

## **BUSINESS SUPPORT AND DIGITAL OVERVIEW AND SCRUTINY COMMITTEE**

**31 AUGUST 2023**

### **LOCAL AUTHORITY TRADING COMPANIES**

Report from/author: Bhupinder Gill, Assistant Director Legal and Governance

#### Summary

The Council has a number of Local Authority Trading Companies (LATCOs) which are managed through boards of directors. Historically those boards have consisted of non-executive directors and also Cabinet Members from the Council. Recent public corporate governance reports into LATCOs operated by other local authorities have criticised such a model.

On 11 July 2023 Cabinet approved changes to the governance model of the council's LATCOs, by replacing councillor representation on the boards of directors by independent directors (executive or non-executive) and the establishment of shareholder boards to perform the shareholder responsibilities. This report is presented to Business Support and Digital Overview and Scrutiny Committee for post decision scrutiny and to consider progress on implementation.

#### 1. Recommendations

- 1.1 The Committee is asked to note the Cabinet's decision, as set out in paragraph 2.2 of the report.
- 1.2 The Committee is asked to note progress in the establishment of the three shareholder boards.

#### 2. Budget and policy framework

- 2.1. The decision is within the council's policy and budget framework including the Council Plan. The creation of shareholder boards and decision making in public will also enhance transparency and accountability of the council's interactions with the LATCOs.
- 2.2. On 11 July 2023, the Cabinet approved the following:
  - 2.2.1. The establishment of three shareholder boards (Cabinet sub committees) for each LATCO (inclusive of their subsidiaries). (Decision 112/2023)

- 2.2.2. To delegate authority to the Assistant Director, Legal and Governance, in consultation with the Leader of the Council, to:
- finalise the terms of reference for each shareholder board;
  - review and, where necessary, amend the articles of association for each LATCO, to improve transparency, accountability, oversight and refine matters reserved for shareholder approval (Decision 113/2023).
- 2.2.3. Delegate authority to each shareholder board to exercise decisions that are reserved to the shareholder and to respond to matters raised by the board of directors (Decision 114/2023)
- 2.2.4. To delegate authority to the Assistant Director, Legal and Governance, in consultation with the relevant Chairperson for each shareholder board, to take decisions that are required as a matter of urgency (Decision 115/2023).
- 2.2.5. To request the Leader of the Council to determine the membership of each shareholder board and the chairperson (Decision 116/2023).

### 3. Background

- 3.1. The council has several local authority trading companies (LATCOs) established to carry out specific functions. The main LATCOs are Kyndi, Medway Development Company (MDC) and Medway Norse. The companies are managed by a board of directors which historically has consisted of individuals recruited to perform that role and also the appointment of a number of cabinet members. Kyndi and MDC also have subsidiary companies as follows:
- 3.1.1. Kyndi Ltd subsidiaries (2) – Kyndi Care Ltd and Medway Public Services Ltd.
- 3.1.2. MDC Ltd subsidiaries (2) – MDC (Land and Projects Ltd) and MDC (PRS) Ltd.
- 3.2. In recent years there have been a number of high profile LATCO failures and external corporate governance reviews conducted have identified poor governance as a contributor, specially the appointment of company directors based on holding political office as opposed to sector relevant skills, knowledge or experience. It was proposed that appointments to the council's LATCO boards of directors are no longer made on the basis of holding political office but rather sector relevant, skills, knowledge and experience. The council's external auditors have also indicated that they would welcome such a change in direction.
- 3.3. In order to ensure proper oversight and appropriate shareholder input can be made it was proposed that shareholder boards are established, as Cabinet sub committees, where relevant Cabinet Members can consider reports and provide either a steer or decision from the shareholder.

- 3.4. The size and membership of each shareholder board is a matter for the Leader to determine and can be different for each shareholder board. Only Cabinet Members can be appointed to each sub committee. Cabinet sub-committees are subject to the access to information rules etc in the same way as the Cabinet is and meetings will be held in the public. Cabinet sub-committees would be supported by Democratic Services.
- 3.5. The portfolios for each Cabinet Member have recently been determined and the lead member for each LATCO is as shown below:
- |                        |                     |
|------------------------|---------------------|
| Medway Development Co. | Cllr Naushabah Khan |
| Medway Norse           | Cllr Simon Curry    |
| Kyndi                  | Cllr Teresa Murray  |
- 3.6. An external public sector legal firm has been retained to review the articles of association for each LATCO and make recommendations to make sure that they remain fit for purpose and provide opportunities to maximise potential for growth and income whilst supporting the councils ambitions.
- 3.7. Medway Norse: Medway Norse is materially different to our other LATCOs as it is a joint venture with Norfolk County Council (NCC). The articles of association for Medway Norse Ltd require two board members to be appointed by Medway Council, who are either a Councillor or an Officer, and three by NCC. Attendance of three directors, one director from Medway Council and two from NCC is mandatory to achieve a quorum for board meetings. Furthermore, the Chair of the board is a Medway appointed director.
- 3.8. We have been informed the company needs to hold board meetings to transact business and thus whilst the Council is reviewing its governance structures in respect of LATCOs it is proposed that Ruth Du-Lieu who is currently appointed as Director continue to perform that role.
- 3.9. Any changes to the articles of association for this company will need to be agreed with the other shareholder, NCC.
- 3.10. Oversight: Once independent directors have been appointed, the council as shareholder will no longer have visibility of reports to be considered at board meetings, and limited opportunity to influence decisions. A mechanism needs to be agreed that will support oversight and the provision of a shareholder steer.
- 3.11. The Cabinet considered two broad options which could assist with such transparency. The notice period for a calling board meeting could be extended with a requirement to serve board papers on the shareholder nominee. This could allow the shareholder board (Cabinet sub-committee) to meet in the interim and provide a steer where appropriate. The notice period would need to be sufficiently long enough for a meeting the sub-committee to be called and meet. It is considered this may frustrate decision making by the board particularly where the shareholder has no material steer to provide.

3.12. As an alternative, the articles could be revised so that the board papers have to be served to a shareholder nominee. That nominee could alert the chair of the shareholder board on the items on the agenda and seek a view as to whether the shareholder board needed to meet to consider their position. Where it was considered no such steer was required the company board of directors could meet and determine issues as planned. Where the shareholder needed to consider the matter, the board could be required adjourn consideration of that item(s) until either 14 days or such time as the shareholder board had reverted (which is the sooner). In extremely urgent cases the Assistant Director, Legal and Governance could provide steer following consultation with the Chairperson of the relevant shareholder board.

#### 4. Options for Cabinet:

4.1. Cabinet was presented with the following options:

4.2. Option 1 - Maintain current arrangements. Following the local elections in May none of incoming cabinet members have experience of working on the LATCO boards and a steep learning curve would be applicable. Whilst that can surmounted, this provided a natural opportunity to review existing governance models and adopt best practice as identified in public corporate governance reports issued recently.

4.3. Option 2 - Shareholder nominee. The role of shareholder and the performance of that role could be discharged by an individual Cabinet Member or the cabinet as whole. Any decision making would need to comply with the rules regarding public decision making and access to information rules. If the cabinet were to perform this role, it would take up valuable time of those cabinet members who do not have direct involvement with the activities of the LATCO. Moving to a single nominee would forego taking advantage of the wealth of experience and knowledge which multiple Cabinet Members can bring and miss the opportunity for collaborative working across portfolios.

4.4. Option 3 - Shareholder board. The creation of a board will facilitate separation of roles of shareholder, directors and advisors. Further, Cabinet Members only performing the roles of shareholder on behalf of the council, will minimise the possibility of conflicts of interest. Further, with multiple board members this will facilitate transparent consultation consideration of matters across several cabinet responsibilities.

#### 5. Advice and analysis

5.1. For the reasons set out above Cabinet approved Option 3. It considered that the creation of shareholder boards comprising a number of cabinet members with direct responsibility for the functions delivered by or served by the LATCO provided the best option to move forward.

5.2. A Diversity Impact Assessment (DIA) had not been prepared. The move to shareholder boards, comprising a number of cabinet members will allow for

wider breadth of views to be considered when determining shareholders reserved matters.

- 5.3. The move to appoint independent directors will also support the opportunity to bring greater inclusion and diversity to the company boards.
- 5.4. As set out in section 3 above, the Council's access to information rules will apply to each of these Shareholder Boards. The call in rules specified in section 15 of the Overview and Scrutiny rules (Constitution) will apply to decisions made by the Shareholder Boards in the same way that apply to Cabinet decisions.
- 5.5. Overview and Scrutiny will likely wish to review its arrangements for scrutiny of the three LATCOs. Presently, the Business Support Overview and Scrutiny Committee receives an annual report from Medway Norse on strategic matters whilst Regeneration, Culture, Environment Overview and Scrutiny Committee receives an annual report on operational matters.

## 6. Progress in Implementation

- 6.1. The Council is the sole shareholder of MDC and Kyndi. The shareholder boards remain to be established and it hoped this will be progressed in the next few weeks. An external law firm engaged to review the articles of associations and also produce a memorandum of understanding has shared a first draft of these documents, which need to be considered before they can be approved. Implementation of progress in relation to these two companies is within the gift of the council.
- 6.2. Medway Norse is a joint venture company and such changes to our relationship will be subject to negotiation and may take longer. The author wrote to Medway Norse with a draft a new contract in late July and is awaiting a response. This request was followed up on 18 August.
- 6.3. Officers met with relevant cabinet members on 16 August 2023 to ensure all relevant stakeholders had a common understanding of the current position and direction of travel. This group will meet regularly to maintain momentum and provide strategic input into the negotiations. Once the details of the shareholder board have been confirmed discussion can be held to agree any proposed changes to the governance model.

## 7. Risk management

- 7.1. Risk management is an integral part of good governance. The Council has a responsibility to identify and manage threats and risks to achieve its strategic objectives and enhance the value of services it provides to the community.

Risk	Description	Action to avoid or mitigate risk	Risk rating
Slower decision making by the LATCo	The requirement to consult with the shareholder prior to decisions by the LATCo board will slow decision making by them	A mechanism for the provision an urgent steer by the shareholder has been proposed	CIII

For risk rating, please refer to the following table

Likelihood	Impact:
A Very likely B Likely C Unlikely D Rare	I Catastrophic II Major III Moderate IV Minor

## 8. Consultation

- 8.1. The Cabinet was advised A copy of this report was shared with the chief officer for each LATCO and they were requested to share it with the current directors, all of whom were asked to provide any feedback in time for consideration the Cabinet. A copy of the draft report was shared with our external legal advisors who support the review of the articles of associations. No adverse comments were received.

## 9. Climate change implications

- 9.1. [The Council declared a climate change emergency in April 2019](#) - item 1038D refers, and has set a target for Medway to become carbon neutral by 2050.
- 9.2. There are no direct implications arising from this report.

## 10. Financial implications

- 10.1. There are no direct financial implications for the Council arising from this report. The appointment of additional executive and non-executive directors to the boards of the companies might incur additional costs, however these would need to be borne by the companies themselves. Officer support to the shareholder boards would be met from within the Council's existing resources.

## 11. Legal implications

- 11.1. These are contained within the body of the report.

## Lead officer contact

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## Appendices

None.

## Background papers

None.