



Part 2 of the Localism Act 2011

Questions and answers





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July 2012

Department for Communities and Local Government

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GENERAL Q&A

Q. Why have you included Part 2 in the Localism Act 2011?

A. Part 2 of the Act provides a strong incentive for public authorities to comply with their EU obligations and hence reduce the risk of the UK being fined by the EU. Fines could be significant, with a minimum lump sum of around £7 million and a substantial daily fine of potentially thousands of pounds until a resolution is reached. We are keen to protect the taxpayer and maintain our UK record of never having been fined regarding an infraction.

Q. Why does the EU have the power to fine us? Why would the UK pay a fine?

A. The Treaty on the Functioning of the European Union sets out the rights and obligations on European Union Member States and their citizens. It also sets out that a Member State that fails to fulfil its obligations can be taken to the Court of Justice for the European Union which will determine whether there has been an infraction of EU law and can ultimately fine the Member State if an infraction has not been rectified.

Q. Have other nations been fined by the European Court of Justice?

A. Yes. To give some examples, in a Spanish bathing water case, the fine was €624,000 per year for each 1% of bathing waters in breach of the relevant Directive. In a French fishing case the fine was a €20 million lump sum fine and €58 million every 6 months until the issue was resolved. In a Greece state aid case the fine was a lump sum of €2 million and €16,000 for each day of delay in complying with the judgement.

Q. Would this power be applicable to individual citizens?

A. No – the power only applies to public authorities.

Q. What are public authorities? Does this include private companies?

A. Public authorities are defined as any legal body or person that has non-devolved public functions.

Where a private company has direct responsibility for public functions - for example this may be the case with utilities companies or statutory undertakers - then the Act is applicable. However we would seek to first use any existing regulatory frameworks to resolve any issues.

We would only seek to use the Localism Act power with a private company if the company had caused or contributed to an active infraction case and any existing regulatory bodies had not been able to effectively rectify the situation.

Q. What about Devolved Administrations? Won't they be covered?

A. Devolved Administrations are part of the UK Administration and are responsible for observing and implementing EU obligations that concern devolved matters. Should the UK ever be fined in relation to an infraction, then Devolved Administrations would pay for any proportion of the penalty which relates to a matter falling within their responsibility. For this reason, there is no need for the power to apply to Devolved Administrations and it does not do so.

The power does apply to non-devolved matters across the UK, and would be used in a way which did not prejudice the performance of devolved functions.

Q. What is the Welsh Mirror Power?

- A. Part 3 of the Act was developed on the request of the Welsh Government. This allows Welsh Ministers to pass on fines to public authorities in Wales which have devolved functions and fully replicates the UK provisions, including designation and an independent advisory panel, for Wales.

If the UK and Welsh Ministers were both going to use their respective powers for a related topic, then the Ministers would coordinate and cooperate in order to ensure fairness between administrations and in relation to the treatment of public authorities.

We have consulted upon and published a policy statement for Part 2 of the Act. The Welsh Government will develop and consult upon a policy statement for Part 3 of the Act.

Q. Public authorities do not have a say in the content of EU Directives. Why should they then have to pay?

- A. The Government consults interested parties, which covers a range of different bodies, during the EU negotiating process and again before EU legislation is transposed into domestic law. There is also active Parliamentary scrutiny.

It is worth remembering that the rule of law requires that public authorities comply with the law, regardless of its source, domestic or international.

Q. Why has the Government named local government as specific sector for involvement when new EU negotiations would affect local authorities?

- A. Local government is one of the democratically elected tiers of Government in the UK. Local authorities have a broad span of responsibilities, covering a large range of issues which affect people locally and many of these responsibilities are affected by EU laws and regulations.

For this reason, Government specifically names local government as a key sector for involvement when negotiating and transposing any new EU laws which would result in legal obligations on local authorities which could potentially lead to future financial sanctions for non-compliance.

Q. What has changed following the consultation on the policy statement?

- A. The original policy statement has been revised in light of the consultation responses.

There have been around 21 detailed additions to the final policy statement covering a broad range of points, including on procurement and contracting, on shared culpability across multiple authorities, on suggested actions and outcomes for compliance, on selecting members for any independent advisory panel and on clarifying the terms of reference for the independent advisory panel.

Q. How would you ensure that a fine would be allocated in a fair, reasonable and proportionate manner?

Authorities would not be held responsible for breaches of EU law that are 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 and had previously been designated in Parliament by order. There would be an independent advisory panel looking at the fair apportionment of any fine.

Q. What is a designation order and why is it necessary?

- A. Before any authority could incur a fine, there must first be a debate in both the House of Commons and House of Lords on a designation order.

The designation order would specifically name the authority or authorities putting us at risk of a fine; the specific infraction case; and the authority's legal responsibility. Only actions or omissions after designation would be taken into account when passing on a future fine. This gives the authority time to rectify the situation before a fine is imposed.

This means that there are no surprises, and encourages compliance in time to avoid any fines on the UK.

Q. How are you going to make sure any independent advisory panel is actually independent?

- A. An independent advisory panel would be made up of legal, technical, financial and sector expertise, with members from outside of central Government.

It is inconceivable that the Minister would not speak with affected parties when setting up a panel. After all, a Minister would have no desire to face a legal challenge about fixing the composition of the Panel in his favour.

Q. Will authorities be given a chance to make their case before being asked to pay a fine?

- A. Yes.

Before any fine, there would be extensive discussions between the Government and the responsible authorities in order to defend the infraction case and try to avoid any fines.

Should this be unsuccessful and there is a fine imposed by the EU, and the authority has previously being designated in Parliament, then authorities would be given the opportunity to make representations directly to the independent advisory panel.

Q. Why not let an arbitrator or the courts decide on allocating fines?

- A. It is for Ministers to decide on policy and allocating resources – it would be wrong for a single unelected individual to decide on the local government finance settlement, for example, and so it is also wrong for them to decide on this. However, at the end of the process, the Minister's decision is open to challenge by judicial review in the courts and therefore transparency is maintained throughout the process.

Q. What if public authorities have not been given the powers or the resources to deal with many of the issues on which they could be fined?

- A. As a matter of usual business, public authorities need to have a clear understanding of their legal commitments and ensure they accord with these in everyday work – this is not new.

The Minister is legally required to have regard to the effect of any payment on an authority's finances and their ability to pay. It is not in the Government's interests to bankrupt public authorities.

Q. Why is this power appropriate at a time of economic hardship?

- A. We need to do all we can to avoid any fines in the first place – it is not fair for people in the UK to have to pay fines, either through taxes or higher bills, when they could have been avoided.