

ROTHERHAM BOROUGH COUNCIL – REPORT TO MEMBERS

1.	Meeting:	Overview and Scrutiny Management Board
2.	Date:	13th April 2012
3.	Title:	Proposed policy statement for Part 2 of the Localism Act 2011 – Government consultation
4.	Directorate:	Resources

5. Summary

Part 2 of the Localism Act 2011(c. 20) provides a new discretionary power for the Government to require a public authority to pay all or part of any financial sanction imposed by the European Court of Justice for non-compliance (infraction) with any European obligation, where such a sanction has been imposed and the public authority demonstrably caused or contributed to that sanction.

Section 49 of the Act requires the Government to consult on a policy statement on the application of Part 2. This report provides recommendations for a response to the Government's consultation.

6. Recommendations

That OSMB:

- a) **Consider and comment on the recommended responses to the consultation questions as set out in the appendix to the report;**
- b) **Make recommendations to the Deputy Leader of the Council for the sign off of the Council's response to the consultation.**

7. Proposals and Details

Part 2 of the Localism Act 2011(c. 20) Act gives discretionary power to the Government to require a public authority to pay all, or part, of a financial sanction imposed on the UK by the Court of Justice of the European Union. The Act sets out the processes for using the provisions of Part 2 including a requirement for the Government to issue a policy statement covering the operation of this Part of the Act. Part 3 of the Act covers EU Sanctions in relation to Wales.

The Government is required to consult on the policy statement and poses 12 questions as part of the consultation.

The issue of EU sanctions is not new, and the Government set out that the UK has never faced any financial sanction. The new provisions, however, would lead to the Government being able to pass on any sanction to those alleged to have been at fault.

The proposed policy statement is set out in three chapters plus an annex; and asks 12 questions. Chapter two is relevant to the devolved administrations and local government. Only the local government contents is covered in this report.

Chapter 1 – Context

In this chapter, the Government set out the rationale, stating that there has never been any sanction against the UK and suggesting that the provisions of Part 2 of the Act will provide an incentive for public authorities to comply in future.

It makes reference to the creation of an independent panel to advise when action is taken under Part 2 and the requirement on it to have regard to the policy statement.

It also makes reference to where a private company has such public functions, that the default position would be to use any existing regulatory framework.

The chapter also gives commitment that should there be a requirement to revise the policy statement, that the Government work with appropriate bodies and consult on any revisions.

Chapter 2 – Local government

This chapter sets out that the Government would involve local government or a suitable representative body if appropriate ahead of, and during negotiations on new EU laws (those negotiated after the Act has come into force) and ahead of transposition into domestic law. When defending a potential infraction case, the Government would also liaise with any local authority directly involved in the case, including prior to any referral to court.

Chapter 3 – Key principals

This chapter sets out four principals. These are stated as:

Working in partnership – the Government, as a matter of good practice, would seek to engage with affected parties when negotiating and transposing EU laws. This would help to ensure that expertise, knowledge and experience of external parties is drawn upon as the UK Government formulates its position and approach.

Transparency and no surprises – authorities would be given the time and opportunity to put things right before being asked to pay. The use of the provisions should never come as a surprise. The Minister would consult any public authority in good time before seeking to designate it by Order. Only actions, or inactions, by an authority which occur following designation will be taken into account when passing on a financial sanction.

A fair, reasonable and proportionate process – the use of Part 2 provisions would be fair, reasonable and proportionate. There would be an independent advisory panel which would make recommendations to the Minister. Authorities would not be held responsible for breaches of EU law that were not within their power to avoid, and would only be fined if they have demonstrably caused or contributed to the infraction in relation to which the financial sanction was imposed. Authorities would have opportunities to make representations. Decisions would be evidence-based and transparent.

Ability to pay – once the fair and reasonable apportionment of responsibility for the payment of the financial sanction has been decided, the authorities involved would have a further opportunity to make representations, this time on their ability to pay. If the Minister accepts that an authority could not pay its full share of the costs, then the Minister may decide that a lower amount would be appropriate or that the payment could be made over a longer period. The UK Government would cover the cost of any shortfall, and there would not be any re-apportionment to other organisations involved. The provisions in the Act are not about the recovery of every last pound of any financial sanction imposed on the UK Government but are about consistency in financial and legal responsibility.

An independent advisory panel will consider representations as part of the process. The panel would have a terms of reference as set out in the appendix to the policy document. The panel may consist of one member. The member(s) and Chair would be appointed by the Government.

The independent advisory panel would take various matters into consideration, which could include whether:

- the UK Government had contributed to or caused the infraction of EU law;
- the UK Government had taken all reasonable steps to comply and bring about compliance;
- the UK Government had acted in accordance with the Act and with regard to this policy statement;
- the UK Government had effectively transposed the EU law into domestic law and made public authorities aware of this - this awareness could come from various means, including involvement with suitable representative bodies as

appropriate, public consultation documents and guidance, and promulgation approaches such as Government websites;

- the public authority had a legal obligation;
- compliance was within the public authority's control;
- the public authority had taken all reasonable steps to comply;
- a significant number of other public authorities had or had not complied on the same issue; and
- the level of cooperation demonstrated by the public authority when working with the UK to resolve an initial infraction.

8. Finance

Whilst there have been no sanctions imposed on the UK, there are instances where sanctions have been imposed on other EU member states.

Financial sanctions could be significant with a minimum lump sum of €8.992 million, based on the UK's GDP, and potential additional daily or periodic penalty payments. Financial sanctions incurred by other countries illustrate how this could work. For example, in a Spanish bathing water case, the levy was €624,000 per year for each 1 percent of bathing waters in breach of the relevant Directive. In a French fishing case, the levy was a €20m lump sum financial sanction and €58m every six months until resolved.

9. Risks and Uncertainties

There are no risks arising if the Council is not subject to any non-compliance leading to any warnings or sanctions. It will be for the Council to ensure continuing compliance.

There could be a risk that at some time the Council could be implicated in a non-compliance where the non-compliance was the responsibility of other public sector bodies.

It is not possible to estimate the likelihood of any financial risks arising.

10. Policy and Performance Agenda Implications

The consultation covers draft policies for implementation of Part 2 of the Act as required by the Act.

The proposals are neutral in relation to the Council's policy priorities as set out in the Corporate Plan.

11. Background Papers and Consultation

Proposed policy statement for Part 2 of the Localism Act 2011.

<http://www.communities.gov.uk/publications/localgovernment/part2localismact>

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