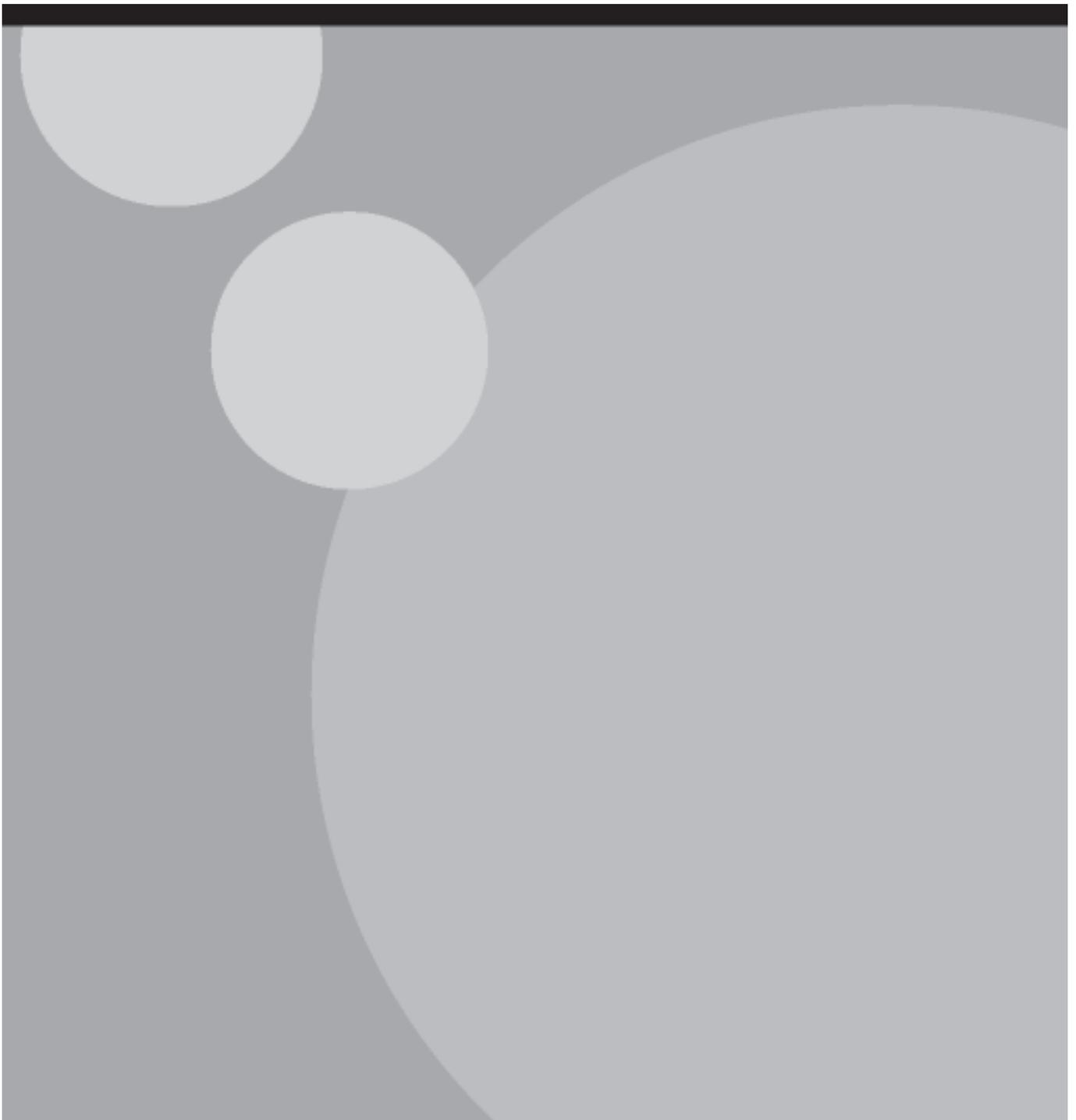




## Policy statement for Part 2 of the Localism Act 2011





# Policy statement for Part 2 of the Localism Act 2011

July 2012  
Department for Communities and Local Government

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Any enquiries regarding this document/publication should be sent to us at:

Department for Communities and Local Government  
Eland House  
Bressenden Place  
London  
SW1E 5DU  
Telephone: 030 3444 0000

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# Executive summary

## Chapter 1: Introduction

**This Chapter is relevant to all public authorities.**

The Localism Act 2011<sup>1</sup> gained Royal Assent on the 15 November 2011 and provides a substantial and lasting shift in power away from central government and towards local people. The Government has given public authorities more powers and freedoms to conduct their business and deliver services to the public. This includes a major reduction in the “oversight” role of central government. Public authorities must, therefore, accept responsibility for the consequences of their actions or inaction. Part 2 of the Localism Act introduced a discretionary power for a Minister of the Crown to require a public authority to pay some, or all, of a financial sanction from the Court of Justice for the European Union where the public authority has caused or contributed to that sanction.

## Chapter 2: Context

**This Chapter is relevant to all public authorities.**

Countries in the European Union must take appropriate measures to ensure fulfilment of their obligations arising out of the treaties or resulting from the acts of the institutions of the Union - all public authorities are subject to this duty. All parts of the UK administration take compliance with EU obligations seriously, which is why we have never been fined under the EU infractions procedure. Part 2 of the Localism Act 2011 reinforces these arrangements by ensuring that all parts of the administration face financial incentives to comply.

### **Purpose and applicability of the policy statement**

The purpose of the statement is solely to comply with the Secretary of State’s duty under section 49 of the Localism Act. It is relevant to the UK Government, devolved administrations of Scotland, Wales and Northern Ireland, any independent advisory panel set up under section 53 of the Localism Act, and public authorities (defined as the local authorities specified, or any other body or person which has non-devolved public functions).

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<sup>1</sup> The full Localism Act 2011 may be viewed at:  
<http://www.legislation.gov.uk/ukpga/2011/20/contents/enacted>

## Chapter 3: Devolved administrations and local government

This Chapter is relevant to devolved administrations and local authorities.

### Devolved administrations

In Scotland, Wales and Northern Ireland, the provisions would only be applied to non-devolved functions not funded from devolved administration devolved budgets. The Minister must not prejudice the performance of any devolved functions by use of these provisions, and would consult the devolved administration as and when is appropriate.

### Local government

As a tier of democratic government in the UK, the Government recognises that local authorities have a particular role to play in delivery of EU obligations. Local authorities have wide ranging responsibilities locally. Where it is considered that a new EU legislative act (as described in Article 289(3) of the Treaty on the Functioning of the European Union<sup>2</sup>) would result in legal obligations on local authorities which, if breached, could potentially lead to financial sanctions for non-compliance, the Government specifically names local government as a key sector for involvement. In such cases, the UK Government would involve local government – or a suitable representative body if appropriate – ahead of, and during negotiations on new EU laws (those negotiated after the Localism Act came into force) and ahead of transposition into domestic law. When defending a potential infraction case, the UK Government would also liaise with any local authority directly involved in the case, including prior to any referral to court under Article 258 of the Treaty of the Functioning of the European Union.

## Chapter 4: Key principles

This Chapter is relevant to all public authorities.

- **Working in partnership** – the UK Government, as a matter of good practice, would seek to engage with affected parties when negotiating and transposing EU laws. This would help to ensure that expertise, knowledge and experience of external parties is drawn upon as the UK Government formulates its position and approach.
- **Transparency and no surprises** – authorities would be given the time and opportunity to put things right before being asked to pay. The use of the provisions

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<sup>2</sup> The full Treaty on the Functioning of the European Union can be viewed at: <http://eur-lex.europa.eu/en/treaties/index.htm>

should never come as a surprise. The Minister would consult any public authority in good time before seeking to designate it by Order, normally giving at least one month notice prior to laying the Designation Order in Parliament. Only actions, or inactions, by an authority which occur following designation will be taken into account when passing on a financial sanction.

- **A fair, reasonable and proportionate process** – the use of Part 2 provisions would be fair, reasonable and proportionate. There would be an independent advisory panel which would make recommendations to the Minister. Authorities would not be held responsible for breaches of EU law that were not within their power to avoid, and would only be fined if they have demonstrably caused or contributed to the infraction in relation to which the financial sanction was imposed. Authorities would have opportunities to make representations. Decisions would be evidence-based and transparent.
- **Ability to pay** – once the fair and reasonable apportionment of responsibility for the payment of the financial sanction has been decided, the authorities involved would have a further opportunity to make representations, this time on their ability to pay. If the Minister accepts that an authority could not pay its full share of the costs, then the Minister may decide that a lower amount would be appropriate or that the payment could be made over a longer period. The UK Government would cover the cost of any shortfall, and there would not be any re-apportionment to other organisations involved. The provisions in the Act are not about the recovery of every last pound of any financial sanction imposed on the UK Government but are about consistency in financial and legal responsibility.

## CHAPTER 1

# Introduction

**This Chapter is relevant to all public authorities.**

## Part 2 of the Localism Act (2011)

1. The Localism Act 2011<sup>3</sup> gained Royal Assent on the 15 November 2011 and provides a substantial and lasting shift in power away from central government and towards local people. The Government has given public authorities more powers and freedoms to conduct their business and deliver services to the public. This includes a major reduction in the “oversight” role of central government. Public authorities must, therefore, accept responsibility for the consequences of their actions or inaction.
2. The UK, in common with all countries in the European Union, must comply with its European legal obligations. If it does not, it may be brought before the Court of Justice for the European Union (“European Court of Justice”) in what are known as infraction proceedings. If the UK is found to be in breach of EU law, the UK must take steps to remedy that breach. If it does not, it may be brought back before the Court and a financial sanction may be imposed.
3. The European Court of Justice can impose as the financial sanction a lump sum and/or ongoing penalty payments until such point as compliance is achieved. Financial sanctions could be significant with a minimum lump sum (as set out in the Commission’s communication SEC (2011) 1024<sup>4</sup>) of €8.992 million, based on the UK’s GDP, and potential additional daily or periodic penalty payments. Financial sanctions incurred by other countries illustrate how this could work. For example, in a Spanish bathing water case, the levy was €624,000 per year for each 1 percent of bathing waters in breach of the relevant Directive. In a French fishing case, the levy was a €20m lump sum financial sanction and €58m every six months until resolved.
4. So far, the UK has never had a financial sanction imposed in relation to an infraction. Prior to the Localism Act, payments of any financial sanctions levied on the UK, as a result of a public authority’s breach of EU law, would have been the sole responsibility of the UK Government. There was no mechanism in place to ensure that public authorities were held to account for their part in any failure to comply with European

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<sup>3</sup> The full Localism Act 2011 may be viewed at:

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

<sup>4</sup> The full communication may be viewed at:

[http://ec.europa.eu/eu\\_law/infringements/infringements\\_260\\_en.htm](http://ec.europa.eu/eu_law/infringements/infringements_260_en.htm)

law. Such misalignment in accountability meant there was less incentive for public authorities to meet their obligations and avoid any financial sanctions falling on UK taxpayers.

5. Part 2 of the Localism Act introduced a discretionary power for a Minister of the Crown to require a public authority to pay some, or all, of a European Court of Justice financial sanction where the public authority has demonstrably caused or contributed to that sanction.
6. Costs would only be incurred by those public authorities that had responsibility to comply, had demonstrably caused or contributed to the financial sanction, and had previously been designated under section 52 of the Localism Act for the infraction case in question. The expectation is that, through the use of the provisions in the Act to incentivise compliance by public authorities, the risk of financial sanctions being allocated to the UK (and therefore the risk to public authorities) will be significantly reduced.
7. The Localism Act includes a duty for the Secretary of State to consult upon and publish a policy statement. The consultation took place between the 31 January and 22 April 2012. This document is therefore the published policy statement to which a Minister of the Crown and any independent advisory panel must have regard when exercising functions under Part 2 of the Localism Act 2011.

## CHAPTER 2

# Context

**This Chapter is relevant to all public authorities.**

### European Union infractions

8. The UK's EU obligations are set out mainly in the Treaty on the Functioning of the EU (and in binding measures adopted under it). This is a key document which sets out the rights and obligations on countries in the European Union and their citizens. It also sets out the procedure under which a nation state which fails to fulfil its obligations can ultimately be taken to the European Court of Justice. This procedure is referred to as "EU infractions".
9. Article 4(3) of the Treaty sets out that:

"States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union."

All public authorities are subject to this duty.
10. Any infractions are conducted against the UK Government, as representative of the UK nation state, and not against any constituent part or body of the UK. All parts of the UK administration take compliance with EU obligations seriously, which is why we have never been fined under the EU infractions procedure. When faced with an infraction, the various parts of the UK administration work in partnership, respecting their respective duties, to address the potential failure.
11. Part 2 of the Localism Act 2011 does not affect the underlying roles and responsibilities of public authorities, but it does reinforce these arrangements by ensuring that all parts of the administration face financial incentives to comply.

### The Localism Act provisions

12. It is in all parties' interests to avoid infractions which may lead to any EU financial sanctions in the first instance, and to resolve the apportionment of any EU financial sanctions quickly to limit additional penalties.

13. Part 2 (sections 48 to 57) of the Localism Act 2011 (the 'Act'), gives a discretionary power whereby a UK Government Minister could require responsible local and public authorities to pay all, or part of, an EU infraction financial sanction issued under Article 260(2) of the Treaty of the Functioning of the European Union, for failure by the UK to remedy a breach of EU law found in earlier infraction proceedings.
14. As the power is discretionary, it would be decided on a case-by-case basis whether or not it should be exercised, and whether or not to initiate a process to recover some, or all, of the EU financial sanction.
15. EU financial sanctions could only be recouped where the financial sanction is imposed on or after 31 May 2012, the day that Part 2 of the Act came into force.

## Purpose and applicability of the policy statement

16. The purpose of the policy statement is solely to comply with the Secretary of State's duty under section 49 of the Act. The effect of the statement is comprehensively set out in that section, which requires a Minister of the Crown and an independent advisory panel established under section 53 to have regard to this statement in exercising functions under Part 2 in relation to an EU financial sanction.
17. This policy statement is relevant to:
  - the UK Government including individual Government Departments
  - devolved administrations of Scotland, Wales and Northern Ireland
  - any independent advisory panel
  - public authorities.
18. 'Public authority' is defined in the Act as a local authority, of the kind specified in section 51 (3), and any other body or person which has non-devolved public functions. Non-devolved functions refer to functions which remain within the jurisdiction of the UK Government, rather than functions which have been devolved to the Scottish Government, the Welsh Government and the Northern Ireland Executive.
19. Where a local or public authority has delegated responsibility to another body or contracted with another party to deliver services regarding that function, the legal obligation in relation to that function remains with the original authority. If a public authority demonstrates that they have taken all reasonable steps to ensure

compliance when developing contracts and managing contractors, then the independent advisory panel may take this into consideration when making recommendations to the Minister.

20. Where a private company has such public functions for which it is directly responsible (this may be the case with utilities companies or statutory undertakers for example), the default position would be to use any existing regulatory framework first to resolve the issue. The UK Government would only seek to designate a private company under the Act if they had such public functions and had caused or contributed to an active infraction case and any existing regulatory bodies had not been able to effectively incentivise compliance.

## Revising the policy statement

21. In the spirit of continuous improvement and partnership, if the statement requires revision, the Minister would work with appropriate bodies on the revisions and would consult prior to publication. The UK Government would ensure there are reasonable timescales when consulting.

## CHAPTER 3

# Devolved administrations and local government

**This Chapter is relevant to devolved administrations and to local authorities.**

## Devolved administrations

22. Devolved administrations are responsible for observing and implementing EU obligations which concern devolved matters. In law, UK Ministers have powers to intervene in order to ensure the implementation of these obligations. If the devolved administrations wish, it is open to them to ask the UK Government to extend UK legislation to cover their EU obligation. The devolved administrations are directly accountable through domestic courts, in the same way as the UK Government is, for shortcomings in their implementation or application of EU law. All four administrations agree that, to the extent that financial penalties are imposed on the UK as a result of any failure of implementation or enforcement, or any damages or costs arise as a result, responsibility for meeting them will be borne by the administration(s) responsible for the failure. These administrations are the UK Government, the Scottish Government, the Welsh Government and the Northern Ireland Executive.
23. When using the powers in the Act, the Minister must not prejudice the performance of any devolved functions by use of these provisions.
24. In devolved administration areas, there is no application of the powers in respect of devolved functions. The powers would not be used in respect of non-devolved functions funded from devolved administration devolved budgets (as paid from HM Treasury to the devolved administrations by block grants). Instead the usual HM Treasury and devolved administration arrangements apply, whereby HMT would recover all or a proportion of the penalty from the budget of the devolved administration to the extent that the infraction relates to a matter falling within its responsibility (please see paragraph B4.25 of the March 2010 Concordat on Co-ordination of EU Policy Issues<sup>5</sup> and the Statement on Funding Policy<sup>6</sup>).

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<sup>5</sup> The Concordat on Co-ordination of European Union Policy Issues can be viewed at: <https://update.cabinetoffice.gov.uk/resource-library/devolution-memorandum-understanding-and-supplementary-agreement>

<sup>6</sup> The Statement of Funding Policy is available on the HM Treasury website at: <http://www.hm-treasury.gov.uk>

25. Prior to the use of these provisions, in advance of the certification procedure set out in section 50(2) of the Localism Act, the arrangements above would:
- be used to determine any apportionment of the national level financial sanction amongst administrations; and
  - be used to also establish the source and amount of the funding for any non-devolved function, where applicable.
26. Where the function is non-devolved and not funded by devolved administration budgets, the level of funding made available for that function would need to be taken into consideration, with the specific objective of ensuring that the financial sanction applied to the public authority was proportionate and did not exceed the total level of funding provided for that non-devolved function and hence did not impinge on its capacity to deliver its devolved responsibilities.
27. Prior to seeking to designate by Order or issuing a warning notice to an authority which had both devolved and non-devolved functions, the Minister would first need to consult the devolved administration(s) concerned. Furthermore, whenever the Minister invites representations from any such mixed-function authority, the Minister would also invite representations from the relevant devolved administration(s).

## Interrelationship between Parts 2 and 3 of the Act

28. Part 3 of the Act provides equivalent powers to Welsh Ministers in relation to public authorities in Wales which have devolved functions. Where appropriate, UK and Welsh Ministers would ensure there was coordination and cooperation in order to ensure fairness as between administrations and in relation to the treatment of public authorities.

## Local government

29. Local government is one of the democratically elected tiers of government in the UK. Local authorities have a broad span of responsibilities, covering a large range of issues which affect people locally. Many of these responsibilities are affected by EU laws and regulations.
30. For those new EU legislative acts (as described in Article 289(3) of the Treaty of the Functioning of the European Union) – negotiated after the Act came into effect – which

would result in legal obligations on local authorities which could potentially lead to future financial sanctions for non-compliance, the UK Government specifically names local government as a key sector for involvement. For the purposes of this part of the policy statement, any local government organisation with a specific function (for example waste, fire or transport) would be part of this closer involvement approach.

31. The UK Government would involve local government – or a suitable representative body as appropriate – at the following stages:
- In time to influence EU negotiations – the relevant UK Government Department would look to identify local implications where known (for example, technical administrative, resource and financial implications) in the relevant Explanatory Memorandum which it prepares on the EU legislative proposal, and to be accessible to the local government sector to discuss any local implications. All Explanatory Memoranda will be circulated to the Local Government Association and the Convention of Scottish Local Authorities, for their awareness on behalf of their members, and to the local government representative bodies in Wales and Northern Ireland, if they so choose;<sup>7</sup> and
  - Ahead of transposition into domestic law – the relevant UK Government Department should also take into consideration the New Burdens doctrine, which is part of a suite of measures to ensure council tax payers in England do not face excessive increases, and the Better Regulation Executive guiding principles that burdens are minimised and UK businesses are not put at a disadvantage relative to their European competitors.
32. The purpose of this involvement would be to inform local government of any new legal obligations arising from new EU laws and the UK implementing measures and to give local government the opportunity to inform the legislative process. This information and awareness could also come from various means, including involvement with suitable representative bodies as appropriate, involvement directly with local

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<sup>7</sup> Explanatory Memoranda are the Government's initial written evidence to Parliament which summarise the contents of a proposal for EU legislation or other important EU document. These Memoranda contain information about the aims of the proposal and the Government's initial attitude towards it. All Explanatory Memoranda are considered by the House of Commons European Scrutiny Committee and the House of Lords Select Committee on the European Union. It is not possible to sort the circulation of Memoranda so any organisation on the circulation list would receive all documents, not just those of relevance to them. More information on Explanatory Memoranda can be viewed at: <http://europeanmemorandum.cabinetoffice.gov.uk/fags.aspx>

authorities, public consultation documents and guidance, and promulgation approaches such as Government websites.

33. At an early stage in defending any potential infraction case (covering any failure to fulfil the UK's obligations under the treaties or legally binding measures adopted under them), the UK Government would also liaise with any local authority directly involved in the case, including prior to any referral to court under Article 258 of the Treaty of the Functioning of the European Union. Such local authorities would have a critical role to play in providing evidence to be used in the preparation of the UK's defence.
34. This is in line with the principles of localism, fairness and partnership and would provide for a more developed role for local government, with timely involvement and input on issues which are most likely to impact on local authorities. It would assist the UK Government to evidence and cost draft EU measures. It would minimise the risk of infractions occurring, and the imposition of financial penalties under Article 260(2).

## CHAPTER 4

# Key principles

**This Chapter is relevant to all public authorities.**

### Working in partnership

35. The UK Government is responsible for negotiating and ensuring compliance with EU law. Responsibility for transposing and implementing EU law is divided between the UK Government and the devolved administrations. In some cases, public authorities have responsibility to comply with EU measures, either by virtue of being part of the UK nation state under EU law or via domestic law that transposes EU law.
36. Prior to the Act, payments of any financial sanctions levied on the UK, as a result of an authority's or body's breach of EU law, would have been the sole responsibility of the UK Government. There was no mechanism in place to ensure that public authorities were held to account for their part in any failure to comply with European law. The only approach for non-compliance would have been to subject public authorities to UK domestic judicial proceedings. The Act instead gives a new provision for the UK Government to apportion financial sanctions imposed by the European Court of Justice to public authorities, in accordance with the Act and with regard to this policy statement.
37. As explained at paragraph 10, all parts of the UK administration already cooperate to ensure the UK responds effectively to infractions. Where a public authority is involved in an infraction, the lead UK Department or devolved administration will often rely on the authority to provide evidence of its compliance or commitment to comply. The authority will look to the lead Department or devolved administration to explain how it proposes to address the infraction. These arrangements generally work well, which is one reason why the UK has never been fined.
38. The UK Government accepts that the possibility of financial sanctions being passed on to public authorities means compliance with EU obligations is more important than ever.
39. The UK Government, as a matter of good practice, would seek to engage with affected parties when negotiating and transposing EU laws. This helps to ensure that expertise, knowledge and experience of external parties is drawn upon as the UK Government formulates its position and approach.

## Transparency and no surprises: designation orders

40. EU financial sanctions under Article 260(2) result from a lengthy process involving the European Commission (the “Commission”), UK Government, and the European Court of Justice.
41. Partnership working could help to avoid any EU financial sanctions in the first instance. The Government and public authorities must take all reasonable steps to comply with EU laws.
42. The Commission’s ‘pre-referral to court under Article 258’ stage, involving the UK in instances of alleged breaches or ‘infractions’ of EU law, starts with a ‘letter of formal notice’ inviting the UK Government to respond. If the Commission is not satisfied with the UK’s response, it may then respond by issuing a ‘reasoned opinion’ to demonstrate how the UK has failed to fulfil its obligations under the Treaties or binding measures adopted under the Treaties. The UK Government would alert, involve and update where appropriate, relevant public authorities so that authorities have the time and opportunity to take the necessary corrective action.
43. As part of this, a Minister may seek, through the affirmative resolution procedure in both Houses of Parliament, a **designation order** to name one or more authorities which are involved in the infraction case. The designation order would contain the following information: 1) name of the authority/ authorities, 2) the specific infraction case at issue, 3) the activities of the authority/ authorities covered by the designation, i.e. the acts or omissions of the authority at issue in the infraction in the context of any specific UK legal obligations implementing the relevant EU legal obligations and the authority's relevant functions. The Explanatory Memorandum for the order would set out the rationale for seeking the designation and this would be further covered in the debates in both Houses.
44. Only actions, or inactions, by authorities which occur following designation would be taken into account when passing on a financial sanction, and only those actions or inactions which relate to the specific infraction case.
45. A Minister must consult with the public authority, and the appropriate national authority if the public authority has mixed functions, before seeking to designate. Notice of designation would normally be given at least one month prior to laying the Designation Order in Parliament.
46. A Minister may seek to designate at any point following a ‘letter of formal notice’. However it is likely that the Minister would seek to designate at Reasoned Opinion

stage, at an Article 258 referral to court, or after the first judgment that there has been a breach, though this would vary according to the circumstances of an individual case.

47. If the authority is designated at the same time, or after, a financial sanction from the European Court of Justice then the principle of 'no surprises' would apply – the authority would be given opportunity to comply before incurring a financial sanction. A late designation is likely to mean that it would be unfair for the Minister to pass on any of the lump sum financial sanction or the first tranche of any periodic penalties. In such circumstances, the Minister could fairly seek to pass on an appropriate amount of any further periodic penalties, subject to the procedures and principles set out in this statement.
48. The designation order would remain in effect until such time as the specific infraction case is closed by the European Commission or the court proceedings end, however designated authorities could end their liability to pay financial sanctions by providing evidence which demonstrates compliance (please see paragraphs 74 - 77).
49. If the Commission is not satisfied with the UK response it may begin court proceedings by referring the issue to the European Court of Justice. The UK Government Department would liaise with the relevant authority or authorities when formulating the UK's submission to the Court.
50. If the European Court of Justice finds that the UK has failed to fulfil its obligation under the Treaties, it will issue a judgment to that effect and the UK will be required to take the necessary measures to comply with that judgment. If however the Commission subsequently considers the UK has not taken the necessary measures to comply with the judgment, it may bring the case back before the Court and seek a financial sanction.
51. If the Court finds that the UK has not complied with its initial judgment, it may impose a lump sum and/ or periodic penalty payment on the UK. The Court can impose a lump sum and/or ongoing penalty payments until such point as compliance is achieved. Financial sanctions could be significant with a minimum lump sum (as set out in the Commission's communication SEC (2011) 1024<sup>8</sup>) of €8.992 million, based on the UK's GDP, and potential additional daily or periodic penalty payments.

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<sup>8</sup> The full communication may be viewed at:  
[http://ec.europa.eu/eu\\_law/infringements/infringements\\_260\\_en.htm](http://ec.europa.eu/eu_law/infringements/infringements_260_en.htm)

## A fair, reasonable and proportionate process

52. Due to the probability that apportionment of an EU financial sanction may involve multiple parties, including the UK Government, the Minister would establish an independent advisory panel (please see paragraphs 59-73) to help identify the parties involved, the split of responsibilities, culpability, compliance and to ensure that the case for both the apportionment and recovery of costs is fair and robust.
53. A panel would only be formed if a) the UK was fined for an EU infraction, b) the Minister wished to pass part, or all, of a financial sanction on to a public authority and c) the Minister had previously designated the authority by Order.
54. As the power is discretionary, the Minister may decide not to invoke the procedure to pass on financial sanctions at this point under certain circumstances. For example, a Minister may, on occasion, deem there is no public benefit from pursuing a case with a very small authority, for example one with an annual income of less than £50,000. Public authorities should not assume that this will always be the case as circumstances will vary.
55. The panel would collectively hear representations from interested parties and make a reasoned report to the Minister. The report would set out the facts, evidence that the panel has relied upon and justifications for its advice and subsequent recommendations. The panel's report would need to fairly record the conclusions of the panel, including the existence of any differences of view within the panel, with details. The report would be made publicly available. The Minister would only issue a final notice having considered the panel's advice and subsequent recommendations.
56. Any recovery of costs in relation to EU financial sanctions should be fair, reasonable and proportionate, with transparent, evidence-based decisions. The process is as follows:
  - Independent advisory panel established
  - The Minister issues a warning notice to the authority/ authorities setting out the proposed procedure and timetable, the amount the UK has been fined, the total amount of that financial sanction which is relevant to this process<sup>9</sup>, and the

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<sup>9</sup> As set out in Section 50 of the Act, the Minister may certify an amount for this process which is less than the full financial sanction from the European Court of Justice. This is because some of the full financial sanction may relate to devolved functions exercised in devolved administration areas, and therefore not be relevant to Part 2 of the Localism Act. The process, and independent advisory panel's considerations, would only relate to the amount specified by the Minister.

evidence and intentions for passing financial sanction(s) (lump sum and periodic penalty payments) onto the authority/ authorities, and invites representations on the timetable and procedures to go to the Minister and representation on all other matters to go to the independent advisory panel

- The independent advisory panel reviews all the representations and makes a reasoned report, including evidence-based recommendations, to the Minister on each party's proportion of culpability in relation to a) any lump sum financial sanction, b) any periodic penalties already accrued and c) any future periodic penalties
- If the Minister still proposes to go ahead, the Minister then issues a draft final notice, covering both lump sum and any potential periodic penalty payments, and invites the authority to make representations on its ability to pay, either to the Minister or to the panel as per the authority's preferences. The Minister would include the independent advisory panel's recommendations in the correspondence, with an explanation for any departures from the panel's recommendations
- The panel reviews any representations they have received and makes reasoned recommendations to the Minister about ability to pay or, if representations were made directly to the Minister, the Minister considers the authority's representations on this subject
- If the Minister still proposes to go ahead, the Minister then issues the final notice covering both lump sum and any periodic penalty payments. The Minister would include the independent advisory panel's recommendations in the correspondence, with an explanation for any departures from the panel's recommendations. The Minister would share their views on what actions or outcomes by a public authority may be likely to achieve compliance and end the financial liability
- The decision can be subject to judicial review.

57. The exact timetable would be decided on a case by case basis, taking into account the following: a) complexity of the case - which may result in introducing further stages of decision-making and representation; b) level of any ongoing penalties being imposed on the UK - which could increase the need for timely resolution and compliance; and c) any representations from authorities requesting changes to the proposed timetable. The Minister would decide on the timetable, with regard to the views of the panel and any representations received.

58. It is expected that the absolute minimum amount of time for a public authority to consider and make representations on the warning notice will be four weeks, for the most straight-forward cases.

## Forming an independent advisory panel

59. **Establishment:** the Minister would establish an independent advisory panel.
60. **Constitution:** broad terms of reference are attached at Annex A. These may be tailored to the specific case by the Minister. The independent advisory panel could then further adapt the terms of reference with agreement of the Minister. The Minister would discuss the procedure and timetable in each case with the panel. The panel would receive evidence and representations on culpability and any other issues the panel wishes to consider, within its remit.
61. **Membership:** the Minister would appoint the members, including a chairperson. The panel needs to be made up of legal, technical, financial and sector expertise, with members from outside central Government. When appointing a panel, the Minister would clearly set out the criteria for selecting panel members. The Minister would also keep the affected authority or authorities informed so that the membership would not come as a surprise.
62. If there is a representative body for the affected authority, this body would be invited to put forward nominations in respect of its members to the Minister for sector expertise (for instance, if an English local authority is involved, the Local Government Association would be invited to provide nominees; if a Scottish local authority is involved, the Convention of Scottish Local Authorities would be invited to provide nominees).
63. Where an authority does not have any representative organisation which could act on its behalf, then the Minister would consider how best to seek sector nominations to the panel, including potentially seeking nominations from the affected authority itself so long as this did not lead to a conflict of interest.
64. The Minister has the right to refuse nominations, but if none of the nominees are deemed suitable, the Minister would provide an explanation in discussions with the body making the nominations.
65. The validity of any acts of the panel is not affected by a vacancy among its members. The chairperson would have a casting vote.
66. **Making representations:** the public authority, the devolved administration (if appropriate) and the Minister may make written and oral representations to the panel.

67. The independent advisory panel would take various matters into consideration, which could include whether:
- the UK Government had contributed to or caused the infraction of EU law
  - the UK Government had taken all reasonable steps to comply and bring about compliance
  - the UK Government had acted in accordance with the Act and with regard to this policy statement
  - the UK Government had effectively transposed the EU law into domestic law and made public authorities aware of this - this awareness could come from various means, including involvement with suitable representative bodies as appropriate, public consultation documents and guidance, and promulgation approaches such as Government websites
  - the public authority had a legal obligation
  - compliance was within the public authority's control
  - the public authority had taken all reasonable steps to comply
  - the public authority, on delegating a function, had taken all reasonable steps to ensure compliance when developing and managing any contract
  - multiple authorities shared responsibility and culpability for the same infraction
  - a significant number of other public authorities had or had not complied on the same issue without being part of the infraction case
  - the level of cooperation demonstrated by the public authority when working with the UK to resolve an initial infraction.
68. The panel would assess the relevance and weight of these matters in relation to the fairness, reasonableness and proportionality of passing on any financial sanctions and in the light of the particular case and circumstances.
69. When contemplating whether all reasonable steps were taken, the panel would need to take into account reasonable resources – so an authority would not be expected to divert all their funds to ensure compliance on one issue, nor would the UK Government be expected to provide additional funding to avoid an infraction. The UK Government would also not be expected to take or use powers of direction over local authorities where they already had clear obligations to comply with EU law – such intervention to avoid an infraction case would go against the spirit of localism.

70. When contemplating whether multiple authorities shared responsibility and culpability for the same infraction, the panel would need to consider how to keep all parties informed and how to fairly assess the relative contributions made to the EU financial sanction by each authority.
71. **Ability to pay:** the panel and the Minister must consider the authority's ability to pay the apportioned financial sanction. As part of this, the Minister may wish to consider any significant adverse impact on third parties - for example, where the public authority is funded by fees paid by individuals.
72. If there was a financial constraint, the Minister would consider providing an alternative approach which could be a lower amount or an amount paid over a longer period, or even no financial recovery from that authority. The UK Government would cover the cost of the shortfall, and there would not be any re-apportionment to other authorities involved.
73. As a minimum, the Government would need to pay for the proportion of the financial sanction that equates to their proportion of responsibility. The Government would also pay for all its legal costs in relation to the infraction.

## Achieving compliance

74. The authority would notify the Minister and provide supporting evidence as soon as it believes it has complied with the requirements of the European Court of Justice's judgment and with any relevant UK domestic legislation, or has taken all reasonable steps to do so.
75. Upon delivery of the evidence to the Minister, the authority may also seek the suspension of payments for any ongoing financial sanctions, whilst the evidence is being reviewed to assess whether the authority has taken all reasonable steps to comply. The expectation would be for the Minister to agree to a suspension, unless it was clear upfront that the evidence was significantly flawed or insufficient.
76. The Minister may ask the independent advisory panel to consider whether or not, in their view, the evidence provided does demonstrate that all reasonable steps have been taken to ensure compliance with the judgment and with any relevant UK domestic legislation implementing the EU law. The Minister may also invite the authority, and the devolved administration if relevant, to make representations before deciding whether to terminate or vary the requirement to pay.

77. If the Minister is satisfied that the authority has taken all reasonable steps to ensure compliance, then the UK Government would agree with the authority the amount of any final payment that is due and the authority's liability would end upon that payment. This would be clearly set out in writing. Any final payment would be based on the date compliance was achieved, not the date the Minister reviewed the evidence. Any ongoing periodic penalties would not be reapportioned to other authorities upon one authority ending its liability to make payments. Any shortfall would be paid by the UK Government.
78. If the outcome of the review is that all reasonable steps to ensure compliance have not been taken, then the authority would be informed, with evidence and rationale, and the UK Government would ask the authority to make any payments suspended during the review of evidence.
79. The Minister may decide to make the payment requirement less onerous without any application from the authority.

## ANNEX A

# Independent advisory panel broad terms of reference: Part 2 of the Localism Act 2011

**This Annex is relevant to all public authorities.**

## Context

This independent advisory panel is formed at the point of need, as a short-term ad hoc panel and within the context of the following specific circumstances:-

- a) the UK has been fined for an EU infraction;
- b) the Minister wishes to pass on a specified amount of that financial sanction on to responsible public authorities; and
- c) the Minister has successfully designated these bodies by Order in Parliament, using affirmative procedures.

## Purpose

The purpose is to ensure that the apportionment and recovery of any financial sanctions from a public authority is fair, reasonable and proportionate. As part of this, the panel would identify the parties involved, the split of responsibilities, culpability, compliance and ensure that the case for both apportionment and recovery of costs from public authorities is fair and robust.

## Composition

The panel is appointed by the Minister. When appointing a panel, the Minister must clearly set out the criteria being used to select members.

The panel may not include existing members of central Government, nor any civil servant currently working for central Government. The panel may not include any person who had been a member of the Government or a civil servant during the previous two years.

The panel may not include existing members of an affected public authority, nor any employee currently working for the affected authority. The panel may not include any person who had been a member or employee of the affected authority during the previous two years.

The panel will consist of one or more people and must have legal, technical, financial and sector expertise. A single member panel would only be formed in a very straight-forward case.

If, as is likely, there is more than one panel member, a chairperson will be appointed by the Minister. The chairperson has a casting vote on any decision to be taken by the panel.

The Minister would keep any affected authorities informed when forming the panel so that the membership does not come as a surprise. The Minister would seek nominations for sector expertise from any relevant representative body in respect to its members and invite one or more of the people nominated onto the panel. The Minister would be able to reject all nominations, should the Minister have reason.

Where an authority does not have any representative organisation which could act on its behalf, then the Minister would consider how best to seek sector nominations to the panel, including potentially seeking nominations from the affected authority itself so long as this did not lead to a conflict of interest.

## Representation

Parties may make written and oral representations to the panel, using legal or other professional representatives as they see fit.

## Remit

The panel is advisory, and its purpose is to make a reasoned report, with evidenced recommendations, to the Minister. The recommendations must cover each party's proportion of culpability in relation to a) any lump sum financial sanction, b) any periodic penalties already accrued and c) any future periodic penalties. The panel's report needs to fairly record the conclusions of the panel, including the existence of any differences of view within the panel, with details. The report would be made publicly available.

It is in all parties' interests to resolve the apportionment of any EU financial sanctions quickly to limit additional penalties. The panel has a broad scope on issues to consider but will be asked to make recommendations within specific timescales. The Minister would discuss the procedure and timetable with the panel.

The panel may receive oral and written representations and evidence directly from the Minister, the devolved administration (if appropriate) and from the public authorities involved.

The panel can take into consideration a broad range of factors which would lead to findings on culpability, levels of responsibility, ability to pay (where the authority wishes the panel to consider this) and compliance.

## Resources

The Minister would have the power to pay expenses and allowances to panel members and provide facilities and accommodation.

The Minister may also provide a secretariat to the panel, using Government employees.

The panel will be asked to act in accordance with the Act and policy statement. The Minister would also provide advice to the panel on criteria for assessing ability to pay, and any such advice would also be provided to the authority, giving the authority the opportunity to comment on it.

A panel may adapt these Terms of Reference with the agreement of the Minister and after consulting the authority or authorities in question.

## ANNEX B

# Explanatory note for Part 2 of the Localism Act 2011

**This Annex is relevant to all public authorities.**

## Sections 48 - 57

**Section 48** gives discretionary power to a Minister of the Crown to require a public authority to pay all, or part of, a financial sanction imposed on the UK, after the commencement of the Localism Act, by the European Court of Justice under Article 260(2) of the Treaty of the Functioning of the European Union. This requirement can only be imposed if the public authority has been designated in relation to the specific infraction case in question (also see Section 52), and it must be imposed by way of a final notice (see Section 56), which must be preceded by a warning notice (see Section 54).

**Section 49** The Secretary of State must issue a policy statement concerning this Part and consult prior to publication. Any Minister using the Localism Act powers and any independent advisory panel set up under them (described in Section 53) must have regard to the policy statement.

**Section 50** This section enables a Minister to give a certificate which has the effect of specifying a part of an EU financial sanction to which the powers under this Part do not apply. The intention is that this power will be used for parts of the EU financial sanction which are the responsibility of one or more of the devolved administrations.

**Section 51** gives definitions of some of the terms used in this Part. A public authority is a local authority (as specified) or any other body or person which has any non-devolved functions, functions being ones of a public nature. A public authority with mixed functions is one which has both devolved and non-devolved functions; and the 'appropriate national authority', in relation to a public authority with mixed functions, is one of the devolved administrations of Scotland, Wales and Northern Ireland as are relevant, depending on the body's devolved functions.

**Section 52** gives power to a Minister to designate by Order in Parliament one or more named public authorities, identify the specific infraction case to which the designation relates, and describe the activities of the authority covered by the designation. Only acts or omissions after designation can be taken into account when passing on a

financial sanction, and only activities which are carried out in the exercise of non-devolved functions of the authority can be included.

The Minister must consult with the public authority, and the appropriate national authority if the public authority has mixed functions, before seeking designation.

A Minister would be able to make a designation order at any point once an infraction case had been opened by the Commission, and the UK Government had been formally notified – the earliest would be following a formal notice letter under Article 258 of the Treaty of the Functioning of the European Union.

All designation orders are subject to the affirmative procedure, that is, the approval of both Houses of Parliament must be obtained.

**Section 53** sets out that, once a financial sanction has been imposed on the UK and a public authority has been designated by Order for the related infraction case, then the Minister must set up an independent advisory panel before issuing any warning notice.

**Section 54** sets out the procedural requirements for warning notices. The Minister must consult with the independent advisory panel and any appropriate national authority before issuing a warning notice.

The warning notice must: state that the Minister believes the public authority has caused or contributed to an EU financial sanction and that it would be appropriate to consider requiring the public authority to make payments, and the rationale for this; identify the relevant financial sanction and specify the amount of the sanction (lump sum, accrued periodic penalties to date and any ongoing periodic penalties which will fall due and at what frequency); set out the proposed procedures, arrangements and timetable for determining whether payments would be appropriate; invite the public authority to make representations to the Minister on the proposed procedures and to the independent advisory panel on culpability and any other matters the public authority deems relevant; invite the appropriate national authority to make representations if a body with mixed functions is involved.

Following any representations on procedures, the Minister may consult with the independent advisory panel and then issue a revised warning notice, listing any changes to the timetable or procedures.

**Section 55** sets out the matters which must be determined before issuing a final notice, including whether any activities of the public authority did cause or contribute to the financial sanction since designation; whether the public authority will be asked to

pay a financial sanction and, if so, the proportion of any financial sanction (lump sum, accrued periodic and ongoing periodic payments) to be paid and when.

The independent advisory panel must provide an evidenced report containing recommendations about the apportionment of lump sum and any periodic penalties, and the report must be published. The Minister must then invite further representations from the public authority, and appropriate national authority if relevant, on ability of the authority to pay and potential impact on finances and any devolved functions. The Minister must have regard to the independent advisory panel report, impact on finances and not prejudicing the performance of devolved functions.

**Section 56** sets out that a final notice requiring payment must: identify the relevant EU financial sanction; specify the total amount of the sanction and the amount and frequency of any future periodic payments; specify the activities of the authority which have been determined caused or contributed (and continue to do so for future periodic payments) to the financial sanction since designation; summarise any other matters determined, and the rationale for the determinations; and specify the amounts to be paid, when, how and to whom.

The Minister may terminate the requirement to make payments towards periodic payments, or vary it to make it less onerous, if he or she sees fit due to changing circumstances, either on the application of the public authority or of his or her own motion. On application by an authority, during the application review, the Minister may suspend any payments which would otherwise fall due, but this does not affect the liability to make any payment once the suspension is ended, unless the Minister so decides.

The Minister may consult the independent advisory panel, and seek representations from the public authority and any appropriate national authority before reducing or terminating the requirement to pay.

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