community Council wished to set up a limited company with directors, or a Partnership with partners, how to address potential conflict of interests between roles and responsibilities (and what if there is a conflict between community council and county councils?).

**2. Do the requirements in the draft regulations, in respect of the business case, cover the right things?**

Yes, but as above, they are not comprehensive enough (see above comments regarding the benefits of the GPOC, its limits/restrictions and the practicalities).

Are there any other matters the business case should be required to capture?

Point 1 of the Business Case should include 'benefits' as well as aims & objectives, to clarify the need for exercising the power.

As well as any associated risks, assessment of severity and actions to mitigate, the business case should include how and why it has been concluded that the aims, objectives (and benefits) outweigh the risks.

The business case should include reference to the benefits, competencies required for use of the GPOC. Currently, the draft regulations seem to suggest a 'one size fits all' approach, which may not work in practice.

The need to re-assess and review the business case should also be included

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

No, as this should be an internal matter, but it would be helpful to state if using the GPOC is an Executive or Council function, and the level of decision-making should be stipulated.

The body funding the company should approve the business case. Moreover, if grants are applied for, for example, a grant scheme run by the Principal Council, the Principal Council should approve the business case. Moreover, consideration should be given to what happens if the company is insolvent, i.e. who is responsible for any debt, and is there a requirement to maintain records? The regulations need to be clear as to what is expected from the start (and cover the scenarios for the structure of the company – is this a charity, trust, company?). What happens if the Community Council is already undertaking a role/service, how will this work/fit in with the new powers?



**4. What are your views on the proposed application of the draft regulations to eligible community councils**

The conditions in the draft Regulations are clear. It is not agreed that Community Councils should have the same powers as principal councils. There are inherent risks in protecting public funds, in that many councils have demonstrated that they are unable to manage their own accounts resulting in Audit Wales public interest reports. Two unqualified AGW opinions alone (S.30 (4) of the 2021 Act may not be sufficient assurance. The requisite qualification for clerks (S.30 (3) of the 2021 Act) may not be sufficient.

Clarity is needed regarding the structure and governance of the trading Company (e.g. i.e. definition of Company, whether limited for liability purposes (how to protect public funds), who can be a director (must they be Community Councillor), conflicts of interest with community council role/Company/3<sup>rd</sup> parties e.g. contractors for Company work and how working with 3<sup>rd</sup> parties will affect the requirements of the governance/structure of the Company.

Please also see above comments regarding community councils. Also, if community councils are minded to use the GPOC, some safeguards/assurances would be needed e.g. ensuring their accounts balance etc, since small community councils have limited funds. Equally, there are some very competent larger community councils, so one size may not fit all.

**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?**

No. See reply to Q4 above.

The following comment in the consultation document in relation to community councils is also unclear:

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

As stated above, there is the potential for conflicts of interest, and whether there is an at arm’s length decision in commissioning work, and whether community councils are able, through other ventures, to ‘trade’ in any event? Consideration should also be given to situations where community councils could be in a competing position with county councils, and whether Community councils could come together to share service?

**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?**

Yes, in relation to principal councils. It is not agreed that Community councils should have either of these powers (See Response to Question 4 above).

Consideration might be given to Community Councils meeting the same budget threshold as they have regarding local Well-being plans under S.40(1) of the Well-being of Future Generations (Wales) Act 2015: a Community Council is only subject to the duty to take all reasonable steps towards meeting the local objectives included in the local well-being plan that has effect in their areas if its gross income or expenditure was at least £200,000 for each of the three financial years preceding the year in which the local well-being plan is published.

There should be qualifying requirements/threshold for eligible community councils, including competency safeguards, and have plans in place that could cover eventualities e.g. could some smaller community councils come together to meet e.g. £200k threshold, to allow the power to be open to all community councils, but with sufficient safeguards in place.

**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?**

It is assumed that these bodies will have same powers as principal councils.

NPAs and FRAs should be treated the same as principal councils, with a level playing field for these bodies to exercise the GPOC.

**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?**

An estimate is £15,000 per business case for County Council, but the costs shall depend on how much detail is needed for a particular business case; there could also be disbursements/expenses associated with setting up the business case, in addition to the estimated costs. Costs for private sector business cases can differ to those for public sector business cases and the trading profit could need to be significant to cover those set-up costs.

**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?**

No effects. The Welsh language standards will apply as normal.

**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.**

See Response to Question 9 above.

**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. Please enter here:**

The issue of S.36 of the 2021 Act statutory guidance is paramount in guiding councils in the use of the new powers and limitations set out in S24-27 of the 2021 Act, in particular the distinction between an authority trading in the ordinary functions or in exercise of the general power.

Regarding the recovery of money owed from the company, this makes sense in terms of protecting public funds.

What about entering into partnership with local stakeholders or other authorities- what governance arrangements will apply (if it was not just the principal council/community council)?

Will limited companies be permissible?

How will any liabilities associated with receivership be addressed?

Can Local Authority Members or Chief Officers hold roles of Company directors and/or company secretary?

Regarding the use of Community Councils of the General Power of Competence in risk assurance terms, any fall out or financial losses caused by Community Councils will have a knock effect on the whole County, Welsh Government and County Council reputation potentially.

Sean Hanson, Chief Executive of Local Partnerships stated that “A well-defined business case should sit at the heart of any council-owned company. This will ensure that the use of public resources will not distort a functioning market and challenge market-tested assumptions to avoid ‘optimism bias’.

Once established, councils should continually re-assess the business case and challenge the ongoing existence and relevance of their entities and the extent to which their objectives remain relevant over the company’s lifetime.

It can be difficult for councils to balance competing drivers, such as allowing a company the freedom to manage activities without interference, and ensuring that it is held to account for its actions.”

There are related issues that have not been addressed, as follows:

- What are the expected arrangements re preparation of the company's accounts & independent audit of accounts (if falling outside of Council's annual Statement of Accounts)?
- Can the company be formed in collaboration / partnerships with other bodies using the power?
- How will contracts be let (by Council or company?) – will company be subject to Council's CPRs?
- How will VAT be treated? Subject to Council's account, or will company have to register separately with HMRC?
- What about staff undertaking tasks for company – employed by Council or company? Will the Council need to consider TUPE arrangements?  
The principal Council should recover any money owed, as the Company should be treated as an independent body.  
Also, regarding the Community Councils' use of the General Power of Competence, perhaps their business case should be approved by their respective County Councils?

As stated above, clarity should be given on the aims of the regulations, the benefits of the GPOC, how the public and private organisations could link together, further clarity on the restrictions/limits to the GPOC, governance issues, accountability, structure of the companies (including insolvency/responsibility for debt), current work undertaken by Community Councils, conflicts of interest/conflicting positions between Principal Councils and Community Councils. Of course, Councils already have a process for declarations of interest and following the code of conduct, and there are safeguards available with liability, such as with reckless conduct, but it would be helpful to provide further guidance in order to limit the potential for litigation/conflicts.

**Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here:**