

Balance of EU competences review: LGA response

September 2013



SUMMARY

1. The Local Government Association (LGA) is the national voice of local government. Our mission is to work with councils to support, promote and improve local government.
2. Given the broad range of EU competences affecting local government, the LGA is submitting a single response to the Government's Balance of EU Competences Review rather than respond to each specific consultation. Our response covers the role of local authorities, principles of subsidiarity, good governance and better regulation in EU legislation and its implementation, which are relevant to all policy fields.

INTRODUCTION

3. We understand that the Review aims to develop an audit of what the EU does and how it affects the UK on 32 specific policy topics. Members of the LGA European and International Board discussed the Review with a Foreign Office official in July 2013. Our members expressed reservations about the organisation of the review, which they considered to be protracted and over-complex. Overall, they felt that the local dimension was missing from the Review, and that the "call for evidence" may not distinguish between objective, fact-based evidence on the one hand, and anecdotal, politically-motivated commentary on the other.
4. The LGA is responding to this review for three reasons:
 - i. the Review covers many areas where local authorities have a duty to provide services, enforce regulations, and/or inform the general public. We estimate that around half of all new UK laws affecting the sector have their origins in EU law. Once transposed, they may have financial, administrative and regulatory implications;
 - ii. the 2011 Localism Act EU Financial Sanctions provision requires a significant shift in the way that the Government considers how new EU legislation could affect local councils in terms of new obligations and burdens; and
 - iii. more needs to be done to ensure the process of negotiating, transposing and implementing EU laws is effective. We recommend practical steps are taken to achieve this within the UK and in Brussels.

Submission

THE ROLE OF THE LGA

5. The LGA is a cross-party organisation and does not take a view on the future UK role and relationship with the EU. Our role is to assess the impact and practicability of specific EU legislative proposals and policy initiatives on a case-by-case basis. The earlier local authorities can influence the process, and the more involved they are with the Government in doing that, the more effective new laws are likely to be. Our aim is to ensure that EU legislation is proportionate and fit for purpose, in that it delivers its intended benefits without imposing undue financial, administrative and regulatory burdens on our member authorities. We are concerned that in recent years, local authorities have had to deliver many new EU obligations at a time of severe budgetary constraint.
6. We want to ensure that our member authorities benefit from EU funding and other opportunities that can be accessed through our EU membership, and that exchange of experience and good practice is promoted. Working through institutions such as the EU Committee of the Regions (CoR) and the Council of European Municipalities and Regions (the pan-European LGA) can be an effective way of ensuring that the interests of English local government are pursued.

IMPACT OF EU RULES ON LOCAL AUTHORITIES IN ENGLAND

Wide-ranging impact of EU obligations on local authorities

7. Local authorities have a broad range of functions. Many of these are affected by EU laws, with which they comply through UK Statutory Instruments which transpose EU Directives, or through EU Regulations which have 'direct effect'. These can have a significant, administrative, financial and regulatory impact on the way in which local authorities are run, and the services that they provide or procure, costing time and money to implement.
8. We estimate that around half of all new UK laws affecting the sector have their origins in EU law. Broadly, the areas of EU legislation and policy that we prioritise include promoting jobs and growth via EU funds; regulation of public services and procurement; state aid rules; environment, waste and energy; employment law; equalities and social policy; good governance and local democracy.
9. Once transposed, EU law impacts local authorities through:
 - a. energy efficiency and consumption rules affecting municipal buildings, housing stock and public transport;
 - b. landfill, waste framework, waste electrical and electronic equipment, and air quality rules framing all local environmental and waste management services;
 - c. the renewable energy directive setting ambitious targets for energy generation and in the transport sector;
 - d. internal market laws on public procurement framing the way in which local authorities buy goods, works and services; and laws on licensing affecting their regulatory activities;

- e. state aid rules affecting how new businesses, public transport, and airports can be supported with public finance;
 - f. new EU rules affecting the activities of local authority registrars – EU birth, death, and marriage certificates;
 - g. working time and health and safety rules affecting shift patterns in Fire and Rescue Authorities and residential care homes; other EU employment laws stipulate parental leave entitlements and rules on the employment of temporary workers;
 - h. wide ranging consumer policy laws are regulated by local authority trading standards officers;
 - i. regulation of businesses, often delivered through local trading standards, environmental health and licensing services;
 - j. rules on the free movement of people and labour can affect local communities and local economies in many ways, with the consequence that local services may need to be adapted;
 - k. EU cohesion policy defines how much funding is available to create growth and jobs in local communities; and
 - l. rules to make it easier for the service and retail sector to operate across the EU impact on council licensing functions.
10. The impact of these laws may be positive or negative, and the burdens imposed may be negligible or substantial, proportionate or disproportionate to the objectives being pursued. The magnitude of the burden may be affected by the way in which the EU law is transposed into UK law ('goldplating'). In some cases, the EU provides funding to assist local authorities to meet their obligations.

Transposition issues

11. The Localism Act EU Financial Sanctions provisions enable a Minister to seek to pass on to a local authority a fine from the EU for tacitly failing to comply with an EU obligation, if the Government can prove that the local authority contributed to UK non-compliance. This significantly changes the relationship between central and local government on EU legislative matters.
12. The Government assumes that all local authorities know if a UK Statutory Instrument implements an EU Directive, and should therefore be aware if they are potentially liable to an EU financial sanction. The reality though is not that clear cut. This is because the Government has not always made explicit in domestic legislation that it is wholly, or in part, transposing an EU law. This practice, if continued for future EU legislation, will have a significant impact in enforcing the Localism Act EU financial sanctions provisions.

Case study: Air Quality

The Government transposed its responsibilities under the EU Ambient Air Quality Directive through the UK Air Quality Standards Regulations. It is entirely separate to, and has no read across with, UK legislation setting out local authorities' air quality management role through the Environment Act and Air Quality Regulations, neither of which makes clear that they result from an EU law, or that failure to comply could potentially result in an EU fine being passed on by the Government.

13. It can take years for EU laws to be agreed, transposed and implemented. Often these decisions are made without a thorough assessment by the Government on how these rules will be implemented. At times the concerns of local government are inadequately addressed, which may result in unforeseen financial and administrative burdens on local authorities.

Case study: EU public procurement Directive

When it came to agreeing the 2004 EU public procurement Directive, the Government predicted that the new rules would not add new costs or administrative burdens to the public sector or business, and that 'any costs in the procurement process should be reduced by these simplified and improved rules'. In practice, there have been a number of different cost and administrative burdens on local authorities. These include needing to seek legal advice on certain types of contractual relations, and having to spend time dealing with the threat of legal challenges. Typically procurement officers spend more time on legal issues, whilst failed bidders seek disclosure of all information to the contract award, and seek to challenge it. A 2010 LGA survey revealed that 66% of local authority procurement managers felt the Directive brought increased procurement process costs and administrative burdens, creating a more complex procurement process.

14. Notwithstanding the above, the EU rules have modernised the way in which councils procure i.e. by using framework agreements, e-auctions, and the competitive dialogue procedure. The rules have helped local authorities to achieve cost savings from better value goods, works and services contracts.
15. Recent changes to be agreed by the end of 2013 will help local authorities allowing faster award procedures, greater local authority collaboration, and an ability to stipulate environmental and social conditions. They are required to fully adopt e-procurement within 30 months following the introduction of the Directive.
16. Unclear and poorly drafted reinterpretation of directives into domestic regulations can lead to uncertainty and significant additional cost.

Case study: Waste Framework Directive

One example is the experience of DEFRA and the Welsh Government who, following a costly and time-consuming legal challenge, recognised that the domestic regulations as drafted did not adequately reflect the requirements of the Waste Framework Directive and should be amended. DEFRA and the Welsh Government have now replicated the requirements of the Directive into domestic regulations. The officer resource and wider litigation costs incurred by both the Department and the Welsh Government could have been avoided by taking this clearer approach at the outset of proceedings.

Reducing the burden of EU law on local authorities

17. Despite English local authorities being subject to an array of EU obligations, little is done by the Government to adequately involve them in assessing the impact of these laws before they are agreed or transposed, which creates unnecessary burdens.

Case study: Energy Performance of Buildings Directive

Reducing energy consumption is a significant EU, national and local authority priority. However, the original Energy Performance of Buildings Directive and its implementation have added administrative and financial burdens to local authorities. The Directive sets minimum energy standards for new and existing buildings undergoing major renovation, but implementation in England focused on process, rather than outcomes. The Directive recommended that all public buildings be assessed and display an energy certificate (DEC) no more than ten years old, highlighting energy consumption. DCLG however set out that DEC's be renewed *annually*. This cost fell to local authorities, increasing implementation costs for English local authorities compared to EU counterparts.

18. EU legislation sometimes impinges on the ability to make local decisions about how services are fundamentally designed and delivered. For example, the EU Services Directive contains many positive initiatives but it also place limits on how licensing services can operate and the fees that can be charged. On-going discussions relating to EU food legislation suggest councils may be required to charge for some services. This would restrict the ability for councils to design services based on local needs and priorities.

Success stories

19. There are instances where the Government has engaged effectively with local authorities on EU legislation, but these are the exception rather than the rule. Key to this has been early engagement before a UK policy line is developed, enabling local authorities to help give an evidence base to UK policy positions.

Case study: Energy Efficiency Directive

The draft Directive proposed to apply a binding annual 3% renovation target to local government buildings. While the policy intentions of the EU were supported by local government, it would have been financially impossible for councils to achieve this without diverting significant resources from key services, at a time of unprecedented budgetary constraint. Working with the Government and other local governments across the EU to identify the potential impact of the EU target, we were able to successfully remove local government from the scope of the Directive. Moreover, from a UK perspective these targets were unnecessary since a number of national initiatives (Carbon Reduction Commitment, Green Deal, and other local measures) already steer English local authorities to achieve energy efficiency improvements in their building stock.

Case study: Directive promoting renewable energy sources

The Renewable Energy Directive set the UK a target to increase alternative energy usage to 15% by 2020. Through the CoR, the LGA successfully campaigned for the Directive to recognise local authorities' role in decentralised, alternative energy generation, and the positive impact it could have on local green job creation, secure energy sources, and more local control on future supplies. It enabled local areas to press ahead with renewable energy, without adding complexity to local planning regulations. Only by working closely with the Government from the outset was local government able to influence the outcome in Brussels and Westminster.

CONCLUSIONS AND RECOMMENDATIONS

20. Our experiences have led us to the conclusion that the decision making process in agreeing EU laws and transposing them into UK law, and their implementation, could be more effective.
21. Given the breadth of EU obligations affecting local authorities and the introduction of the Localism Act, the LGA has repeatedly called for a more robust, closer and structured involvement from the outset with Government Departments on EU issues involving the sector. For us, it is imperative that Ministers have an appreciation of the impact of specific targets and deadlines in proposed EU laws, and of local authorities' ability to deliver them.
22. While the Localism Act led to a Government commitment towards a more systematic approach to gather intelligence and evidence on the local implications of EU laws, it remains to be seen how effective and systematic this will be.
23. The LGA has initiated a series of activities to promote better partnership working. Principles of sharing relevant information, working together in compiling a shared evidence base to further our mutual priorities and to ensure maximum influence on shared priorities are key outcomes that we would like to achieve. We anticipate a number of EU reviews on existing Directives, including working time, and seek assurance from the Government that it will examine the implications on local public services (Fire and Rescue Authorities and residential care homes), so that future pressures are mitigated.
24. The LGA frequently lobbies the Government (in Whitehall and Brussels), the European Commission and Parliament to promote the principles underlying these recommendations through the EU smart regulation strategy, and by applying these principles to specific directives. The LGA has good working relationships in Brussels with UK civil servants (UKREP) for intelligence-gathering and influence.

25. **Rewiring Public Services**, a new LGA campaign proposes ten significant changes between local and central Government in order to transform public services. The initiative contains two important elements which are relevant to this consultation and which are reflected in our recommendations. The first is to address the ‘English question’ relating to devolution. Our model reduces bureaucracy and red tape by streamlining services and devolving to the local level, resulting in a slim core for central government of England. The second is to ensure that the principle purpose of regulation is to enable the delivery of economic growth aligned to local vision. Our recommendations are presented in the light of these benchmarks.

Recommendations relevant to the Government

26. **Identifying challenges early**. As the sole UK negotiator for EU laws affecting English local authorities, the Government has an important role in securing the best possible outcome for UK taxpayers. This should require a thorough examination by the Government in partnership with the LGA and its member authorities to analyse challenges and opportunities in delivering and/or implementing measures at local authority level and ensuring it is costed. It must engage with the LGA at two crucial stages: firstly: whilst negotiating the UK’s line on a draft EU law which could affect local services; and secondly: when UK Parliament transposes an EU directive into UK law (see public procurement example).

27. **Systematic, high level engagement is needed**. Scotland, Wales and Northern Ireland have a constitutional right to be consulted and influence UK national policy, including on EU legislation, and to participate in Council meetings in Brussels. There is no equivalent influence or representation for England. This absence was most notable when decisions were made to re-allocate part of England’s EU funding allocation to the Devolved Administrations. It is our view, as set out in *Rewiring Public Services*, that in most cases this would best be done by consulting local government through the LGA.

28. **Avoiding goldplating**. There is a risk that the original purpose of legislation may be lost by over-zealous legal interpretation or reinforcement, losing sight of the original intention to enable or safeguard appropriate rights and responsibilities. The LGA therefore urges the UK Government to apply new EU rules in the lightest possible way and avoid ‘goldplating’ (see energy performance of buildings example). In recent years, English local authorities have had to implement new EU obligations at a time when they have had to absorb cumulative reductions in their budgets. The Government has outlined its commitment to protect businesses from goldplating EU legislation by using direct ‘copy out’¹. The same commitment should apply to local authorities, in particular given their new exposure to potential EU fines at a time when their capacity to deliver has been reduced.

¹ <https://www.gov.uk/government/news/government-ends-goldplating-of-european-regulations>

29. **Effective transposition.** In line with the above, the Government should identify more explicitly the link between EU obligations and UK Statutory Instruments (see air quality example), so that there is clarity where and how domestic law responds to EU obligations and statutory requirements. This could be done by stating on the face of a UK Statutory Instrument which EU law it fully, or in part, transposes, and any EU targets and deadlines it incorporates and which may in consequence expose the local authority to a potential EU fine.
30. **Effective communication.** The Government could use the www.gov.uk website more effectively to house in one place all information relevant to a Directive and its implementation. An annual list of EU legislation affecting local government could be published to ensure that all parties understand the origin of new obligations. This should be in addition to systematic, timely and co-ordinated communication, which is critical if local authorities are to apply rules in a timely manner and thus avoid the UK being in breach of EU law.

Recommendations for EU decision-makers

31. **Only legislate when necessary.** We acknowledge that ‘good governance’ is not ‘no governance’. In some policy areas it is logical that EU countries collaborate to set a level playing field. However, the EU should legislate only when absolutely necessary and with a minimum of bureaucratic rules and a maximum of consultation, forewarning and financial assistance, leaving it to local authorities and the UK Government to work out the detail. This addresses the issue of ‘subsidiarity’.
32. **Light-touch EU legislation.** We recommend ‘light touch’ EU legislation where appropriate, in which the legislative purpose is clearly articulated, and that it should be for the Government, in consultation with local authorities and the LGA, to work out the detail of how we achieve EU objectives. This addresses the issue of ‘proportionality’.
33. **Alternatives to legislation.** The EU should consider alternatives to legislation, and introduce time limits and review periods (‘sunset clauses’), to accelerate the repeal and simplification of existing rules (the concept of ‘one-in, one-out’).
34. **Strengthen democratic legitimacy.** EU decision-makers must better involve local authorities - through the LGA, European associations and local government representatives in the CoR - to strengthen the democratic legitimacy of EU decisions and ensure that all new EU laws are necessary, proportionate and workable.
35. **Effective EU wide enforcement of rules.** Where EU laws are in place, there must be more effective enforcement of rules across Member States. We note that the UK assiduously implements its EU obligations, while others take a less robust approach to compliance.