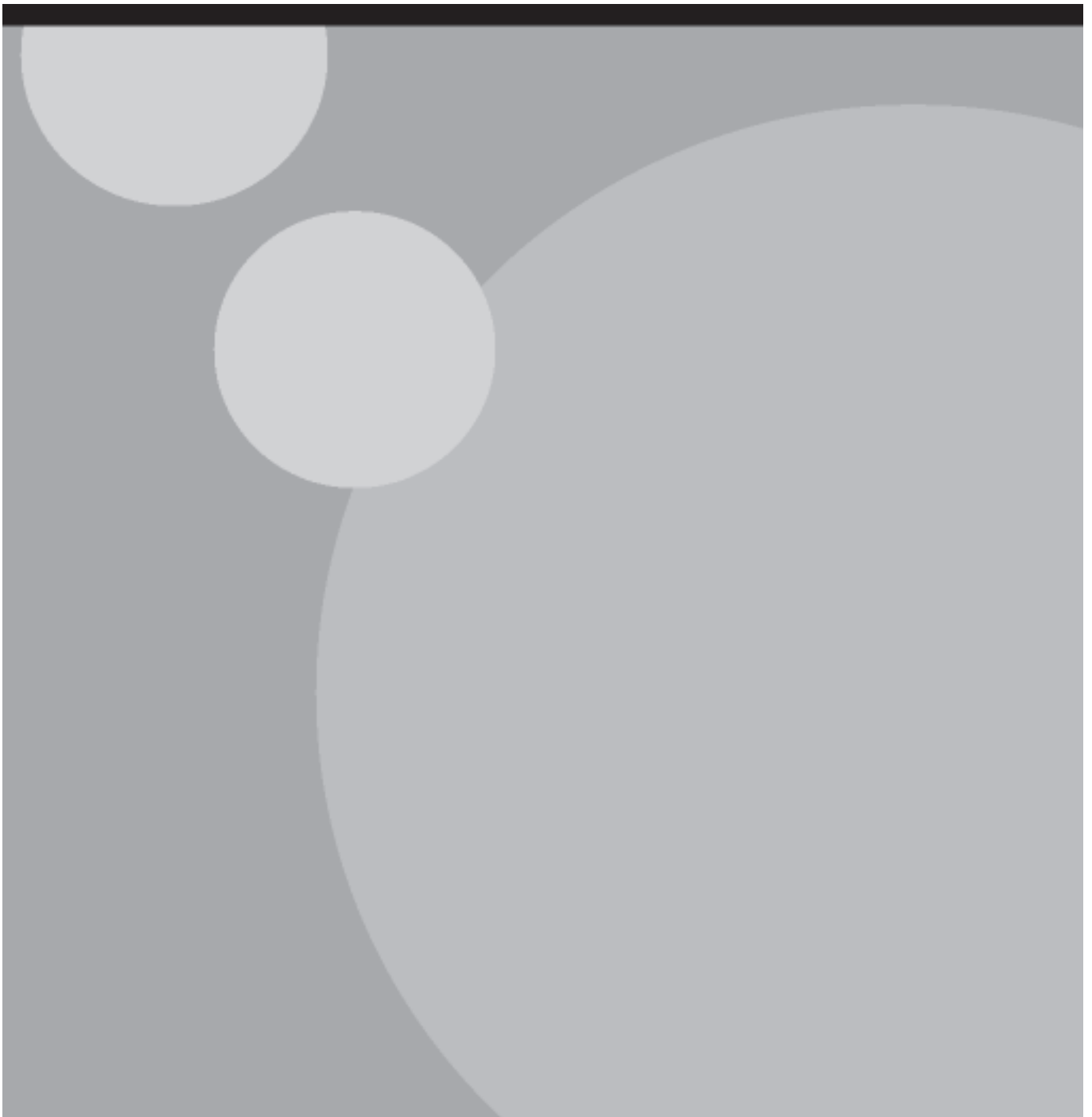




Consultation on the proposed policy statement for Part 2 of the Localism Act 2011

Summary of consultation responses and the Government
response





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Consultation purpose and introduction

1. The Localism Act 2011¹ gained Royal Assent on the 15 November 2011 and provides a substantial and lasting shift in power away from central government and towards local people. The Government has given public authorities more powers and freedoms to conduct their business and deliver services to the public. This includes a major reduction in the “oversight” role of central government. Public authorities must, therefore, accept responsibility for the consequences of their actions or inaction.
2. The UK, in common with all countries in the European Union, must comply with its European legal obligations. If it does not, it may be brought before the Court of Justice for the Europe Union (the “European Court of Justice”) in what are known as infraction proceedings. If the UK is found to be in breach of EU law, the UK must take steps to remedy that breach. If it does not, it may be brought back before the Court and a financial sanction may be imposed.
3. The European Court of Justice can impose as the financial sanction a lump sum and/or ongoing penalty payments until such point as compliance is achieved. Financial sanctions could be significant with a minimum lump sum (as set out in the Commission’s communication SEC (2011) 1024²) 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 one 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.
4. So far, the UK has never had a financial sanction imposed in relation to an infraction. Prior to the Localism Act, payments of any financial sanctions levied on the UK, as a result of a public authority’s breach of EU law, would have been the sole responsibility of the UK government. There was no mechanism in place to ensure that public authorities were held to account for their part in any failure to comply with European law. Such misalignment in accountability meant there was less incentive for public authorities to meet their obligations and avoid any financial sanctions falling on UK taxpayers.

¹ The full Localism Act 2011 may be viewed at:

<http://www.legislation.gov.uk/ukpga/2011/20/contents/enacted>

² The full communication may be viewed at:

http://ec.europa.eu/eu_law/infringements/infringements_260_en.htm

5. Part 2 of the Localism Act introduces a discretionary power for a Minister of the Crown to require a public authority to pay some, or all, of a European Court of Justice financial sanction where the public authority has demonstrably caused or contributed to that sanction.
6. Costs would only be incurred by those public authorities that had responsibility to comply, had demonstrably caused or contributed to the financial sanction, and had previously been designated under section 52 of the Localism Act for the infraction case in question. The expectation is that, through the use of the provisions in the Act to incentivise compliance by public authorities, the risk of financial sanctions being allocated to the UK (and therefore the risk to public authorities) will be significantly reduced.
7. To date, the UK has never been fined in relation to an infraction.
8. The Localism Act includes a duty for the Secretary of State to consult upon and publish a policy statement. This was the purpose of the consultation exercise which ran from the 31 January to the 22 April 2012.

Overview of consultation responses

Overview of respondents

9. The consultation asked for views on the proposed policy statement, published as part of the consultation document. This was of particular relevance to public authorities, which are defined in Part 2 of the Localism Act as a local authority and any other body or person which has non-devolved public functions.
10. The consultation process closed on 22 April 2012. We are grateful to the organisations and individuals who took the time to respond. We have now considered all responses received by the closing date, and those received in the following week.
11. In total, 55 responses were received, as set out in the table below. The majority of these responses were from local government or related to local government: parish and town councils, district councils, county and unitary local authorities, local waste authorities, local fire authorities, a statutory transport body, representative bodies and a public body. The one member of the public who responded did so in relation to parish councils. Responses were also received from a regulatory body and a utility company.

Focus	Type of respondent	Number of respondents
Local	Local authority	33
	Local fire authority	2
	Local waste authority	3
	Town or parish council	5
	Local government representative body	7
	Public body	1
	Statutory transport body	1
	Member of the public	1
Public	Utility company	1
	Regulatory body	1

12. It should be noted that some respondents did not reply to all questions posed and some offered multiple answers to individual questions. Consequently, we have tried to break down responses to each question and indicate the overall position, but there have been elements of subjective analysis in doing so.

13. The number of local government related responses far outnumbered those from other types of public authority. It should therefore be borne in mind that any simple numerical consideration could give disproportionate weight to the views of local authorities above any other category of respondent.

Main findings and themes

14. On balance, the proposed policy statement was positively received with the majority of respondents welcoming the clarity and fairness.
15. There were questions about the legislation as a whole, particularly about the financial implications for public authorities. Views were also given about specific EU directives – particularly on air quality, waste recycling and urban waste water treatment.
16. The consultation posed twelve specific questions, as well as asking for any general comments. The questions which received the most responses were on partnership working, processes for designation and passing on fines, and membership of the independent advisory panel.
17. Overall, three main themes emerged:
 - Procurement and contracting implications – this was a major theme in responses from local authorities, and their representative bodies, with views about the contracting authority retaining responsibility when a function is sub-contracted.
 - Greater guidance and clarity of legal obligations on authorities – this was a major theme in responses from local authorities, and their representative bodies, with some seeking a list of all legal obligations by each public authority.
 - Setting up an independent advisory panel – a series of different options and points were made in relation to setting up an independent advisory panel, including on selection, nominations, expertise, and size.
18. A further three sub-themes emerged:
 - Clarity of designation orders – a significant number of local authority responses sought that clear and transparent information was provided to Parliament with any designation order.
 - Decentralisation implications – several local authorities asked what would happen if responsibility has been fully transferred from a local authority to a parish council, town council, or voluntary organisation.
 - Local authorities receive greater financial assistance – a number of local authorities requested various forms of additional financial assistance from Government.

19. The next chapter goes through each of the twelve consultation questions, and gives a summary of the consultation responses (including picking up on these themes) and the Government response for each.

Overall Government response approach

20. In general, we are encouraged by how the proposed policy statement has been generally welcomed. The vast majority of respondents have focused in on particular themes and suggestions and there have not been any requests for significant changes in the structure or content of the proposed policy statement overall.
21. In determining how best to respond to the suggestions and views that were raised in the consultation, we have borne in mind the following:
 - our commitment to minimising guidance as part of our wider commitment to localism, growth and the Big Society
 - the broad range of EU law and authorities covered by the policy statement and the resulting need for the statement to remain high-level, and not cover specific individual cases or policies
 - the Government's strong desire to avoid any fines in the first place and, if fined, to resolve any compliance issues quickly in order to minimise any ongoing periodic or daily fines.

Consultation responses and Government response by question

22. The consultation asked 12 specific questions relating to the proposed policy statement:

1. Do you have comments on the context in Chapter 1?
2. Do you have comments on the purpose or relevance of this policy statement?
3. Do you have comments on how the powers on non-devolved matters would be applied and the role of devolved administrations?
4. Do you have comments on the proposed approach in relation to local government?
5. Do you have comments on whether public authorities, which are not local authorities, would wish to see equivalent provisions for involvement? If so, please explain what these would be and how any capacity constraints, such as for smaller organisations, could be managed.
6. Do you have any comments on the principle and general application of working in partnership?
7. Do you have comments on the processes for designation and the time and opportunity given for corrective action?
8. Do you have comments on the process for passing on fines?
9. Do you have comments regarding the level of detail to cover in this policy statement on criteria to establish the authority's ability to pay the apportioned EU financial sanction? Or is that best left to be defined in individual circumstances?
10. Do you have comments regarding the membership of an independent advisory panel, including how panel members are selected?
11. Do you have comments on the broad terms of reference under Annex A?
12. Do you have comments on the approach regarding achieving compliance and ending liability?

Question 1: Do you have comments on the context in Chapter 1?

23. Of the 55 total responses, 31 answered this question. Of these, 32 percent were generally supportive in their overall response and 19 percent expressed different opinions. The rest gave a range of other messages which meant such overall categorisation was not possible, or else gave a response which was not relevant to this question.
24. The supportive responses were mainly welcoming some of the principles and provisions included in the policy statement, such as partnership-working. For example, a district council said “it is reasonable to expect all public authorities to comply with EU obligations and face penalties for non-compliance” and a representative body said “we have engaged in the discussions that led to the Localism Act and we welcome this consultation and indeed the Policy Statement.”
25. The different opinions primarily covered the financial implications of the legislation. For example, a county council said it “completely disagrees with the Government’s policy of being able to require local authorities to pay all or part of European financial sanctions which have been levied on the UK Government.”
26. Many local authority responses contained similar wording which expressed surprise over the legislation, recognised that the final legislation and the policy statement were much improved from the initial proposals and that partnership working would need to be effective in order to avoid fines.

Government response

27. We have been clear that Part 2 of the Localism Act provides necessary provisions to protect UK taxpayers.
28. The provisions are about encouraging authorities not to incur fines for the UK in the first place and, in the unprecedented circumstance that the UK is fined in relation to an infraction, to achieve compliance quickly, using a process which is fair, proportionate, reasonable and with ‘no surprises’.
29. Where authorities have responsibility under the law, they need to act responsibly. We do not want to pay escalating fines to Europe. To date, we have never incurred fines regarding an infraction and we want to keep it that way.

Question 2: Do you have comments on the purpose or relevance of this policy statement?

30. Of the 55 total responses, 38 answered this question. Of these, 26 percent were generally supportive in their overall response and 26 percent expressed different opinions. The rest gave a range of other messages which meant such overall categorisation was not possible, or else gave a response which was not relevant to this question.
31. The majority of all respondents to this question welcomed the policy statement itself, noting the useful clarity and fairness of the approach. Only one respondent did not see any relevance from the proposed policy statement.
32. In the responses which were not clearly supportive overall, two themes emerged – on decentralising functions and on contracting and procuring functions:
 - eight responses covered what would happen if a service had been fully decentralised – for example, to a local community, a voluntary group or a town or parish council. A number of town and parish councils asked about the implications for them as they did not have the legal resources to assess all EU law.
 - 26 responses questioned the implications for sub-contracted services, including around the difficulties of ensuring contracts obliged contractors to adhere with the law and the potential for increased procurement costs. Suggested actions for the Government to take ranged from passing on any EU fines directly to the sub-contractors, issuing guidance on contract development and management, and ensuring that any independent advisory panel took into consideration the role of any sub-contractors and whether the authority had taken all reasonable steps to seek that the sub-contractor comply with EU law.

Government response

33. We welcome the broad acceptance for the proposed policy statement and the general perception that it is fair and useful. The statement reflects our early and ongoing commitment to make use of the provisions fair, reasonable and proportionate.
34. Part 2 of the Localism Act 2011 seeks to address a misalignment in accountability so that public authorities responsible for complying with EU law are encouraged to do so in order to avoid any financial sanctions falling on UK taxpayers.
35. When designating a public authority under Section 52 of the Act, the Minister needs to be satisfied that he or she is designating the public

authority for something which is within their responsibility. If a function has been decentralised, the Minister would need to review the individual circumstances, and consult with the relevant authority or authorities, before laying a designation order in Parliament.

36. The Localism Act entrenches rights for local voluntary groups to be taken seriously when they have good ideas about how things can be done differently. The best way of making decisions is by local people for local people. The final policy statement has therefore adapted a parish council suggestion from the consultation and say that, in advance of setting up an independent advisory panel:

“As the power is discretionary, the Minister may decide not to invoke the procedure to pass on fines at this point under certain circumstances. For example, a Minister may, on occasion, deem there is no public benefit from pursuing a case with a very small authority, for example one with an annual income of less than £50,000. Public authorities should not assume that this will always be the case as circumstances will vary.”

37. In keeping with a light touch approach, it is not for Whitehall to dictate how to develop contracts and manage sub-contractors. Local and public authorities are best placed to do this and to ensure their contracts best reflect expectations of compliance with the law.

38. Under Part 2 of the Localism Act, any independent advisory panel has a broad remit and may decide what matters they wish to take into consideration. The final policy statement makes it clear that this includes consideration of whether a public authority has taken all reasonable steps in managing contractual relationships and sub-contractors:

“If a public authority demonstrates that they have taken all reasonable steps to ensure compliance when developing contracts and managing contractors, then the independent advisory panel may take this into consideration when making recommendations to the Minister.”

39. It is a matter for public authorities to decide whether to seek contributions or damages from their contractors, in accordance with contract law.

Question 3: Do you have comments on how the powers on non-devolved matters would be applied and the role of devolved administrations?

40. Of the 55 total responses, five answered the question posed on devolved administrations and non-devolved functions.
41. Of these, two of the responses acknowledged the position as stated.
42. Two responses asked that there be equitable and consistent treatment regardless of the type of public authority or the location of the authority in the UK.
43. One response welcomed the fact that the powers only applied to non-devolved matters in devolved administration areas.

Government response

44. An equitable and consistent approach can be taken across the whole of the UK in relation to non-devolved functions.
45. Where devolved functions are involved, it has been agreed between all four UK administrations – the UK Government, the Scottish Government, the Welsh Government and the Northern Ireland Executive – that any European infraction fine would be allocated to the administration(s) responsible for the failure.
46. It is then for each of these four administrations to decide whether it would be appropriate for it, in turn, to seek to pass the fine onto the responsible authority in its area of jurisdiction.
47. To date, the UK and Welsh Governments have created the legislation to pass on such fines, as part of an approach to incentivise compliance and avoid any fines in the first place.

Question 4: Do you have comments on the proposed approach in relation to local government?

48. Of the 55 total responses, 43 answered this question. Of these, 49 percent were generally supportive in their overall response and 19 percent expressed different opinions. The rest gave a range of other messages which meant such overall categorisation was not possible, or else gave a response which was not relevant to this question.

49. The supportive responses welcomed the approach in the policy statement and the offer of greater involvement and partnership working.
50. The different opinions ranged from questioning the resource implications of greater involvement, questioning whether involvement would be “tokenistic” and providing a view that authorities should not pay fines if they had no say in the development of the original EU law.
51. Most responses sought even closer partnership working between central and local government. Responses and suggestions included:
- a desire to see the policy statement approach being delivered
 - multi-disciplinary teams from central and local government working together on new EU laws and policies
 - new formal structures, including a Joint Committee of central and local politicians
 - local authorities to be informed straight away of any infraction case
 - the Local Government Association (LGA) and the Convention of Scottish Local Authorities (COSLA) to be informed of any infraction case involving their members.

Government response

52. We welcome the general acceptance from respondents that the section on partnership working with local government gives significant opportunity for local government to get involved. We have clarified in the final policy statement that:
- “For the purposes of this part of the policy statement, any local government organisation with a specific function (for example waste, fire or transport) will be part of this closer involvement approach.”
53. We understand that local authorities need to judge where best to give their time and resources. It will therefore be for local government to determine how much they want to do and contribute.
54. This means that the level of involvement will vary depending on individual circumstances. In some cases, local government may volunteer to take an active role in assessing the local implications of an EU proposal, working closely with the lead Government Department.

55. We are open to all levels of engagement but we do not intend to set up new bureaucratic or hierarchical structures to develop elaborate approaches on EU matters – that would not be good use of taxpayers' money.
56. Explanatory Memoranda are the Government's initial written evidence to Parliament which summarise the contents of a proposal for EU legislation or other important EU document. These Memoranda contain information about the aims of the proposal and the Government's initial attitude towards it. All Explanatory Memoranda are considered by the House of Commons European Scrutiny Committee and the House of Lords Select Committee on the European Union.³
57. The Cabinet Office regularly emails all the Explanatory Memoranda to Parliament and has agreed to add the Local Government Association and Convention of Scottish Local Authorities to this circulation list. The local government representative bodies in Wales and Northern Ireland would also be added if they so choose.
58. One local authority, one utility company and one statutory transport body also asked in their consultation responses to be added to the circulation list. We have written separately to these organisations, setting out what is entailed and to confirm interest.
59. The rule of law requires that all parts of the UK administration, including the UK Government and local and public authorities, comply with the law, regardless of its source, domestic or international. It is therefore right that a public authority complies with the law, and accepts responsibility for complying with the law, regardless of whether they originated the law, contributed to the law or commented on the law. Therefore we do not accept that local authorities should only be held responsible for fines where they had a say in the development of the original law.
60. The UK Government takes a risk-based approach to infraction cases and does not gold-plate our approach. We are committed to engaging responsible authorities at an early stage in any infraction case. We may not always do this immediately on receiving a query as we would first seek to close down any ungrounded cases from the Commission without unnecessarily burdening an authority.
61. We understand that the Local Government Association (LGA) and the Convention of Scottish Local Authorities (COSLA) have asked to be notified of individual infraction cases concerning their members in order to take an informed overview. However the EU Commission's process is generally a confidential one and Commission documents are subject to the Commission's confidentiality restrictions. For this reason, the UK

³ More information on Explanatory Memoranda can be viewed at:
<http://europeanmemorandum.cabinetoffice.gov.uk/faqs.aspx>

Government is of the view that it is only in a position to share such information with any local or public authority directly involved in the case.

62. As representative organisations, the LGA and COSLA could ask their member authorities to let them know of any infraction cases - but local authorities would also need to consider their own legal obligations and whether they can share any information or materials.

Question 5: Do you have comments on whether public authorities, which are not local authorities, would wish to see equivalent provisions for involvement? If so, please explain what these would be and how any capacity constraints, such as for smaller organisations, could be managed.

63. Of the 55 total responses, 19 answered this question.
64. Of these, 26 percent thought it seemed reasonable for public authorities to have equivalent provisions for involvement, although some identified that this would depend on circumstances or that public authorities themselves are “best placed to advise Government on how they should be involved.”
65. 5 percent of responses thought that public authorities would not wish to see equivalent levels of provisions.
66. The rest gave a range of other messages which meant such overall categorisation was not possible, or else gave a response which was not relevant to this question.
67. Only one public authority, which would not be treated as part of the local government sector for involvement, asked for closer engagement with Government. This was a utility company, which also identified in its response that it already had a very close relationship with Government.

Government response

68. As only one public authority requested further involvement along the lines of that offered to local government, it would not be sensible to develop a broad approach for all types of authorities on all types of issues where there is no apparent demand.
69. Instead, as part of its normal close working relationship with the water sector, and in particular Water UK, Defra will discuss with them whether there are any changes that need to be made to its current engagement and consultation practices to ensure that their views are fully taken into account when negotiating EU law.

Question 6: Do you have any comments on the principle and general application of working in partnership?

70. Of the 55 total responses, 39 answered this question. Of these, 56 percent were generally supportive in their overall response and 13 percent expressed different opinions. The rest gave a range of other messages which meant such overall categorisation was not possible, or else gave a response which was not relevant to this question.
71. The supportive responses mainly welcomed the open and collaborative approach and thought the principles were fair. One council said “the Council has experience of working with central government on an infraction case. Our experience was that the partnership working and systems in place to produce the necessary documents, in the necessary format, were both excellent and worked very well.”
72. The different opinions mainly sought further clarity or more resources:
- 25 local government-related responses indicated greater guidance and clarity of legal obligations would be useful, with some seeking a list of all legal obligations by each type of public authority and some seeking greater clarity where responsibility is shared across a number of different authorities.
 - eight local authority responses asked for further financial assistance in some form from Government, such as by providing funding to pay the fine, providing funding to remedy a breach, providing funding to resource involvement and partnership working, or permitting the capitalisation of all fines.

Government response

73. In keeping with a light touch approach, it is not for Whitehall to develop and maintain detailed lists of all EU and UK legal obligations by each different type of local and public authority. Authorities need their own legal advice which takes into account their individual circumstances and aims.
74. We will ensure that any independent advisory panel is aware that they need to take in account any situations where responsibilities are shared across multiple authorities. We have added to the final policy statement that:
- “When contemplating whether multiple authorities shared responsibility and culpability for the same infraction, the panel would need to consider how to keep all parties informed and how to fairly assess the relative contributions made to the EU fine by each authority.”

75. We do not feel it is incumbent upon Government to provide extra financial resources to local authorities should they decide to take up the opportunity of closer involvement in partnership-working.
76. Where local authorities are given new duties to deliver and enforce, the New Burdens doctrine applies; this is part of a suite of measures to ensure council tax payers in England do not face excessive increases.
77. Capitalisation is the means by which the Government exceptionally permits local authorities to treat revenue costs which are incurred in a particular financial year as capital. This means that these costs can be funded from capital, including by borrowing or use of capital receipts. Capitalisation is strictly controlled and local authorities must apply to the Department for Communities and Local Government for permission to capitalise expenditure. The Government would not be willing to agree a general approach that local authorities could capitalise any fines paid.
78. We have written into the final policy statement that the Government would pay for its legal costs in relation to an infraction and would not seek to pass these on to public authorities.

Question 7: Do you have comments on the processes for designation and the time and opportunity given for corrective action?

79. Of the 55 total responses, 42 answered this question. Of these, 62 percent were generally supportive in their overall response and five percent expressed different opinions. The rest gave a range of other messages which meant such overall categorisation was not possible, or else gave a response which was not relevant to this question.
80. In particular, the supportive responses welcomed the approach taken and the Parliamentary scrutiny role.
81. The different opinions questioned the obligation to comply remaining with the public authority even where they had sub-contracted a service; and two authorities queried whether positive actions to mitigate an issue prior to designation would not be taken into account.
82. 19 local authority responses asked that designation orders provided information in a clear and transparent way to Parliament, including identifying the UK obligation on the authority involved.
83. One respondent asked that authorities be given one month notice before being designated in Parliament.

84. One respondent asked that, for individual cases, authorities were consulted on how long they would be given to take corrective action.

Government response

85. We appreciate that a significant majority of responses welcomed the designation approach, and giving authorities the time to put things right. We can give reassurance that all positive actions to mitigate an issue may be given in evidence and considered by any independent advisory panel. It is only actions or inactions which contributed to an infraction fine and took place before designation that cannot be taken into account as part of passing on a fine.
86. This Government is committed to transparency. We will ensure that Parliament has clear information as part of any designation. The Government is legally obliged to list in the designation order the activities of the authority relating to its functions and obligations – this means that authorities can only be designated for something which is their responsibility.
87. We are also legally obliged to consult with the authority before seeking to designate it in Parliament. This is set out in Section 52 of the Localism Act. As requested, we have included in the final policy statement that this means:
- “Notice of designation would normally be given at least one month prior to laying the Designation Order in Parliament.”
88. It is for the lead Government Department and Minister to establish the most appropriate amount of time to be given for corrective action in light of individual circumstances, including the position of the European Commission. As a matter of good practice, Government would always seek to do this in liaison with the relevant public authorities.

Question 8: Do you have comments on the process for passing on fines?

89. Of the 55 total responses, 43 answered this question. Of these, 28 percent were generally supportive in their overall response and 12 percent expressed different opinions. The rest gave a range of other messages which meant such overall categorisation was not possible, or else gave a response which was not relevant to this question.
90. The supportive responses mainly welcomed the principles and the approach. For example, a utility company said “the inclusion of an independent advisory panel is particularly helpful.”

91. Other views were mainly around the decision-making to be taken out of the Minister's hands. However one response indicated that setting up an independent advisory panel would be too expensive and it would be better if the process avoided the need for a panel.
92. On timings, ten local government related responses included similar wording that, without any case history, it was not possible to say whether four weeks for the most straight-forward cases was sufficient. Two authorities suggested six weeks instead, one suggested three months. One response thought the process was "longwinded but fair."
93. Six responses sought a right to appeal any findings or decisions by an independent advisory panel and the Minister. This included a suggestion that there was a ten day appeals period should the Minister increase the amount of a fine above that recommended by the panel.
94. Five sought that the panel has stronger decision-making powers, nine asked that the panel always looked into ability to pay, and two asked that the panel always looked into whether an authority had achieved compliance.

Government response

95. As the responses on timings were inconclusive, we are maintaining the guideline that the minimum amount of time for a straightforward case would be four weeks. This is not mandatory and authorities will be consulted upon the timings being proposed in each case.
96. A straightforward case would be one where, for example, there was only a single authority involved and that authority had previously agreed an action plan and timetable in order to bring about compliance but the authority had not delivered against the plan.
97. In such circumstances, a one person panel may be appropriate, so long as that person had all the technical, sectoral, legal and financial expertise required for the case. The Government acknowledges that this would be very unlikely.
98. The reason for this approach on straightforward cases is the driving need to incentivise and achieve compliance as quickly as possible to avoid paying escalating fines on an ongoing and potentially daily basis.
99. This is also the reason why further appeal processes have not been incorporated. Public authorities would be consulted prior to designation and they would receive at least two warning notices and be able to make representations at least twice during any process to pass on fines. This is a transparent approach which balances openness with the need to quickly end any ongoing periodic or daily fines.

100. It is for Ministers to decide on policy and allocating resources – it would be wrong for an unelected person or panel to decide on the local government finance settlement, for example, and so it is also wrong for a panel's decisions to be final or binding. However, at the end of the process, the Minister's decision is open to challenge by judicial review in the courts and therefore transparency and independence is maintained throughout the process.
101. We are also of the view that it is for authorities to decide whether they wish to approach the panel or the Minister regarding their ability to pay. Some authorities may wish to keep their evidence of the financial situation confidential, particularly where sharing information with the panel may be commercially prejudicial. The Minister would give guidance to the Panel on how to assess ability to pay so that a consistent approach is taken. This is set out in Annex A of the policy statement.
102. This Government is committed to minimising the number of public bodies in existence as not doing so both reduces accountability and increases the cost burden on UK taxpayers. For this reason, any independent advisory panel would be time limited and may be disbanded before any authority is ready to prove compliance, particularly if compliance takes some time to achieve.

Question 9: Do you have comments regarding the level of detail to cover in this policy statement on criteria to establish the authority's ability to pay the apportioned EU financial sanction? Or is that best left to be defined in individual circumstances?

103. Of the 55 total responses, 30 answered this question. Of these, 10 percent asked for more detail on establishing ability to pay, 43 percent thought that would be best left to be defined in individual circumstances. The rest gave a range of other messages which meant such overall categorisation was not possible, or else gave a response which was not relevant to this question.
104. There were some individual suggestions on how to assess a local authority's ability to pay:
- that the UK's GDP is divided by the local authority area's GDP and the fraction applied to the fine
 - that the fine be capped at a set percentage (increase) of council tax
 - that the local authority's reserves, both general and those specifically set aside for paying any incurred fines, are not taken into account.

Government response

105. On balance and in line with the majority of responses, we believe it is better for ability to pay to be defined in individual circumstances, taking into account the specific details of the case and the authorities involved.

Question 10: Do you have comments regarding the membership of an independent advisory panel, including how panel members are selected?

106. Of the 55 total responses, 41 answered this question. Of these, 44 percent were generally supportive in their overall response and 15 percent expressed different opinions. The rest gave a range of other messages which meant such overall categorisation was not possible, or else gave a response which was not relevant to this question.
107. The supportive responses mainly welcomed the scrutiny from an independent advisory panel and supported the approach of seeking nominations for sectoral experience.
108. Different views were mainly questioning that the panel was appointed by the Minister.
109. 25 responses sought changes or clarity to the approach taken in appointing members of the independent advisory panel, including:
- 11 sought that the panel had different expertise, such as financial expertise, or included a member of the judiciary
 - eight said that there should never be a one person panel and two said a one person panel should only exist in non-contested circumstances
 - 12 asked about or recommended that authorities were consulted upon panel membership or were able to nominate directly to the panel. One of these responses proposed that the affected authority nominated 50 percent of panel members
 - eight thought that the Minister should not have an unfettered ability to veto nominations
 - four thought the panel should elect its own chairman
 - one thought that it would be useful if the policy statement could set out an outline of the criteria which Ministers would use when selecting panel members.

110. A number of local authorities welcomed the Local Government Association's decision to appoint a pool of people for nominations following publication of the final policy statement.

Government response

111. We welcome the proposal that there is also financial expertise within panel members and this has been added to the final policy statement.
112. It is already a requirement that there is legal expertise in the panel. It may not be possible to find a member of the judiciary who can participate in a panel in a timely manner so we do not propose to adopt this tighter restriction.
113. As there is a driving need to incentivise and achieve compliance as quickly as possible to avoid paying escalating fines on an ongoing and potentially daily basis, we do not propose to entirely rule out one person panels nor do we propose to formally consult upon panel membership.
114. However, 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 or her favour.
115. We have also added to the final policy statement that:
- “Where an authority does not have any representative organisation which could act on its behalf, then the Minister would consider how best to seek sector nominations to the panel, including potentially seeking nominations from the affected authority itself so long as this did not lead to a conflict of interest.”
116. In our view, a panel would clearly not be independent if 50 percent of its members had been nominated by an affected authority. Members would be nominated by an authority with the hope of preventing the authority from receiving any fines. In such circumstances, it is very likely that the chairman would always be in the position of using his or her casting vote, making the panel effectively a one person panel in terms of decision-making.
117. The Minister may refuse all nominations to the panel only if he or she has good reasons for doing so, and these reasons must be set out in an explanation. This is not an unfettered right of veto.
118. The Minister will appoint the chairperson of the panel because it is the Minister who will have the full overview and understanding of the different expertise and skills of individual panel members. It is not possible to set out

the selection criteria in the overarching policy statement as the approach may differ depending on individual circumstances but the Minister will make the criteria clearly known in each individual case. This has been set out in the final policy statement:

“When appointing a panel, the Minister would clearly set out the criteria for selecting panel members.”

Question 11: Do you have comments on the broad terms of reference under Annex A?

119. Of the 55 total responses, 24 answered this question. Of these, 42 percent were generally supportive in their overall response and 17 percent expressed different opinions. The rest gave a range of other messages which meant such overall categorisation was not possible, or else gave a response which was not relevant to this question.
120. Most of the comments reflected responses given under Question 10 on panel membership – such as on a single person panel and the advisory nature of the panel. These have been identified and considered under the previous question.
121. The supportive comments mainly set out that the approach was sensible. For example, one local authority said that it “supports the broad terms of reference, particularly the fact that no existing members of central Government or the Civil Service are to be involved. In addition, allowing the terms of reference to be tailored as required to the individual case is very important.”
122. There were three responses that covered a range of detailed points for the terms of reference, including on:
 - expanding the purpose set out in the terms of reference to more accurately reflect the text in the main body of the policy statement
 - former members of the Government and civil servants should not sit on a panel within two years of ending their service
 - Members of Parliament should not be panel members.

Government response

123. We have taken on board the detailed comments on expanding the purpose and on former members of the Government within two years of working for the Government. To be even-handed, we have also ruled out former members and employees within two years of working for the affected

authority. These changes have been made to the terms of reference in Annex A of the final policy statement.

124. We do not feel it appropriate to universally rule out Members of Parliament as this does not take into account specific knowledge and abilities.

Question 12: Do you have comments on the approach regarding achieving compliance and ending liability?

125. Of the 55 total responses, 16 answered this question. Of these, 19 percent were generally supportive in their overall response. The rest gave a range of other messages which meant such overall categorisation was not possible, or else gave a response which was not relevant to this question.
126. The supportive responses stated that the approach was right and reasonable.
127. Two responses asked for a clear definition of “all reasonable steps” and some others gave examples which might be seen as taking all reasonable steps – for example, if a contractor had caused the infraction and there were not sufficient levers in the contract for the public authority to ensure compliance; or if there was a no vote in a council tax increase referendum which meant the local authority felt it could not get sufficient resources to comply.
128. Four responses asked for clear guidance from Government on what actions they needed to take to ensure compliance, especially where responsibility, culpability and fines had been shared by a number of different agencies.
129. Three responses asked that the independent advisory panel always considered whether compliance had been achieved.

Government response

130. We believe it is for an independent advisory panel to consider and define what “all reasonable steps” means in the context of an individual case and its specific circumstances.
131. We agree that clarity on how to bring about compliance is needed, particularly in order to comply as quickly as possible. The final policy statement sets out that, upon giving final notice of payment:

“The Minister would share their views on what actions or outcomes by a public authority may be likely to achieve compliance and end the financial liability”

132. We have also clarified in the final policy statement that:

“Any final payment would be based on the date compliance was achieved, not the date the Minister reviewed the evidence.”

133. As set out in paragraph 102, this Government is committed to minimising the number of public bodies in existence as not doing so reduces accountability and increases costs funded by UK taxpayers. For this reason, any independent advisory panel would be time limited and may be disbanded before any authority is ready to prove compliance, particularly if compliance takes some time to achieve.

General comments

134. Of the 55 total responses, 21 gave general comments. Most of these covered points which were relevant to specific questions and have been covered under the responses to those questions.

135. Of the remaining general comments, the majority of these were general views in relation to the legislation or policy statement, providing a spectrum of positions:

- for example, a town council stated it “protests that it is not acceptable to pass on such an onerous responsibility to local councils and [we] would not accept this proposal without the money coming with it from Central Government”
- for example, a fire authority stated that it “whilst not welcoming the proposals, accepts that Part 2 of the Localism Act 2011 is now statute and a policy statement is, therefore, necessary. The Fire Authority is pleased to see that a ‘no surprises’ approach has been adopted and is satisfied that this is the appropriate approach in these circumstances”
- for example, a public authority stated that it “welcomes the policy statement, which reflects the importance of the working relationship between public authorities and Government. The principles are a sound basis for the Minister to exercise his discretionary powers which are intended to ensure that public authorities can be held to account where they have caused or contributed to a failure to comply with European law.”

Government response

136. We understand that devolution of responsibility can give new opportunities but it can also be challenging, particularly if there are financial implications. Where the responsibility sits with a public authority, the accountability also

needs to sit with that authority – this is a simple and longstanding principle for good governance.

137. If a public authority breaches the law and causes a fine which another party then pays, there is no incentive for that authority to comply with the law in the first place. If a Minister passes on a fine and also the money to pay the fine, there remains no incentive to comply with the law. Part 2 of the Localism Act is all about incentivising public authorities to comply with their EU obligations and to protect UK taxpayers.

Government next steps and implementation

138. We are grateful to all those that responded to the consultation. As a result, we have identified around 21 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 panel.
139. In particular, we have made changes setting out that:
- any local authority with a specific function would be part of the closer involvement approach for the local government sector - for example, with waste, fire, or transport functions
 - the Minister may decide not to invoke the process to pass on a fine, once received, in certain circumstances - for example, a Minister may, on occasion, deem there is no public benefit from pursuing a case with a very small authority, for example one with an annual income of less than £50,000
 - the Minister would share their views on what actions or outcomes by a public authority may be likely to achieve compliance and end the financial liability.
140. Alongside the publication of this document which analyses the consultation responses and gives a detailed Government response, we have published the final policy statement which accompanies Part 2 of the Localism Act 2011.
141. Under Section 49 of the Localism Act, the Minister and any independent advisory panel must have regard to the policy statement in exercising functions under Part 2 in relation to an EU financial sanction.
142. The Localism Act 2011 (Commencement No. 5 and Transitional, Savings and Transitory Provisions) Order 2012⁴ was laid in Parliament on the 3 April 2012 and commenced Part 2 of the Localism Act on the 31 May 2012. Any fines issued on or after 31 May 2012 can therefore be passed onto any responsible authority that has been previously designated in Parliament, in accordance with Part 2 of the Localism Act and the published policy statement.

⁴ This Order may be viewed at: <http://www.legislation.gov.uk/uksi/2012/1008/made>