Social Care Procurement
A briefing note on procurement, state aid and consultation matters relevant to the provision of social care services

National Market Development Forum
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Foreword

This briefing note has been produced at the request of members (both providers and councils) of the National Market Development Forum\(^1\) (part of the Putting People First work programme), who were concerned at the highly differing approaches taken by councils in their tendering arrangements for social care services, even though such arrangements have been governed by a single set of EU Procurement legislation. The request was to identify the minimum requirements of the EU rules in this regard.

Consequently, the working title for this document was ‘social care procurement made simple’. However after many iterations it has become apparent that although we can usefully pull together and summarise the EU procurement rules as they impact on social care, we cannot in all honesty make them very ‘simple’. We have though (amazingly) managed to produce a three-page Executive Summary to sit ahead of the longer detailed advice to allow an ‘easy read’ overview.

We hope that the briefing note proves useful for both service providers and commissioners and supports their collaborative efforts to ensure the simpler and more efficient contracting of social care services.

Special thanks to Belinda Schwehr\(^2\), Care and Health Law for overseeing the development of this guide and Eversheds\(^3\) for their work on the original draft.

Jeff Jerome
National Director, Social Care Transformation

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1 The National Market Development Forum (NMDF), established in 2010 and initially resourced by the Putting People First Consortium, involves around fifty key individuals from a range of independent sector social care and housing providers and national umbrella bodies, as well as representatives from councils, government and CQC. Its purpose is to explore some of the challenges of market development in adult social care in the context of personalisation, and to propose practical ways in which partners can work together to address them in the future. The NMDF is supported by the Department of Health, the Association of Directors of Adult Social Services, the Local Government Association, and LGID.

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Executive Summary

Introduction

The National Market Development Forum has identified the need for better clarity, consistency and simplicity in the legal side of procurement processes for care and support services. This paper addresses this requirement and assists care providers, councils and their partners to adopt efficient and streamlined procurement practices, using appropriate, proportionate legal approaches. The current legal framework already allows for less formality than would sometimes be expected, in relation to procurement of works, services and supplies, for or on behalf of the public sector in the area of social care. Areas focused on include identifying the key principles of public procurement law, consultation obligations and state aid rules, in the context of social care purchasing.

The key findings are outlined in this summary, with detailed explanations available in the (appended) full paper.

Public Procurement

1. Social care purchasing will generally be categorised as Part B services under the Public Contracts Regulations 2006. For these services, limited public procurement rules apply (e.g. requiring contract award notices after the procurement) together with a duty to treat suppliers equally, transparently, and in a non-discriminatory way. Purchases of Part B services do not require the full application of the Regulations.

2. If the value of a social care purchase is under the threshold (currently £156,442) not even the limited regulations apply - all that is needed is a fair procurement process, regardless of whether the services are categorised as Part A or Part B.

3. Any process devised by an authority to award a contract for the purchase of goods, works or Part B services, regardless of value, should:

   • undertake a proportionate level of advertising;

   • ensure equal treatment between all those who respond;

   • be non-discriminatory to general categories of, or of particular, bidders

   • make transparent how the process will be run, how bidders can participate, how responses will be evaluated, and when the contract will be awarded.

4. Personal Budgets:

   4a. Where a person has been recorded as electing to receive a direct payment, the procurement rules do not apply, and the person is free to choose whoever they prefer to meet their needs, subject

only to lawful conditions under the direct payment regulations. Even where such an individual chooses an agent, including the council itself, to manage their direct payment, the public procurement rules still do not apply. This outcome applies to the purchases of individual service users who join together in order to collectively purchase services, because they are not a public authority.

4b. Where the council is ‘managing’ an individual’s personal budget, either directly or through a commissioning agent, public procurement rules will continue to apply.

5. Framework agreements can be used to secure supplies from a single provider or several providers. These are useful for authorities wishing quickly to access services for the benefit of service users where the authority is obliged to control the contractual arrangements (as in the directly managed form of personal budget as opposed to a direct payment). This is different from an authority signposting direct payment recipients to local providers, and from making lists of suppliers available for individual service purchases to choose from when making their own decisions as to whom to contract with (see next point).

6. Authorities may set up recommended draft agreements or lists or websites with providers’ details, and make these available to individual service users purchasing services with their Direct Payments or their own money. But it must be understood that direct payment clients cannot be limited to providers who are pre-approved by a Council acting as a commissioner of public services; they are free to buy from virtually anyone. The Public Contract Regulations do not apply to the facilitation of agreements between direct payment recipients and providers. Giving providers a space to advertise their services is not inherently risky for a council but if a council is providing any form of endorsement of providers’ services, standards, registration status or viability it is good practice to have in place reasonable quality assurance arrangements and make public any available information about how providers on these lists have performed, regardless of whether the customer was a public or private sector purchaser. In the interests of transparency the basis of any ‘approval’ or inclusion in a list given to direct payment clients must be made clear: one example would be a list of providers who have indicated that they are willing to provide services at the rate allowed for by the council in its Resource Allocation system.

7. Sharing information and experience with enterprises of all sizes outside of the tendering process is crucial to ensure the market is well briefed on how to approach the process. The procurement
process should be tailored to the target market that the required services are aimed at (for example, small providers, voluntary sector, large commercial organisations). It would be disproportionate for small providers or the voluntary sector to have to run their businesses along the same lines as a large commercial organisation.

8. A ‘fair’ tendering process must include proportionate advertising together with a non-discriminatory, transparent process. Even if a below threshold (Part A or B) service is being purchased, local authority auditors customarily look for this to demonstrate value for money and take the view that advertising helps satisfy the State Aid rules. The website of the authority is one example of a place to advertise contract notices or offers of subsidy using minimal resource.

9. An extension, renewal or material amendment to a public contract can make for a ‘new’ contract under the public procurement regime if these changes fall outside of specific variation clauses. Whilst it is usual for a contracting authority to reserve rights to amend the contract the variation right must not amount to a right to redraft the contract, because that breaches the requirement of transparency. A key test is whether there is a material change in the contract by adding new terms, new services or extending timescales – legal advice should be sought if in doubt.

10. If providers are concerned they have not had a fair opportunity to participate in the letting process for below threshold or exempt contracts, perhaps where they feel the process has not been fair and transparent, then they may raise issues with senior council officers or members of the council or ask for the matter to be considered by the relevant Scrutiny Board or the Council’s Audit Committee. Matters of serious concern should be raised with the council’s Monitoring Officer or Chief Finance Officer.

Consultation

11. Local Authorities may be required to undertake a consultation procedure (see page 38 of the appended full paper for details) prior to de-commissioning, changing service delivery models, cutting grants, changing charges, or changing the FACS threshold. A failure to meet the consultation duties, and in particular, the public sector equality duties, may result in being exposed to legal challenges. It is desirable to be explicit about the aims and positive outcomes expected from any change within the course of consultation. The appended paper sets out some practical advice to ensure that adequate, albeit proportionate, consultation is offered, and flags up requirements arising from the new Equality Act 2010.
12. A contract which allows for termination does not require consultation with the provider, it simply requires contractual notice of termination. Other legal rules giving the client rights, or the public a right to consultation, may however contribute to the requirement to do the equivalent of at least something akin to consultation (see page 36 of the appended full paper for details).

State Aid – Grants, subsidies or other assistance to local organisations

13. Most authorities are scrutinising the amount and use of grant funding critical to delivering services through the voluntary sector. Authorities should ensure that making use of public funding by giving grants, subsidy or other assistance does not trigger the application of the State Aid rules. The most practical and certain way of avoiding any breach of the state aid rules, whilst remaining compliant, particularly at a time when grant funding may be critical to the survival of much of the voluntary sector, is to have an open and competitive procurement or subsidy-allocating process.

14. State aid rules may be complied with in the case of support for either very localised businesses, where the effective competition can only ever be from another business which also operates on the same purely localised basis, or very small businesses, where the de Minimis Block Exemption Regulation\(^5\) rules are available for aid of less than 200,000 within any rolling period of 3 fiscal years.

15. In order to avoid State aid issues arising authorities should:

- ensure that payments are made in return for the provision of goods or services with evidence in place that no more than the market rate has been paid for such goods or services (procured in accordance with the UK and EU rules where applicable or, where such rules are not applicable, by way of a transparent benchmarking exercise); or

- provide state resources to the recipient entity on purely commercial terms (e.g. a loan at a commercial rate on interest); or

- limit any grant to a level consistent with the requirements of the De Minimis Aid Block Exemptions.

Introduction

As a result of the personalisation agenda, local authorities will increasingly be considering different ways to play their part in the development of social care services and the market. This raises a number of legal issues in respect of procurement and State Aid where authorities will be entering into contracts with or providing grants to third parties for the purchase or subsidy of services.

This is a complex area of law which has been subject to a great deal of interpretation through the national and European courts. The State Aid rules and procurement rules operate together and set out procedures which must be followed by the public sector when it enters into contracts with a third party to provide services to it or on its behalf. The procurement rules aim to achieve transparency in ensuring there is a fair process in choosing who to buy from, and the State Aid rules are designed to prevent distortion of competition or the giving of an unfair advantage to one business over another. This paper gives an overview of the key principles of procurement and State Aid. Further detailed guidance can be found on the OGC website in the following Guides:-

- Introduction to the EU Procurement Rules
- Competitive Dialogue in 2008 - OGC Guidance

Summary of public procurement regulations – what is public procurement and how do the regulations work?

Public procurement is the purchase of goods, works and/or services by the government and public bodies, including local authorities. The procurement regime forms part of the internal market and is designed to ensure free trade across the EU and to prevent state-owned or state-related bodies from succumbing to pressure to ‘buy national’.

The EC Treaty lays down obligations to ensure free movement of goods, services and establishments across the EU. Treaty obligations (principally avoiding discrimination, acting fairly and equally between potential providers and being transparent in procurement activity) apply to all public sector procurement irrespective of the value of any procurement undertaken.

- The Treaty obligations are supported by EU Directives which have been transposed into UK law.

Background to the public contracts regulations 2006

The current EU Directive on public procurement (Directive 2004/18/EC) was adopted in 2004 and was transposed into UK law by the Public Contracts Regulations 2006 (the “Regulations”). These new
regulations came into force on 31 January 2006 and apply to all “contracting authorities”, which concept includes local and central government and NHS bodies. The EC Treaty-derived obligations, which apply to all public procurement, irrespective of value are:

i. to treat suppliers and potential suppliers equally and in a non-discriminatory way; and

ii. to act in a transparent way.

The Directive and the Regulations now specifically address the obligation of contracting authorities to meet the basic EC Treaty principles
Chapter 1 - Local authority procurement of social care

There are three issues for an authority to consider when looking to procure anything:

- What is being bought?
- What is the value of what is being bought?
- Who is actually buying, and in what capacity?

Although we will look at each of the above three issues and the principles for lawful procurement that are associated with them separately, in practice all three questions need to be asked simultaneously as determining whether certain rules apply to a services contract (for example), can only be achieved if one knows the value of the services and who is ultimately purchasing them.

What is being bought?

The first issue for an authority to consider when looking at whether the Regulations apply is what it is that they are purchasing.

Generally, the Regulations apply in some form or another where an authority is purchasing works, services or supplies that are valued over a financial threshold set out in the Regulations.

The Regulations classify public contracts as either works, services or supplies contracts. A works contract is a contract in writing for consideration (i.e. any form of payment) for the carrying out of a work or works. A ‘work’ is the outcome of any works which is ‘sufficient of itself to fulfil an economic and technical function’.

A services contract is a contract in writing for consideration for a person or other entity to provide services. Consultancy agreements, contracts for provision of domiciliary or residential care, provision of maintenance services, and provision of transport services are all examples of services contracts. There are different types of services contracts - see below for an explanation.

A supplies contract is a contract in writing for consideration for the purchase or hire of goods and for the siting or installation of those goods, but not their maintenance. Purchase, lease, rental, hire and installation (but not maintenance) of goods (including purchase of substances, electricity and vehicles) are all examples of a supplies contract.

If a contract is for a mixture of works, supplies and/or services, it is classified as a “mixed contract”. Complex rules apply to mixed contracts although the definitions of services and supply of contracts set out in
the regulations may assist. As a rule of thumb the value of each type of requirement should be assessed and the Regulations that apply to the largest part of the contract will apply to the entire contract.

The dominant purpose of the procurement is also considered in reaching a decision on classification. Legal advice should be sought prior to making any decision as to a mixed contract. It is usually clear from the subject matter which classification the contract falls into and which Rules apply. An example of a mixed contract would be where there were arrangements to install an emergency call system in sheltered housing with an ongoing obligation for the contractor to provide an emergency response service. That would be a mixture of a supplies and services contract. Guidance on mixed contracts can be found on the OGC website in the Introduction to the EU Procurement Rules.

Introduction to the EU Procurement Rules - OGC Guidance

How do the regulations distinguish between different types of services?

Authorities should be aware that there are two different types of services contracts in the Regulations - Part A services and Part B services. A contract which has a value below the relevant threshold (discussed below) would be outside the Regulations, whether it is for Part A or Part B.

Part A and B services are set out in Schedule 3 of the Regulations. Each set of services listed in Part A and Part B has been given a range of numerical codes called Common Procurement Vocabulary (CPV) Codes. Authorities can check the category of services by referring to the CPV codes published on the simap website and checking whether the CPV code for a particular service falls into Part A or Part B. Subject to the value of the contract being above a financial threshold (see below), contracts for Part A services are subject to the full application of the Regulations, including placing OJEU contract notices, tendering procedural rules, specifications, pre-qualifications, etc. These are summarised below.

Part B services that are above the financial threshold are subject only to limited provisions within the Regulations - rules on technical specifications, contract award notices and submission of statistical reports. In summary, the position is as follows:

- Part A above threshold services must follow the full Regulations and the EC Treaty principles of non-discrimination, transparency and equal treatment.

- Part A below threshold services have to comply with the EC Treaty principles and an authority’s own standing orders.

Part B above threshold services must comply with limited provisions in the Regulations in addition to EC Treaty principles.

Part B below threshold services have to comply with the EC Treaty principles and an authority’s own standing orders.

Due to the existence of a Part B category of “health and social services”, many social care services will fall into Part B. But authorities must be clear that this does not mean that all above threshold services procured by a social services department fall under Part B – the limited regime set out in the Regulations only applies to contracts for the provision of health and social care. For example, a contract for the provision of transport for social care service users will fall under Part A as it is classified as transport services and not social care services - regardless of whether the transport service is provided under a social care statute. Authorities should seek legal advice if in doubt.

Where a contract is for both part A and Part B services its classification is usually decided by which part represents the larger value.

**How far do procurement rules apply to Part B services contracts?**

As discussed above, where social care services such as domiciliary care services and residential care services are classified as a Part B service and they are of a value in excess of the financial threshold set out at point 2 below, the full application of the Regulations will not apply. However, those areas of the Regulations that will still apply are as follows:

a. Technical specifications in the contract documents (Regulation 9) - there must be no discrimination created by specifying standards that are UK-based. Equivalents must be considered by the contracting authority;

b. A contract award notice must be placed (Regulations 31 and 42) - this must be done after the contract has been awarded to the winning bidder; and

c. Reports to the Commission (Regulations 40(2) and 41) - statistics on the contract that has been let and the procurement process generally must be kept in case they are requested by the EU Commission.

d. EC Treaty principles must also be adhered to – non-discrimination, transparency and equality of treatment. As the result of case law and an EC interpretive communication from 2006 it has been made clear that this will require authorities to carry out some proportionate advertising - advertising that is proportionate to the value and scope of the contract.
The website of the authority is an ideal place to advertise due to the minimal resource that is required to do this. An advert may be placed voluntarily by way of a contract notice on OJEU, but the authority will have to make it clear that the notice is being placed voluntarily and that the full Regulations do not apply to the authority's process. Although there is no definitive rule as to when a Part B service contract that is above the financial threshold should be advertised, authorities should, in the light of case law, the interpretive communication mentioned above and the general trend that is emerging from the government's transparency agenda, be ensuring that making a decision not to advertise the contract is the exception rather than the rule, and the justification for that stance recorded.

e. Even if an authority believes that there is only one provider capable of providing a service, advertising is the only real way to ensure (and to prove to an auditor) that there are no other providers able to deliver the services required. Advertising should be wide enough to ensure that any interested organisations are likely to be made aware of the contract. It is possible that the services are so particular and bespoke that the authority is aware there is only a specialist range of providers who could tailor their services to those needs. In those circumstances, provided that the authority is certain that they are aware of the providers in the market; the advertising could be limited to a particular sector.

f. Subject to the rules set out in an authority's own standing orders, there is no specific requirement to advertise below threshold Part B contracts but local authority auditors customarily look for this as evidence of transparency and a way of demonstrating value for money. The State Aid rules run in parallel to the procurement rules and advertising helps satisfy these rules too.
What would an authority need to consider when preparing a fair process for procuring Part B services?

Other than the above, there are no rules governing the process that authorities must undertake when procuring social care services contracts (classified as Part B services contracts).

But, if an advert placed by an authority (in line with (d) above) is likely to attract any competition, the authority will need to devise a non-discriminatory, transparent process in order to determine which bidder or bidders the authority is going to contract with.

This may involve allowing all those bidders who meet the criteria specified by the Council on to a framework agreement (as is often the case with residential care services where the Choice of Accommodation Directions give the right to choose a service provider, to the service user, not the Council, subject to 4 qualifications to that choice) with all the details of the terms agreed. Alternatively it may involve undertaking a competitive process and assessing tenders in order to determine the bidder who has the most economically advantageous offer (for example by assessing price and quality). Alternatively, the authority may decide, after evaluating whether certain minimum standards are met on a pass/fail basis, to evaluate tenders on price alone.

What is the value of what is being bought?

Once a decision has been taken as to what it is that is being procured, the next step in determining whether the Regulations apply at all is to assess the value of the contract. Local authority contracts will fall into one of two categories:

1. Contracts with a value that exceeds the financial threshold set out in the Regulations - and to which the Regulations will apply in full or in
part, depending on category (as explained above).

ii. Contracts with a value that is below the financial threshold set out in the Regulations - and to which the Regulations do not apply but to which EC Treaty principles and the authority’s internal standing orders/contract procedure rules will apply.

The full Regulations apply only after a Part A contract has exceeded the financial thresholds applicable to the procurement. Where the estimated value is lower than the threshold, but is sufficiently near to the threshold, then best practice dictates that the authority should always proceed on the basis that the Regulations will apply to the procurement. If a contract has an estimated value above the threshold, the extent to which the full or only part of the Regulations apply to its procurement will depend on whether the services are Part A or Part B.

The current threshold values (1 January 2010 - 31 December 2011) for local authorities are:

<table>
<thead>
<tr>
<th>Supplies</th>
<th>Services</th>
<th>Works</th>
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<tr>
<td>£156,442</td>
<td>£156,442</td>
<td>£3,927,260</td>
</tr>
<tr>
<td>(€193,000)</td>
<td>(€193,000)</td>
<td>(€4,845,000)</td>
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All values for the purposes of the thresholds are net of VAT.

For all contracts, the value is the whole of the estimated value (not an annual sum). Where the contract can be extended, the net value shall be for the whole of the contract plus the net value of the extensions.

For contracts of indeterminate duration the value is 48 times the average monthly value. Accordingly, the vast majority of specialist residential (though not domiciliary) care packages (any packages for over £750 per week) being purchased by authorities will be classed as “above threshold”. However, it will still only be necessary to have regard to the limited rules set out previously and follow the broad principles of non-discrimination, transparency and equality of treatment, because these are Part B services.

Similarly, where the contract includes an option that will affect the estimated value, the authority should assume the option will be exercised for the purposes of estimating the contract value.

Contracting for managed personal budgets for services within the Part B category may involve letting smaller contracts, which may be below the threshold in any event. There are detailed rules affecting the calculation of value which may require separate contract values to be aggregated together. Contracts must not be split to reduce values and avoid application of the Regulations. Any disaggregating of contracts for the purposes of avoiding the procurement thresholds will be in direct
contravention of the Regulations. Where it becomes clear, through a procurement process, that a number of smaller procurements should be considered to be part of the ‘whole’ or overall procurement, the process should be stopped and examined in light of the requirements of the Regulations. Legal advice should be sought if there are concerns in this regard.

What is required for procurement of contracts below the financial threshold?

If the contract value is below the financial threshold set out in the Regulations, it will generally still be appropriate for the authority to advertise the procurement and involve some level of competition. This would not be a requirement under the Regulations, as below threshold contracts (either Part A or Part B) would be outside the scope of the Regulations. However, authorities still need to procure such contracts in compliance with EC Treaty principles and the internal standing orders/contract procedure rules of the individual local authority. The exact details of what this would require will be a matter for each local authority to decide but it would be unusual for it not to require some competition and as above, authorities should follow best practice and ensure that taking a decision not to advertise a contract is the exception rather than the rule and that justification is recorded.

The general principles of equality, non-discrimination and transparency always apply, even where the contract falls outside of the application of the Regulations. Accordingly, any process devised by an authority to award a contract for the purchase of goods, works or services that falls completely outside of the scope of the Regulations (i.e. below threshold contracts) should:

- undertake a proportionate level of advertising;
- ensure equal treatment between all those who respond to the advert/express an interest in the opportunity;
- be non-discriminatory to a certain bidder or category of bidder; and
- be transparent - meaning that everything about the process, including how it will be run, how bidders can participate, how responses will be evaluated, when the contract will be awarded etc., is transparent to bidders. Local authorities may wish to consider initiatives such as soft market testing or open days for bidders.

Before undertaking any procurement exercise it is important to be clear about what is being bought and the type of market one aims to be attracting. Where it is anticipated that small providers or the voluntary sector are best placed to provide the services, the procurement process should be tailored accordingly. For example, if a charity or voluntary organisation ran a
café in a local park and there was a sense that a similar venture would work well in a local health centre rather than a commercial franchise running the operation, the authority could grant a licence rather than a long lease of the premises and simply require the personal presence of a named manager. This would be something which may be more attractive to a smaller enterprise and it should not be difficult for the organisation to find funds for a short term property commitment. Larger enterprises would look for bigger and longer term arrangements. It is really about tailoring the requirements to the circumstances and finding opportunities to target the right market.

It would be disproportionate for small providers or the voluntary sector to have to run their businesses along the same lines as a large commercial organisation. For example, it will not be cost effective for small providers to have in place high levels of public liability insurance, produce the types of policies and procedures which operate as a matter of course in large organisations or demonstrate they have major financial backing or assets. Sharing information and experience with enterprises of all sizes outside of the tendering process so they are well briefed on how to approach the process is recommended. It would not be appropriate to prohibit any provider or organisation from tendering and it is important to have a distinction between providing general information about processes and focused bidder events close to specific procurement processes. Tailored information sessions of a general nature outside the procurement process are acceptable practice. These could also help authorities to tailor the specific procurement process itself, by developing shorter simplified agreements and straightforward instructions.

Who is buying?

The third issue for an authority when deciding how to procure a contract is to look at who is entering into the contract. With the introduction of the personalisation agenda to social care, in the future there are likely to be two possible purchasers of social care services:

- Individual service users/groups of individual service users who have been awarded Direct Payments; and
- Local Authorities (or companies acting on their behalf as contracted commissioners of public services).

Procurement by individual service users (where the service user is entering into the contract in person or through a Suitable Person, and making payment for the services from their ‘Direct Payment’ form of a personalised budget) will fall outside of the Regulations, as individuals are not contracting authorities and are free to engage the service provider of their choice to provide services to them, subject to any
prohibitions by way of lawful conditions under the Regulations, in their individual Direct Payment documentation. Groups of individual service users who join together in order collectively to purchase services will also fall outside of the Regulations as the individual(s) purchasing the services are private individuals purchasing services for their own interests through one or more of their number, and therefore do not fall under the definition of a public contracting authority. An individual or a group can appoint a manager to buy services on his, her or its behalf, as an ordinary agent. The direct payment client can even choose to use the local authority’s support and the local authority has the vires to offer that support under the Local Government Act 2000, if it is perceived to be for the benefit of the area. Authorities offering payment services for Direct Payment clients, behind Shop4Support facilities, or payroll services for Direct Payment clients, are already acting in this capacity. An authority’s acting merely as the agent of a private individual cannot attract public procurement regulations.

Purchases by the local authority or by a third party acting as agent of the local authority, for example, through a strategic partnership’s purchase of services to be provided to service users – where the authority is the intended principal, and making payment either directly to the contractor for those services (or through the mechanism of the client paying their Council-assessed statutory contribution for their social care services, to the provider, with payment merely of the agreed balance by the council), are all governed by public procurement law as set out above.

Key points:

- Neither individual service users nor groups of service users acting collaboratively, nor agents acting on behalf of individuals or groups, are subject to the procurement rules.
- Where a local authority enters into a contract in its own name, or engages a third party to act on its behalf as its commissioner, the procurement rules will apply, as public procurement is then occurring.

Framework Agreements

Where an authority requires repetitive purchases of goods, works or services or where an authority knows it will have a future requirement for goods, works or services but does not know the precise quantity or quantities which it will require, it may decide to set up a framework agreement.

A framework agreement is an agreement or arrangement with one or more contractors setting out the terms and conditions under which one or more purchasers may enter
into (or “call off”) a specific contract during
the term of the agreement. It does not
contain an obligation to supply or pay for
anything, but just sets the terms on which
subsequent call-offs will be made. A
framework agreement may set a price and
set out terms in respect of quality or the
amount of services which may be required.
It is commonplace for local authorities to
set up framework agreements for
themselves and other public bodies to make
use of. The benefit of framework
agreements is that they enable authorities
to quickly purchase goods, works or services
and also provide value for money because
they make it unnecessary to go through the
expense of a full procurement process each
time.

Before setting up a framework agreement,
it may be necessary to advertise it in the
OJEU (where the value of the framework is
over the financial threshold set out in the
Regulations).

When the services are procured through a
framework and individual contracts (call-
offs) are awarded under the framework, it
is not necessary to go through the full
procedural steps in the Regulations again,
but the authority must call off contracts in
accordance with the rules it has set out in
the particular framework. In the case of a
multi-supplier framework, this may involve
the authority carrying out a mini-
competition. Guidance may be found in the
OGC paper ‘Guidance on Framework
agreements’.

If a framework agreement is being set up
for Part B services (even above threshold
Part B services), only the standard rules set
out above in respect of the procurement of
Part B services must be followed. This would
not usually require a contract award notice
in each individual case of later call off
because the Regulations provide that this is
not necessary where a contract is awarded
which complies with the procedures set out
in regulations for entering into framework
agreements (Regulation 19). Care would
need to be taken where the contract was
above threshold to check that all the
correct processes had been followed. The
process varies depending on whether or not
there is a mini competition or whether the
selection is based on criteria in the original
framework.

Framework agreements can be used to
secure supplies from a single provider or
several providers, for consultancy services or
for major or minor work. They would be
useful for authorities wishing quickly to
access services for the benefit of service
users where the authority is obliged to
control the contractual arrangements (as in
the directly managed form of personal
budget as opposed to a direct payment).
This is different from an authority making
lists of suppliers available for individual
service users to choose from, when making
their own decisions as to whom to contract
with for the spending of a direct payment.
What practice should an authority follow when making lists of providers available for use by individual service users?

People buying services for themselves will not have contracts at the ready and the service providers may not have had private clients before, and simply have agreed to Council-created contractual terms and conditions in the past.

Authorities may choose to assist service users by setting up recommended draft agreements or Council provider lists which are made available to individual service users purchasing services with their Direct Payments, if they wish. So long as it is understood that the clients cannot be limited to providers who are pre-approved, and are free to buy from virtually anyone, a council can decide to offer a list of ‘approved’ providers to Direct Payment clients. There is no obligation to take such steps and authorities can also grant fund voluntary sector bodies to promote awareness of the services which are available in the market, under section 65 of the Health Services and Public Health Act 1968. ‘Approval’, in this context, cannot relate to the provider’s price, because that is a matter for negotiation between the provider and the purchasing client. A different sort of list, however, could be provided e.g. a list of providers who have indicated that they are willing to provide services at the rate allowed for by the council in its Resource Allocation system.

Although sign-posting arrangements are not caught by the Regulations (assuming the authority is not purchasing services in its own name and the service user is free to purchase from elsewhere) it is prudent and good practice for the authority if the authority is endorsing the provider in any way (quality, financial viability, registration status etc) (as opposed merely to advertising its local market presence) to undertake some form of process to demonstrate they have tested the capability, experience and financial standing of the supplier. That is because if the Council appears to be making representations about particular service providers, it may find that it is vulnerable to challenge from service users who are dissatisfied with the service they receive or from service providers who believe that a competitor has been given an advantage. In a sign-posting exercise it is important not to restrict coverage to contractors who have only been accepted onto a pre-approved list by the council in the context of its own procurement decision-making, as Direct Payments services users are their own purchasers, and public procurement processes must be kept distinct from measures designed to inform the council’s clients of the scope of existing services in the area.

Lists of providers could include a summary of what they do, details of checks which have been undertaken by the Council by way of its own parallel procurement functions or by the CQC as far as
registration is concerned, if the service is a regulated one, and information that it has been given for the purposes of advertising, on charges and fees.

The authority should also make it clear to individual service users the basis on which it is making a list or draft terms of agreement available. It should explain that the responsibility for making contractual arrangements for individual care or support rests with the service user.

If undertaking a non-procurement-related exercise to decide which suppliers to place on a pre-approved list for the benefit of the general citizen population, authorities should make their decisions using criteria that relate to the needs of the service users and not the needs of the authority, and involve service users as part of the decision making process.

Care must be taken in managing any draft recommended terms for agreement by making it clear what their status is and distinguishing them from formal framework agreements which will generally have been subject to formal procurement processes by the Council.

If an authority chooses to offer draft terms of agreement for use by individual service users purchasing from local providers, the authority should compose such terms with individual service users in mind; for example, when addressing termination, compensation for default, confidentiality and payment arrangements.
What are the obligations where the full regulations apply, for example in relation to Part A services

In most cases, a contract notice must be published (sometimes described as an OJEU notice or contract notice in the Official Journal of the European Union.) This is done in a standard form. There are minimum timescales which apply to the various phases of the procedures. The procedures also require selection criteria and award criteria to be disclosed to tenderers. There are also reporting and de-briefing requirements on a contracting authority in respect of the decision it makes. Further guidance is available on the OGC website, for example:-

- Introduction to the EU Procurement Rules
- OGC Guidance on Central Purchasing Bodies
- OGC Guidance on Framework Agreements
- OCG - 2010 Procurement Policy Notes
- Competitive Dialogue in 2008 - OCG Guidance

What are the consequences of failing to comply?

Where the Regulations apply, a supplier harmed as a result of the breach may bring proceedings under the Regulations which can result in suspending a procedure, setting aside a contract (in addition to the authority receiving a financial penalty) or the award of damages.

Additionally, the European Commission can take action for breach of the procurement regime against the government of the member state where the authority who has failed to comply is based.

What action can a provider take to ensure a fair process in procurement of Part B services?

Where the Regulations do not apply but providers are concerned they have not had a fair opportunity to participate in the letting process for below threshold or exempt contracts, perhaps where they feel the process has not been fair and transparent, then they may raise issues with senior council officers or members of the council or ask for the matter to be considered by the relevant Scrutiny Board or the Council’s Audit Committee. Matters of serious concern should be raised with the council’s Monitoring Officer or Chief Finance Officer. The current role of “Monitor”, the independent regulator of Foundation Trusts, is likely to alter as a
result of the changes anticipated under the Health and Social Care Bill. The plan is that “Monitor” will be transformed into the economic regulator for health and adult social care and will have a duty to promote competition, where appropriate. In doing so it will have regard to securing continuous improvement in the way services are delivered and ensuring fair access to services. The Bill also provides for “Monitor” to have the power to investigate complaints that a Commissioning Board or commissioning consortium has failed to comply with good procurement practice.

The role of consultation in maximising fairness

When Local Authorities are making decisions about provision of services or the charges to be made there is sometimes an obligation to consult with service users and providers. This paper analyses the source of these obligations below. For the moment, the paper focuses on the contribution that proper consultation can make to the overall need to be seen to be fair, in procurement functions.

The Local Government and Public Involvement in Health Act 2007 required PCTs and local authorities to produce a Joint Strategic Needs Assessment (JSNA) of the health and wellbeing of their local community.

There is government guidance which complements the statutory guidance ‘Creating Strong, Safe and Prosperous Communities’, and provides tools for local partners undertaking JSNA. It describes the stages of the process, including stakeholder involvement, engaging with communities and recommendations on timing and linking with other strategic plans. It also contains guidance on using JSNA to inform local commissioning, publishing and feedback.

- Guidance on Joint Strategic Needs Assessment

The general well-being duties in the Local Government Act 2000 also require consultation in respect of the setting of the annual council budget arrangements which will of course impact on the general availability and provision of services. Consultation can be used to inform what is required of providers and evaluation criteria. For example, one Authority has recently provided individuals with vouchers to purchase lunch in a village pub rather than have a formal procurement of a delivered meals service. This was based on consultation with the service users.

Local authorities have a duty to ensure that good value is obtained for services provided using public money (the “Best Value” duty to ensure economy, efficiency and effectiveness). Expenditure is subject to review by internal and external auditors who operate within Guidance and legal processes which require evidence of value for money by demonstrating that public
money is used effectively. Auditors would be rightly critical if tender processes and contracts did not require assurances about matters such as health and safety, care with the use of personal data, the qualifications of staff or observance of equalities duties by providers.

It is common practice for local authorities to require suppliers to comply with requirements in respect of equal treatment on grounds of sex, race and disability. This is achieved by asking for details of any adverse claims in Tribunal or Court and for equalities policies in a tender process. Once contracts have been entered into there are requirements to provide information and often for funding to be withdrawn if there is a complaint of discrimination. This is to ensure local authorities comply with their own duties to promote equality of opportunity and the positive duty to have regard to the need to eliminate unlawful discrimination.

The Equalities Act 2010 contains a "public sector equality duty" which will include the duty to publish data in respect of the elimination of discrimination by public bodies and information on the effect of policies and practices on service users. Authorities will still probably retain specific requirements in contracts to ensure compliance with providers’ own duties under the legislation in relation to goods and services.

The duty to publish data will mean that service users and regulators will also be able to assess for themselves whether or not providers are following policies and practices which eliminate discrimination and how good relationships are being fostered which support the duty. This should help with ensuring compliance with requirements placed in contracts. Service users will, in theory, be able to assess the information provided and decide how well authorities are complying with their duties. Feedback from service users can be used by Authorities to assess how fully a contractor complies with the requirements in the contract in respect of equalities. Evaluating the feedback will enable the Authority to demonstrate it takes compliance with the Authority's duties seriously. There are no plans to tell public bodies how to use procurement or other contracts with third parties as a lever to improve equality in the private sector. The new duty is expected to come into force in April 2011.

More detail on the detail of consultation powers, duties and practice is given below.

**Moving the goalposts – managing procurement risk if your contract needs to change**

The new government’s public sector spending plans are raising many new issues; not least, the issue of change. Faced with pressure to reduce spend, procure more efficiently and meet onerous budget targets, it is perhaps seen as an easy win for the public sector to revisit the scope
and terms of existing contracts to try to secure better value from providers. This might be aimed at reducing the scope of contracts by removing services, or, more and more, by consolidating spend or looking to pool resources by allowing other organisations to buy through existing contracts.

It is a common misconception that EU and UK public procurement laws are concerned only with changes in scope during the procurement process, and that once a procurement has been carried out, authorities have a free hand to make whatever changes they wish. But this is not so. There are traps for the unwary if and when changes are made to existing albeit correctly procured contracts. It is right to say that many authorities in the UK have already found themselves in hot water over these issues - including the Legal Services Commission.

This is because an extension, renewal or material amendment to a public contract can make it a ‘new’ contract under the public procurement regime. When a ‘new’ contract arises, the authority should not simply place the work with the existing contracting party, but should award it under a new procurement process. This would apply to any public contract but the details of the process required would differ according to whether the contract is one to which the full, or only limited, or none, of the Regulations apply.

The new remedies regulations, introduced in December 2009, mean that an award without a new procurement is an illegal direct award, and vulnerable to the remedy of ineffectiveness, or cancellation, up to six months after it has been entered into. The public body would also be liable for fines and potential breach of contract claims from the supplier whose contract has been ended.

There are two considerations when assessing whether changes are permitted, both of which arise from the obligations to ensure equality of treatment and transparency in all procurement activity. The first question is to assess whether the changes are so material that they effectively create a new contract which should be re-advertised. Next, even if the changes are not material, have the changes been identified through a variation clause which is suitably transparent?

**Key points:**

- Adding or removing services to or from existing contracts can amount to creating a new contract which should be subject to a procurement process, depending on the value.

- The key test is whether there is a material change in the contract by adding new terms, new services or extending timescales.
Is there a new contract?

In Case C-454/06 Pressetext v Austria, a case which related to post-contract changes, the European Court of Justice (ECJ) set out some fairly clear guidance on the issue which is a helpful benchmark for all public sector bodies asking themselves this question.

Pressetext had sought to provide press agency services to the Austrian government but had been unsuccessful. They challenged proposed amendments to a contract with an existing provider on the basis that changes that occurred in the agreements for 2001 and 2005 materially affected the base agreement.

The ECJ said that the amendments constituted the award of a new contract when they were materially different in character from the original contract and demonstrated the intention to renegotiate the essential terms of that contract. The ECJ went on to comment that the types of amendments that are ‘material’ are those that:

- introduce conditions, which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted;
- extend the scope of the contract considerably to encompass services not initially covered by the initial award procedure; and,
- change the economic balance of the contract in favour of the contractor in a manner not provided for in the terms of the initial contract.

These issues need careful consideration on a case by case basis. Authorities need to review their original OJEU contract notices and tender documents to be clear on the scope of the advertised contract, and compare them against the changes proposed.

An example may be where there is a contract in place to provide residential care and there is a wish to ask the contractor to also provide day care on the closure of a day care centre; or a proposal for the provider to de-register the care home and turn the offering into supported living, for tenants, instead of residents. Before asking the residential care home to provide the day care services it will be important to review the original tender documents and see whether there is a significant increase in value, whether the arrangements are in the scope of what was originally envisaged and also whether it would be possible to identify someone who might have tendered for either the larger package of work or the smaller day care services contract. In these circumstances the safest course will be to follow the appropriate procurement process.
Authorities should ask themselves in particular whether changes will make the contractor better off under the contract, include services unrelated to the original requirement, or go beyond the estimated contract value in the notice. These factors all point towards a new contract. In each case it will be a question of degree.

**What about variation clauses?**

Contractually, parties can of course agree any changes which fall within the scope of any contractual variation clause.

However, it cannot always be assumed that very broad amendment clauses comply with the procurement Directive’s overriding principle of transparency. The Court of Appeal came to this view in the case of *R (on behalf of the Law Society) and Dexter Montague v Legal Services Commission* (2007) which was a challenge to a contract awarded by the Legal Services Commission to law firms that wished to provide legal aid services.

The Court said that it was usual to expect that a contracting authority may reserve rights to amend the contract and it recognised that changes might be desirable or required during a contract’s life. Despite this, the right to amend in this case was so broad that it amounted to a right to redraft the contract, and the Court said that this breached the requirement of transparency. Local authorities and service providers therefore should be aware of the risk of challenge which may arise from contracts with very broad variation clauses and consider at the time of procuring a contract the extent to which variation may be required and to plan accordingly. Similarly, persuading a provider to agree to reduce the level of services in return for paying a slightly lower price, may mean there is a risk of challenge from someone who would have been willing to provide the services, possibly for a cheaper rate, from the outset. The Court of Appeal also referred to ECJ case law which says that transparency requires that the scope of the OJEU contract notice to be sufficiently detailed to allow a bidder to know what is being procured. This has been recently reinforced by a decision of the ECJ in *Commission v Spain*, where it was decided that changes made by a Spanish authority which increased the scope of the motorway toll operating contract to include roads not envisaged in the OJEU notice amounted to a material change.

**What next for contracting authorities?**

Public procurement challenges have become almost every day events. As part of this culture, it should not be forgotten that changes after a contract award can be challenged.

Authorities need a Safety First approach if making changes considered necessary, if needs change, because this can have the
side effect of rendering the contract wholly different from that originally procured. The most sensible approach is to take steps to deal head-on with procurement risk, by auditing contracts and change clauses to ensure that scope creep is recognised and risks are addressed, for example. It should not be forgotten that awarded contracts can be set aside, thanks to the new remedies regulations, and so challenge is as much a concern for a contractor as it is for the authority. Despite rare pro-authority decisions such as the recent case of Varney v Hertfordshire County Council, whether the courts will give the benefit of the doubt to authorities forced to make material changes to contracts is anything but clear.
Chapter 2 - State Aid

What is the purpose of the state aid rules?

The purpose of the EU State Aid rules is to secure a level playing field within the European Union in terms of economic activities undertaken, and to ensure that Member States do not operate potentially wasteful subsidy races. A further purpose of the State Aid rules is to ensure that where public subsidies are applied they are effectively channelled into areas which are in line with EC objectives to increase competitiveness within the European Union in the most effective way and involving only the minimum amount of subsidy necessary.

The rules also ensure that where public funding/subsidies are deemed necessary they are applied by way of the most appropriate instrument, thus avoiding potentially wasteful use of public resources. Under the provisions of Article 107 of the Treaty on the Functioning of the European Union (“TFEU”), the grant of State Aid is prohibited unless and until it has been approved by the European Commission. The Commission typically takes 4-6 months to make a decision. The notification process requires authorities to provide supporting evidence to justify its proposed action.

Key Points:

- It is very important to take careful account of the State Aid rules and ensure that making use of public funding by giving grants, subsidy or other assistance does not trigger the application of the State Aid rules. The rules governing State Aid are not straightforward and need specialist advice if there is any proposal to proceed without an open and fair competition.

- The most practical and certain way of remaining compliant is to have an open and fair competition, i.e. a transparent procurement process whenever asking a third party to provide services to the public sector or considering a third party for a grant.

- If the procurement relates to the award of a services contract to be undertaken for and on behalf of the relevant public body then this should (if done on an open and transparent basis) demonstrate the market price for such services and thus no element of aid having been given with regard to the price paid. But a competitive procurement exercise will not, on its own, be sufficient to remove State Aid issues if what is being awarded is a grant, rather than a services contract.
The state aid rules explained

There are four elements to State Aid, all of which must be satisfied if a measure is to constitute prohibited State Aid. If the four tests are met, or if there is a risk that they are met, there is an obligation to notify the European Commission before the aid is given. The four elements are as follows:

- the aid must be granted by the state or the state resources;
- the aid favours certain undertakings or the production of certain goods;
- the aid affects trade between member states; and
- the aid will distort or have the potential to distort competition.

It can be difficult to recognise whether these four elements are met, particularly since there is no definition, as such, of State Aid. Examples might include giving a grant or other subsidy, giving a loan, on preferential rates or providing goods or services on preferential terms or indemnities against operating losses - and granting leases at less than best consideration.

What are the criteria for state aid

The provisions of Article 107(1) of the TFEU set out the specific criteria that need to be present in respect of a measure in order for that measure to amount to a State Aid. These criteria are as follows.

1. The measure must involve directly or indirectly the use of state resources

There is a fairly widely held misconception that in order to fulfil this requirement public funding must be applied by way of a grant, to raises State Aid issues. However, the EC effectively regard as State resources anything which involves the application of any element of resources held/utilised by the State. In addition to grant funding, this could include, but is not limited to, the following:

- Investments;
- Guarantees;
- Rent subsidies;
- Disposal of land or other assets;
- Payments for goods or services;
- Loans;
- Secondment of staff / renting out of equipment;
- Providing a grant or subsidy.

Due to the extent of what is covered by the term “State resources” it is unlikely that any supportive intervention/activities undertaken by the State would not involve State resources at some level. It should also be noted that even funds which are not provided directly by the State may be deemed to be State Aid, where such funds can be considered to be “imputable to”/within the control of the State (i.e. the State exercises an element of control as to how such funds are expended). An example of this is Big Lottery funding.

Even where a grant is provided as part of a competitive process, sometimes known as “competition for subsidy”, that may constitute state aid.

2. The measure results in a selective benefit to an undertaking

As indicated above, a measure of public funding can only amount to State Aid if its provision results in a benefit accruing to an entity which amounts to an “undertaking”. If, therefore, it can be demonstrated that the recipient of any State resources is not an undertaking, then the application of such resources can not amount to State Aid, as the recipient entity is effectively incapable of receipt of State Aid. Whether or not an entity amounts to an “undertaking” is dependent upon whether or not it engages in “economic” activities. Both the European Court of Justice (“the ECJ”) and the EC have applied a deliberately wide definition of what amounts to “economic” activities, covering: “Any activity which consists of the offering of goods or services on a given market which could, at least in principle, be carried out by a private actor in order to make a profit”.

Due to the wide ambit of this definition, as a general rule the fact that an entity operates on a not-for-profit basis or indeed is also a public sector body will not preclude it from being an “undertaking” and thus it will be an entity capable of receipt of State Aid. The EC has expressly stated that the type of entity and the basis on which it is funded are irrelevant for the purposes of ascertaining whether or not it is an “undertaking” (and thus an entity capable of receipt of State Aid). What is important is the nature of the activities undertaken, rather than the nature of the entity which undertakes them. It will not matter whether the grant is for the general administration of the entity or to pay for a
particular service that the organisation wants to deliver (such as independent brokerage) or to actually deliver specific services that the council wants to see available in the area, such as market navigation.

Entities which receive State resources in return for goods and services will undoubtedly amount to “undertakings” and thus be entities capable of receipt of State Aid. In such circumstances, care would need to be taken to ensure that the basis on which such State resources are applied to such undertakings does not confer the required “selective benefit” for the presence of State Aid. This can generally be demonstrated by evidencing that payments made are no more than the market rate for the goods/services provided in return for such payments. The most effective way of demonstrating this is through an open and competitive procurement process.

An example of the wide application of State Aid rules is where public funding is provided to an organisation through a grant to enable the recipient organisation to provide free services to end user clients. This could be the provision of advice or information or the provision of services, such as market navigation or brokerage. At first sight, it would not seem that these were services which were offered ‘commercially’. However, this could amount to State Aid because the activities could at least in principle be undertaken by the private sector for profit. The fact that no charge is made to the end user is irrelevant if the organisation is receiving a grant or other form of compensation that enables it to undertake the activity.

Making superfluous goods available

Another example of where purchasing of goods or services by the State may raise State Aid issues is where the State funds or supports the provision of goods and services that are effectively superfluous to the needs of the public authority in terms of performing its State functions. In such circumstances even if it can be demonstrated that the market price is paid for such services, then there may still be a State Aid. An example of this was where a Spanish public authority purchased a significant number of ferry tickets from a company offering services from a particular ferry port. The purchase went well beyond the relevant authority’s needs in relation to its own internal functions and was clearly designed to benefit the relevant ferry company and therefore amounted to State Aid.

It is not unusual for Authorities to require contractors to build spare capacity into arrangements to ensure that the Council can meet its statutory duty to ensure there is adequate provision of resources. This is cost effective and gives reassurance that additional provision can be accessed quickly. This may mean that from time to time there is a surplus of provision. If the
surplus is justifiable and can be demonstrated to be a contingency to meet genuinely unquantifiable service delivery needs this is unlikely to be classed as State Aid but it is important to be aware of the risks and that each case will be considered on its facts. Further advice should be sought if there will be a long term purchase of surplus capacity of a significant amount.

Do state aid rules apply where a local authority wishes to enter into a contract or give a grant to a social enterprise?

The State Aid rules operate on the basis of “what an entity does” rather than “what it is”. The key question is “is the recipient an undertaking?” as only undertakings are capable of receipt of State Aid. An undertaking is an entity if it engages in activities which could in principle be supplied commercially - which the offering of social care and support services to a public body would seem clearly to be, even if it is by a charitable organisation, community interest company, or other form of social enterprise.

3. The measure affects trade between member states

As a general rule, the EC applies a very low hurdle in terms of what is necessary for fulfilment of this requirement, with it covering not only measures that actually affect trade but also those that could potentially affect such trade. The test for fulfilment of this criterion is found to be “Is, or potentially, could the activity be undertaken, by entities within other Member States?”, rather than “Does the recipient entity trade on a cross-border basis?”

In the case of very small localised businesses, such as one-site operation hairdressers, taxi companies and similar businesses which operate solely on a purely local market and where the effective competition can only ever be from another business which also operates on the same purely localised basis, these will fall outside of this criterion.
Key point:

- Support to small localised businesses (for example grants to voluntary organisations or support given where individual groups take over the running of services in accordance with the provisions in the Localism Bill) that can only function locally would not ordinarily meet the criterion that there was a disproportionate impact on member states. But although care and support services will always be localised to the population benefiting from them, it would be risky to assume that this principle would always apply to social care services where the potential overall value of the services delivered could be high and also where the contract covers a range of professional or highly technical services.

Possible exemption to state aid rules where limited aid is given

As explained, there are formal exemptions which may be helpful where small grants or other support is given to support very localised activity or where limited funding is given in accordance with the Block Exemption regulations. This may be helpful in the context of social care where financial or other support is given to community organisations or social enterprises. On the basis of the comments detailed above, as a general rule, entities providing services to the State will generally operate on a sufficiently wide market for any benefit to such entities likely to be viewed by the EC to have at least the potential to affect trade. Only where resources are applied to very localised entities for very localised activities can this be argued not to be the case, so it is safer to use the De Minimis Aid Block Exemption Regulation\(^2\) rules wherever possible. This allows any undertaking to receive (from all relevant sources) up to €200,000 within any rolling period of 3 fiscal years, with the EC expressly stating that funding provided in full compliance with the De Minimis Aid Block Exemption will not amount to State Aid.

Key point:

It is very possible that payments to community-based care and support organisations could be of a level whereby they are consistent with the De Minimis Aid Block Exemption. It would be risky for a local authority to provide grant funding to an organisation using this exemption whilst at the same time entering into a contract for services at the market price without losing the exemption. Legal advice should be sought if this is being considered.

4. The measure must distort or threaten to distort competition

The EC regards almost all (if not all) funding which selectively benefits an “undertaking” and affects or has the potential to affect trade to have at least the potential to distort competition. This is on the basis that such entities operate within a competitive market and any selective benefit resulting from State resources afforded to them will logically have the potential to place them in a more advantageous position than their competitors and thus enhance their ability to compete within the market in question.

If payments are made in respect of economic activities, how can the state aid prohibition be avoided?

As indicated above, even where payments are made by the State towards activities that are economic in nature, in order for such payments to amount to State Aid there must be some element of benefit (in the form of a subsidy) which distorts or threatens to distort competition and affects intra-Community trade. As a result, there will generally not be State Aid where a public authority is simply paying a competitive market price for the delivery of goods or services to it or on its behalf.

Procurement for goods or services

In practice, as this note has explained earlier, the purchase of goods and services by public authorities in the UK is required to comply with European public procurement legislation.

Compliance with such legislation will generally operate to demonstrate that payments are made in line with market rates and thus do not amount to an over-compensation (and a benefit to the recipient entity) so long as the payment relates to a genuine requirement of the relevant authority, rather than a payment in return for something that the recipient does or would do already. In such cases it can be robustly argued that there is no subsidy to the recipient entity and thus no State Aid.

Key to compliance is demonstrating a sound process as this is the basis on which price is market-tested and if the competitive process is not a compliant one then this casts doubts as to the price paid being validly market-tested and raises the risk of it being viewed as an overpayment and thus a State Aid.

It is important to remember however that a more limited process applies to procurement of Social Services (which are mainly Part B services) and that this will only need to involve compliance with the general principles of transparency, equality and non-discrimination as set out in the earlier part of this briefing.
**Services or general economic interest – a further possible exemption**

It is possible for payments to be made by a public body to an “undertaking” linked to the performance of services of general economic interest (“SGEIs”), without such payments amounting to State Aid. Where it can be demonstrated that payments by the State amount simply to compensation for the performance of so-called SGEIs, the ECJ has indicated that such payments will not amount to State Aid if they fulfil certain criteria.

These criteria have been set out by the ECJ in its judgment relating to the *Altmark* Case with the caveat that if payments from the public purse in return for the performance of SGEIs do not meet all of the criteria set out within the Altmark Case (the “Altmark Criteria”) then they would automatically be viewed as amounting to State Aid.

On this basis, if funding in relation to a particular activity undertaken by an undertaking can be structured in the manner whereby it amounts to nothing more than the minimum amount of compensation necessary for the performance of an SGEI (in the context of the economic aspects of the project) then, subject to such payments complying with the Altmark Criteria, aid issued in the context of such payments should not give rise to an issue.

The crucial components of the Altmark Criteria are as follows:-

- the recipient undertaking must actually have public service obligations to discharge and the obligations must be clearly defined; this means that only bodies which are the delegates or agents of public bodies can be regarded as ever coming within the criteria.

- the parameters within which the compensation is calculated must be established in advance in an open and transparent manner;

- the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligation(s) taking into account the relevant receipts and a reasonable profit; and

- where the undertaking which is to discharge the public service obligation(s) is not chosen pursuant to a public procurement procedure, the level of compensation needed is determined on the basis that analysis is necessary of the cost that a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging their obligations, taking into account the relevant receipts and a reasonable profit in respect of discharging the relevant obligation(s).

3 Judgments in Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (“Altmark”) [2003] ECR I-7747
It should be noted that only if all these criteria are met, will compensation regarding the undertaking of an SGEI be viewed by the EC as not involving the grant of State Aid.

SGEIs include such things as gas, electricity and public transport and are usually services which the market does not provide and are in the general interest. This means beneficiaries should be the community at large and not a specific industry sector. Although it may be possible to say that social services amount to services of general economic interest, before relying on the exemption, it will be necessary to take detailed advice on the exact nature of the entity. The State needs to designate the activity as an SGEI for the exemption to be available.

Whilst the EC have indicated that the decision as to whether an activity is an SGEI is to an extent within the ambit of the individual Member State (subject to there being no manifest error in terms of any such designation), they have within various decisions on State Aid instruments indicated that an SGEI relates to the assignment of obligations by a Member State (or part of it) to an “undertaking” which if that undertaking were considering its own commercial interest would not assume or would not assume to the same extent.

Examples of an SGEI in the UK is the provision of social housing and the development by credit unions for specific funding instruments to assist members of the public excluded from obtaining credit from the market. UK Government Guidance\(^4\) states that key elements of an SGEI are:

- The services must be provided in the interests of the general populace;
- There must be an element of public good for the population as a whole, whether environmental, social, cultural or other, non economic welfare;
- The service must be one that is not supplied already or at least not supplied to the extent required by the SGEI.

An example of providing State Aid for an SGEI would be if the public body made additional payments to companies who had existing contracts with them for providing food to hospitals or residential care homes. If an additional payment was made to encourage them to supply more fresh fruit as part of those arrangements that could be support for an economic activity. It would arguably fall within an exemption because it would have a clear public health benefit and be of benefit to a significant number of people to enable it to be within the general interest. We are assuming that the potential for State Aid arises because the support would not initially have been subjected to competitive pricing. The sensible thing for the authority to do in those circumstances will be to build it into the tender conditions to remove the State Aid concern.

But meeting the requirements of the Altmark Criteria in order to eliminate State Aid.

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\(^4\) BIS Guidance Note - How the State aid rules impact upon funding for the delivery of public services including Services of General Economic Interest (SGEI) October 2009
Aid is notoriously difficult, particularly where there has been no public procurement. This is due to the requirements in the fourth Altmark Criterion, where the undertaking which is to discharge the SGEI is not chosen pursuant to a public procurement procedure.

**Could a local authority give financial assistance or a contract to a social enterprise without going through a procurement exercise?**

If a social enterprise provides services to a local authority, there should be some form of competitive exercise in order to avoid issues of unfair procurement and State Aid overcompensation being raised, even if the services are Part B services or the potential exemptions apply because the services are of general economic interest, or the de minimis block exemption applies. The safest position is to run the proportionate competitive process to avoid the risk of State Aid challenge. This means that the entity is not seen as an undertaking within the rules because it is providing services where there is no even theoretically possible commercial market, or alternatively there is no prohibited state aid, because the block exemption rules apply.

If a local authority makes a payment to a social enterprise which is not a payment for services provided and thus a grant, then that should be applied in a State Aid compliant manner. The Localism Bill places a duty on local authorities to consider applications from groups of individuals or local organisations who wish to take over the running of services. The draft Bill makes it clear that the procurement process must be entered into in those circumstances.

**Key points:**

- Where a social enterprise or third party provides services to a local authority those services should be obtained through a procurement process to avoid breach of State Aid Rules.

- Where a local authority gives grants or other support the only way that can be done without breaching State Aid obligations is to:
  - provide it at market value levels or
  - rely on the de minimis exemption or
  - rely on the purely localised activity exception or
  - rely on SGEI, on the basis it is operating as a quasi public body (which is unusual in relation to grant recipients).
Practical conclusions on state aid

The criteria for the presence of State Aid are applied very widely by the EC and thus it is very easy for a measure involving public funding to amount to State Aid and thus be subject to the general prohibition on the grant of State Aid without the EC’s prior written approval. To avoid the risk of challenge on the basis that there has been unlawful State Aid given by a public authority, the simplest thing to do is openly to procure services.

If this is not possible, then another option is simply to provide grants to those entities which do not engage in economic activities. But if, those entities are, in reality, providing services, albeit not under contract, at a low cost or for free to members of the public, simply because that is what the grant funding body wants to see happening, it may be difficult to say that they are not engaged in ‘economic activity’ within the definition of State Aid. Another alternative would be to limit the grants to what is permissible under the de minimis block exemption. The availability of that exemption would, however, need to be evaluated on a case by case basis and legal advice may be needed.

In such circumstances care would need to be taken to ensure there is an appropriate State Aid instrument available to justify approval of the aid by the EC either by way of compliance with the requirements of a Block Exemption Regulation, such as the General Block Exemption Regulation⁵ (which provides for automatic approval from the EC for measures that are fully consistent with its terms) or an existing State Aid scheme which has already been approved by the EC. The General Block Exemption may include support given to small and medium enterprises (SMEs) to include purchasing assets or the payment of wage costs. Examples of aid to other bodies may include aid for the purposes of training workers or providing help with finding jobs for disabled or disadvantaged workers. Full details of all State aid legislation and decision issued by the EC can be found on the EC’s Europa website at the following address:

http://ec.europa.eu/competition/state_aid/overview/index_en.html

Failing this the State Aid would need to be formally notified to, and approved by, the EC prior to its grant, in order to be lawful. In order to avoid State aid issues arising authorities should:

- ensure that payments are made in return for the provision of goods or services with evidence in place that no more than the market rate has been paid for such goods or services (procured in accordance with the UK and EU rules where applicable or, where such rules are not applicable, by way of a transparent benchmarking exercise); or

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• provide state resources to the recipient entity on purely commercial terms (e.g. a loan at a commercial rate on interest); or

• limit any grant to a level consistent with the requirements of the De Minimis Aid Block Exemptions.

• ensure that funding is provided strictly in accordance with the criteria for SGEIs as set out in section 3.2 (we would recommend specialist advise be sought before reliance is placed on the SGEI route to justify funding in State aid terms).

Alternatively, on a risk-assessed basis, funding could be applied to operate on a non state aid basis where it is concluded that the recipient:

• is not an undertaking, as it does not engage in any economic activity (but the fact that an entity operates on a not for profit basis does not mean it does not engage in economic activity) (see section 2.2. above; and/or

• engages only in activities of a very localised nature (see section 2.3 above)

Attached at Appendix 1 are flow charts to aid in an initial analysis of whether these State Aid rules may apply.
Chapter 3 - Consultation Duties in connection with de-commissioning, cutting grants, charging or changing the F.A.C.S threshold

Local Authorities are often required to undertake a consultation procedure prior to implementing service changes that will affect local service users or other interested parties, such as special interest groups in the wider community (for example in relation to closing care homes or amending charges for social care).

There are both general and specific statutory and purely common law reasons why councils must consult.

Sometimes the duty is mandatory and explicit (eg equality promotion duties in statute) or recommended and general (eg before changing the charging policy, because it is recommended in government guidance); at other times it is implied by the public law of fairness, or observance of human rights (eg closing care homes – duty to residents, because it is their home); sometimes it is a duty owed to a group (eg equalities groups), and at other times to particular individuals (eg existing service users); and sometimes it will be necessary purely because the authority has promised to do it (eg promising to abide by a voluntary sector compact to consult grant recipients before cutting grants).

It is therefore important for Authorities to be clear whether they are carrying out a formal consultation process with particular statutory requirements which need to be followed (ie certain bodies to be consulted) or whether they are consulting voluntarily, in which case, general principles will inform the content and scope of the process and the breadth of consultees chosen for involvement.

However, once it has been decided that a consultation should be undertaken, on whatever basis, an adequate fair procedure must be adopted, because inadequate consultation is not sufficient to count as consultation at all, and a year or more can be lost through a successful challenge to the outcome.

What is required?

The Cabinet Office published its latest version of its Code of Practice on Consultations in July 2008 which although aimed at central government bodies, contains useful points to note on carrying out written consultations.

The scope of a consultation varies, depending on the proposed changes to a service provision; however some broad
principles have been established by case law and must be borne in mind from a very early stage, ideally from the outset of a proposed change to a particular service. The requirement is to consult all interested parties, and in doing so authorities should provide sufficient information to enable those being consulted to form a considered view.

Interested parties may include service users, relatives, carers, advocates and other public bodies or groups or parties who would be directly or indirectly affected by the proposed changes to the service provided. The consultation needs to be done whilst the proposals are still at a formative stage in order for an authority to show it has conducted a fair procedure in reaching a decision which is reasonable. Where in the course of the consultation, a new option emerges, which the authority wishes to consider, it will generally be appropriate to consult afresh on the option before proceeding to publish the proposal. The body doing the consulting must allow adequate time for interested parties to consider the proposal and formulate their response and ensure that all the results from interested parties are conscientiously taken into account when the ultimate decision is taken. It is important that authorities record all discussions or meetings, which consider those representations in order to show that the authority has taken these into account in reaching a subsequent decision. This is information that members of the public may be able to access through a request under the Freedom of Information Act.

**Equalities Duties**

Local authorities have had long-standing statutory duties that can be discharged through consultation, in respect of compliance with anti-discrimination law and policy.

Those duties are now consolidated for the most part in the Equalities Act 2010. Many of the provisions of the Equalities Act 2010 came into force on the 1st October 2010. However, the public sector equality duty will not come into force until April 2011 at the earliest. This means that Authorities will continue to include specific requirements in contracts and procurement processes to ensure providers comply with the equality duties previously imposed upon Authorities. The general purpose of the 2010 Act is to harmonise discrimination law and strengthen the law by further developing current anti-discrimination legislation in the Race Relations Act 1976, the Disability Discrimination Act 1995 and the Sex Discrimination Act 1997. The broad equalities duties are in respect of the need to promote equality of opportunities as well as a duty to have regard to the need to
eliminate unlawful discrimination.

Whilst the equalities duties are more onerous for public sector bodies, many of the duties also apply to businesses or other third parties providing services. Additionally, where there are arrangements between the public sector and third parties the duties will normally be passed on through contractual arrangements and through monitoring the relationship. On 4 October 2010, the Equality and Human Rights Commission (EHRC) published guidance:

- Using the equality duties to make fair financial decisions.

- New Guidance on Public Sector Duties

The guide sets out what is expected of a key public authority decision-maker when making difficult decisions on issues such as re-organisations, relocations, redundancies and service reductions, in order to comply with the public sector equality duties. The guide aims to assist decision-makers in ensuring that the public authority decision-maker:

- Follows a robust process when assessing the equality impact of its financial proposals.

- Thoroughly considers the impact the financial proposals will have on equality groups before taking its decision.

Although an assessment can be by way of an analysis that systematically assesses any adverse impact of a change in policy, procedure or practice, the EHRC recommends the assessment takes the form of an Equality Impact Assessment (EIA), since by law an assessment must:

- Contain sufficient information to enable a public authority to show it has paid “due regard” to the equality duties in its decision-making.

- Identify methods for mitigating or avoiding any adverse impact.

The use of a formal EIA document when developing financial proposals means that the public authority has:

- A written record of the equality considerations that it has taken into account.

- Included in its decision a consideration of the actions that would help to avoid or mitigate any unfair impact on particular equality groups.

- Made an open and transparent decision based on evidence.

- Undertaken the consultation should be undertaken when proposals are at a formative stage.

- Consulted those affected, both service users and providers and ensured that
the impact assessment identifies both positive and negative impacts.

- Asked whether or not the action is justified and also how any adverse impact can be minimised as well as how changes will be monitored and reviewed.

A failure to meet the public sector equality duties may result in authorities being exposed to costly, time-consuming and damaging legal challenges - failure to comply with these equalities duties is an increasing area of challenge for the public sector. In a number of recent challenges (most of which were successful) the courts have considered the adequacy of consultation and the meaning of the term “to have due regard”.

In Chavda v Harrow LBC [2007] EWHC 3064 (Admin) the Council’s decision to restrict adult care services under FACS criteria to people with ‘critical’ needs was challenged. A summary of an equality impact assessment simply stating that implementing the proposal could result in potential conflict with the Disability Discrimination Act 1995 had been submitted to the Council in preparation for its decision. The court found that this was insufficient to enable the Council to comply with the duties in the 1995 Act and that the decision was therefore unlawful. It is not enough to tell decision-makers that proposals raise implications for equality; attention must also be called to the particular obligations imposed by the law in relation to those issues.

In a case that was settled before judgment, the Southall Black Sisters organisation had received £102,000 from a Council for the years 2007 to 2008 under a three-year rolling sponsorship agreement. In 2007 the Council decided that rather than funding individual organisations under sponsorship agreements it would commission borough-wide services from community and voluntary organisations by open competition according to published criteria. Notice was given to the Southall Black Sisters in July 2007 to bring the funding arrangements with the Council to an end in March 2008. A judicial review was conceded 2 days into the hearing, and the Council agreed to continue to fund the organisation pending a further fresh decision as to the criteria it would adopt for the commissioning of services to assist the victims of domestic violence. The Council also agreed to pay the costs and those of the Equality and Human Rights Commission which took part as an interested third party. The total costs were thought to be likely to be worth a whole year’s grant in any event. The Court expressed the importance of compliance with equality duties and was critical of the failure by the Council to conduct a full Equality Impact Assessment before making a decision to withdraw funding.

The case of R (Domb) v Hammersmith and Fulham LBC was heard in the Court of
Appeal in 2009. Deciding the other way, the Court was satisfied the Council had not failed to take account of its equalities duties when setting a budget which included introducing charges for non-residential care. The claimants alleged that the Council could not have taken the duty to have regard to the need to promote equality of opportunity given that the only two options for reducing council tax by 3% were imposing charges or raising the eligibility threshold for care services. The Court thought it could not be said that all theoretical options had to be regarded as being open: ‘Decision-making would simply become impossible on such a basis. One has to start somewhere.’

It is notable that the Equality Impact Assessment undertaken by the Council found that the proposed policy would have a negative impact on users of the care service who were women or from an ethnic minority background. However, the Court of Appeal agreed with the Council’s submission that the Equality Impact Assessment had not found a specific differential adverse impact. Despite the fact that ethnic minority residents were more likely to receive home care services, the level of their income was less likely to render them liable for the charge and so they were not disproportionately affected by introducing charges. So the court agreed that the Council, both in substance and in form, had had due regard to the need to eliminate discrimination and to promote equality of opportunity in relation to the relevant equality duties. The essence of the impact assessment was properly transferred into the report to cabinet.

In Boyejo, however, in 2010, Barnet LBC resolved to change the way it provided support services to those living in sheltered accommodation, by terminating contracts for on-site warden based services and developing a peripatetic support service, with the retention of an alarm service to all residents in such accommodation. Portsmouth City Council decided to terminate the provision for sleep-in night time staff at each of certain high level support sheltered housing schemes and to introduce instead a mobile night service. The focus of the Portsmouth case was a preliminary impact assessment carried out by a policy development manager in the Housing Service which concluded that the proposed changes could have no feasible adverse effect or impact on members of equality groups, including disability groups. The actual outcome had been ignored in favour of the ‘planned’ outcome. Parts of the report to members presented conclusions, without the data needed to evaluate them.

The Court was not impressed. “Members are heavily reliant on officers for advice in taking these decisions. That makes it doubly important for officers not simply to tell members what they want to hear, but to be rigorous in both inquiring and reporting to them.”
Both Barnet and Portsmouth had some regard to the impact on residents as a group, but neither authority had any or sufficient regard to impact upon those residents with disabilities, as a separate group, or to the need to recognise that having due regard might mean considering treating disabled persons more favourably than others.

In the case of *R v The Secretary of State for Education ex parte Luton Borough Council and Others* [2011] EWHC 217 (Admin) one of the issues the court was critical of in respect of the judicial review challenge of the decision to cancel funding for school rebuilding projects under the Building Schools for the Future (BSF) programme, was the failure of the Secretary of State to have due regard to statutory equality duties. The judge was critical of an attempt to rely on an Equality Impact Assessment produced after the decision was taken. Any such assessment should have been carried out before the decision was taken, in the view of the Secretary of State. As a result, the Secretary of State has been ordered to reconsider decisions in relation to the projects.

Similar issues were raised in the recent London Borough grants case, *Hajrula v London Councils* [2011] EWHC 151 (QB). In that instance, the London Councils were subject to judicial review proceedings in respect of decisions to cut its proposed budget for grant schemes for 2011/2012. The Councils were required to do further work on equalities in the context of the agreed budget. The judge said that the Council had reached its decision without due regard to equality duties under the Race Relations Act 1976, the Sex Discrimination Act 1976 and the Disability Discrimination Act 1995. The solicitor acting for the claimant suggested that individuals who may lose their funding should be given three months notice of the proposed change. The London authorities needed to cut their budget from £26m to £17.8m with further budget cuts likely in 2012/2013.

**General principles in relation to de-commissioning of grants and contracts for social care and support:**

- Termination of a contract which allows for termination does not require consultation with the provider – it simply requires contractual notice. Authorities do not owe ‘preferred’ or any other providers a duty to keep them in business.

- However, depending on the nature of the service, there may be other legal rights in play, such as

- the client’s right to choose accommodation of their preference, subject only to price, suitability, availability and terms, or

- the obligation to maintain a care plan
until lawful re-assessment has been completed;

- observance of Human Rights Act principles regarding emotional and psychological links with the current community etc;

- (potentially) observance of the Mental Capacity Act Code about Best Interests consultation with the client’s friends and relatives, and of the existing provider.

- Re-assessment of individuals is triggered in community care law by any proposal for substantial change in the content (the nature of, the setting for, or the form of the arrangements to be made, to meet eligible need – not, per se, by a change in provider, where that does not involve any of the above).

- However, broad proposals for re-commissioning of non-residential services do still have to take into account the clients’ Article 8 human right to respect for their private life, family and home – and this may extend to consultation. It must be seen to be at least possible for the client to convince the authority that their current provider should be left in place, under a spot contract. That is because there is case law recognising that a client can, in special circumstances, have such a dependency on a particular provider that he must be consulted about a proposed change; (R v Essex County Council ex p Bucke, [1997] C.O.D. 66); and consultation, to be genuine, must acknowledge that at least some of the people affected will need to stay with their current provider. So a proper practice would be writing to clients to inform them of the forthcoming expiration of a local contract or other proposal for changing a provider and asking for representations about the impact on that person – in advance of the need to make a new arrangement.

- In relation to framework agreements set up by local authorities or new contractual arrangements for service users, authorities will need to take care that their standard terms and conditions do not dilute their fundamental statutory obligations (for example the duty to re-assess or ensure overall adequacy of provision to meet assessed need). Authorities will be vulnerable to judicial review proceedings on the basis that they have set up arrangements which are regarded as illegal, unreasonable, or lacking in procedural propriety. A Welsh Council was successfully judicially reviewed in December 2010 for failing to take all relevant considerations into account (in particular, Welsh Assembly Government guidance with s7 Local
Authority Social Services Act 1970 status, which used the exact wording from the English document known as ‘Building Capacity’, 2001) when deciding to offer no increase to care homes with which it was already in a contractual relationship. (R (Forest Care) v Pembrokeshire CBC [2010] EWHC (Admin)).

- Decisions about Council grants to the voluntary sector are discretionary decisions under discretionary functions and they can be withdrawn, subject only to the conditions of the award. There is no automatic duty to consult the recipient before withdrawal.

- However, if Authorities decide to terminate grants to local voluntary bodies, and the impact is sufficient as to be likely to affect the range or extent of services provided by that organisation, or to close that independently-running service down, Authorities are now obliged to consider discrimination and equality promotion obligations in the community before doing that, and that will mean public consultation, into which the recipients can have input, in any event.

- If public consultation is not required by the above principle, but merely promised, for instance by way of a public commitment to the voluntary sector Compact concluded in 1998 and renewed recently by the Coalition government (The Compact) this gives the public what is called a legitimate expectation that the status quo will continue until after the consultation is over. That expectation should be honoured unless there are very good reasons why it cannot be.

- If any form of consultation is done, and it is not done well enough, the outcome can be challenged, in any event, on that ground alone.

- When consulting, there is every reason to be explicit about the aims and positive outcomes expected from the change. For instance, if proposing to close a day care centre, the reason will be the thrust of Government policy and to foster the autonomy of service users, to ensure that they are not set apart from the community. When closing a care home, the prospect of losing a grant from central government has been seen as justification for the need to close unviable homes. In the Watts case in the European Court, recently, the court agreed that it would be likely that a council would be challenged if it did not take account of its resources in reaching decisions about closure of care homes, which suggested that it would not be appropriate to keep a care home open, if it was uneconomic and out of date.
Practical steps for local authorities to consider

As part of its consultation procedure, a council should consider undertaking any or all of the following:

- Assemble information and set out aims and principles for changes;
- Identify options; including doing nothing;
- Complete an Equality Impact Assessment;
- Involve key partners, for example planning and environment departments, social services or transport authorities who are involved in strategy development and implementation for proposed changes to particular services;
- Produce publications such as newsletters which raise awareness and request that responses are left at public places such as town halls and libraries;
- Hold meetings targeted at particular groups;
- Use councillors to engage with local communities;
- Use local media;
- Establish websites or forums to discuss the proposals and online questionnaires;
- Develop recommended strategy after careful consideration of consultation responses from interested parties;
- Keep records of the views expressed during consultation and an audit trail of how these were taken into account by the decision-makers;
- Take action after the process has been completed.
Appendices
1. State Aid Flow Charts

Project/Programme

- Involves use of State resources
  - Yes
  - No

- Provides benefit to an undertaking
  - Yes
  - No

- Distorts or threatens to distort competition
  - Yes
  - No

- Has effect on trade between Member States
  - Yes
  - No

State aid only if all 4 criteria met

No State aid
2. Examples of Assistance Which may be State Aid

State Resources include all public funds (whether from Central Government, European structural funds, other public bodies, receipts from assets etc).

The project/programme could include a wide range of assistance that may be State Aid - the following is not exhaustive but captures some of the most common forms:-

Grant

Loans and guarantees (unless compliant with EC “commercial tests”)

Equity investment (unless on commercial terms acceptable to a prudent private sector investor (“MEIP”))

Subsidised training/consulting

Sale/lease of land/buildings at less than market value

Subsidised use of equipment/services

Subsidised secondment of staff

Selective tax measures

Overcompensation for goods/services purchased by the public sector

If in doubt seek advice from State aid team.
Does Project/Programme result in benefit to an undertaking?

Is recipient an “undertaking”?

No

Not undertaking: criterion not met

Yes

Recipient as undertaking. Does it receive benefit as result of measure?

No

Not undertaking: criterion not met

Yes

Does the recipient get a better deal than would otherwise be available under normal market conditions e.g. it cannot demonstrate to have paid market rate or less for goods/services purchased from the recipient or that services/facilities/assets are only made available to the recipient at market rate or greater.

No

No benefit: criterion not met

Yes e.g. grant given

Benefit to undertaking: criterion met.

No State aid

Does recipient engage in activities which amount to the provision of goods or services on a given market that the private sector could at least in principle undertake for profit? Seek legal advice before relying on this as a means for establishing no State aid.

Is recipient a public sector body and undertaking wholly owned by public sector in each case only carrying out public sector functions?

No

Is recipient as undertaking. Does it receive benefit as result of measure?

Yes

Benefit to undertaking: criterion met.
4. State Aid Flowchart - Does Aid Distort Competition?

Does Project/Programme result in distortion of competition?

- Yes
  - Is market closed to competition i.e. can only one entity legally undertake activity and that is all it does?
    - Yes
      - Possible argument criterion not met but seek legal advice before concluding there is no State aid
    - No
      - Does measure simply result in transfer of state resource from one part of public sector to another for use for same purpose e.g. to wholly owned public sector body to undertake public work that would otherwise have been performed by the Agency?
        - Yes
          - Possible argument criterion not met but seek legal advice before concluding there is no State aid
        - No
          - Criterion likely to be met

- No
  - No State aid
5. State Aid Flowchart - Does it Affect Trade Between Member States?

Does Project/Programme result in effect on trade between member states?

Does the recipient engage in Inter-Community trade or is the activity it undertakes one which is engaged in or could be engaged in by undertakings in other Member States?

Yes to one or both

State Aid criterion met

Is activity of very localised nature e.g. hairdresser, dentist, local taxi service or local community based projects?

No

Yes

Argument is ‘no effect on trade’, but seek legal advice before relying on this criterion to demonstrate no State aid

No effect on trade - criterion not met

No to both

No State aid

Yes to one or both
6. De Minimis Aid

De Minimis Aid Block Exemption

Will measure lead to recipient having received more than €200,000 in total of De Minimis aid in over a period of 3 fiscal years (of the recipient) including the fiscal year in which the proposed measure is to be applied?

Yes

Aid not compatible with De Minimis Block Exemption

No

Is benefit of measure quantifiable in monetary terms and the amount notified to recipient as De Minimis aid, with a De Minimis declaration completed?

No

Is measure for assistance in any of the following sectors/activities*:-
  - Agriculture
  - Fisheries
  - Transport
  - Exports
  - Coal
  - Shipbuilding
*assumed not to be relevant

Yes

No

Block Exemption Aid can be given subject to more detailed procedures being complied with.