DCN transformation in localities toolkit

A guide to legal issues

trowers & hamlins

Contents

Abbreviations

ALMO	Arm's length management organisation
CA	Combined Authority
DCN	District Councils' Network
DPA 98	Data Protection Act 1998
EPB	Economic Prosperity Board
GDPR	General Data Protection Regulation
ICO	Information Commissioner's Office
LGPS	Local Government Pension Scheme
MHCLG	The Ministry for Housing, Communities and Local Government
MOU	Memorandum of Understanding
PCR	Public Contracts Regulations 2015
SoS	Secretary of State for Housing, Communities and Local Government
SPV	Special Purpose Vehicle
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended)

Introduction

This general legal guidance (guidance) has been commissioned by Grant Thornton and the District Councils' Network (DCN) to supplement the "DCN Transformation in Localities Toolkit". This guidance outlines the principal legal implications of collaboration between district councils.

This guidance covers:

- the various legal powers enabling collaboration;
- models of collaboration;
- contractual methods of collaboration; and
- some practical considerations to help choose the most appropriate method of collaboration.

Executive summary

This guidance starts with an explanation of collaboration at district level. The first model of district level collaboration that this guidance explains is collaboration via delegation, with reference to joint committees, and delegation of functions to other local authorities. The powers to delegate both executive and non-executive functions are explained, in addition to some key considerations when deciding on whether or not to delegate.

This guidance then moves on to collaboration by means of arrangements and agreements, namely arrangements to share staff and agreements to supply services to a public body. The first involves district councils placing staff with another district council in order to efficiently pool resources to achieve a joint aim. The second involves district councils entering into service agreements to sell services to another district council, akin to an arm's-length transaction.

This guidance then explores the creation of separate legal entities for specific collaboration projects, namely companies which can benefit from the joint Teckal exemption from public procurement rules. The powers to establish these entities are explained and illustrated by some real-life examples of the application of these models in practice.

Combined authorities and Economic Prosperity Boards are then outlined. A flowchart demonstrates the necessary steps that district councils (and other local authorities) have to take before an order to establish either of these collaborative bodies is made.

This guidance then moves on to explaining the super-district / super district + model of collaboration. The first is where two or more district councils merge to become a single district council. The second is where district councils merge with a place-based service in another county. The powers to merge and key considerations of these models are highlighted.

The final model of collaboration that is explained is local government reorganisation to single tier, also known as "unitarisation". This section provides an explanation of the concept of local government reorganisation to single tier and the process and for obtaining an Order for unitary local government.

Once the model of collaboration is chosen, it is advisable to document it in a contract. Memorandum of Understanding and inter-authority agreements are explained with recommendations as to which type of document is most appropriate to use depending on the nature of the collaboration.

This guidance then moves on to cover the following key legal considerations that in our experience tend to crop up on multi-authority collaborations:

- the duty of consultation;
- governance;
- public procurement;
- state aid;
- options appraisals;
- tax;
- intellectual property;
- data sharing;
- employment; and
- pensions matters.

To make this guidance easier to digest we have not quoted all relevant legislation in the main body of this document and have instead included it in footnotes should you or your lawyers wish to refer to it.

Overview

There are many ways in which district councils can collaborate and transform. One end of the spectrum involves complete structural transformation, where a district council ceases to exist as a separate legal entity, where local government is reorganised into a single tier or district councils merge. The other is where the district councils remain intact as separate legal entities but collaborate through a combined authority, joint committees, delegation of functions, jointly-owned companies, inter-authority agreements or arrangements for the placing of staff at the disposal of another council.

This guidance is based on successful collaboration models that have been pursued by local authorities (including district councils) to provide a range of options for collaborative working between district councils.

Legal powers

In common with most other local authorities, district councils have been created by legislation. This means they were established under legislation passed by Parliament and therefore need to act within their powers, what can reasonably be inferred from those powers and the requirement to act for a "proper purpose". Moreover, they must exercise those powers reasonably, having regard to all relevant considerations and disregarding irrelevant considerations, and with regard to their duty to obtain value for the public money entrusted in them by taxpayers.

Collaboration at district level

Using powers dating back to the 1970s, local authorities have been collaborating and have transformed. The section below outlines these methods of collaboration.

Joint committee

The power to establish a joint committee is contained in sections 101 and 102 Local Government Act 1972. Executive functions are delegable under sections 9E and 9EA of the Act and the Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2012.

Joint committees - Things to think about:

- a joint committee does not have a separate legal identity. It has no corporate status and so is unsuitable for trading (where it enters into contracts in effect such arrangements are enforceable against each of the individual authorities);
- joint committees maintain more sovereignty than if an external authority were delegated with the functions;
- joint committees can also include co-opted members. Although, such members cannot vote;
- voting can only be by simple majority;[1]
- joint committees are subject to the political balance requirements which means that appointments to joint committees should be in line with the political composition of the local authority[2];
- a joint committee is not suitable for a short-term or interim arrangement. It is not worth establishing a joint committee unless it will last at least four years / an electoral term;
- joint committees are accountable and transparent because they are part of the administrative machinery of local government.

1 Paragraphs 39 to 44 of Schedule 12 (Meetings and Proceedings of Local Authorities) of the Local Government Act 1972.
2 Local Government and Housing Act 1989 Schedule 1 and the Local Government (Committees and Political Groups) Regulations 1990; Section 15(5) Local Government and Housing Act 1989 states that the seats on any body which fall to be filled by appointments made by any relevant authority or committee of a relevant authority must have regard to the following principles of political balance: (a) that not all of the seats on the body may be allocated to the same political group; (b) that the majority of the seats on the body is allocated to a particular political group if the number of persons belonging to that group is a majority of the authority's membership; (c) subject to (a) and (b), the number of seats on the ordinary committees of a relevant authority which are allocated to each political group bears the same proportion to the total of all the seats on the ordinary committees of that authority as is borne by the number of members of that group to the membership of the authority; and (d) subject to (a) and (c) the number of the seats on the body which are allocated to each political group bears the same proportion to the number of all the seats on that body as is borne by the number of members of that group to the membership of the authority.

Delegation to another local authority

A local authority (including a district council) can delegate the discharge of non-executive functions to another local authority (whether the district council or another tier of authority) if they so decide, pursuant to their powers under section 101(1)(b) of the Local Government Act 1972, a "section 101 delegation".

The power to delegate executive functions to another local authority is found in section 9EA of the Local Government Act 2000 and the Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2012.

The delegation of functions is a common form of collaboration between local authorities and can be used for short, medium or long-term arrangements. It can be particularly helpful where there are difficulties recruiting staff to work in a particular function in a particular district, or conversely, where there is spare staff capacity. It can also be used to help achieve economies of scale and efficiency.

In common with the other forms of voluntary, non-structural collaboration, delegation can also be a useful alternative to outsourcing or contracting out. It is particularly useful where it may be unlawful for a district council to outsource a function to a contractor because it involves public sector functions (such as some enforcement of regulatory matters) which could not be legally contracted out due to the prohibitions in section 71 of the Deregulation and Contracting Out Act 1994.

Case Study: Brentwood Borough Council and Basildon District Council – Section 101 Delegation Arrangements

Basildon and Brentwood have collaborated for a number of years in relation to the provision of services across both Councils' areas. In order to deliver additional budget savings, the Councils wanted to put in place a formal framework arrangement which would provide flexibility for either Council to delegate statutory functions to the other in the future.

Brentwood was advised in relation to the terms of a section 101 Delegation Framework Deed with Basildon allowing either Council to delegate various statutory functions to the other under section 101 of the Local Government Act 1972. The individual delegated statutory functions are to be documented through dedicated work orders. Brentwood was advised on advantages and disadvantages of collaborating via section 101 arrangements and a detailed legal review of the draft Revenues and Benefits Work Order was carried out, this was the first statutory function to be delegated to Basildon.

Brentwood was also advised on key TUPE and pensions issues concerning the transfer of Brentwood staff to Basildon as part of the Revenues and Benefits arrangements (including issues regarding relocation of staff); considered the terms of any required indemnities/warranties; advised on exit arrangement issues and provided general advice on structuring the arrangements to ensure compliance with EU procurement rules.

Delegation – Things to think about

Some things to think about when considering whether to delegate functions include:

- does the authority who will be carrying out the discharge of the function have the necessary capacity and experience within its staff establishment to maintain the same level of service? (For example, if a district council is intending to delegate finance functions to the county council, how will county staff deal with housing matters which are not county functions?);
- is the function to be delegated in its entirety or will certain parts of the function be reserved by the delegating authority? (For example, the decision to bring legal proceedings within your authority);
- will elected members be happy to give up sovereignty in relation to the exercise of the function to be delegated? Conversely, will elected members of the recipient authority feel comfortable with the potential reputational issues in being responsible for the performance of a service for another authority?;
- the delegation of the function may involve the transfer of staff under the TUPE regulations;
- the precise terms and the duration of the proposed delegation and any circumstances where the authority which is the recipient of the delegation may decline to discharge the function in question should be carefully considered. (For example, where a potential conflict of interest may arise between the authorities making and receiving the delegation, such as in town planning matters).

Delegation is one method of pooling resources to collaborate. Two other methods of resource sharing are outlined below: arrangements to share staff and agreements to supply services to a public body.

Arrangements to share staff

An arrangement under section 113 of the Local Government Act 1972 allows a district council to place its staff at the disposal of another local authority[3] in order to achieve efficiencies. This is particularly beneficial when one authority is better resourced. The district council and the other authority would need to come to an agreement as to how to provide the relevant services.

Under section 113 the district council and the other local authority should have a bespoke inter-authority agreement (detailed later in this guidance) between the two authorities to set out the terms on which certain individuals would be made available to the other party for the purposes of enabling those individuals to deliver the services.

Before to deciding to take any formal decision in relation to the agreement, district councils must consult with the relevant officers who are likely to be involved in the arrangement and must not enter into any agreement until the consultation has been concluded and considered as a key relevant consideration in the decision making process.

Sharing staff – Things to think about

Some key things to consider:

- how to make the delivery of the services more accountable and manage the performance of the services (for example, through benchmarking and KPIs);
- an arrangement under this model does not allow trading or profit and it can blur lines of accountability;
- whether to share staff by way of a secondment or TUPE;
- an arrangement under this model can result in uncertainties with regard to the application (or not) of TUPE when the arrangement is terminated.

It is important to take specialist employment law advice before, during and at the conclusion of the arrangement.

3 Section 113, Local Government Act 1972.

Agreement to supply services to a public body

Local authorities may enter into an agreement to supply services to a public body and charge a fee, pursuant to section 1(1) Local Authorities (Goods and Services) Act 1970[4].

This model in effect involves a district council "selling" its services to another authority or vice versa. This is an arm's-length transaction and should not require a high degree of trust. However, a sufficiently robust agreement and a performance monitoring management regime should be put in place.

It can be used to sell or trade in services to entities provided they are designated as "public bodies" under LAGSA[5].

It does not need to involve the establishment of a separate legal entity like a company nor a special committee structure. It should be documented by an inter-authority agreement and optionally supplemented by an unincorporated board (see below in MOU section).

A district council is permitted to make a profit as a result of selling or trading services using this model[6]. A district council would therefore be permitted to charge its "customer authority" a profit. The customer would be the other authority. However, it would not be permitted via this arrangement for a district council to charge service users for statutory services or to make a profit from service users. The only entity that the Council could lawfully charge/make a profit from is other public bodies (as designated by the SoS by statutory instrument).

The models described above are unincorporated, which means they have no separate legal identity. However, where a collaboration project is long-term, and in particular is aimed at raising a profit then district councils should consider an incorporated structure such as a joint company, outlined below.

Joint company and joint Teckal

Joint company

Two or more district councils can establish a company to collaborate to carry out services and/or to trade services for a profit. This could be a company limited by shares, a company limited by guarantee and both of these companies can be formed as a community interest company (CIC). Alternatively, a registered society model can be used.

In establishing a company, authorities can rely on the power in section 1 of the Localism Act 2011 which grants local authorities a general power of competence[7] subject to pre-existing legal prohibitions. Section 4 of the Localism Act 2011 also sets out limits on the exercise of the general power of competence for a commercial purpose[8].

Alternatively, section 95 of the Local Government Act 2003 provides a power for local authorities to trade in function-related activities through a company[9].

There is also service-specific legislation which can authorise the establishment of other specific companies for specific reasons.

A company is a good option for district councils that have a collaborative partner and a business case which demonstrates the potential for an income stream from the supply of discretionary services or off-shoots from their statutory services.

4 Section 1(1) of the Local Authorities (Goods and Services) Act 1970.
5 section 1(4) of the Local Authorities (Goods and Services) Act 1970.
6 The *R v Yorkshire Purchasing Organisation* [1998] E.L.R. 195 judgment confirmed that: "Section 1(3) (of LAGSA) permits the local authority and the public body to agree such terms as to payment as they consider appropriate".
7 Section 1, Localism Act 2011.
8 Section 4, Localism Act 2011.
9 Section 95 Local Government Act 2003.

Joint Teckal

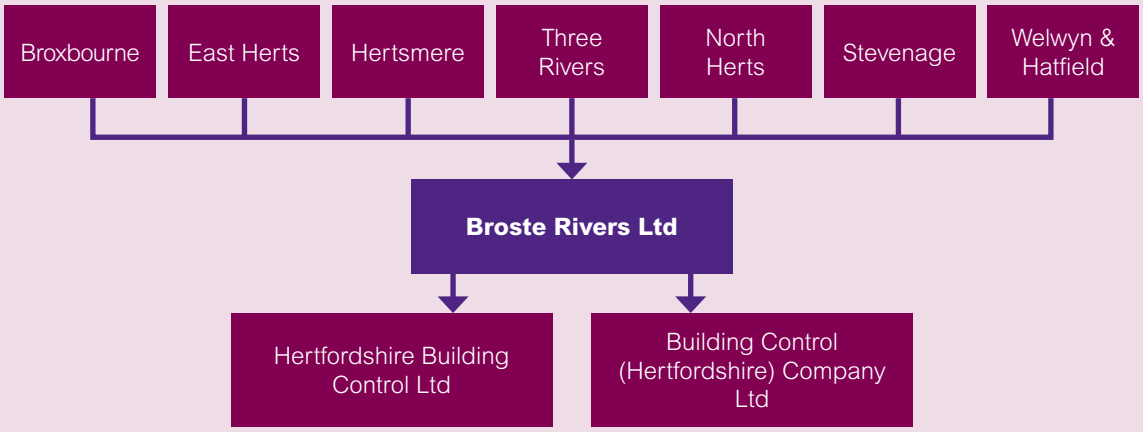
The company can be set up so that it does not have to tender for its work to the authorities which own it under an exemption from the public procurement rules known as "Teckal" or "Joint Teckal" if two or more authorities are involved[10]. The "Teckal" exemption is currently found in the Public Contracts Regulations 2015 (PCR) (see public procurement below)[11].

Case study: Building services collaboration

An example of adopting this model is Broste Rivers, a group of companies set up by seven district councils in Hertfordshire who wanted to collaborate to provide building control services both within their own council areas, to third parties and other local authorities outside of their boundaries.

In order to achieve this, Broxbourne Borough Council, East Hertfordshire District Council, Hertsmere Borough Council, North Hertfordshire District Council, Stevenage Borough Council, Three Rivers District Council and Welwyn Hatfield Borough Council set up a joint venture holding company, Broste Rivers Ltd, which wholly owned two companies:

- Hertfordshire Building Control Ltd, set up as a "body governed by public law" to discharge the seven district councils' statutory duties to provide building control services to their inhabitants at cost price; and
- Building Control (Hertfordshire) Company Ltd, a commercial entity to provide an "Approved Inspector" service within other local authorities' and other non-statutory services to third parties within their areas, with a view to generating profit.



We had to consider carefully the application of procurement exemptions, particularly in relation to the commercial entity, to ensure that it did not have to procure its own services.

The commercial collaboration enabled the district councils to pool resources to produce efficiencies, particularly with respect to back office costs such as ICT and premises costs. Additionally, surplus generated could be reinvested in the company and the respective local authorities.

10 Regulation 12(4), (5) and (6) Public Contracts Regulations 2015.
11 Regulation 12(1) Public Contracts Regulations 2015.

Case study: Super-ALMO Collaboration

The Super-ALMO East Kent Housing is an example of a joint Teckal company, formed by Canterbury City Council, Dover District Council, Shepway District Council and Thanet District Council. This was the first multi-authority arm's length management organisation (ALMO), established to manage over 16,000 homes under a 30 year contract.

In order to meet the requirements for a joint Teckal company, the four district councils had to adapt the well-established ALMO structure, which involved implementing a new governance structure to provide sufficient control over the ALMO by all four district councils. This was balanced with the need to provide operational independence and flexibility for the ALMO, in accordance with the requirements of local authority decision making and corporate governance.

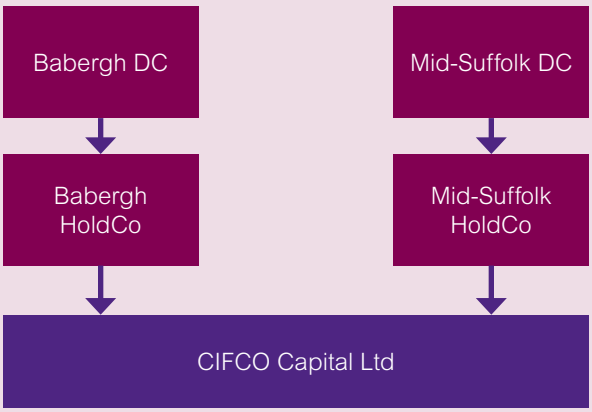
The collaboration enabled the four district councils to save money on direct management costs, as well as procurement and ICT and other support service costs.

Case study: Commercial Property Investment Company Collaboration

Babergh and Mid Suffolk District Councils collaborated to create a Joint Commercial Property Investment Company, CIFCO Capital Ltd. The company was set up with a £50 million investment fund to invest in commercial property nationally, with the aim of providing a revenue stream to the respective district councils through the collection of rent.

The structure involved both district councils setting up wholly owned commercial holding companies, these holding companies then each owned a 50 per cent shareholding in CIFCO Capital Ltd. CIFCO Capital Ltd invests in commercial property across the country. Consideration had to be given to the governance of the investment company to ensure that it was sufficiently controlled to fall within the Teckal exemption from procurement rules, but was also sufficiently independent to make commercial decisions.

The £50 million investment fund was structured as a loan from the two district councils to CIFCO Capital Ltd to fund up to 90% of the costs of the acquisition of property with the balance of the money required to fund the acquisition being contributed as equity. The two councils also made available an overdraft facility to CIFCO Capital Ltd to fund its working capital requirements, the level of such overdraft being reviewable annually. CIFCO Capital Ltd provided security over its assets, including any property acquired, as security for all amounts borrowed from the two district councils. The loans are repayable from the rental income on property acquired.



The collaboration gained media attention over the fact that the investment company purchased commercial property in areas that were outside their respective districts in Suffolk such as a Marks and Spencer in Brentwood, Essex and a building containing a Caffe Nero and Wagamama in Peterborough.

CIFCO Capital Ltd has been successful in providing a revenue stream for the respective councils, with returns being in excess of £1.6 million per annum.

Joint companies – Things to think about

- The purpose of the company. A company could be used to distribute a profit from services the district councils do not have a statutory duty to provide. However, for some companies it may be more appropriate for any profits to be reinvested in the company. The legal form of the company should not be decided upon until the business case is completed, as some company forms may not suit the desired outcome.
- The collaborating councils would need to prepare and have regard to a HM Treasury Green Book compliant business case before resolving to establish the company.
- A Joint Teckal company does not have to bid for work from its contracting authority shareholders as long as the Teckal exemption continues to apply.
- A Joint Teckal company is able to trade with external bodies for up to 19.9% of its annual turnover to generate income. This needs monitoring.
- The company can be established as a "body governed by public law" which would have itself to comply with public procurement tendering rules when buying in its supplies. Alternatively, it is possible (with care) to establish a company with solely commercial objectives (i.e. not public policy aims) which may be free from public procurement rules (see below).
- Articles of association and a shareholders agreement for the company would need to be drawn up as well as contract(s) between the company and the contracting authorities and possibly service agreement(s) if any of the authorities are to provide support services (e.g. payroll to the company).
- Company directors have personal legal duties which cannot be delegated and can conflict with their council roles. They also need to understand the operation and finance of the company. All directors must understand the legal responsibilities of their roles before taking office. Training is strongly recommended.
- Financial or "in kind" help to the company such as low interest loans, advance payments, lending staff or equipment below value, or low rent premises could constitute unlawful state aid. State aid challenges are becoming more common and are relatively inexpensive to bring. The existence of state aid can lead to mandatory claw back plus interest and adverse PR. State aid exemptions exist will but need expert advice to navigate.
- Specialist advice should be sought on the impact of corporation tax and VAT (as well as SDLT if land is involved).

As highlighted above, there are many ways in which district councils can collaborate without the need for structural transformation. However, should this be a desirable (for economic or efficiency reasons, for example) the models below explain structural transformation, starting with combined authorities.

Combined authority

A combined authority is a strategic and operational body with district and potentially other representatives that also takes on devolved powers and resources from central government.

A new combined authority can be formed to carry out specific local authority or other functions (e.g. housing) but the district councils otherwise remain in existence.

The SoS may establish a combined authority by an order under section 103(1) of the Local Democracy, Economic Development and Construction Act 2009 and the Cities and Local Government Devolution Act 2016, following a "governance review" and a consultation and the publication of a scheme recommending the creation of a combined authority[12].

Another structure that involves devolution is an Economic Prosperity Board, discussed below.

Formal district clustering

Economic Prosperity Boards

Economic Prosperity Boards (EPBs) are structures which allow for collaboration and joint working between local authorities for the purpose of improving economic development, regeneration and transport. EPBs operate in specified areas as set out in the Local Democracy, Economic Development and Construction Act 2009.

To establish an EPB, two or more local authorities (which can be district councils) must undertake and publish a review concerning the effectiveness and efficiency of arrangements to promote economic development and regeneration within the specified area. If the review concludes that the establishment of an EPB for an area would be likely to improve:

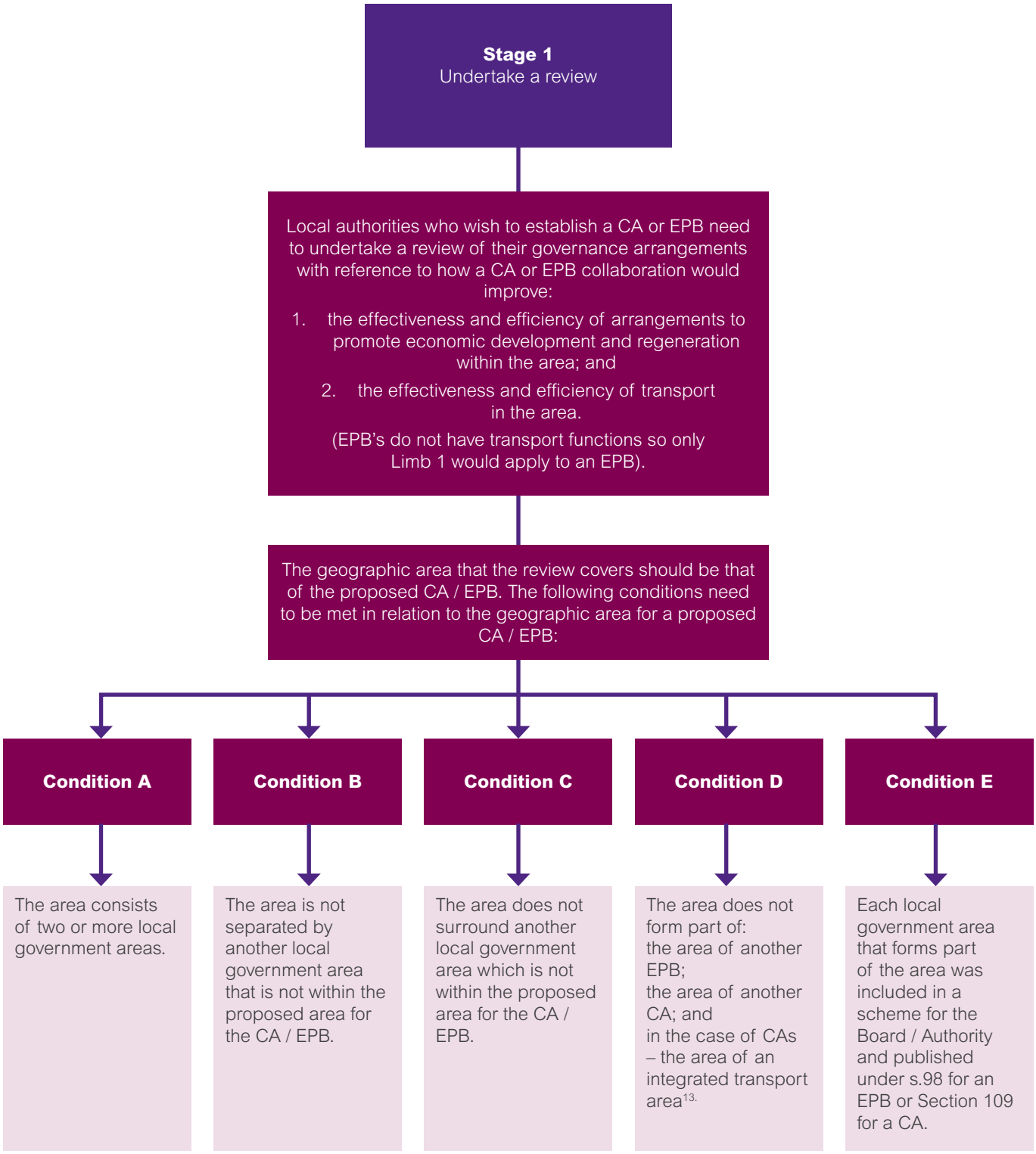
- the exercise of statutory functions relating to economic development and regeneration in the area; and
- economic conditions in the area,

then the authorities may publish a scheme for the establishment of an EPB for the area.

The SoS may then make an order establishing an EPB, but only if having reviewed the scheme prepared by the authorities, the SoS considers that to do so is likely to improve the factors as set out above.

12 'Combined authorities' Briefing Paper, Number 06649, 4 July 2017, page 4, para 1.2; section 110 of the Local Democracy, Economic Development and Construction Act 2009 Act (as amended by the 2016 Act).

Flowchart of the process leading to the establishment of a Combined Authority (CA) or Economic Prosperity Board (EPB)



13 Sections 88 and 103 of the Local Democracy, Economic Development and Construction Act 2009 Act.

Stage 2
Prepare and publish a scheme

Once the local authorities have conducted their governance review, they may prepare or publish a scheme, setting out how the CA / EPB will. Things to include are:

1. the proposed area;
2. proposed functions; and
3. the constitution.

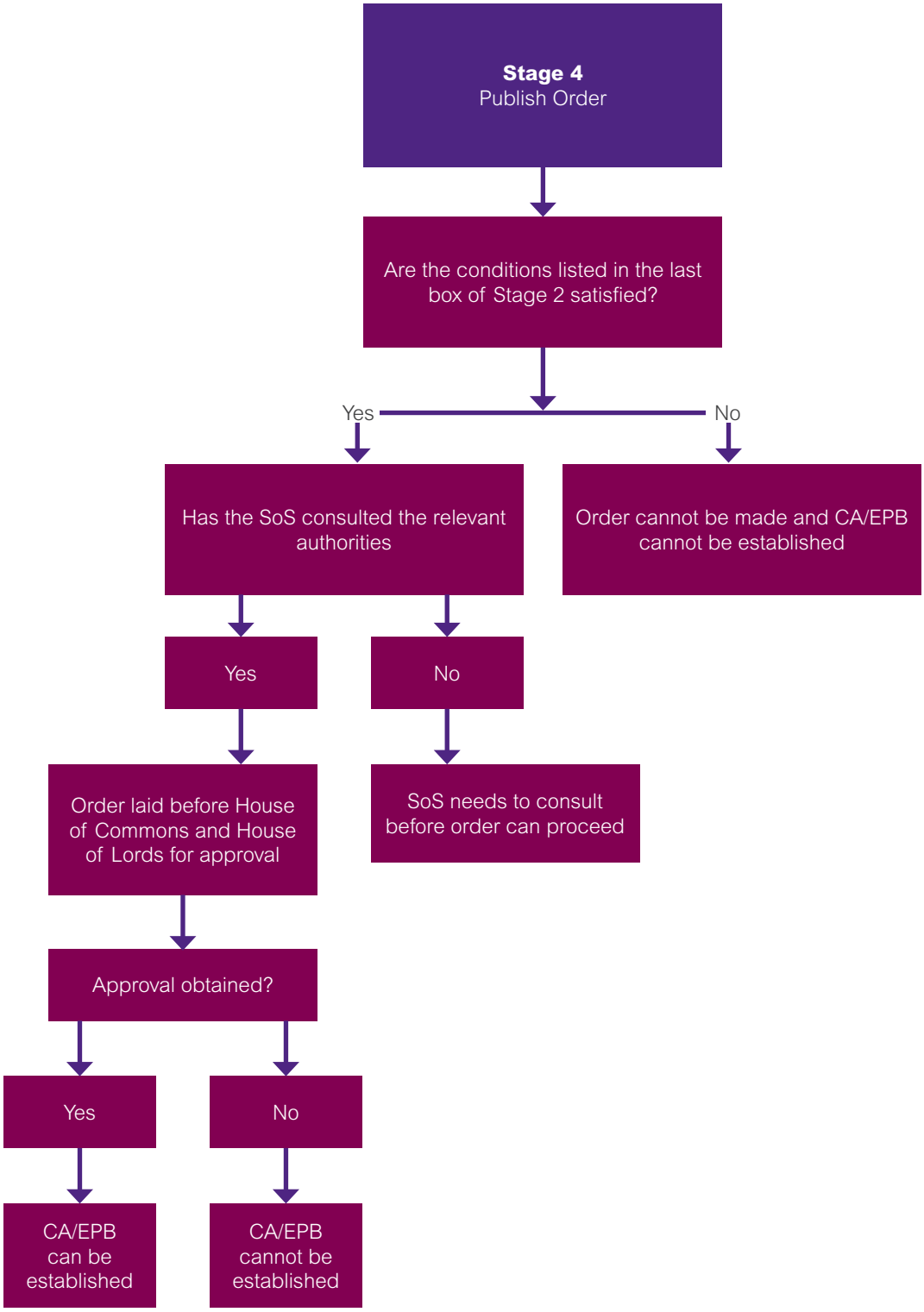
All local authorities whose areas are within the proposed area for the CA / EPB must either be involved in the preparation of the scheme, or provide their consent to the scheme.

The local authorities involved and SoS must consider the following in relation to establishing a CA / EPB:

1. improvements to the exercise of statutory functions relating to economic development and regeneration in the area;
2. improvements to transport in the area (for CAs);
3. improvement to the effectiveness and efficiency of transport in the area (CAs); and
4. economic conditions

Stage 2
SoS consults on draft order to establish CA / EPB

1. SoS must consult all local authorities to be affected by the scheme as well as anyone else the SoS deems appropriate.
2. The SoS considers publishing a draft Order for the establishment of a CA or EPB.


Stage 4
Publish Order
Are the conditions listed in the last box of Stage 2 satisfied?
Yes
No
Has the SoS consulted the relevant authorities
Order cannot be made and CA/EPB cannot be established
Yes
No
Order laid before House of Commons and House of Lords for approval
SoS needs to consult before order can proceed
Approval obtained?
Yes
No
CA/EPB can be established
CA/EPB cannot be established

Super-district / Super-district +

The super-district model is where two or more district councils merge to become a single district council.

The super-district + model is the same as the super district model but also involves the merger of one or more district councils and/or place-based services in another county.

There is a power for the SoS to merge the areas of two or more district councils by statutory instrument[14]. The SoS must make regulations to this effect[15]. District councils may be merged in relation to devolution deals agreed by central government where it may not be appropriate for the existing councils to establish a combined authority[16].

Regulations made by the SoS to merge two or more district councils must be made with the consent of all district councils involved. However, until 31 March 2019, if the regulation is in relation to structural or boundary matters, only one local authority needs to provide consent[17]. Thereafter, due to a sunset clause in the legislation, all district councils will need to provide consent[18].

An example of the super-district model is the Suffolk Coastal and Waveney District Councils' merger in 2017, consented to by both respective district councils.

The Ministry for Housing, Communities and Local Government (MHCLG) established five broad consideration principles in relation to Suffolk Coastal and Waveney District Councils' proposal to merge the two authorities. However, these tests do not have statutory force and do not form part of statutory guidance. This means that they could easily be revised at a later date depending on the current SoS's policy priorities. It is therefore prudent to check with MHCLG what the most up-to-date tests will be applied before working up a merger proposal[19].

The five principles that the proposal for two or more district councils wishing to merge had to demonstrate were[20]:

- better local/public services;
- significant cost savings;
- greater value for money;
- stronger and more accountable local leadership; and
- sustainability in the medium to long term.

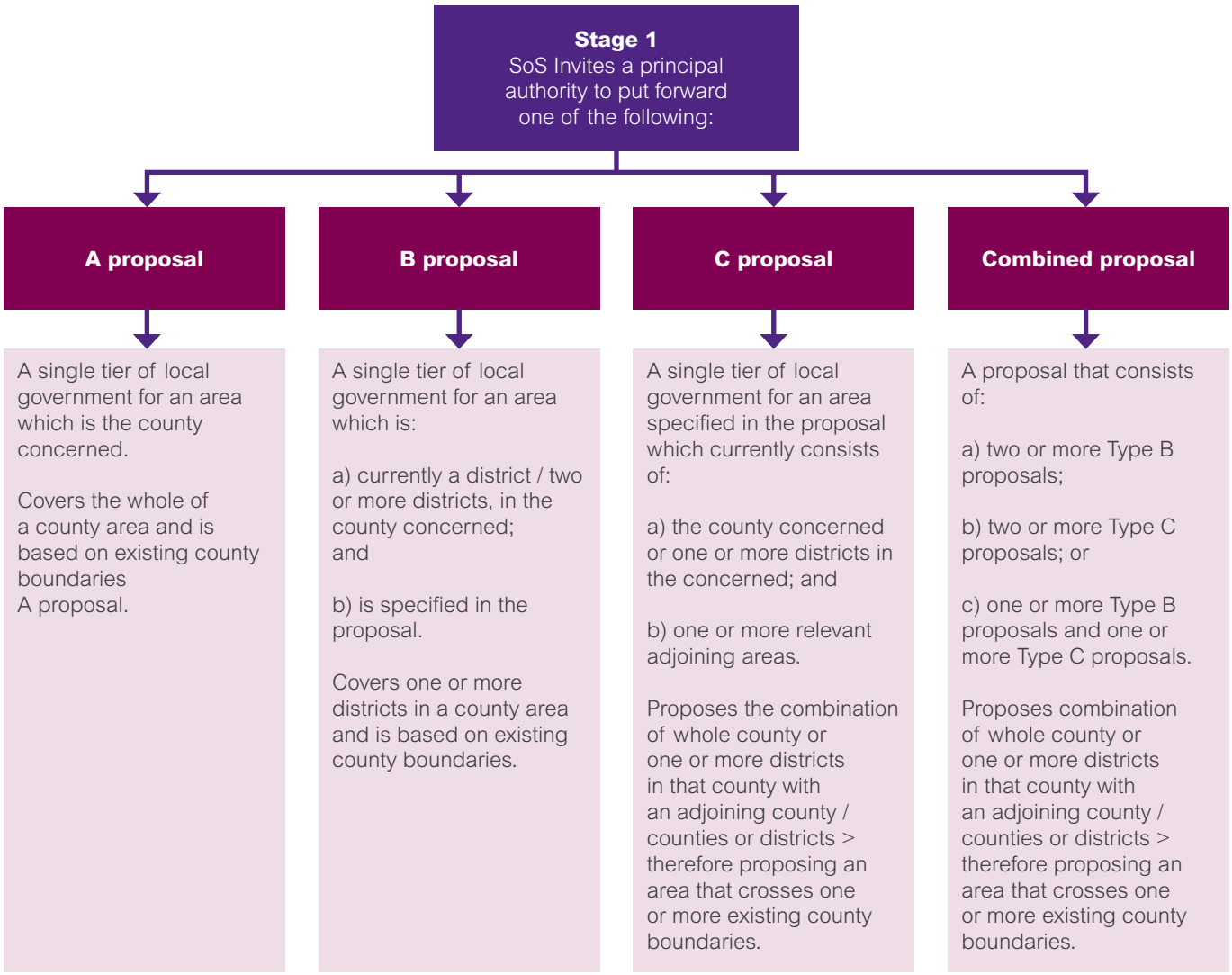
Unitarisation

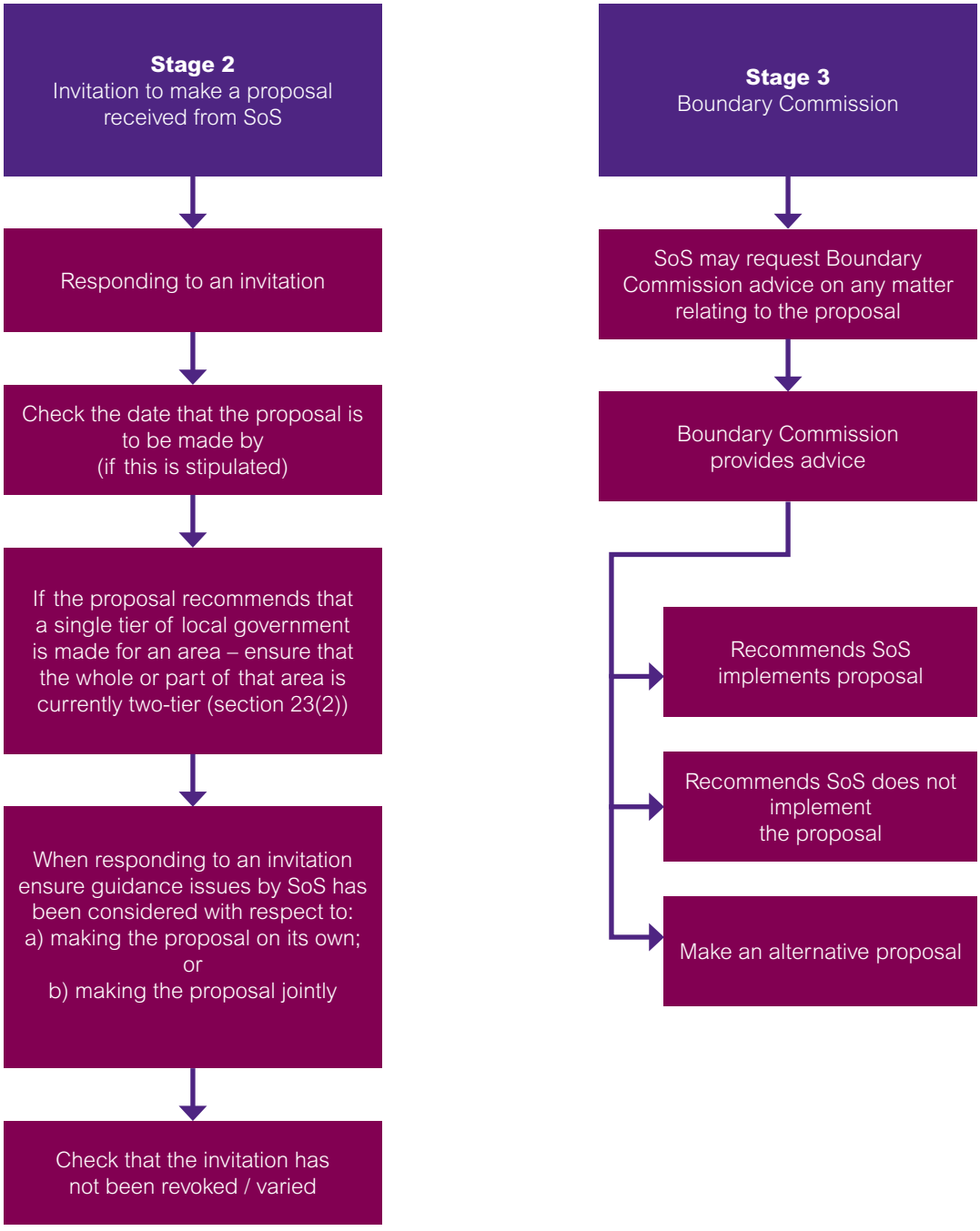
Local government reorganisation to single tier, also known as "Unitarisation", is where the functions of district councils and / or other councils (typically a county council) are combined to provide a single tier of local government.

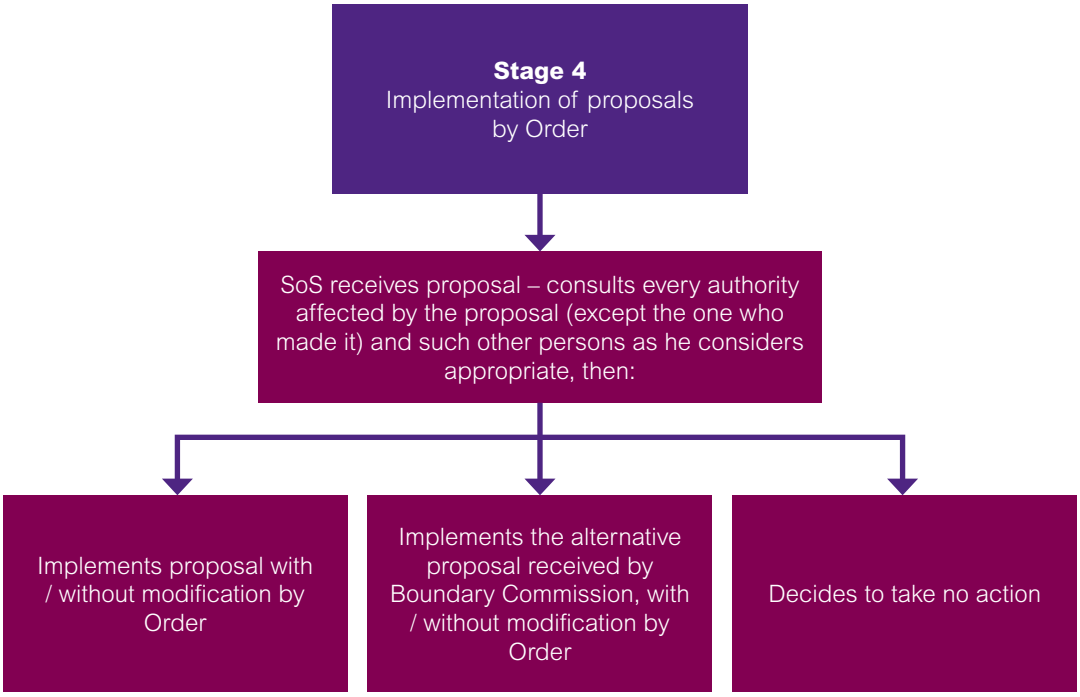
The Secretary of State for Housing, Communities and Local Government (SoS) may "invite" a local authority to make a proposal for a single tier of local government[21]. The SoS may then make an order implementing the proposal (the Order)[22].

14 Cities and Local Government Devolution Act 2016, Section 15(1); Cities and Local Government Devolution Act 2016, Explanatory Note, para 47.
15 Cities and Local Government Devolution Act 2016, Section 15(1); Cities and Local Government Devolution Act 2016, Explanatory Note, para 44; S15(1) CLGDA defines "local authorities" by reference to Section 23 Local Government and Public Involvement in Health Act 2007, which described local authorities as county councils, district councils or London borough councils.
16 Cross on Local Government, Part 1 – Law of Local Government Administration, Chapter 3, Local Authority Areas and Status, Section B. Alterations in Area and Status, 3-18C.
17 Cities and Local Government Devolution Act 2016, Section 15(4), (5); Cities and Local Government Devolution Act 2016, Section 15(1); Cities and Local Government Devolution Act 2016, Explanatory Note, para 48.
18 Cities and Local Government Devolution Act 2016, Section 15(8).
19 'East Suffolk Council', The proposal for merging Suffolk Coastal & Waveney District Councils, Suffolk Coastal District Council and Waveney District Council, Cabinet Report, page 11.
20 'East Suffolk Council', The proposal for merging Suffolk Coastal & Waveney District Councils, Suffolk Coastal District Council and Waveney District Council, Cabinet Report, page 11.
21 Sections 1 to 7 of the Local Government and Public Involvement in Health Act 2007; pursuant to section 3(1) of this act, a direction to form unitary local government cannot be made by the SoS after 25 January 2008.
22 Section 7 of the Local Government and Public Involvement in Health Act 2007; Local Government in England: structures, Briefing Paper, 19 December 2017.

The following flowchart illustrates the steps that district councils (and other local authorities) need to take before an Order for unitary local government can be made by the SoS.




Stage 2
Invitation to make a proposal received from SoS
Responding to an invitation
Check the date that the proposal is to be made by (if this is stipulated)
If the proposal recommends that a single tier of local government is made for an area – ensure that the whole or part of that area is currently two-tier (section 23(2))
When responding to an invitation ensure guidance issues by SoS has been considered with respect to:
a) making the proposal on its own; or
b) making the proposal jointly
Check that the invitation has not been revoked / varied
Stage 3
Boundary Commission
SoS may request Boundary Commission advice on any matter relating to the proposal
Boundary Commission provides advice
Recommends SoS implements proposal
Recommends SoS does not implement the proposal
Make an alternative proposal



Unitarisation – Things to think about

Things to think about are:

- transitional measures (e.g. designation of interim Statutory Officers);
- transfer of procurement processes before contracts have been awarded;
- creation of a new constitution;
- designation of Monitoring Officer, Chief Finance Officer and Head of Paid Service;
- the staff of each district council may well have different terms and conditions of employment - there may be potential to negotiate harmonisation of terms of employment for staff (subject to TUPE and consultation requirements); and
- rationalisation of operational and administrative property (e.g. depots, office accommodation etc.).

Contractual arrangements

This guidance has outlined a range of collaborative models in the sections above. It is advisable that any form of collaboration is documented. Below, we outline two methods of documenting collaboration: a Memorandum of Understanding, which is useful for documenting an informal collaboration, or a collaboration in its infancies, and an inter-authority agreement which is suitable for longer-term or more formal collaboration projects.

Memorandum of Understanding (MOU)

To document an early stage of collaboration, district councils can use an MOU[23].

If the collaboration is:

- aspirational;
- requires flexibility;
- there is a high degree of mutual trust and ;
- fixed outcomes are not required,

then documenting the collaboration through an MOU is a good idea. The collaboration should ideally be overseen by an unincorporated consultative board. The board should be comprised of representatives from both / all district councils and can involve service user representatives and other agencies, to engage and focus the authorities who are collaborating.

The advantages of such an approach are:

- flexibility;
- fluidity;
- ability to involve a wide range of people on a board (for example, service users).

The disadvantages are:

- no legal certainty that an outcome will be achieved;
- lack of legal enforceability;
- it is not suitable for incurring liabilities, entering contracts, employing staff or where TUPE or other complex matters are involved;
- decisions of any board cannot be formal council decisions and can only be “indicative” or consultative and would have to be referred back to the duly appointed formal decision-making bodies or individuals.

An MOU and an optional unincorporated board can be used to document and implement most non-structural forms of collaboration (except a Joint Committee, Joint Teckal company or an Economic Prosperity Board as these models all have built-in board structures).

The governance and any operational arrangements should be set out within the terms of the MOU.

An MOU can be expressed to not be legally binding in its entirety or in certain parts. This allows flexibility for district councils to include some aspirational matters which are not intended to be contractually enforceable.

If the councils do not intend the MOU to be legally binding, it is important to state this expressly. Otherwise, there is a risk that the MOU could be construed to be a legally binding contract. This could lead to a district council incurring liabilities if an obligation is not performed. (Note, under English law, something does not need to be written or signed, to constitute a legally binding contract even though most district councils’ standing orders require contracts to be in writing and signed.)

As a board arrangement would be an unincorporated association, the representatives can operate bespoke voting arrangements according to the provisions of the MOU, unlike the simple majority arrangements required for a joint committee (see above).

23 Section 111, Local Government Act 1972.

As an alternative to an MOU, a contractually binding inter-authority agreement can be used. A key issue to consider at the outset of the collaboration is what both district councils want to achieve and how comfortable the councils will both feel being tied in to legal obligations.

If the collaboration under the MOU is successful then the district councils may wish to consider formalising all or part of it into an inter-authority agreement.

Inter-authority agreement

Another alternative for documenting collaboration is for two or more district councils to enter into an inter-authority agreement. This is more detailed than an MOU and will usually be completely or partly legally binding.

Inter-authority agreements are usually used to document arrangements for:

- placing staff at the disposal of other authorities under section 113 of the Local Government Act 1972;
- for formal delegations under section 101 of the Local Government Act 1972 or s9E and s9EA and s9EB of the Local Government Act 2000 and the Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2012);
- for service agreements under LAGSA 1970 and to document the behind the scenes operation of joint committee arrangements (see above); and
- and to supplement joint committee arrangements

An inter-authority agreement will often meet the classification of a "co operation agreement" under public procurement law (see below) and if so, is not subject to the procurement rules. However, it should not be automatically assumed that any inter-authority agreement falls outside procurement law unless all the specific requirements under the relevant exemption are met.

A co-operation agreement is a mutual co-operation agreement between two local authorities and/or any other public bodies who are "contracting authorities" (see footnote 34). E.g. registered providers, NHS Trusts or Teckal companies (see above). This provides an exemption from the tendering requirements of the public procurement rules[24].

This could be a useful option for a district council wishing to collaborate with another district council (or other local authority) with a similar ethos and policy objectives. Especially where there is a shared vision as to how to deliver the service. A high level of trust is required in order for this to work successfully.

This could involve a lead authority arrangement, with authorities resolving to delegate certain clearly defined administrative functions to a single lead authority with a meeting of elected members. Alternatively, it could involve a lead authority supported by a decision-making forum of authority officer representatives who have delegated authority to make decisions.

With regards to unitarisation / local government reorganisation, all contracts, rights and liabilities are transferred to the new unitary authority by way of statutory transfer, e.g. The Cheshire (Structural Changes) Order 2008 (see discussion above).

Attention should be paid as to whether every contract allows for assignment. If not, then this will be a matter for negotiation, especially if assigning to an entity that is not a public authority (e.g. a company). It will be necessary for each authority to carry out a due diligence exercise.

24 The mutual co-operation agreement exemption applies under Regulation 12(7) of the Public Contracts Regulations 2015: "Regulation 12(7) A contract concluded exclusively between two or more contracting authorities where all of the following conditions are fulfilled:— (a) the contract establishes or implements a co-operation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common; (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and (c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation".

Examples of due diligence questions are:

- what contracts does the district council (or other local authority) currently have?
- what are the transfer, assignment and termination provisions in relation to these contracts?
- there may be potential procurement issues with assigning a contract and it may be necessary to re-procure or come within an exemption such as Regulation 72 contract changes (see below).

It should be borne in mind that voluntary, non-structural arrangements entered into by district councils may fall under the definition of a "best value arrangement" under section 3(1) Local Government Act 1999. It is therefore vital to ensure consultion is carried out with regard to the arrangement in order to prevent the risk of legal challenge. This is detailed in the next section.

Duty of consultation relevant to all forms of collaboration

The duty of best value imposes an obligation on "best value authorities" to consider "overall value" when assessing service provision[25]. Overall value encompasses factors such as economic value, environmental value and social value.

In the context of district councils, a "best value authority" includes the following[26]:

- an English local authority (i.e. a district council or a county council or a London Borough council);
- an Economic Prosperity Board (see above);
- a combined authority (see above).

A "best value authority" has a responsibility to make arrangements to secure constant improvement in the way in which it exercises its functions, whilst having regard to principles of economy, efficiency and effectiveness[27]. As part of this duty and before making a decision about a best value arrangement (e.g. a collaboration with another council), a "best value authority" must consult[28]:

- representatives of persons liable to pay any tax, precept or levy to or in respect of the authority;
- representatives of persons liable to pay non-domestic rates in respect of any area within which the authority carries out functions;
- representatives of persons who use or are likely to use services provided by the authority; and
- representatives of persons appearing to the authority to have an interest in any area within which the authority carries out functions.

If a district council does not fulfil its duty to consult at a formative stage of deciding whether to make a best value authority then it is vulnerable to legal challenge[29].

Governance

Each new body requires a constitution, internal regulations and rules of governance. If there is more than one district council working together then it can be efficient to have identical constitutions and standing orders (e.g. as do Forest Heath District Council and St Edmundsbury District Council).

25 Revised Best Value Statutory Guidance, Department for Communities and Local Government March 2015, paragraph 2.
26 Section 1(2) Local Government Act 1999
27 S3(1) Local Government Act 1999; "best value authorities" must also have regard to any guidance issued by the Secretary of State
28 S3(2) Local Government Act 1999
29 *R. (on the application of Nash) v Barnet LBC* [2013] *EWHC 1067 (Admin);* [2013] – this was a challenge to a local authority's decision to outsource a high proportion of its functions to a private company on the grounds that it was unlawful for lack of consultation pursuant to s3(2) Local Government Act 1999; and *Peters v Haringey LBC* [2018] EWHC 192 (Admin) in which one of the grounds of challenge against a local authority's decision to form a development vehicle was the failure to consult under s3 Local Government Act 1999.

Governance – Things to think about

Issues to consider where two separate authorities remain as separate legal entities:

- dispute resolution and conflicts of interest;
- if the Chief Finance Officer or Monitoring Officer works for both authorities then this can give rise to professional conflicts of interest. It is advisable to consider in advance how such an issue could be resolved; and
- governance for collaboration will need special care if the two authorities have different constitutional arrangements (e.g. committee / cabinet models).

Public procurement

District councils are subject to European procurement rules by virtue of being a public authority. The Public Contracts Regulations 2015 (PCR), which implement the EU Directive[30], are rules which govern the procurement of goods, services and works above certain thresholds by public authorities[31]. The public procurement rules can still be engaged in the case of district council collaboration because the fact that the authorities are public bodies does not automatically exempt the arrangement they have from being regarded as a "public contract" under the procurement rules.

It should be borne in mind that there is likely to be a public procurement regime and possibly prohibition on state aid after Brexit. The details depend on the trade agreements that the UK signs up to.

Hence, the arrangement will need to meet the specific rules of a specific exemption or be procured. All exemptions are strictly defined, and arrangements designed with the purpose of circumventing the public procurement rules are automatically vulnerable to challenge. Typical exemptions which may apply in collaborations between district councils are:

- Co-operation Agreement under Regulation 12(7) of the PCR (see above);
- the "Teckal" or Joint Teckal exemption (see above) will apply where all of the following conditions are fulfilled:
  - one or more "contracting authorities"[32] control the company in the same way that it/they controls its/their own departments;
  - more than 80% of the activities of the company are carried out for its local authority shareholders/members; and
  - there is no private shareholder or member of the company[33].

Transfer of Public Functions

Less commonly, such as in the case of some of the structural options such as unitarisation, local government reorganisation or district council merger, a special exemption from public procurement rules applicable to the transfer of public functions may apply. It was decided in the case of Remondis GmbH v Region Hannover that the transfer of functions by public authorities to an autonomous special purpose vehicle (SPV) (e.g. a newly established authority) governed by public law is not a public contract[34].

30 Public Sector Procurement Directive (2014/24/EU).
31 Explanatory Memorandum to the Public Contracts Regulations 2015, para 2.
32 Contracting authority means local authorities (including district councils), regional authorities, the State, bodies governed by public law and central government authorities, Regulation 2 Public Contracts Regulation 2015.
33 Regulation 12 Public Contracts Regulation 2015.
34 Remondis GmbH & amp Co KG Region Nord v Region Hannover and others (Case C-51/15), para 57: https://uk.practicallaw.thomsonreuters.com/w-005-2314?transitionType=Default&contextData=(sc.Default)&firstPage=true.

Joint procurement

Central purchasing bodies

If district councils want to procure together frequently then there is an ability for local authorities to jointly procure supplies and/or services through a "central purchasing body" this is usually a purchasing consortium or joint committee[35].

Occasional joint procurements

There is also power for local authorities to agree to perform certain specific procurements jointly on a one-off basis[36].

Bodies governed by Public Law

If forming a new body, then that body could be a "body governed by public law", which is a body that is established to meet needs in the general interest, does not have a commercial character, has a legal personality and is either managed or primarily financed by the State, local authorities or other "bodies governed by public law"[37]. A "body governed by public law" would itself be subject to the procurement rules and have to advertise and tender for the supplies it intends to buy in.

Contract changes – Regulation 72 of the PCR

Should a council wish to modify a contract to add in another authority's requirements to assist the collaboration then this might not necessarily mean the contract has to be reprocured. An exemption to the PCR under Regulation 72 may apply in the following circumstances[38]:

- where the scope and nature of the possible modifications were stated in the original procurement documents;
- where the original procurement documents do not provide for modifications that would alter the overall nature of the contract;
- where the need for modification has been brought about by circumstances which a diligent authority could not have foreseen;
- the modification does not alter the overall nature of the contract; and
- any increase in price does not exceed 50% of the value of the original contract[39].

Care needs to be taken if relying on any exemption. Hence it is advisable to seek specialist procurement law advice.

State aid

State aid will usually be unlawful unless there is an exemption. State aid is an issue when provided by public authorities to undertakings (i.e. a JV company) where it has the potential to distort competition in the relevant market (e.g. the consultancy services market).

The issue of state aid can arise where a company enjoys a benefit which has been conferred by a public authority. Typical examples of benefits which may constitute state aid are: low rent premises, staff cost recovery, seconded staff, low or subsidised back-office services, use of a brand[40], uniform, a low interest loan, use of appliances and/or equipment below market value, a funding grant or a transfer of assets

35 Regulation 37(1) Public Contracts Regulation 2015.
36 Regulation 38(1) Public Contracts Regulation 2015 - one contracting authority can manage the procurement on the behalf of the other authority but both authorities remain jointly responsible for fulfilling their obligations under the PCR.
37 Regulation 2(1) Public Contracts Regulation 2015.
38 Regulation 72(1)(a) and (c) Public Contracts Regulation 2015.
39 Regulation 72(1)(c) Public Contracts Regulation 2015.
40 See the alleged state aid complaint submitted by the Fire Industry Association (SA.38360 (2014/CP) where the European Representation to the EU Brussels (Competitiveness & Markets) stated that in their view based on their understanding of the circumstances the benefit from the use of the names and logos was unlikely to have exceeded the de minimis threshold of 200,000 Euros.

below market value. Any IT, audit, accounting, HR and/or other central services provided by the public authority to the company at below market value could also constitute unlawful state aid.

The consequences for the company of being a recipient of unlawful state aid is that if a state aid complaint or challenge is brought, then the public authority which conferred the benefit would be ordered to clawback the value of the benefit from the company plus mandatory interest. The clawback may lead to the company's insolvency as well as reputational damage for the company, the authority and the individual officers who authorised the state aid (whether knowingly or unknowingly).

State aid challenges are becoming more common in the UK and a state aid complaint is relatively inexpensive and easy to make. The existence of unlawful state aid may also be spotted by auditors or grant funders and lead to grants being clawed back or contracts terminated.

Following the UK leaving the EU, it is considered likely that the UK will retain some state aid law in order to maintain competitiveness and a level playing field between the public and private sectors on trading matters.

Options appraisal

When deciding upon the model of collaboration, local authorities should prepare and publish an options appraisal.

This should cover the following as a minimum:

- the authorities involved in the collaboration;
- the recommended collaboration model and why other models are not appropriate;
- the services to be delivered through the chosen model;
- the legal powers that enable the delivery of services through the chosen model;
- any procurement requirements such as advertisement, or any exemptions to procurement rules being relied upon;
- the results of any public/service users' consultation;
- the impact of collaboration on employees of the participating authorities and any changes to employer / pension schemes;
- how the collaboration is to be financed;
- an equality impact assessment; and
- an implementation plan.

The options appraisal will set out the legal and financial basis for the collaboration and demonstrate that the collaborating authorities have considered the impact on other local authorities and take into account any relevant local or national policy.

Property

Property can include operational and administrative premises which may be held freehold, under a lease or a licence. The release or disposal of surplus property can generate capital receipts or revenue if put into a special purpose vehicle. We suggest some practical steps below for authorities seeking to collaborate.

Step 1 – Carry out an Internal Audit to see what you own and occupy

What properties does each district council have an interest in? Freehold and leasehold interests, licences or tenancies at will, all have their own specific issues that need to be considered.

Step 2 – Investigate

Early due diligence is key to establish whether any property issues or operational issues need to be addressed. For example, for what statutory purpose is the property held, are there any restrictions on title? Are landlords' or other third party consents needed? Can some assets be disposed of to generate a capital receipt or put into a separate incorporated vehicle to generate revenue? A district council should ascertain the terms applicable to any assets / liabilities to be inherited by the new entity (e.g. a new unitary council, a new district council or a joint company).

Step 3 – Collaboration

How has each district council been operating its properties to date and what's the plan post-collaboration? Are any ancillary documents or agreements enjoyed by one district council to be used by another authority going forward, such as service agreements or construction documents?

Step 4 – Delivery

In relation to the creation of a company or joint company by district councils, the necessary legal paperwork will need to be prepared to ensure the district councils' intentions are delivered once the company has been established.

Tax

When collaborating with non-local authority partners, participating in companies, or relocating premises, tax considerations such as VAT, corporation tax and SDLT should be borne in mind at an early stage.

Intellectual property

Intellectual property rights can often be overlooked or misunderstood in a local government context but are a critical issue to consider when seeking to collaborate.

Intellectual property can include trade marks, domain names, copyrights and patents and before establishing a new entity or company it is important to do an audit of all assets and not to forget intellectual property assets. An intellectual property audit involves looking at the following questions:

- What does each authority think it owns?
- What does the authority own (brand and logo trade marks, domain names, copyrights, patents)?
- What are the rights of employees and terms in employees' contracts regarding ownership of IP rights?
- What does the authority use?
- What does the authority license to third parties and what are the terms of the licence?
- What does the authority license from third parties and what are the terms of the licence (e.g. service level agreements, software agreements)?
- What statutory requirements apply?
- How will data protection rules apply?

It is a good idea to identify new or adaptive needs and transitional requirements by considering the following questions:

- Is an assignment of rights required?
- New licences to or from third parties (can these be granted) or is sub-licensing permitted/transitional provisions?
- Employee contracts and IP rights
- What to do with "redundant" rights
- Rights which were previously granted as part of old structure that are no longer available need to be licensed/separated
- Data protection.

It is also a good idea to identify future right requirements by looking at the following matters:

- What new names and logos might be needed?
- What new functions will be involved?
- Rights of ownership - who will need what?
- Creation and use of new rights (copyright etc.) and existing rights (e.g. website content, literature prepared for each entity)
- Data protection.

Data sharing

District councils sharing data should consider the legal (regulatory) and commercial issues that potentially apply.

Until 25 May 2018, the Data Protection Act 1998 (the DPA 98) is applicable to the processing of personal data. Simply put, the term "process" captures many forms of actions, including collection, use, storage, sharing and deletion. The term "personal data" means data from which a living individual can be identified. District councils sharing personal data must consider the applicability of the DPA 98.

Where the DPA 98 applies, district councils may only share personal data in accordance with the eight data protection principles. Additionally, district councils should also consider any relevant codes of practice issued by the Information Commissioner's Office (the ICO). The ICO is the UK's data protection regulatory authority. The ICO has issued a code of practice specifically on data sharing which district councils should consider when sharing personal data.

The DPA 98 will be replaced by the General Data Protection Regulation (the GDPR) on 25 May 2018. In the UK, the GDPR will apply through the UK's Data Protection Act 2018 (subject to Royal Assent). The GDPR largely retains the data protection principles which district councils must consider when sharing personal data. Codes of practice issued by the ICO will continue to be relevant. District councils must also have a lawful basis for processing personal data. Additionally, in certain specified circumstances, the GDPR requires entities involved in the sharing of personal data to enter into contractual provisions in relation to the data sharing.

Data sharing – Some things to think about

Some of the key issues to consider under the DPA 98 and the GDPR include:

- data sharing must be lawful, fair and transparent;
- the processing must be secure;
- district councils must be in a position to demonstrate compliance with the regulations; and
- district councils must have a lawful basis for sharing personal data.

With reference to the lawful basis for sharing personal data, as a general rule, district councils may not share such data without the consent of the individual. Personal data may be shared without consent only where it is necessary for the district council:

- to perform a contract to which the individual is subject;
- to comply with a legal obligation to which a district council is subject;
- to protect the vital interests of the individual or of another person;
- to perform a task carried out in the public interest or in the exercise of official authority vested in the district council; or
- for the purposes of the legitimate interests pursued by the district council.

When sharing personal data for example when collaborating with another council, the NHS or a voluntary services provider, compliance with data protection legislation involves the consideration of a number of questions, including:

- Do the district councils have the specific powers conferred on them by legislation to share personal data?
- Must an information notice be provided to individuals to inform them on how their personal data will be shared and with who their personal data will be shared? If so, how will that information notice be made available to individuals?
- Do district councils require the individuals' consent to share their personal data? If so, how is consent obtained?
- On what lawful grounds can district councils share personal data?
- What risk does the data sharing pose to the privacy of individuals?
- How will the personal data be kept secure?
- Is a controller-processor agreement required?
- What is the data sharing meant to achieve? Can the objective be achieved without sharing data from which a living individual can be identified?

The maximum fines for non-compliance with the DPA 98 are £500,000. The maximum fines for non-compliance with the GDPR are 20 million Euros or 4% of an organisation's global annual turnover, whichever is higher.

Even if the data does not include personal data, district councils should still consider entering into a contractual arrangement to govern the sharing of data. The contractual arrangement should as a minimum address issues which may include:

- a description of the data being shared;
- who the data may be shared with;
- for what purpose;
- obligations of confidentiality on the persons who receive the data; and
- the circumstances under which the arrangement can be terminated and the consequences of termination (i.e., what happens to the data on termination?).

Employment

One of the issues to consider is the implications for staff who will be needed to work in the collaboration. If services or functions are moving from one organisation to another (whether another council or a joint company), then the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) (TUPE) are likely to apply. TUPE protects employees from dismissal and protects their terms and conditions of employment, including their continuity of service. TUPE also imposes obligations on the employers (both transferors and transferees) to inform and consult representatives of the affected employees.

Alternatives or exceptions to TUPE

It is possible that some arrangements, which may be best regarded as transfers of administrative functions or administrative reorganisations may fall within the limited exemption from TUPE, referred to as the "Henke exemption". In Henke v Gemeinde Schierke (CJEU 1996), the court concluded that the Acquired Rights Directive, from which TUPE derives, was designed to protect workers from unfavourable consequences resulting from changes in the structure of undertakings resulting from economic trends at national / community level. Public administrative re-organisations or transfers of administrative functions between public administrative authorities were stated not to constitute transfers of undertakings. Because the transfer related only to activities involving the exercise of public authority and not an economic activity, there was no transfer. Generally, this exception is narrowly interpreted, but advice should be sought on any particular reorganisation or collaboration.

Depending on the nature of any new "undertaking", which arises as a result of the collaboration, alternative staffing models might need to be considered. There might be some services of functions which have, as a matter of statute, to be performed by an officer or employee of a public authority. In this case, TUPE could cause some problems. Alternative models such as secondment or joint employment can be useful to explore, particularly for a delegation of functions.

A secondment is where an employee is employed by one employer, but seconded to another who managed the seconded employee and uses their services on a day to day basis. It needs careful implementation to ensure it is not deemed to be a TUPE transfer.

Joint employment involves two employers being jointly and severally liable for a single employment contract with on employee.

In both a secondment and a joint employment situation, the two employers must agree their respective obligations to the individual.

Managing change

Where either employer envisages "measures" in relation to a transfer, it must consult representatives of the affected employees about those measures. TUPE also imposes certain obligations on the employers to notify each other about the transferring employees and their respective measures.

Generally TUPE prevents changes to employees' terms and conditions and/or dismissals which are because of the transfer. Changes and dismissals are permitted if they are for a reason unrelated to the transfer, or if the employer has an "economic, technical or organisational reason entailing changes in the workforce" (and ETO reason). Advice should be sought in each case, but generally an employer requires an objective business case for any changes and must comply with all applicable consultation requirements (both collective and individual). There are separate rules and protections for collectively negotiated terms.

Harmonising terms and conditions is not an ETO reason and so the employer seeking to change terms and conditions must ensure that they have an ETO reason which supports both the changes to terms and conditions proposed and the "changes in the workforce". Change in the workforce must be a reduction in numbers, a significant change in function for the employees or a change in workplace location.

If a new employer is being set up which is owned or controlled by a public authority, or any other organisation, it is likely to be an "associated employer" for the purposes of equal pay legislation. Thought will need to be given to the terms and conditions to be offered to transferred or new employees, who may be able to draw comparisons with employees of the authority. Thought will also need to be given to the working practices of the new organisation, including what HR policies and procedures it will apply.

Pensions

When it comes to addressing pensions issues arising from a collaboration between councils, we always recommend early engagement with the administering authority. This is particularly the case where the councils sit within separate Local Government Pension Scheme (LGPS) funds.

The administering authority may be a different local authority altogether and forward thinking is advisable as technical pensions issues will need careful scrutiny by LGPS fund committees, which often only meet on a quarterly basis.

How will council employees be affected by the merger and might they end up under a different LGPS fund? These are questions to consider as part of the overall strategy. If the merger involves two or more administering authorities, you may need to open up a dialogue with those authorities to determine the LGPS fund where the Council's liabilities will be allocated. The "buy in" from each administering authority will be crucial in making headway on any proposal. Either way, the costs associated in determining the amount transferred between LGPS funds will be shared by each local authority. Timing is a key factor as actuarial involvement will be necessary.

There is legal provision for staff transfers between LGPS funds. Where staff end up under one LGPS fund, the council will need to bear in mind that this could alter the employer contribution rate the council pays. Much will depend upon the age and pension service profile of the staff concerned. There may in time be an increase or perhaps a reduction in the contribution rate as a direct result in the movement of staff.

Invariably, all local authorities will have entered into agreements with service providers to perform contracts for services. As part of the due diligence exercise, the council should review the collaborating authority's LGPS admission agreements with service providers and the service contract terms. This exercise will flush out any guarantees or risk exposure which could be inherited as part of the collaborating exercise.

Case study: Cotswold District Council

Cotswold District Council, Forest of Dean District Council and West Oxfordshire District requested legal advise in respect of with pensions' issues from its 20/20 Partnership transformation (now known as Publica).

This crossed two different LGPS "Local Government Pension Scheme Advisory Board" administering authorities. We successfully worked with the Councils and the LGPS funds to achieve a "pooling" or "grouping" of employer contribution rate for the respective Councils and the service delivery vehicle – a complex commercial solution.

This required detailed engagement and management of a number of stakeholders - the LGPS funds and their actuaries, and timing milestones pushing progress forward with the LGPS funds and their advisers.

Conclusion

This guidance has outlined a number of models which we hope will assist district councils to collaborate. As explained within each respective model, there are a number of different legal and practical considerations, particularly with respect to: powers, documentation, governance, public procurement, state aid, property considerations, tax implications, intellectual property, data sharing, employment and pensions.

We hope that this guidance is useful when deciding upon the most suitable form of collaboration for any given project and welcome any queries which might arise on legal issues.

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