

CJC RESPONSE TO ODPM DRAFT ORDER AND STATUTORY GUIDANCE ON TRADING

Extracts from the order and statutory guidance are shown first in bold, followed, indented, by CJC observations

THE ORDER

- 1 (2) **This Order applies to best value authorities in England which**
- (a) **are local authorities within the meaning of section 1(2) of the Local Government Act 1999(); and . . .**
- (3) **this Order does not apply to the following description of best value authority when acting in its capacity as a fire authority exercising functions under the Fire Services Act 1947()—**
- (a) **a non-metropolitan county council;**
- (b) **a non-metropolitan district council where there is no county council for the area; and**
- (c) **the Council of the Isles of Scilly.**

CJC observations

The Order does not apply the new trading powers to fire authorities (including all-purpose authorities acting as such), MPTAs, national parks, waste disposal authorities or police authorities.

The last omission is understandable because police authorities already have wide trading powers. So far as we know no case has been made for not giving the new powers to the other single-purpose authorities. Most such authorities have staff with some special technical skills, which we feel would in some circumstances be highly marketable, and we hope consideration could be given to the making of further Orders to include them.

- 2 (2) **A best value authority shall not exercise the power in paragraph (1) until it**
- (a) **has prepared a document setting out a business case in support of the proposed exercise of the power**

CJC observations

We fully understand the need for business cases to be made out before authorities commit themselves to expenditure on significant new resources, such as additional labour or new investment. Many (and possibly most) uses of trading powers will however be where no such commitment is needed.

This is to be expected because the grounds usually cited for giving local authorities wider trading powers are that authorities already have the necessary skilled workforce and capital assets, and ask only for powers to offer them to a wider market. If then authorities get no takers, they lose nothing; but if they do win business, they gain. In these common circumstances, business cases need only to identify the services, supplies or works to be offered for sale; and whatever minor risks would be run.

If on the other hand authorities do so well that they want to expand the business, and take on more staff, or invest in new plant or equipment, this would of course be a different matter, and would indeed require full business cases.

We therefore suggest that the statutory guidance should be amended to make clear that the effort needing to be put into business cases should be proportionate to the risks which would be involved in trading.

This might look too obvious to mention. But once statutory requirements are legislated for, practitioners now tend to take them literally; and often come under all sorts of external pressure to do so. Guidance about the need for proportionality might therefore enable them to resist any such pressure.

STATUTORY GUIDANCE

This Guidance is divided into . . . parts:

1. Introduction from paragraph . . . to . . .
2. Statutory Guidance from paragraph . . . to . . .
3. Other Guidance and Information

CJC observations

We believe that only paras 34, 65 and 69 would constitute statutory guidance. The rest are either for information, or advice. The information is excellent and we suggest no change in it. A great deal could as always be said about the advice in the draft, but we feel no need to do so ourselves, or not yet – trading will in any case no doubt soon become a fruitful field for such advice from innumerable sources.

Our observations are therefore limited to the statutory guidance.

Preparing to trade

34. **Local authorities will need to be prudent, in particular, about putting council tax payers' money at risk. It is for this reason that the Order requires authorities to prepare a detailed business case before embarking on trading under these new powers, and to have the business case approved by the council before trading starts following a full discussion with the auditor. Local authorities remain bound by general administrative law, legal principles such as Wednesbury reasonableness, and fiduciary duties. A number of steps need to be considered by authorities when preparing to trade. These are set out at Annex B.**

CJC observations

This para reads as if the Order includes a requirement for authorities to discuss their business cases with their auditors before they start trading. The Order does not however say this, and we ask whether it is in any case a suitable activity for external auditors, and whether Ministers have statutory authority to commit auditors to undertaking it.

Publication

The CJC has no objection to these observations being communicated to whoever ODPM feel might be interested.