

LGA Briefing – The Localism Act Part 2: EU Financial Sanctions

November 2011



This EU financial sanctions briefing covers:

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1. LGA activity to influence Part 2 of the Bill

The Local Government Association (LGA) warned that punitive, unprecedented and retrospective plans to allow Ministers to force down national fines to local authorities were unfair, unworkable, dangerous for council budgets and unconstitutional. The 'unconstitutional' issue most exercised councils and legal commentators as it offered no independent appeals process in case of dispute between the authority and the Minister, who would in effect be judge, jury and executioner, despite the likelihood that the Government would be likely to share the practical and moral responsibility for incurring any future fine.

The LGA took every opportunity to discuss EU fines with Communities and Local Government (CLG) Ministers and officials. In the Commons, we called for the clauses to be scrapped, suggesting alternative solutions and ran a campaign for councils to write into their local MP.

As it became clear through the Lords that Ministers were committed to the policy, sustained lobbying by the LGA and Greater London Authority resulted in a major policy rethink with Government tabling its own amendments to legislation so that Ministers no longer have the power to act as judge, jury and executioner, and that there be appropriate independent scrutiny of any efforts made by Ministers to pass fines on. The LGA also submitted a proposal for a statutory statement of government policy to determine how EU fines will operate.

2. Summary of the Act's EU financial sanction clauses and the proposal for a Statutory Statement of Government Policy

The LGA welcomes CLG efforts to incorporate the views of the sector as expressed by members of Parliament. The amended legislation, and LGA's proposal for a statutory statement of Government policy laid in Parliament, provide for a fairer, transparent system with more safeguards for authorities than originally proposed.

2.1 Legislation

Briefing

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Clauses 48-57 introduce Part 2 EU financial sanctions and are summarised below. In a nutshell, costs will only be incurred if local and public authorities had:

- responsibility to comply
- demonstrably caused or contributed to the financial sanction
- been designated by Order of Parliament
- been issued with a warning notice
- the opportunity to make fair representations to an independent panel
- been issued with a final notice.

Clause 48 gives discretionary power to a Minister to require a local or public authority to pay all, or part of, a EU fine imposed on the UK for failing to comply with a Court of Justice of the European Union (CJEU) ruling under Article 260(2) for non compliance with EU law after the Localism Act has commenced.

Clause 49 states that the Secretary of State must consult on, and issue, a policy statement. Any Minister using the powers and any independent panel set up under them (see Section 53) must have regard to it.

Clause 50 is relevant to the Devolved Administrations.

Clause 51 defines public authority as a local authority or any other body or person which has any non-devolved, public function.

Clause 52 introduces parliamentary scrutiny whereby a Minister will designate by name one or more local or public authorities by Order of Parliament, naming the infraction case, and relevant UK legal obligation. All Orders are subject to approval of both Houses of Parliament. Only actions/inactions post designation will count towards a fine thus applying a 'no surprises' principle – likely to be at or around infraction stages.

Clause 53 applies where a financial sanction has been imposed on the UK, an authority is designated, and an independent advisory panel is established. Terms of reference highlight it will have a chairperson and suitable sector expertise nominated from interested organisations.

Clause 54 establishes that a Minister must consult the panel and issue a warning notice to the authority setting out: how it could have contributed to an EU financial sanction, the financial payment sought, and proposed procedures and timetable. The Minister must also invite the authority to discuss the procedures and make representations to the panel on its culpability.

Clause 55 states that if an authority receives notice of a fine from a Minister, and contests it, an Independent Advisory Panel will consider the case and provide advice and recommendations to the Minister in an evidenced report about the authority's culpability.

Clause 56 states that any final notice requiring payment must identify the relevant EU financial sanction; the total amount of the sanction; and the amount and frequency of future periodic payments. It would specify the activities of the authority which caused or contributed to the financial sanction since designation, the rationale for decision; and the amounts to be paid, when, how and to whom.

Section 57 then defines some of the terms used in this Part of the Act.

Part 3 of the Act allows for the Welsh Assembly Government to introduce mirror powers which could have an impact on Welsh local authorities.

2.2 Proposal for a statutory statement of Government Policy

Outside of the legislation, the LGA has put forward a proposal for a statutory statement of Government policy which has been laid in the House of Lords Library (see clause 49). It was drawn up in consultation with CLG and endorsed by the GLA. It sets out the context around which EU fines legislation will be used, and is based on four key components: working in partnership; no surprises; fair, reasonable and proportionate process; and ability to pay.

Working in Partnership

The LGA argued that local authorities should not be expected to pay proportions of EU fines when it had no say in how the related EU laws were negotiated, or in how these laws were transposed. Through the draft Statement of Policy the Government specifically names local government as a key sector for consultation when negotiating new EU laws that could feasibly result in legal obligations on local authorities which, if breached, could lead to fines for non-compliance. In such cases, Government will:

- consult local government ahead of negotiations on new EU laws (those negotiated after the Act has come into force);
- highlight local implications in preliminary UK Government positions through explanatory memoranda;
- consult local government ahead of transposition of any EU laws, and make clear any new legal obligations; and
- involve local authorities directly when defending potential EU infraction cases, including at the first pre-litigation stage.

The LGA is pleased that Government recognises the importance of working jointly with local government on future EU policy. This seeks to ensure the UK does not receive any EU fines on future EU laws.

No Surprises

- The Government will alert relevant authorities as soon as there is an alleged EU infraction, which could lead to a potential fine, and work closely with them to defend the UK position in the EU.

- We lobbied for Designation Orders to not only highlight relevant EU infractions but also UK legal obligations, where appropriate. This is important as local authorities comply in the main with UK regulations which implement EU laws. This process ensures Ministers provide clear information up front, so as not to surprise local authorities.
- Designation before a fine is passed down ensures councils have time to put right any alleged actions or inactions, before being put before a panel. If a Minister seeks to designate at the same time, or after the EU imposes a fine, it is 'likely to mean that it would be unfair for the Minister to pass on any of the lump sum fine or the first tranche of any periodic penalties'.

Fair, reasonable and proportionate process

The LGA lobbied for the panel to be as impartial as possible by widening its role to receive representations ,helping identify culpability, ensuring LGA can nominate representatives to it (if our member authorities are brought before the panel), and shaped the terms of reference.

Ability to pay

The independent panel, and the Minister, must consider the authority's ability to pay any apportioned fine, and provide an alternative approach which could be a lower amount, or an amount paid over a longer period, or even no fine recovery at all. The Government will cover the cost of the shortfall and there will not be any re-apportionment to other organisations involved.

3. Q&As

What are EU fines anyway?

The UK, like every other member state of the European Union, must comply with legal obligations. If it does not, a lengthy infraction process involving the European of Commission, UK Government, and the Court of Justice of the European Union (CJEU) may ensue. 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 CJEU, and a financial sanction imposed on the UK. The process is set out in the LGA statement of policy.

What do councils have to do with EU law in the first place?

EU legislation has a significant impact on the way local authorities are run, and the services they provide or procure, from waste management, procurement, health and safety to employment law. They can have a regulatory, administrative and financial impact, costing time and money to implement. Local authorities comply with domestic law (or UK statutory instruments) which transpose EU law, or with those EU obligations which have 'direct effect'. For a snapshot of how EU laws impact locally, see *Knowing Me, Knowing EU: the Impact of EU law on local authorities* <http://www.lga.gov.uk/lga/publications/publication-display.do?id=12300325>

However while local authorities seek to influence laws are developed at EU level and transposed here in England, it is the UK Government which negotiates, and signs up to EU laws and targets. To date however it has done so with insufficient consultation of the local authority sector. We believe the partnership working agreed between the LGA and Whitehall will see a shift enabling us to be involved in a more timely and appropriate fashion.

Are we expecting EU fines soon?

The UK has not yet been fined for non-compliance with any EU legislation. By introducing this section into the Act, the Government confirms that there is a real risk that EU fines may be imposed on the UK, and if local authorities are found to have contributed to this infraction, it will seek to pass on part of, or all of, a fine.

The minimum level fine to the UK is €10 million plus a potential daily rate until the European Commission is satisfied with compliance. The UK can be fined for failing to comply with any EU law, so it is difficult to predict the financial difficulty this policy will place on the local authorities. Discussions with DCLG reveal that local authorities may potentially be contributing to non-compliance with four EU directives (air quality, public procurement, services and waste framework). The Government's Impact Assessment fails to substantiate these claims.

If you have a query about a EU derived regulation which your council has or is implementing, or are interested in finding out more about EU financial sanctions please get in touch. This Q&A section will be updated regularly to incorporate questions from the sector and share learning.

4. Next steps – we need your support

CLG is now converting the LGA proposal for a statutory statement of policy into a Government statement. It will be subject to a twelve week public consultation, and the LGA is keen to ensure the substance of our statement is maintained in final Government policy. **It is important that the Government consultation does not water down any of the protections our statement offers to local authorities;** we are urging Government to robustly defend it. We would like to encourage all of our member authorities to feed into the consultation process, and will post material on our EU fines page soon to make it easier for you to contribute.

Any move to require contributions from local authorities must go through the toughest of scrutiny to ensure there are **no surprises**, that a **fair, reasonable and proportionate** process is used, that decisions are based on an **ability to pay**, and that throughout the entire process Whitehall and local government work together in **partnership** to avoid EU fines occurring in the first instance.

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