
TRANSEUROPA – AUDITOR'S REPORT

To: **Extraordinary Governance and Audit Committee – 26 February 2014**

Main Portfolio Area: **Financial Services**

By: **Financial Services Manager**

Classification: **Unrestricted**

Ward: **All**

Summary: To present Members with the auditor's findings to the objections to the 2012/13 accounts in respect of the Transeuropa debt and to present the Council's response to the auditor's recommendations

For Decision

1.0 Introduction and Background

1.1 The Council's auditors, Grant Thornton, received objections from three local electors to the 2012/13 accounts. The objections were as follows:

- The Council acted unlawfully in making a fees and charges agreement with Transeuropa (TEF) and its associated companies, which is contrary to Article 107 of the consolidated Treaty on the functioning of the European Union.
- The Council failed to recognise expenditure relating to TEF in the 2012/13 accounts.
- The Council has failed to achieve value for money in its dealings with TEF. In particular:
 - The payment deferral and repayment arrangements are not supported by contractual agreements;
 - The Council failed to undertake an assessment of the risk of deferring harbour duties and related charges to TEF;
 - The Council's section 151 officer failed to provide an adequate response to Councillors on the robustness of estimates made in the 2012/13 budget;
 - The Council has incurred a financial loss by allowing a large debt to build up unnecessarily and by failing to secure a charge on the assets of the company.
- The Council has failed in its corporate governance/transparency in that
 - There was a lack of transparency throughout the decision making process, with decision taking limited to a small group of officers, the Leader and the Portfolio Holder;
 - The debt deferral and repayment agreements with TEF had significant financial implications and should have been reported to Members as a Key Decision;
 - Significant budget variations should have been reported to Members.

- 1.2 The auditor was asked to:
- Apply to the court for a declaration that the Council has incurred unlawful expenditure by making a fees and charges agreement with TEF;
 - Issue a report in the public interest regarding the failure of the Council to account for the expenditure in respect of TEF;
 - Issue a report in the public interest regarding the failure of the Council to achieve value for money.
- 1.3 The auditor has reviewed the written submissions and representations from the objectors; reviewed internal reports taken to Management Team or Cabinet; reviewed correspondence between the Council and TEF; made enquires of relevant officers and sought legal advice. The auditor's findings are attached at Annex 1.
- 1.4 The auditor has concluded that he does not think that the items of account were unlawful and does not intend to issue a report in the public interest. However, some specific recommendations for the Council have been highlighted within the report. These recommendations have been considered by senior managers and their comments on the report are detailed below.

2.0 Response to Auditors Recommendations

2.1 Overall, the Council considers the auditor's report to be fair and balanced.

2.2 The following comments are made in respect of the report:

'Decision to Defer Payment was Key Decision'

2.2.1 The auditor has concluded that the Council failed to comply with the requirements of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 because the decision to defer the payment from TEF of harbour dues was a key decision and the Council should therefore have notified the Chair of the Overview and Scrutiny Panel. A 'Key Decision' is defined in the Regulations as an executive decision which is likely:

- (a) *To result in the relevant local authority incurring expenditure which is, or the making of savings which are, significant having regard to the local authority's budget for the service or function to which the decision relates; or*
- (b) *To be significant in terms of its effects on communities living or working in an area comprising two or more wards or electoral divisions in the area of the relevant local authority.*

However, the Council's view is that this was not a key decision for three reasons:

- Firstly, the decision at the time it was made could not have resulted in the making of significant savings or the incurring of significant expenditure, thus failing to satisfy the 'financial' test. The auditor agrees with this in his response.
- Secondly, at the time the decision was taken, it was unlikely to have had a significant effect on communities living or working in two or more wards, thus failing the 'community impact' test. In this regard the auditor concluded that the decision would have had a significant impact due to 'the value that the cross-channel ferry operator added to the district in terms of supporting local employment and the supply chain benefits that it brought.' However, as the Port of Ostend was the home port for TEF and the boats were crewed by foreign nationals, the TEF ferry service did not as a matter of fact support significant local employment in any ward thus failing the

requirement to have a significant effect on communities living or working in two or more wards in the district. This view is supported by creditor information derived from the receivers of TEF which show that the principal supply chain beneficiaries were Belgium companies located in and around the Port of Ostend.

- Thirdly, the proposals on the fee structure were to preserve an existing situation rather than to propose a change that would have a significant impact on the local economy.

The Council's view, therefore, is that this was not a key decision and therefore the Council was not under a specific duty to notify the Chair of the Overview and Scrutiny Panel

'Contemporaneous Notes of Key Decisions with Commercial Partners to be kept'

'Notes of key discussions between senior management team and members of the executive to be kept'

- 2.2.2 Commercially sensitive discussions need to be held confidentially in order for these to be meaningful and allow proposals to be discussed fully. Potentially such discussions can have significant financial consequences for the Council and therefore the auditor has recommended that contemporaneous notes of key discussions with commercial partners and between the senior management team and members of the executive are kept. The Council agrees with this and formal notes are now being taken at key meetings. However, with respect to the TEF discussions, the meetings themselves were followed up with considerable contact with TEF setting out the agreed action and having meeting notes would not have changed the approach taken or the position the Council now finds itself in with regard to the recovery of the debt.

'Raising Confidence in the Maintenance of Confidentiality'

- 2.2.3 It was the view of the Chief Executive and the Leader that sharing this decision more widely would have compromised commercial confidentiality resulting in serious harm to the commercial interest of both the Council and TEF. The Auditor has therefore recommended that the Council considers the steps it could take to improve confidence in its ability to maintain commercial confidentiality, thus enabling decisions to be shared more widely with key members.
- 2.2.4 The Council fully support this sentiment in principle, but the fact remains that all too often commercially sensitive and/or confidential information finds its way into the public domain not because of any inherent weaknesses in the Council's decision making and reporting processes (which are fit for purpose) but by human agency. In this regard, if there was evidence that the person leaking such information was a Council officer then formal action would be instituted under the Council's disciplinary procedures, which could result in the dismissal of the officer in question. However, if there was evidence to show that the leak was by an elected member that would be referred to the Standards Committee as an alleged breach of the Members Code of Conduct. In this respect the Auditor's attention is drawn to the fact the Standards Committee currently lacks the power to apply any meaningful sanctions if a councillor is in breach of the Members Code of Conduct discloses commercially sensitive or confidential information. Indeed one councillor has gone on record to make it clear that he intends to disclose confidential or commercially sensitive information that comes into his possessions if he considers that it is in the public interest to do so.
- 2.2.5 This is the real world context in which the Council has to try to maintain confidences and protect commercially sensitive information from disclosure. Consequently, the Council will continue on a case by case basis to balance the need to preserve commercial confidentiality against the risk of compromising that objective by sharing such information

more widely internally. However, doubts are likely to continue to be resolved in favour of the preservation of commercial confidentiality given the potential financial and legal implications of the Council fails to do so.

- 2.2.6 The Council proposed action plan in response to the recommendations made within the auditor's report is shown at Annex 2 to this report.

3.0 Corporate Implications

3.1 Financial

- 3.1.1 As a consequence of the auditor undertaking this review in response to the three objectors, an additional audit fee of £15,000 has been incurred by the Council.

3.2 Legal

- 3.2.1 The council's position with regard to the application of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 is set out in paragraph 2.1.3 above.

3.3 Corporate

- 3.3.1 The findings of the audit report will assist in the revision and development of more robust governance arrangements for consulting on, and recording decisions taken.

3.4 Equity and Equalities

- 3.4.1 There are no equity and equalities implications.

4.0 Recommendation

- 4.1 **That Governance and Audit accept the auditor's report.**

- 4.2 **That Governance and Audit approve the action plan at Annex 2 to this report and note the action already taken.**

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Reporting to:	Sue McGonigal, Chief Executive & S151

Annex List

Annex 1	Auditor's report
Annex 2	Action plan

Corporate Consultation

Legal	Harvey Patterson, Corporate and Legal Services Manager
Finance	Sarah Martin, Financial Services Manager and Deputy S.151 Officer