



Briefing 07/45 July 2007

# Trading and charging: an update

To: All Chief Executives, Main Contacts and Email Contacts (Scotland)

CC: All Chief Executives, Main Contacts (England, Northern Ireland and Wales)

## **Key issues**

Scottish Executive clarifies that explanatory note 26 of the Local Government in Scotland Act 2003 is incorrect and can be disregarded.

This removes any notion that local authorities are limited to the use of surplus capacity when trading with other public sector bodies.

It brings a successful conclusion to a long term APSE lobbying campaign.

## 1. Background

During 2003 / 2004, the Association for Public Service Excellence met informally with civil servants on a number of occasions to review the situation regarding the interpretation and application of surplus capacity in Scotland under the new Local Government in Scotland Act 2003 (LGISA2003), and the 1970 Goods and Services Act (as amended).

Initially, it was our understanding that subject to the adherence of due procurement practices and the relevant EU regulations that the new trading environment for Scotland allowed for:

- **Unlimited trading with other local authorities**
- **Unlimited trading with other public sector bodies**
- **Trading to specified limits with bodies involved in works of a public nature, and,**
- **Trading on new build activity (pending commencement), dependant upon yet to be agreed levels and the establishment of a robust regulatory framework**

The language of the legislation (LGISA 2003: Section 8: Relaxation of restrictions on supply of goods and services etc. by local authorities), combined with the open and supportive discussions within Committee by Ministers as the Bill progressed, highlighted a new flexible framework, with the inherent capacity to support a wide range of linked policy objectives such as Community Planning, and by association, recent policy initiatives such as the drive towards Efficient Government.

However, during discussions with civil servants it came to our attention that explanatory note 26, which accompanied the Local Government in Scotland Act 2003, stated that in relation to trading activity with other public bodies: -

***"Where the agreement is with other public authorities or bodies, contractual partners where the provision is intended to support services provided to the authority through a pre-existing contract; or to bodies serving a public purpose where the provision is to support that public purpose, the local authority must trade from its own surplus capacity in staff services, property and facilities, although the income it makes is not subject to restriction."***

Whilst the explanatory notes are not in themselves guidance, the existence of the above reference has understandably caused a strong reaction from the Associations 32 local authority members in Scotland.

Initial discussions with members of the civil service created further confusion as it seemed to be mistakenly taken for granted that such a restriction had always been in place, and that the existence of the above explanatory note was therefore, intended.

The Association then acquired a full and detailed legal opinion from Eversheds solicitors, which clarifies that no surplus capacity restriction was previously in existence, and that there appears to be no basis for such an interpretation within the revised legislative framework in Scotland.

A full copy of the opinion was provided to the Scottish Executive.

Clearly, if left unchallenged such an interpretation would actively preclude the potential for a range of joint working initiatives across the public sector and would seem to work against the objectives of the legislation, and indeed, the Scottish Executive and Scottish Parliament.

To summarise, the key points raised included: -

- **No previous 'surplus capacity' restriction was in force in law, it was a misunderstanding which was fully clarified in the Yorkshire Purchasing Organisation case (YPO) (1996)**
- **Prior to the LGISA 2003, local authorities across Scotland have been and continue to be involved in a range of joint trading arrangements with bodies such as health boards, police and fire. If explanatory note 26 was upheld, all such bodies could potentially be in breach of the law.**
- **A surplus capacity restriction on trading with other public bodies appeared to conflict with both the language of the legislation and its intended purpose as discussed extensively in Parliament and during Committee deliberations.**
- **Such a framework would represent a regressive situation, which in essence would be more restrictive than the past CCT regime in this aspect.**

The explanatory note appeared to interpret both the Local Government in Scotland Act 2003, and the amendments made within to the Local Authorities (Goods and Services) Act 1970, as having implemented a new restriction on trading with other public bodies to the basis of surplus capacity only. No previous 'surplus capacity' restriction was in force in terms of joint trading arrangements with bodies such as health boards, police and fire. Therefore, rather than providing greater opportunity within a more open and accountable framework, such an interpretation, if upheld, clearly represents a step backwards in the development of Scotland's trading framework.

## **2. APSE involvement**

Following the initial meeting with civil servants, APSE discussed the matter with Eversheds who undertook a detailed analysis of the situation to aid discussions on the

matter. They were of the opinion that the whole context of the 2003 Act, Ministerial announcements and, in particular, the need for councils to take the lead in Community Planning and make partnership working more efficient and cost-effective, supports the view that the interpretation of the Acts should be relaxed rather than import restrictions based on surplus capacity only.

Such a view is directly supported by Eversheds Solicitors who in their written opinion, expressed the view that in terms of both the Local Government in Scotland Act 2003, and the Local Authorities (Goods and Services) Act 1970, as amended, there is no actual statutory restriction to surplus capacity and that its reference within corresponding explanatory notes was confused at best.

Taking all of the above into account, APSE campaigned on behalf of its membership to clarify the position. Meetings and correspondence were exchanged in 2004, 2005 and 2006, during which time the civil servant with responsibility for the issue changed three times. In April 2007, a meeting took place with Eversheds, the Scottish Executive and APSE with a view to discussing the relevance of the Explanatory note 26. The view expressed by APSE was that clarification was required by the Executive in relation to section 8 of the Local Government Scotland Act 2003 and if possible to confirm that this section does not accord with Explanatory Note 26 published alongside the Act.

It was explained by Eversheds that the interpretation now placed on s8 is that a Local Authority's reliance on this power does *not* depend on spare capacity being available. This change is to bring the interpretation into line with the proper construction of the original Local Authorities (Goods and Services) Act 1970 in England, following the ***Yorkshire Purchasing Organisation case in 1996***.

The Executive has viewed a legal opinion written by Cirell and Bennett of Eversheds which gave a full explanation of the proper legal interpretation of these provisions. The opinion made available to Local Authorities via membership of APSE.

### **3. Current position**

As a result of successful negotiations the Executive have now confirmed that paragraph 26 of the Explanatory Notes to the Local Government in Scotland Act 2003 is incorrect and can now be disregarded. In any event, the Explanatory Notes to an Act may only be referred to for legal effect in exceptional circumstances, and this is not one of those circumstances. See attached letter.

Although this has been a lengthy campaign on behalf of the APSE membership, APSE believes that despite the timescale involved, it must be construed as being a major coup in lobbying terms. At last there is clarity in relation to the Explanatory Note 26 and local authorities can get back to joint delivery and shared services with other public sector partners without the legal uncertainty brought about by this rogue explanatory note hanging over them.

The Scottish Executive has asked APSE to work with it to clarify other issues contained within sections 8 and 9 of the Act around trading limits for work with the private sector and new build.

APSE also intends to run a short legal briefing session with Steve Cirell and John Bennett of Eversheds later in the year. This will look at the implications of this ruling, what the implications are for local authorities and their public sector partners and give some practical examples of what additional services could be delivered on the back of this.

APSE would welcome any comments this, which should be sent to [ptaggart@apse.org.uk](mailto:ptaggart@apse.org.uk)

**Pat Taggart**  
**Principal Advisor**