



Extraordinary Meeting of the Council

Time and Date

2.00 pm on Tuesday, 31st May, 2016

Place

Council Chamber, Council House, Coventry

1. **Apologies**
2. **Declarations of Interest**

It is anticipated that the following matter will be referred as a Recommendation from Cabinet 31 May 2016. The report is attached and the relevant Recommendations will be circulated separately.

3. **West Midlands Combined Authority**
 - 3.1 Implementing the Devolution Agreement - Provision for Mayoral West Midlands Combined Authority (Pages 3 - 88)
Report of the Chief Executive
 - 3.2 Statement by the Leader

Item for Consideration

4. **Ricoh Arena Judicial Review** (Pages 89 - 122)
Report of Executive Director of Resources

Chris West, Executive Director, Resources, Council House Coventry

Friday, 20 May 2016

Note: The person to contact about the agenda and documents for this meeting is Carolyn Sinclair/Suzanne Bennett 024 7683 3166/3072

Membership: Councillors F Abbott, N Akhtar, P Akhtar, R Ali, A Andrews, R Auluck, R Bailey, S Bains, L Bigham, J Birdi, J Blundell, R Brown, K Caan, J Clifford, G Crookes, G Duggins, D Gannon, M Hammon, L Harvard (Chair), J Innes, B Kaur, L Kelly, D Kershaw, T Khan, A Khan, R Lakha, R Lancaster, M Lapsa, J Lepoidevin, A Lucas, P Male, K Maton, T Mayer, J McNicholas, C Miks, K Mulhall, J Mutton, M Mutton, J O'Boyle, G Ridley, E Ruane, T Sawdon, P Seaman, B Singh, D Skinner, T Skipper (Deputy Chair), H Sweet, K Taylor, R Thay, C Thomas, S Walsh, D Welsh and G Williams

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language please contact us.

Carolyn Sinclair/Suzanne Bennett
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Cabinet	31 May 2016
Council	31 May 2016

Name of Cabinet Members:
Cabinet Member for Policy and Leadership

Director Approving Submission of the report:
Chief Executive

Ward(s) affected:
City-wide

Title:
Implementing the Devolution Agreement - Provision for Mayoral West Midlands Combined Authority

Is this a key decision?
Yes

Executive Summary:

On 23 February 2016 Coventry City Council consented to a Draft Order to be laid before Parliament to allow for the creation of the West Midlands Combined Authority (WMCA), this initial “Establishment Order” is currently before parliament and is anticipated to come into force on 10th June 2016 on which date the WMCA will be established.

Negotiations with Government have continued to ensure that the WMCA creates the right economic development incentives for the people of Coventry. The “Devolution Deal” is the basis of this agreement and underpins the first stage of devolution. Assurance work around the Devolution Deal has been undertaken by PWC and Grant Thornton and is attached to this report.

On the 13 October 2015 Council resolved:

“That any devolution deal would be subject to a separate and detailed decision by Cabinet and Full Council which would include an analysis of the benefits and risks and the value of the deal to the city of Coventry along with any proposed changes in governance including whether or not to have an elected metro mayor.

A further report and documentation in relation to the process and details for a Mayoral Combined Authority are to follow this report to be received in advance of the Council and Cabinet meetings on the 31st May.

Recommendations:

Cabinet is recommended to:

1. Consider the Devolution Deal and due diligence work surrounding it and make recommendations to the City Council.

Council is recommended to:

2. Consider the Devolution Deal and due diligence work surrounding it.

List of Appendices (web links to documents as indicated)

Appendix 1 WMCA Devolution Agreement

Appendix 2 Assurance Document by PWC

Other useful background papers:

Cities and Local Government Devolution Act 2016

<http://www.legislation.gov.uk/ukpga/2016/1/contents/enacted/data.htm>

Local Democracy, Economic Development and Construction Act 2009

<http://www.legislation.gov.uk/ukpga/2009/20/contents>

Has it been or will it be considered by Scrutiny?

No

Has it been or will it be considered by any other Council Committee, Advisory Panel or other body?

No

Will this report go to Council?

Yes

1. Context (or background)

- 1.1 The seven Metropolitan Councils of the West Midlands (Birmingham City Council, City of Wolverhampton Council, Coventry City Council, Dudley Metropolitan Borough Council, Sandwell Metropolitan Borough Council, Solihull Metropolitan Borough Council and Walsall Metropolitan Borough Council) conducted a Review of Strategic Governance in 2014 to assess whether the arrangements for economic development, regeneration and transport as they stood should continue or would benefit from improvements. This review highlighted the positive joint working to date that has been in place through informal arrangements, and then considered the options for the future. It considered change against the key statutory tests under the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA):
- The exercise of statutory functions relating to economic development, regeneration and transport
 - The effectiveness and efficiency of transport
 - The economic conditions in the area
- 1.2 This concluded that the establishment of a combined authority for the West Midlands was best placed to support business to further growth and to create jobs, to secure an improvement in the region's economic conditions. The Combined Authority would draw together strategic work across transport, economic development, employment and skills, improving outcomes and providing opportunity for the region.
- 1.3 A Scheme was then drafted to form the legal basis for the creation of the new body containing the membership, powers, functions and voting arrangements. At its meeting on 13 October 2015 Council endorsed these proposals and agreed that Coventry City Council should formally become a Constituent member of the WMCA. This Scheme was submitted to Government on 26 October 2015. A draft Order ("The Establishment Order") based on the scheme was created by the Secretary of State and approved by Council on 23 February 2016. This "Establishment" Order is currently laid before parliament and, subject to Parliamentary approval, it is envisaged that the Secretary of State will make the Order on the 10th June 2016 and on the day the Order is made the West Midlands Combined Authority will come into force; this will be its vesting day.
- 1.4 The remit of the Combined Authority for the West Midlands Combined Authority will be strategic economic development, regeneration, transport, employment and skills functions that can be better delivered collaboratively across the West Midlands. The Combined Authority will remain a focused strategic decision making body, with responsibility over those strategic issues where it is mutually beneficial for local authorities, Centro, and the Local Enterprise Partnerships to work together. It is not a 'super Council' and each Council will maintain its independence and sovereignty.

2. Matters for consideration

2.1 Devolution Deal

2.1.1 In November 2015 a proposed devolution deal was signed by the Leaders of the seven Constituent Councils and the three Local Enterprise Partnership Chairs. The Devolution Deal was negotiated for the benefit of the Citizens of Coventry and the West Midlands region; PwC and Grant Thornton have been engaged to undertake the assurance and due diligence work around the establishment of the WMCA and Devolution Deal. This assurance report is at appendix 2 for consideration by Cabinet and Council.

2.1.2 The assurance report states:

“It is clear from discussions with all constituent and non-constituent Members that engaged with us, that the establishment of the West Midlands CA and the negotiation of a Devolution Agreement with the Government provided Councils with the ability to go further and faster in exploiting the economic potential of the area. It also enables authorities to take more concerted action on productivity in the public and private sectors, including a programme of ambitious public service reform.

Our review of the economic market assessment information available to the constituent authorities supports this conclusion and would appear to be a sound basis on which to develop proposals. “

3. Options considered and recommended proposal

3.1 Cabinet and Council is asked to consider the Devolution Deal in accordance with the resolution of Council on the 13 October 2015 including analysis of the benefits and risks and the value of the deal to the city of Coventry.

4. Timetable for implementing this decision

Council and Cabinet are to consider the devolution deal on the 31st May 2016.
The anticipated vesting date of the West Midlands Combined Authority is 10th June 2016.

5. Comments from Executive Director of Resources

5.1 Financial implications

The agreed Combined Authority establishment budget for 2015/16 was £2.1 million, each of the participating local authorities contributing £300,000. The actual expenditure incurred totalled £1.5 million in 2015/16, with the remaining budget committed to be spent early in 2016/17. The City Council has now set aside a further budget of £500,000 to meet an anticipated levy from the Combined Authority in 2016/17.

5.2 Legal implications

The Local Democracy, Economic Development and Construction Act 2009 (as amended) allows two or more local authorities to form a combined authority which is a separate public body and which may exercise certain functions of the member authorities.

6. Other implications

6.1 How will this contribute to achievement of the Council's key objectives / corporate priorities (corporate plan/scorecard)?

The aim of setting up the West Midlands Combined Authority is to promote economic growth and improve the provision of transport. This is in line with the Council's aim to be a top ten city and to deliver prosperity and social justice by ensuring that local people, including those who are most disadvantaged, are able to benefit from that growth.

6.2 How is risk being managed?

The Combined Authority will be a statutory organisation and its members would be required to manage the risks associated with its activities.

6.3 What is the impact on the organisation?

The combined authority and the development of the devolution deal will use the time and resources of Councillors and senior officers. A combined authority will not replace the Council and its responsibilities and services will remain the same.

6.4 Equalities / EIA

The setting up of a combined authority enables local authorities to work collaboratively to improve economic outcomes and transport in the area. No adverse impact on any group protected under the Equality Act is anticipated by this decision. Once set up a combined authority is expected to meet the requirements of the Equality Act as a public sector body.

6.5 Implications for (or impact on) the environment

None identified at this stage.

6.6 Implications for partner organisations?

Partner organisations will be encouraged to take part in the consultation process outlined above.

Partnership working is key for successful delivery of the Devolution Deal.

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Enquiries should be directed to the above people.

Contributor/approver name	Title	Directorate or organisation	Date doc sent out	Date response received or approved
Jaspal Mann	Equalities Officer	Chief Executive		20/05/16
Suzanne Bennett	Governance Services	Resources		20/05/16
Names of approvers for submission: (officers and members)				20/05/16
Fran Collingham	Assistant Director - Communications	Chief Executive		20/05/16
Chris West	Executive Director	Resources		20/05/16
Martin Reeves	Chief Executive	Chief Executive		20/05/16
Councillor Duggin	Cabinet Member for Policy and Leadership			20/05/16

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HM Treasury



WEST MIDLANDS
COMBINED AUTHORITY

WEST MIDLANDS COMBINED AUTHORITY DEVOLUTION AGREEMENT



HM Treasury



WEST MIDLANDS
COMBINED AUTHORITY

.....
The Rt Hon George Osborne
Chancellor of the Exchequer

.....
Cllr Bob Sleigh
Chair, Shadow West Midlands
Combined Authority
Leader of Solihull Metropolitan
Borough Council

.....
Cllr Darren Cooper
Vice-Chair, Shadow West Midlands
Combined Authority
Leader of Sandwell Metropolitan
Borough Council

.....
Lord O'Neill
Commercial Secretary to
the Treasury

.....
The Rt Hon Sajid Javid
Secretary of State for
Business, Innovation and
Skills

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Sir Albert Bore
Leader of Birmingham City Council

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Cllr Ann Lucas OBE
Leader of Coventry City
Council

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Cllr Peter Lowe
Leader of Dudley Metropolitan
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Cllr Mike Bird
Leader of Walsall Metropolitan
Borough Council

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Cllr Roger Lawrence
Leader of the City of
Wolverhampton

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Stewart Towe CBE
Chairman of the Black
Country Local Enterprise
Partnership

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Jonathan Browning
Chairman of the Coventry &
Warwickshire Local
Enterprise Partnership

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Andy Street
Chairman of the Greater
Birmingham & Solihull
Local Enterprise Partnership

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DEVOLUTION AGREEMENT BETWEEN GOVERNMENT AND THE WEST MIDLANDS COMBINED AUTHORITY SHADOW BOARD

This document sets out the terms of a proposed agreement between the West Midlands Combined Authority Shadow Board and the government to move forward with a radical devolution of funding, powers and responsibilities. Final agreement is conditional on the legislative process, the Spending Review, further public engagement, agreement by the constituent councils, and formal endorsement by the Shadow Board and Ministers early in the New Year.

The local authorities and the Greater Birmingham and Solihull, Coventry and Warwickshire and the Black Country Local Enterprise Partnerships (LEPs) have made significant progress in a very short time, coming together, not only to publish proposals for the creation of a West Midlands Combined Authority, but to secure an ambitious devolution agreement at the same time. This agreement is recognition of that unique shared commitment to the future of the West Midlands.

The West Midlands stands at a moment of great economic potential, as it performs increasingly strongly on growth, inward investment and exports and looks forward to the game changing investment in HS2 over the next decade. The above three LEPs have indicated their intention to work together to form an ambitious single Strategic Economic Plan. The government welcomes and supports this cooperation. The government will work with the proposed Combined Authority to ensure that devolution supports the public and private sector of the West Midlands to grasp these opportunities, including taking forward the HS2 Growth Strategy.

On an even larger scale, there is the opportunity to deliver significant additional economic growth and job creation through the Midlands Engine. The government has set out its support for the Midlands Engine and applauds the West Midlands Combined Authority Shadow Board's continuing positive engagement with this agenda, including the Midlands Connect programme of cross-regional transport connections.

Devolution must enable the West Midlands to tackle the economic and social challenges that the region faces. The agreement includes powers to support adult skills provision and employment support, and the ability to create an integrated approach to local public transport, including a single smart ticketing system.

This agreement is the first step in a process of further devolution. The government will continue to work with the West Midlands on important areas of public service reform to enable people to reach their full potential, including policing, mental health, troubled individuals and youth justice.

The agreement is based on the establishment of a mayor for the West Midlands metropolitan area working as part of the combined authority with a cabinet of council leaders and subject to local democratic scrutiny. However, given the importance of existing collaboration across the three LEP geography, which is an important economic geography for the West Midlands area, as well as with neighbouring areas, the agreement

recognises that the wider partnership with business through the LEPs and with neighbouring councils will be critical to success.

The formal deal would enable the Combined Authority to create an investment fund of over £1 billion through a 30 year revenue stream and locally raised finance. An incoming Mayor would have the option, on the basis of support from business, to raise up a business rate supplement. Further details will be set out at and following the Spending Review through a place-based settlement.

We have a shared confidence in the economic potential of the West Midlands and a shared belief in the power of devolution to help fully realise that potential. Devolution will enable the proposed West Midlands Combined Authority to deliver outcomes that matter to local people: more jobs, better training and improved skills, faster, more convenient and more integrated transport links and more new homes. The government and local political and business leaders have worked together to reach this agreement, and will now work together to champion further meaningful and radical devolution and to secure strong public support for this devolution deal.

Summary of the proposed devolution deal agreed by the government and the West Midlands Combined Authority Shadow Board supported by the Greater Birmingham and Solihull, Black Country and Coventry and Warwickshire Local Enterprise Partnerships.

A new, directly elected Mayor for the West Midlands will act as Chair to the West Midlands Combined Authority (WMCA) and will exercise the following powers and functions devolved from central government:

- Responsibility for a consolidated, devolved transport budget, with a multi-year settlement to be agreed at the Spending Review.
- Responsibility for franchised bus services, which will support the WMCA's delivery of smart and integrated ticketing across the Combined Authority's constituent councils.
- Responsibility for a new Key Route Network of local authority roads that will be managed and maintained at the Metropolitan level by the WMCA on behalf of the Mayor.
- Planning powers will be conferred on the Mayor, to drive housing delivery and improvements in housing stock, and give the same competencies as the HCA. The government will also work with the WMCA Land Commission.

The WMCA will receive the following powers:

- Control of a new additional £36.5 million a year funding allocation over 30 years, to be invested to drive growth.
- Devolved 19+ adult skills funding from 2018/19, with the Shadow Board responsible for chairing Area Based reviews of 16+ skills provision.
- Joint responsibility with the government to co-design employment support for the hardest-to-help claimants.
- Responsibility to work with the government to develop and implement a devolved approach to the delivery of business support programmes from 2017 and deliver more integrated working together on investment and trade.

In addition the government:

- Supports the ambition of the HS2 Growth Strategy and the emerging West Midlands Strategic Transport Plan, and commits to funding the Curzon Street Enterprise Zone extension in order to help deliver this strategy.
- Commits to funding the Eastside Metro extension to Digbeth, subject to a business case, to support the first part of the HS2 Growth Strategy, and supports the work of the Shadow Board to develop a delivery plan, encompassing the Metro extensions from Curzon to Interchange and from Brierley Hill, in order to realise the full benefits of HS2.
- Will work with the Shadow Board through the development of the second Roads Investment Strategy to explore options for reducing congestion on the strategic road network in the West Midlands.
- Commits to support the programme of public service reform across the West Midlands, including working with the Shadow Board to consider the scope for further devolution of youth justice services.

Further powers may be agreed over time and included in future legislation.

Governance

1. The proposal for a Mayoral Combined Authority is subject to the final formal consent of the West Midlands Combined Authority Shadow Board, the constituent councils, agreement of ministers, and to the Parliamentary process for the necessary primary legislation (The Cities and Local Government Devolution Bill and the proposed Buses Bill) and subsequent orders.
2. The Mayor will be the Chair and a member of the proposed Combined Authority and subject to the Authority's Constitution and associated procedures (to be amended in the light of the introduction of a Mayor). The powers contained in this deal document will be devolved from the government to the Mayoral Combined Authority. The Mayor will exercise certain powers, with personal accountability to the electorate, devolved from central government and set out in legislation:
 - Responsibility for a consolidated, devolved transport budget to be agreed at the Spending Review.
 - Powers over the franchising of bus services in the Combined Authority area, subject to necessary legislation and local consultation.
 - Responsibility for an identified Key Route Network of local authority roads that will be collaboratively managed and maintained at the Metropolitan level by the Combined Authority on behalf of the Mayor.
 - The ability to place a supplement on business rates to fund infrastructure, with the agreement of the relevant local enterprise partnership boards, up to a cap.
- Planning powers will be conferred on the Mayor, to drive housing delivery and improvements in housing stock, and give the same competencies as the HCA. The government will also work with the WMCA Land Commission.
3. Other members of the proposed West Midlands Combined Authority (to be renamed as a Cabinet) will become portfolio leads for aspects of the combined authority's responsibilities, on the basis to be set out in its constitution, and agreed with the Mayor.
4. The Mayor for the West Midlands Combined Authority area will be elected by the local government electors for the area of the proposed West Midlands Combined Authority – the areas of the constituent councils of Birmingham City Council, City of Wolverhampton Council, Coventry City Council, Dudley Metropolitan Borough Council, Sandwell Metropolitan Borough Council, Solihull Metropolitan Borough Council and Walsall Metropolitan Borough Council. Subject to parliamentary time allowing for the passage of legislation through parliament, the first election will be held in May 2017. Any powers devolved in the interim will, subject to its establishment, be exercised by the West Midlands Combined Authority.
5. Proposals for decision by the Combined Authority may be put forward by the Mayor or any Cabinet Member. Any questions that are to be decided by the Combined Authority are to be decided by way of two thirds majority of constituent members and overall majority of all members present and voting, subject to those majorities including the vote of the Mayor, unless otherwise specifically delegated through the Authority's Constitution or where it is agreed that specific issues will be reserved for unanimous or constituent member majority voting only.

6. The Cabinet will examine the Mayor's draft annual budget, plans and strategies and will be able to reject them if two-thirds of the constituent council members agree to do so, subject to the circumstances set out in the Mayoral Order.
7. The proposed Combined Authority would have Overview and Scrutiny arrangements and these will be retained, subject to any amendments required to reflect the introduction of the Mayor and any new statutory provisions.
8. Any transfer to the Combined Authority or Mayor of existing powers or resources currently held by the constituent authorities must be by agreement of all constituent members.
9. Further apportionments of funding streams that are already allocated to the Greater Birmingham and Solihull LEP on the basis of the existing overlap formula with Stoke and Staffordshire LEP and Worcestershire LEP will continue to be allocated in this way. This only applies to the Greater Birmingham and Solihull LEP as there are no overlaps with other LEPs for Black Country and Coventry and Warwickshire.
10. Additional funding or budgets that are devolved as a result of this agreement will go to the West Midlands Combined Authority, subject to its establishment. The West Midlands Combined Authority must exercise functions in relation to its area (i.e. it may invest outside the constituent members of the Combined Authority if that investment can be said to relate to its area – in other words not only in its area).
11. This deal relates to the devolution of funding and powers to a Combined Authority with constituent councils as currently proposed. However, following this deal, where appropriate and with local agreement, the government commits to exploring with the West Midlands how best to extend devolved budgets and powers across the three LEP geography and include neighbouring councils in devolution where possible.
12. It is essential that Birmingham continues to robustly pursue the implementation of the improvements recommended by the Kerslake Review. This will ensure that the benefits intended from the creation of the proposed West Midlands Combined Authority and through this devolution deal can be fully realised.

Finance and Funding

13. If established, the Combined Authority will create a fully devolved funding programme covering all domestic budgets for devolved functions ("The West Midlands Investment Fund"), accountable to the Combined Authority subject to the details set out in this document. The Fund will operate as a single programme, bringing together resources for economic growth, skills and employability, regeneration, transport and housing; including future allocations from the Local Growth Fund if agreed locally. The Combined Authority will demonstrate an objective means with which to assess interventions and programme design so that these are aligned to their balanced economic outcomes for the area.
14. The agreement of this deal shall not in any way limit or prevent the proposed West Midlands Combined Authority from bidding for future allocations of national funding nor will it change any previous funding agreements made with the West Midlands.

15. As an initial allocation to the Investment Fund, the government will make an allocation of £36.5 million a year for 30 years in revenue funding, allowing the West Midlands Combined Authority to create an investment fund of over £1 billion, subject to a jointly agreed 5-yearly gateway assessment process to confirm the investment has contributed to economic growth. The emerging West Midlands Combined Authority Performance Framework is being developed as a local monitoring tool and government will discuss with the Combined Authority whether this can be incorporated into the assessment process. In addition, the Mayor will be given the power to place a supplement on business rates to fund infrastructure, with the agreement of the relevant Local Enterprise Partnership boards, up to a cap.
16. The Cities and Local Government Devolution Bill currently in Parliament makes provision which will govern further prudential borrowing for Combined Authorities. Following Royal Assent, the government will work with the West Midlands Combined Authority Shadow Board to determine how these powers could apply within a framework of fiscal responsibility and accountability to the Combined Authority and local authorities.
17. The Combined Authority and government will pilot a scheme which will enable the Combined Authority to retain all business rate growth that would otherwise have been paid as central share to government, above an agreed baseline, for an initial period of five years. The government and the Combined Authority will also discuss wider localisation of business rates.
18. The West Midlands Combined Authority Shadow Board has supported bids for additional Enterprise Zones at Brierley Hill, Dudley, and extensions to the Black Country Enterprise Zones – i54 and Darlaston - as part of the current bidding round for further Enterprise Zones. The government is actively considering the business cases and will bring forward decisions as part of the Spending Review.
19. However, in order to support the Combined Authority Shadow Board's HS2 Growth Strategy, the government agrees to support the Curzon Street Enterprise Zone and approves the business case.
20. The government is committed to working with the Combined Authority to achieve Intermediate Body status for European Regional Development Funding and European Social Funding for the Greater Birmingham and Solihull LEP, to complement other aspects of this devolution deal. The government will work with the Combined Authority Shadow Board to test whether it will be possible to implement and if so, government and Greater Birmingham & Solihull LEP will work together to agree a timetable to put this in place

Skills

21. The government recognises the importance of the existing collaboration between the three Local Enterprise Partnerships on employment and skills. The government is committed to working with the Combined Authority Shadow Board to ensure that, subject to the readiness conditions being met, when skills devolution to the proposed Combined Authority occurs it supports the creation of an effective and coherent Employment and Skills Strategy, which addresses shared challenges over the geography of the three LEPs.

22. The government commits to working with the Combined Authority on Area Reviews of post-16 education and training across the West Midlands. The reviews will be chaired by the Combined Authority and will include all post-16 education and training provision in the initial analysis phase. Recommendations will be focused on general Further Education and Sixth Form Colleges, however the Regional Schools Commissioner and the relevant local authorities will consider any specific issues arising from the reviews for school sixth form provision.
23. The government commits to working with the Combined Authority to support the further development and implementation of the Employment and Skills strategy. This will draw on an evidence base informed by the Area Reviews and labour market intelligence to create the overarching strategic framework for delivering devolved responsibilities. The Employment and Skills Strategy will cover the Combined Authority area, but will also take into account the broader geography of the three LEAs.
24. The government will enable local commissioning of outcomes to be achieved from the 19+ adult skills budget starting in academic year 2016/17; and will fully devolve budgets to the Combined Authority from academic year 2018/19 (subject to readiness conditions). These arrangements do not cover apprenticeships.
25. Devolution will proceed in three stages, across the next three academic years:
 - o Starting now, the Combined Authority Shadow Board will begin to prepare for local commissioning. It will develop a series of outcome agreements with providers, about what should be delivered in return for allocations in the 2016/17 academic year. This will replace the current system of funding by qualifications as providers will receive their total 19+ skills funding as a single block allocation. This new arrangement will allow the Combined Authority Shadow Board to agree with providers the mix and balance of provision that will be delivered in return for the block funding, and to define how success will be assessed.
 - o For the 2017/18 academic year, and following the area review, the government will work with the Combined Authority to vary the block grant allocations made to providers, within an agreed framework
 - o From 2018/19, there will be full devolution of funding. The Combined Authority will be responsible for allocations to providers and the outcomes to be achieved, consistently with statutory entitlements. The government will not seek to second guess these decisions, but it will set proportionate requirements about outcome information to be collected in order to allow students to make informed choices. A funding formula for calculating the size of the grant to local / combined authorities will need to take into account a range of demographic, educational and labour market factors.
26. The readiness conditions for full devolution are that:
 - a. Parliament has legislated to enable transfer to local authorities of the current statutory duties on the Secretary of State to secure appropriate facilities for further education for adults from this budget and for provision to be free in certain circumstances
 - b. Completion of the Area Reviews process leading to a sustainable provider base

- c. After the Area Reviews are complete, agreed arrangements are in place between central government and the Combined Authority to ensure that devolved funding decisions take account of the need to maintain a sustainable and financially viable 16+ provider base
 - d. Clear principles and arrangements have been jointly agreed between central government and the Combined Authority for sharing financial risk and managing failure of 16+ providers, reflecting the balance of devolved and national interest and protecting the taxpayer from unnecessary expenditure and liabilities.
 - e. Learner protection and minimum standards arrangements are agreed.
 - f. Funding and provider management arrangements, including securing financial assurance, are agreed in a way that minimises costs and maximises consistency and transparency.
27. To ensure continued local collaboration following the Area Reviews, the Combined Authority Shadow Board will work in partnership with local colleges and providers to develop the local Skills and Employment Strategy. This will aim to ensure that post-16 providers are delivering the skills that local employers require. It is expected that the Combined Authority Shadow Board will then collaborate with colleges and providers, with appropriate support from the Education Funding Agency, to work towards that plan.
28. The government will work with the Combined Authority Shadow Board to ensure that local priorities are fed into the provision of local careers advice in line with the Employment and Skills Strategy, such that it is employer-led, integrated and meets local needs. In particular, the Combined Authority Shadow Board will ensure that local priorities are fed into provision through direct involvement and collaboration with government in the design of local careers and enterprise provision for all ages, including collaboration on the work of the Careers and Enterprise Company and the National Careers Service.

Employment

29. The proposed West Midlands Combined Authority will work with the Department for Work and Pensions (DWP) to co-design the future employment support, from April 2017, for the hardest-to-help claimants, many of whom are currently referred to the Work Programme and Work Choice. The Employment and Skills Strategy will influence the co-design.
30. The respective roles of DWP and the Combined Authority in the co-design will include:
- DWP sets the funding envelope, the Combined Authority can top up if they wish to, but are not required to.
 - The Combined Authority will set out how they will join up local public services in order to improve outcomes for this group, particularly how they will work with local Clinical Commissioning Groups/third sector organisations and NHS England/the Work and Health Unit nationally to enable timely health-based support.

- DWP set the high-level performance framework. The primary outcomes will be to reduce unemployment and move people into sustained employment. West Midlands Combined Authority will have some flexibility to determine specific local outcomes that reflect the priorities outlined within the Employment and Skills Strategy and are complementary to the ultimate employment outcome (for example in-work wage progression). In determining the local outcome(s) the Combined Authority should work with DWP to develop the Employment and Skills Strategy which will take account of the labour market evidence base and articulate how the additional outcome(s) will fit within the wider strategic and economic context and deliver value for money.
- Before delivery commences, DWP and the Combined Authority will set out an agreement covering the respective roles of each party in the delivery and monitoring of the support, including a mechanism by which each party can raise and resolve any concern that arise.

31. In addition, in the event employment support for this group is delivered through a contracted-out programme, the respective roles of DWP and the Combined Authority will include:

- DWP sets the contracting arrangements, including contract package areas, but will consider proposals from the Combined Authority on contract package area geography.
- The Combined Authority will be involved in tender evaluation.
- Providers will be solely accountable to DWP, but DWP and the Combined Authority's above-mentioned agreement will include a mechanism by which the Combined Authority can escalate to DWP any concerns about provider performance/breaching local agreements and require DWP to take formal contract action where appropriate.

32. In the event that alternative delivery mechanisms are put in place, comparable arrangements will be put in place.

33. The Combined Authority will develop a business case for an innovative pilot to support those who are hardest to help. The business case should set out the evidence to support the proposed pilot, cost and benefits and robust evaluation plans, to enable the proposal to be considered for funding at a later date, subject to Ministerial approval.

Supporting and Attracting Business and Innovation

34. The government commits to working with the Combined Authority Shadow Board and the Greater Birmingham and Solihull, Black Country and Coventry and Warwickshire LEPs to support the further development and implementation of the three LEP Integrated Business Support Ecosystem. In particular, the government will:

- Review the Inward Investment resource location of regional (IST) staff across the three levels of: Partnership Managers; Business Development and Key Account Management teams, currently in 8 locations nationally. The aim will be to seek to

agree options for co-location, under UKTI/IST management, without harming the overall efficiency of the working of the investment model.

- Establish a joint governance structure with quarterly meetings attended by a Director level representative from both UKTI investment and the Combined Authority. These will provide a forum to discuss progress on co-location, and on account management activity by both parties. Wherever possible, this structure will be used to review key decisions and initiatives planned and/or implemented by both parties.
- Provide significant closer working with sector specialists in the transport related sectors (Auto, Rail and Aerospace). This will be within a shared governance structure with resources, under UKTI control.
- Ensure a portion of the GREAT campaign budget for overseas based activity is aligned to appropriate West Midlands sector strengths. This activity should be supported by sector based resource in overseas posts who have been specially briefed to have a strong understanding of Midlands Engine and posts who are Matchmaker partners for West Midlands sector strengths.
- Work together on an appropriate portfolio of investable urban regeneration projects which government would help promote to appropriate international investors (through the Regeneration Investment Organisation), potentially as part of a new Midlands Engine proposition.
- Continue devolved inward investment funding for the Drive West Midlands initiative with the Automotive Investment Organisation to be considered as part of the Spending Review, Export Strategy and future sector prioritisation work. This will determine whether funding should be continued until 2020.

On trade, the government will:

- Ring-fence trade services resource within the Combined Authority area based on an agreed export plan with a dual key approach to activities and reporting on outputs and outcomes to the Combined Authority. Ring fenced resource remains subject to departmental budget changes.
- Develop an export plan between the Combined Authority and UKTI HQ which will allow the Combined Authority flexibility, such as a specific local sectoral focus for Passport to Export and mid-sized business schemes or a different mix of products.

35. On other business services, the government will:

- For the Business Growth Service, seek to devolve responsibility through the Growth Hubs within existing contracts as far as possible, subject to agreed protocols for the interface with national schemes.
- Work with the Combined Authority Shadow Board to develop a devolved approach to delivery of business support from 2017 onwards, although what is ultimately devolved will reflect the decisions taken in the Spending Review on the shape of – and level of spending on – business support schemes.
- Work with the Combined Authority to design a joint approach to enterprise start-up activity

- Enter into discussion regarding the Combined Authority's access to finance needs and how these interact with national access to finance programmes, such as the British Business Bank.

36. On innovation:

- The government recognises the many innovation strengths of the West Midlands, across multiple sectors, and values the contribution they have made towards delivering growth, productivity and high value employment.
- The government will offer the Combined Authority Shadow Board expert advice and support to ensure they are able to put forward a strong proposal for science and innovation audit. An audit would allow the Combined Authority Shadow Board to work with universities, businesses and the Local Enterprise Partnerships to map its strengths, with support from government. Audits will provide a new and powerful way to build on regions' strengths and maximise the economic impact from the UK's research base nationally. They will, for example, provide the government with part of the evidence base on which to make decisions on any further catapults.

Public Service Reform

37. The government will engage with the Combined Authority Shadow Board to discuss the outcomes of their Mental Health Commission.

38. The government will support the Combined Authority Shadow Board to co-design and implement approaches to improving the life chances of troubled individuals (those with multiple problems of homelessness, substance misuse, offending and mental health) and in doing so reduce their cost to public services. The first phase of policy co design will take place within the next months, to be followed by a series of early adoption/ experimentation areas within the region in early 2016, which will be funded by the constituent councils of the proposed Combined Authority. Depending on the outcome of these, the Combined Authority Shadow Board will prepare a business case for further funding, in advance of moving to scale. Relevant early implementation projects and subsequent roll-outs will be agreed jointly with NHS England.

39. The government commits to support the programme of public service reform across the West Midlands. HMT and DCLG will continue to engage with the Ministry of Justice, Department of Health and Home Office to ensure that appropriate support is provided to facilitate the implementation of these reforms.

40. The government commits to a discussion with the Combined Authority Shadow Board about how the government can improve the Combined Authority's ability to use the following national administrative data sets in order to support the Combined Authority's ambition to develop an integrated data system to improve outcomes for individuals with multiple indicators of vulnerability (unemployment, offending, substance misuse, poor mental health and homelessness) while respecting legal and other privacy concerns. These discussions will be informed by the Cabinet Office led data sharing work and commence with the government in early 2016. Subject to further discussion this may include:

- The Prisons Database (held by the Ministry of Justice)
 - The Work and Pensions Longitudinal Study (held by the Department for Work and Pensions)
41. Discussions will also take place as to how the government can support the shadow Combined Authority in analysing and interrogating health data sources to improve care whilst respecting legal and other privacy concerns. These will include:
- Hospital Episodes Statistics, Mental Health Minimum Dataset (held by the Health and Social Care Information Centre)
 - National Drug Treatment Monitoring System (held by Public Health England)
42. The government recognises that the Birmingham City Council is a member of the One Public Estate Programme, and envisages that the proposed Combined Authority will become a member. The Government Property Unit (GPU) has discussed plans for a major public sector locational hub in Birmingham to allow local, regional and national government bodies to co-locate and take advantage of modern integrated working to reduce costs and increase productivity. This will be run as a joint programme between the Combined Authority and GPU and is envisaged to involve the development of a substantial shared office requirement. In addition, the government commits to support community hub proposals in the two other cities of Wolverhampton and Coventry and a series of neighbourhood service integration pilots across the area of the constituent authorities of the proposed Combined Authority.

More and Better Homes

43. The Combined Authority and its constituent authorities will support an ambitious target for the increase in new homes, and will report annually on progress against this target. To ensure delivery of this commitment, the Shadow Board of the Combined Authority and the government agree that:
- Existing Local Authority functions, which include compulsory purchase powers, will be conferred concurrently on the Combined Authority to be exercised by the Mayor. These powers, which provide the same competencies as the Home and Community Agency, will enable the Combined Authority to deliver its housing and economic growth strategies. The government will bring forward further proposals for consultation in the New Year and will, as part of that consultation, discuss how they can be applied to support housing, regeneration and growth.
 - The Homes and Communities Agency and the Combined Authority will work together to develop a joint approach to strategic plans for housing and growth proposals for the area.
 - The government will work with the Combined Authority to support the West Midlands Land Commission. The West Midlands Land Commission will ensure there is a sufficient, balanced supply of readily available sites for commercial and residential development to meet the demands of a growing West Midlands economy. It will create a comprehensive database of available public and private sector land, identify barriers to its disposal/development, and

develop solutions to address those barriers to help the West Midlands meet its goal to deliver a significant number of additional new homes over the next 10 years, and to unlock more land for employment use. The Combined Authority will also be able to use their proposed Land Remediation Fund to support bringing brownfield sites back into use for employment and housing provision.

44. The Combined Authority Shadow Board and the government will continue to discuss the devolution of housing loan funds. The Combined Authority Shadow Board intends to develop further a proposition on a Housing Investment Fund, for discussion with government.

Transport

45. The government is committed to building the Midlands Engine for Growth and supports the emerging proposals for Midlands Connect. The balance of interests across the West and East Midlands is critical to success and the government supports the full engagement of West Midlands partners in the creation of a Midlands Connect Strategic Board and supporting officer structures to provide leadership and accountability. The government commits to ensuring the direct involvement of the Department for Transport, HS2 Ltd, Highways England and Network Rail in the arrangements and considers them critical to the successful delivery of the transport objectives of this deal.

46. The Mayor will:

- a. Receive a devolved and consolidated local transport budget for the area of the Combined Authority (i.e. the areas of the constituent councils), including all relevant local highways funding, with a multi-year settlement to be agreed at the Spending Review. Functions will be devolved to the West Midlands Combined Authority accordingly, to be exercised by the Mayor.
- b. Receive powers for the franchising of bus services in the Combined Authority area, subject to necessary legislation and local consultation. This will be enabled through a specific Buses Bill, to be introduced during the first Parliamentary session, which will provide for the necessary functions to be devolved. This will help the proposed Combined Authority, on behalf of the Mayor, to deliver integrated smart ticketing across all local modes of transport in the Combined Authority area. This will align with the work of Midlands Connect on smart and integrated ticketing across the Midlands.
- c. Take responsibility for a new Key Route Network of local authority roads; the management and maintenance of which will be undertaken at the Metropolitan level by the West Midlands Combined Authority on behalf of the Mayor. To support this all relevant local roads maintenance funding will be placed under the control of the Combined Authority, subject to its establishment, until the Mayor takes office, as part of the single local transport settlement to be agreed at the Spending Review, which will support the delivery of a single asset management plan, working towards shared procurement of highways maintenance services across the Combined Authority's constituent councils as practical reflecting existing contractual and PFI arrangements.

47. In addition, and as part of the deal:

- a. The government and the West Midlands Combined Authority will work together through the development of the second Roads Investment Strategy to examine options for the most effective way to facilitate the movement of goods and people, and manage congestion within the region on the strategic road network. This will include consideration of options for reducing congestion, such as a joined up approach to dynamic demand management and implementing an integrated intelligent transport system which will help improve journey time reliability and allow people and businesses to make informed decisions about their travel choices.
- b. The West Midlands Combined Authority will have the opportunity to bring forward alternative proposals for the management of current and new rail stations in the Combined Authority area (i.e. the areas of the constituent councils). If such proposals would lead to the transfer of any rail stations to the West Midlands Combined Authority, the Combined Authority, with West Midlands Rail, will be obliged to bring forward a business case for consideration by government.
- c. The government will work with the West Midlands Combined Authority to establish any appropriate local traffic and highway powers to be conferred on to the Mayor as part of the Key Route Network.
- d. To support better integration between local and national networks, the government and the West Midlands Combined Authority Shadow Board will enter into joint working with Highways England and Network Rail on operations, maintenance and local investment through a new Memorandum of Understanding, which will be established by 2016.
- e. On strategic transport issues and investment, the government, Network Rail and Highways England will continue to work with the West Midlands Combined Authority through the Midlands Connect Partnership.
- f. The West Midlands Combined Authority Shadow Board will bring forward proposals for potential inclusion in the West Midlands Mayoral Parliamentary Order that would enable the Mayor and Combined Authority to implement safer vehicle standards for freight vehicles entering the areas of the Combined Authority's constituent councils, such as safety measures to protect cyclists.
- g. The West Midlands Combined Authority Shadow Board will bring forward proposals for potential inclusion in the West Midlands Mayoral Parliamentary Order that would enable the West Midlands Mayor and West Midlands Combined Authority to implement Low Emission Zones and potentially Clean Air Zones in the West Midlands Combined Authority area. This will help achieve Air Quality Plan objectives at both the national and local level.

HS2 Growth Strategy

48. The government welcomes the significant progress made to date by the West Midlands in developing its HS2 Growth Strategy. Demonstrating government's

support for the Strategy, this deal provides the proposed Combined Authority with a range of new mechanisms that will help local partners to deliver their ambitions.

49. As stated previously in this agreement, the government will provide the Mayor of the West Midlands with the power to raise supplementary business rates to fund infrastructure, as well as other funding to support local growth. The government also approves the business case for a significant extension of the Enterprise Zone at Curzon Street in order that the funding raised through these mechanisms will support the delivery of the HS2 Growth Strategy, which includes proposals for the Curzon Masterplan, the UK Central Interchange triangle interchange plans, the UK Central infrastructure package, connectivity to Coventry and enhanced accessibility from the Black Country to Birmingham city centre, alongside further government support.
50. The Combined Authority Shadow Board will develop an implementation plan setting out how it intends to deliver the objectives of the HS2 Growth Strategy. The government remains committed to working with the Combined Authority Shadow Board as they develop their implementation plan to help manage risks and support delivery. This should include a prioritised programme of projects and their milestones; the input, output, outcome and benefit indicators that local partners will use to track delivery; the Combined Authority resources being committed to ensuring delivery; and the remit and governance of a Combined Authority-led Development Corporation to deliver the local growth. As part of establishing their prioritised investment programme, the Combined Authority Shadow Board will bring forward business cases for individual transport projects for the government to consider, where required in line with existing agreements and processes, including the interlinked Metro extensions to Brierley Hill and HS2 Interchange. As the most immediate priority in the HS2 Growth Strategy, government also commits to providing funding for the Eastside Metro extension to Digbeth subject to government approval of the business case.
51. The implementation plan will describe how the HS2 Growth Strategy is being delivered in the short-medium (up to 5 years) and longer (5 years plus) term. The Combined Authority Shadow Board, government and HS2 Ltd will work closely on the development of the plan and identification of the resources within it to ensure that local delivery and construction of the HS2 railway are integrated wherever appropriate with implementation plans for local schemes (such as those mentioned above) and any joint opportunities are maximised. The plan will be locally owned, but progress will be regularly reported to the HS2 Local Growth Programme Board. An outline of the implementation plan should be submitted by 31 Jan 2016, with the aim of completing it by spring 2016.

Other areas

52. This deal represents a first step in a progressive process of devolution of funding, powers and responsibilities to the West Midlands Combined Authority (subject to its establishment). As well as the areas set out in this deal, the West Midlands Combined Authority Shadow Board and government will consider further opportunities for devolution and will continue to discuss these. These will include but not be limited to:
 - Proposals for an appropriate relationship between the functions of a Mayor and future role of the Police and Crime Commissioners (PCCs), including in

relation to fire services, to be developed, subject to local consent and a business case developed jointly by the PCC and council leaders, and in consultation with the Fire and Rescue Authorities.

- The government's review of the youth justice system will work with the Combined Authority Shadow Board to consider scope for further devolution of youth justice services to the region, and will look for opportunities to work with the region to test the review's proposals.
- The government will engage with the Combined Authority Shadow Board to discuss the outcomes of their Mental Health Commission.
- The government and the West Midlands Combined Authority will work with the East Midlands to take forward the Midlands Engine project to secure wider transport investment and growth.

Delivery, Monitoring and Evaluation

53. The West Midlands Combined Authority, subject to its establishment, is accountable to local people for the successful implementation of the devolution deal; consequently, the government expects the Combined Authority to monitor and evaluate their deal in order to demonstrate and report on progress. The Cities and Local Growth Unit will work with the West Midlands Combined Authority to jointly agree a monitoring and evaluation framework that meets local needs and helps to support future learning.
54. The government will support the West Midlands Combined Authority by leveraging existing monitoring and evaluation frameworks and, where applicable, by providing assistance to ensure consistency and coordination of metrics and methodologies with other areas receiving a devolution deal. As part of this commitment, the government will work with the West Midlands Combined Authority to explore options for the coordinated application of high quality impact evaluation methods in relation to i) local commissioning of 19+ skills; and ii) employment support.
55. West Midlands Combined Authority Shadow Board will work with the government to develop a full implementation plan, covering each policy agreed in this deal, to be completed ahead of implementation. This plan will include the timing and proposed approach for monitoring and evaluation of each policy and should be approved by the DCLG Accounting Officer.
56. The West Midlands Combined Authority will continue to set out their proposals to the government for how local resources and funding will be pooled across the area.
57. The West Midlands Combined Authority will agree overall borrowing limits with the government and have formal agreement to engage on forecasting. The West Midlands Combined Authority will also provide information, explanation and assistance to the Office for Budget Responsibility where such information would assist in meeting their duty to produce economic and fiscal forecasts for the UK economy.
58. The West Midlands Combined Authority will agree a process to manage local financial risk relevant to these proposals and will develop written agreements jointly with the

government on every devolved power or fund to agree accountability between local and national bodies on the basis of the principles set out in this document.

59. The West Midlands Combined Authority will continue to progress programmes of transformation amongst authorities and with partner agencies.
60. The West Midlands Combined Authority will continue to adhere to their public sector equality duties, for both existing and newly devolved responsibilities.
61. The provisions of this deal will be monitored by a Steering Group of senior officials from the Combined Authority Shadow Board and government, and private sector LEP representatives, meeting at least quarterly, with any issues of concern escalated to Ministers and Leaders to resolve, in keeping with the letter and spirit of this deal.

Consenting to the Combined Authority and Approving the Devolution Deal

*West Midlands
Combined Authority*

Assurance report

29 February 2016

Giving you comfort that
your recommendations
are sound



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Executive summary

Councils are expecting to make key decisions over the coming months:

- Whether to consent to the order to create the West Midlands Combined Authority (WMCA).
- Whether to approve the devolution deal.

The WMCA has made considerable progress in a short space of time to enable these decisions to be taken safely. The work undertaken to date in the following areas should enable Members to take those decisions on the back of a body of evidence and with some confidence that the areas of future work are being planned effectively and that a robust and balanced process has been followed to date:

- Identification and resolution of legal matters relating to the approval and formation of the CA.
- Development of strategic objectives and a strategic economic plan supported by financial and non-financial evidence.

Development of a detailed implementation plan and commencing planning for delivery.

We have been provided with sufficient evidence to conclude that, at this point in the process, enough has been done to prepare Councils for the decisions they need to take. There are some significant risks to the delivery of the Investment Programme, many of which would be faced without the Devolution Deal, which will need careful management as the Programme moves forward.

Background

1. The Local Democracy, Economic Development and Construction Act 2009 (LDEDCA) gives the Secretary of State the ability to establish a Combined Authority (CA), to give it powers and transfer into it the powers of existing bodies, for example Passenger Transport Executives and Integrated Transport Authorities.
2. The Cities and Local Government Devolution Act 2016 (CLGDA) received Royal Assent on 28 January, and gives the Secretary of State further powers to confer additional functions, and make provision for the election of mayors.
3. Combined Authorities formalise the commitment of a number of local authorities to work together. The West Midlands CA (WMCA) is set to be established in June.
4. Councils are making key decisions over the coming months:
 - whether to consent to the order to create the West Midlands CA; and
 - whether to approve the Devolution Deal (“the Deal”).
5. This follows:
 - the WMCA Devolution Agreement published last November;
 - resolutions last October by all seven constituent authorities to approve in principle the formation of the CA; and
 - resolution of non-constituent authorities to accept the invitation to join the CA.

6. The Shadow Board of the WMCA asked us to provide assurance on preparations so that members could make informed decisions.

Working together

7. All seven of the West Midlands Metropolitan Boroughs along with the Integrated Transport Authority (ITA), three Local Enterprise Partnerships (LEPs) and a number of District Councils are working together on a programme which will see:
 - radical devolution of funding, powers and responsibilities from central government
 - an ambitious Strategic Economic Plan (SEP); and
 - major economic and social challenges addressed.
8. In a very short space of time at the end of last year, the organisations put proposals to Government which have been welcomed and agreed. Since then, considerable focus has been given to plans for establishment of the CA, and to clarifying and preparing for the Devolution Deal.
9. The commitment of Authorities and their elected Councillors, from a broad spectrum of political balance, with diverse heritage giving rise to very different social and economic conditions, is striking and commendable. In our conversations with all the Councils, it is clear that there has been a considerable shift in outlook, with each Council gaining a better understanding of its role in the West Midlands.
10. There has been agreement in principle that the Devolution Deal will benefit all areas, but in different ways and to a different extent, with different timing over the life of the Deal. All of this has been achieved through a continual and intensive process of informal and formal discussion and debate. It is in this context that the Councils will now individually formally commit to the new arrangements.

Combined Authority

11. Following the submission of the summary of responses to the consultation on the formation of the CA, the Secretary of State has confirmed his intention to establish it. The draft order was issued by the Secretary of State as this report was drafted. Each Council will now be recommended to consent to the draft Statutory Order to create the West Midlands CA, subject to minor amendments, and to delegate to the Chief Executive (or equivalent), in consultation with the Leader, final consent to the Order.
12. In comparison to the Devolution Deal, the formation of the CA is more reliant on adhering to a clear process with defined stages. Most questions currently being clarified relate to governance and the role of the mayor.
13. There are still a number of risks associated with the establishment of the CA including the possibility of a Judicial Review, or of one or more Councils not giving consent to the draft Order. The risk of the Secretary of State requiring further consultation has now passed with the issue of the Draft Order. Judicial Review is possible at several points, and the Shadow Board has taken advice to identify risks; three months from the draft Order is recognised as the key date.
14. Having said that we are satisfied that the process followed and decision making to date has been effective in identifying, managing and mitigating these risks as far as possible to reduce the possibility of any delays in the establishment of the CA.

Planning for the operation of the new Authority

15. The decision to establish the CA, and the commitment from each of the constituent and non-constituent authorities is a significant landmark in itself, but there is much to be done between approval and day 1 of the new CA. Areas for consideration include:
 - Establishment of Board, executive arrangements, audit and scrutiny arrangements;

- Consideration of committee structures, appointment of members to committees and terms of reference;
 - Formal approval of the constitution;
 - Establishment of new systems and processes;
 - Establishment of workforce including capacity and capability issues; and
 - Drafting and approval of mayoral scheme and Order by both the CA and constituent councils.
16. These and other issues will need full consideration before and after the establishment of the CA. Sufficient resource will be required from individual Councils while dealing with business as usual and elections in some cases.
 17. There is also the possibility of changes to the CA in the longer term. Governance arrangements need to be sufficiently flexible to accommodate new members within the 3 LEP geography, and agile enough to ensure that any potential expansion in membership does not dilute the effectiveness of the CA. Future governance arrangements and inclusion of new members will require a Secretary of State approval and a new Order.
 18. The political implications of any potential expanded membership will need to be understood and worked through, particularly if member Council leaders are to have distinct responsibilities for programmes, initiatives or projects.
 19. The past 18 months has seen an unprecedented level of engagement between the member councils and significant input and commitment from each one, this level of commitment will need to be sustained if the new CA is to be successful from its inception.
 20. The draft Governance Review was approved at a meeting of the West Midlands Metropolitan Leaders in July 2015 and approval given to engage with stakeholders on the Governance Review.
 21. Although combined authorities are still relatively new, a process has been followed, with the support of legal and financial advisers, at both Shadow Board and individual councils, resulting in a well documented trail with evidence available to support key decisions taken. Formal legal advice has been obtained when necessary.
 22. The Shadow Board and Programme Board have met regularly.
 23. All organisations involved should be commended for the pace which has enabled the progress to date. There has been significant commitment from both officers and members and a real drive to establish the CA which is anticipated to be in place from June 1st 2016.
 24. The possibility of a Judicial Review cannot be discounted. The Shadow Board legal adviser submitted a paper outlining the implications of a Judicial Review and the Shadow Board are aware of the possibility of this. However, to date no threat of judicial review proceedings has been received.

Devolution Deal

25. The Deal is set to tackle the economic and social challenges that the region faces.
26. With an annual contribution to the CA of £36.5m for 30 years, along with capital funding, a precept on Council Tax, retained business rates growth of 0.3% of the share currently held centrally and a 2% levy on business rates, the current proposed overall investment package generated amounts to approximately £8bn. This is dependent on a number of factors, including a future mayor raising a levy on business rates and a Council Tax precept.
27. The Deal is underpinned by an agreement, signed by the Chancellor of the Exchequer and the Leaders and Chairmen of each constituent Authority member and three LEPs, setting out the devolution of powers and functions from Central Government, covering:

- transport, including franchised bus services and smart ticketing
 - a new Key Route Network of local authority roads
 - Homes and Communities Agency CPO powers in relation to housing delivery
 - control of funding for investment
 - devolved skills funding
 - joint responsibility for employment and business support
28. None of this is deliverable without the further funding, as well as business case approval and funding for schemes included in the Deal.
29. Government has in turn offered:
- support for the High Speed 2 (HS2) growth strategy and Strategic Transport Plan
 - funding commitment for the Eastside Metro extension, and support for the work on the delivery plan for extensions to Brierley Hill and Interchange
 - to work with the Authority on the Roads Investment Strategy
 - to support work on public service reform
30. Some of the constituent Councils will seek approval of the Devolution Deal in the coming weeks and others will seek approval in May 2016. This split timetable meets the requirements of the Parliamentary timetable and the commitments set out in the Devolution Deal.
31. Significant progress has been made in a relatively short time period and the direction of travel in relation to the Devolution Deal is positive. Given the scale of the Devolution Deal and the complexities involved it is to be expected that the resolution of some matters is still ongoing and it is important to ensure that processes are established to monitor the effective resolution of these outstanding issues in the required timescales.
32. It is clear from discussions with all constituent and non-constituent members that engaged with us that the establishment of the West Midlands CA and the negotiation of a Devolution Agreement with Government has provided Councils with the ability to go further and faster in exploiting the economic potential of the area. It also enables authorities to take more concerted action on productivity in the public and private sectors, including a programme of ambitious public service reform.
33. Our review of the economic market assessment information available to the constituent authorities supports this conclusion and would appear to be a sound basis on which to develop proposals.
34. Although the provisional Devolution Agreement was subject to approval by each Authority and further work was required to refine exactly what was meant by each section of the Agreement, the Leaders of each of the seven West Midlands Metropolitan Boroughs agreed the provisional Agreement as a statement of intent to work with the government on what devolution could look like.
35. Our review supports the conclusion that the content of the Deal sufficiently met its objectives and, subject to its ongoing clarification, this appears to be a sound basis on which to sign the provisional agreement.
36. The intention of the Programme Board is to complete the 'super clarification' process by the end of February which should provide constituent and non-constituent members of the CA with sufficient information to make an informed decision on approving the Deal. As an example, we are aware that other Councils are considering whether to join the CA, but as yet there is no certainty. Were other parties to join, consideration would need to be given to the impact on a Devolution Deal for constituent members, and on the governance of the CA, including requirements for further Orders from the Secretary of State. We understand that there may be some slippage in the proposed super clarification timetable although an exact date for completion is not known.

37. Each Council will need to determine whether or not the outstanding matters are of such significance that the Devolution Agreement cannot be approved in accordance with the proposed timetable. Ratification of the draft Deal is required for the first tranche of £36.5m to be released. Some, if not all, of the Metropolitan Councils are looking to consent to the Devolution Deal in March to meet the CA's commitments, as set out in the provisional Devolution Agreement.
38. The WMCA has commissioned the production of a vision-led Strategic Economic Plan that sets out the action that needs to be taken in order to deliver the vision and the detail of the Devolution Agreement. The development of the SEP has been subject to a rigorous governance process and is expected to be delivered on time to allow Shadow Board sign off before the CA vesting day. The development of the SEP is being delivered alongside the development of associated implementation plans and supporting documents.
39. Regular reports have been made to Shadow Board meetings. We found a significant body of work in progress that has gone a long way to addressing outstanding issues covering the following topics:
- Finance, funding and investment strategy;
 - Balance
 - Joined up linked work streams
 - Appraisal and performance frameworks
 - Governance planning for delivery
 - Other practical matters
- 40.
41. The WMCA committed to establish three major independent Commissions to inform future work that it expects to be co-commissioned with central government as they represent critical shared challenges.
- 42.
43. A significant programme of work has taken place since signing the proposed Devolution Deal in November 2015 to maximise the opportunities and minimise the challenges faced in achieving the WMCA's strategic objectives. The politicians and officers should be commended for the achievements to date. We have seen evidence of the decision making arrangements put in place operating on a regular basis and we have identified a significant number of developments that indicate the arrangements are working.
44. A lot of the developments are live and current so we cannot reach final conclusions on outcomes but the direction of travel is positive.
45. By developing a Devolution Agreement Implementation Plan with support from government the WMCA is well positioned to monitor ongoing implementation plans and quickly identify any areas of slippage so that action can be taken.
46. It is important that the pace of implementation continues and does not slow due to distractions arising from the formation of the CA or the upcoming elections.

Finance

47. Significant progress has been made in a relatively short period. The Investment Programme sets out schemes and funding streams which will inevitably be subject to change and further iteration as proposals develop.
48. The headline figures of a new government contribution of £36.5m pa and the total Investment Programme of £8bn are based on the best information currently available and are subject to change. We have examined supporting information on each element and are satisfied that the totals are the best estimate currently of the total cost and funding required. However, the majority is subject to further feasibility and business case work, and political decisions being taken, before funding can be finalised. At each stage there is considerable risk of change in scope, cost and funding availability, all of which the new Authority will need to keep under constant review. These are risks which each

constituent member of the Authority would face if schemes were to be funded and delivered piecemeal. The government has identified new revenue streams in the Devolution Deal.

49. Many of the financial risks are related to the market, but the analysis of the deal is underpinned by assumptions on borrowing costs. Where we have seen these assumptions set out these broadly align with what we would expect with reference to current projections of relevant indices, but they need keeping under regular review.
50. The range of risks which exist, the number of future actions that are required and the wide scope of the Investment Programme, mean that establishing an effective, proportionate CA governance structure will be critical to ensure that appropriate decisions are made. The ability of the CA to make well-informed decisions, and to deliver against its stated priorities, will be fundamental to its future success.

Prioritisation and Balance

51. The CA has made good progress in developing the Balance work stream. It is critical that the CA agrees an open, transparent and fair process through which individual schemes and programmes of intervention will be identified, assessed, prioritised and their success monitored. There needs to be clarity and agreement amongst all key stakeholders on the process to be followed, and on the specific metrics by which schemes will be analysed. Once this is agreed, the decision-making process should be the primary way in which investments are prioritised.
52. Once the Balance metrics and Decision Economic Impact Model (DEIM) model have been finalised, the extent to which the existing Investment Programme is consistent with the emerging SEP, and the degree to which the proposed interventions will deliver the intended outcomes, will need to be established. Given the range of risks associated with the Investment Programme it is also likely that re-prioritisation will need to occur. This should be driven by the agreed process for decision-making referred to above.

Delivery risks

53. There is a five year review of the Devolution Deal, the criteria for which are yet to be defined. This is set to determine the success of the Deal, and whether further Deals should be made. While there are a range of risks, this five year review is critical for the Deal and the CA. There is a balance to be struck in prioritising projects which provide benefits quickly against those which might take longer to deliver but which have significantly more impact. A combination of effective prioritisation and programme management will be required, and need to be planned for in preparation for the CA.
54. The CA has made significant strides towards getting ready to implement the Devolution Deal. Strategic objectives have been set and a strategic economic plan is close to being finalised. A detailed Devolution Agreement Implementation Plan is being finalised which will allow progress to be measured over the coming months. Significant progress has been made preparing for delivery and attention must now turn to delivering the deal.
55. The draft governance arrangements for the CA are now well advanced. As the delivery of the Devolution Deal develops, and if membership of the WMCA evolves, it is critical that the governance arrangements for delivery are integrated, agile and robust.
56. Establishing the CA and clarifying the Devolution Deal have been the main priorities to date. This has taken significant commitment and drive and the pace of change is continuing to accelerate. More focus can now be given to implementing and embedding effective working practices to support the delivery plan and the achievement of objectives.
57. Detailed monitoring and reporting will be required once the Devolution Deal is being delivered, but a robust Assurance Framework has to be defined and then approved with BIS before funds can flow to the CA. This task is now time critical. There are a number of decisions to take to finalise the

Assurance and Performance Management frameworks, and these need to be taken well in advance of vesting day.

Other main risks

58. The risks associated with the delivery of the Devolution Deal are potentially considerable:

Geopolitical risk

59. Many economies around the world are in largely uncharted territory, with oil prices as low as a decade ago, financial market volatility in China and other developing economies, a very strong dollar, and interest rates in western economies at near zero. At the same time, there is considerable debate about the movement of people across continents, and Britain's membership of the European Union.
60. While all these factors could impact the Devolution Deal's costs and benefits, they are all faced by each member of the CA, regardless of the Authority's formation. Conversely, they emphasise the importance of acting together at scale to make the most of the UK's current performance, and to grow and strengthen the West Midlands Economy underpinned by the Devolution Deal.

Political risk

61. Members need to be conscious of the risk that the devolution deal might not be delivered as planned because of changes in political will or priority, at national, regional or local level. This is relevant particularly since there will be elections at each level, and for the Authority's Mayor, in the period of the first Devolution Deal. It will be the responsibility of the Mayor to determine whether or not to raise additional revenue from local tax payers to underpin the Investment Programme. Again, the individual elements of the Devolution Deal are subject to political risk with or without the CA.
62. The Shadow Board is working to clarify the governance arrangements within the Authority, and further clarification is expected from Central Government.

Market risk

63. As with all significant programmes, particularly including construction, there are cost and delivery risks associated with the market because of availability of contractors, labour and materials. This is a particular feature of current markets as the economy grows out of recession, but is likely to remain a risk in the future because of the timing and significance of projects such as HS2. Success is also reliant on private sectors partners such as land owners and developers. Progress on this risk can be made as business cases are finalised, the delivery mechanism for the CA is defined, and plans for engagement with the market are put in place. These should be key priorities for the Shadow Board and for the Authority on formation.

Overall conclusions

64. Councils are expecting to make key decisions over the coming months:
- Whether to consent to the order to create the West Midlands Combined Authority (WMCA).
 - Whether to approve the devolution deal.
65. The WMCA has made considerable progress in a short space of time to enable these decisions to be taken safely. The work undertaken to date in the following areas should enable Members to take those decisions on the back of a body of evidence and with some confidence that the areas of future work are being planned effectively and that a robust and balanced process has been followed to date:
- Identification and resolution of legal matters relating to the approval and formation of the CA.
 - Development of strategic objectives and a strategic economic plan supported by financial and non-financial evidence.

- Development of a detailed implementation plan and commencing planning for delivery.
- 66. We have been provided with sufficient evidence to conclude that, at this point in the process, enough has been done to prepare Councils for the decisions they need to take. There are some significant risks to the delivery of the Investment Programme, many of which would be faced without the Devolution Deal, which will need careful management as the Programme moves forward.**

Scope and background

Scope

67. As set out in our proposal to the WMCA Programme Board on 29 January 2016, this review is intended to assure you that the recommendations being made to your respective Councils in relation to the establishment of the WMCA and approving the Devolution Deal are sound.
68. We have built on your own sources of assurance from the individual Councils, CA Shadow Board and Programme Office. We have reviewed the assurance provided to members regarding the process you have been through and your readiness to enter into the CA and Devolution Deal arrangements. We have also considered the reasonableness of the high level assumptions about benefits which have been made and independently evaluated your conclusions.
69. In preparation we have met with the Chief Executives of individual Councils to understand the work they are leading on, considered any issues which have been identified regionally or those risks relating specifically to their Authority. In addition, we have met with members of the Programme Board to understand their areas of focus and current progress.
70. We have reviewed a number of the reports and working papers prepared and have included comments in the main section of the report on how these support the decisions to be made.
71. We invited the External Audit Engagement Leaders from all the constituent bodies to discuss current progress and take their questions into account. They have requested a further meeting with representatives from the WMCA towards the end of April.

Background

National Devolution

72. Combined Authorities are legally discrete public authorities established by groups of Councils to deliver economic growth and prosperity across the areas that they cover. The legislation to enable them to be established is contained in the Local Transport Act 2008 and the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA). The Queen's speech last year set out the Government's intention to bring forward new legislation to provide for the devolution of powers to cities/CA areas. This was followed by the publication of the Cities and Local Government Devolution Bill on 28 May 2015. This Bill received Royal Assent earlier this month.
73. Combined Authorities can be delegated functions related to economic development and growth by their constituent local authorities and by the Secretary of State. Transport powers and functions can be transferred to Combined Authorities under the provisions of the Local Transport Act 2008.
74. Constituent authorities can continue to hold their own range of economic development and transport powers and functions concurrently with the CA.
75. A CA is not a 'super council/authority' or a merger of local authorities. Whilst a CA is a legal entity, each local authority retains its own local identity and powers. Any 'asks' of government will always be predicated on the needs of the locality each local authority represents and wishes to secure economic benefits for.
76. Broadly, a CA provides local authorities with the opportunity to collectively:
 - secure greater resources from government over the long-term (ten years+);

- engage with government on issues and functions that cross local authority boundaries (such as transport, economic development, skills, business support, inward investment and employment); and
 - be consulted and ultimately influence the delivery of national programmes to address local need.
77. Under the amended LDEDC the process for creating an Economic Prosperity Board or CA involves the following five main steps:
- A review of governance in the area concerned, which is then published for formal public consultation;
 - The publication of a ‘scheme’ which must also be consulted on;
 - Consultation on the published scheme by the constituent councils, which is then submitted to the Secretary of State for Communities and Local Government;
 - The publication of an Order (if approved) by the Secretary of State to legally establish and recognise the new CA for constituent council consent; and
 - The draft Order is laid before Parliament by the Secretary of State for approval.

Local Devolution

CA

78. Based on the steps required to establish a CA, the WMCA has already completed steps one to three. The members now have to approve the Scheme which will result in the establishment of a CA and approve the proposed Devolution Deal.
79. The WMCA has built on its earlier engagement, including ongoing consultation with local residents from July 2015, and a formal consultation was commenced between 18 January and 8 February. A summary of the consultation response was submitted to the Secretary of State on 12 February and helped inform the Secretary of State’s decision to approve the CA Scheme.
80. The proposal for a Mayoral CA is subject to the final formal consent of the West Midlands CA Shadow Board, the constituent councils, agreement of ministers, and to the Parliamentary process for the necessary secondary legislation and subsequent orders.

Devolution Deal

81. When established, the CA will create a fully devolved funding programme covering all domestic budgets for devolved functions (“The West Midlands Investment Fund”), accountable to the CA. The Fund will operate as a single programme, bringing together resources for economic growth, skills and employability, regeneration, transport and housing; including future allocations from the Local Growth Fund if agreed locally.
82. The proposed agreement with government will see them make an annual contribution worth £36.5 million for 30 years to support an overall investment package worth £8 billion, alongside the creation of up to half a million jobs. At present, the £8 billion investment programme comprises a number of individual projects.

Findings – Establishment of a Combined Authority

Formative stages

83. The idea of a CA for the West Midlands has been around for a considerable time. Birmingham City Council’s white paper “Planning Birmingham’s Future & Budget Consultation 2014-15” in December 2013 proposed the creation of a CA.
84. A joint press statement was issued in November 2014 which was reported on 7th November 2014 <http://www.localgov.co.uk/Councils-reveal-West-Midlands-combined-authority-plan/37573>.
85. At this time, Dudley, Sandwell, Wolverhampton, Walsall and Birmingham councils agreed in principle to join forces and invited other neighbouring local authorities including Solihull and Coventry to join negotiations.
86. The Kerslake Report “*The way forward: an independent review of the governance and organisational capabilities of Birmingham City Council*” published in December 2014 acknowledged that the Black Country and Birmingham City Council were taking steps to form a CA and made the following recommendation:
87. Recommendation 10
88. A CA governance review based on an authority formed of at least in the initial stage the core functional economic area of Birmingham, Dudley, Sandwell, Walsall, Wolverhampton and Solihull should be completed by July 2015. Once this has happened the Government should begin to engage in a dialogue about further devolution. Based on the experience of other combined authorities we recommend that the following proposals should be adopted:

 - a. wherever possible decisions should be reached by consensus, if a vote is required each member should appoint a single representative and decisions should be taken on the basis of one member one vote;
 - b. the secretariat should be based outside of Birmingham City Council;
 - c. the Government wants to see seamless working between Local Enterprise Partnerships and combined authorities. To ensure enterprise retains a strong voice in economic strategy, the chairs of both the Black Country and Greater Birmingham and Solihull Local Enterprise Partnerships should be invited to join the board of the new CA.
89. A Programme Office was established in early 2015 to support the establishment of the CA. This team has been key in ensuring that the whole process has been kept on track and progressed in accordance with legislation and government expectations. The team has seen some changes but continues to provide a valuable input to the CA process.
90. Regular meetings of the Chief Executives and leaders were held from May 2015. At the same time further discussions were held with Solihull and Coventry Councils resulting in Solihull’s Cabinet on 18th June recommending to Council that Solihull moves into a position of being supportive of a CA and Coventry’s Cabinet on 28th May agreeing to the creation of a CA although preferably with councils from Coventry and Warwickshire. A Leaders Summit was arranged in June 2015 with district and borough councils within the 3 LEP areas, and the LEP chairs, invited to discuss the way forward for a Devolution Deal for the West Midlands. This eventually resulted in the establishment of a Shadow Board and the launch of the West Midlands CA website along with the launch in July of a statement of intent signed by the leaders of the seven metropolitan authorities and the three LEP

chairs.

<https://westmidlandscombinedauthority.org.uk/media/1101/westmidlandscombinedauthoritylaunchstatement6july2015.pdf>

91. This commitment from a very early stage in the process of both Chief Executives and Leaders has been a key feature throughout the establishment of the CA with collective leadership evident at all stages of the process.
92. One of the early concerns was around the mayoral role in relation to the establishment of the CA. Consent was received from Department for Communities and Local Government (DCLG) in January 2016 that the establishment of the CA could be done in two phases with the incorporation of the mayor subject to a separate process. We have seen written evidence of this approval from DCLG but have not made any further comments on the move to a mayoral authority in this report.

Governance review

93. Under the LDEDCA 2009 the process for creating an Economic Prosperity Board or CA involves four main steps, the first of which is a review of existing governance arrangements for the delivery of economic development, regeneration and transport. This must lead to a conclusion that there is a case for changing these arrangements based on improvements.
94. The WMCA Governance Review was undertaken between May and July 2015 and updates on progress were presented to meetings of the CA Leaders Group and LEP Chairs. Meetings were held on a weekly basis administered by the Programme Board with Keith Ireland (Managing Director of Wolverhampton City Council) as Programme Director supported by Rachel Ratcliffe as Programme Officer.
95. The Governance Review was undertaken in accordance with Section 108 of the LDEDCA and Section 82 of the Local Transport Act 2008.
96. The review considered the current arrangements in relation to the areas below:
 - a. the exercise of the statutory functions relating to transport in the area;
 - b. the effectiveness and efficiency of transport in the area;
 - c. the exercise of statutory functions relating to economic development and regeneration in the area; and
 - d. the economic conditions in the area.
97. It then considered the following alternative governance options:
 - Maintain the status quo
 - Establish an Economic Prosperity Board (ESB)
 - Establish a CA
98. The review includes a detailed assessment of economic evidence in order to determine if the proposed geography of the CA could be understood as a 'functional economic market area' (FEMA). The review concluded that a FEMA exists at the level of the seven unitary authorities but also acknowledged that the three LEP areas created a stronger FEMA and the review recognises the ambition to collaborate across this broader area.
99. The review concludes that:
100. In order to deliver the identified improvements in the efficiency and effectiveness of governance of economic development, regeneration and transport in the West Midlands, a CA should be established pursuant to Section 103 of the Local Democracy, Economic Development and Construction Act 2009. The Leaders of the seven Metropolitan authorities of the West Midlands are all committed to a CA for their area. They agree that a CA collaborating across the much wider and

important geography across the three LEPs is crucial and that LEP representation on the board will be key to the area's success and aligned priorities. Additionally, the West Midlands Integrated Transport Authority shall be dissolved pursuant to Section 91 of the Local Transport Act 2008 and its functions transferred to the CA.

101. The Governance Review has been compared to that undertaken by other authorities as part of a proposal to establish a CA and found to be broadly comparable. All contained the legislative basis, a review of economic evidence, a consideration of current arrangements and a case for change and an options appraisal.
102. Other governance reviews included details of regional arrangements in relation to employment and skills and also strategic planning and housing although these are not required by the Act.
103. The draft Governance Review was approved at a meeting of the West Midlands Metropolitan Leaders in July 2015 and approval given to engage with stakeholders on the Governance Review.

Stakeholder engagement

104. In conjunction with the Governance Review, the Leaders of the seven metropolitan authorities conducted a process of engagement with stakeholders across the CA region. This process included engagement with neighbouring authorities and the three Local Enterprise Partnerships (LEPs) (Black Country, Coventry and Warwickshire, and Greater Birmingham and Solihull).
105. This engagement helped to shape the CA proposals and saw five district authorities (Cannock Chase, Nuneaton & Bedworth, Redditch, Tamworth and Telford & Wrekin) and the three LEPs joining the WMCA as non-constituent members.
106. Six of the seven authorities took a similar approach to engagement but Coventry adopted a different approach as a result of greater local concerns over the establishment of the CA.
107. The engagement process took a number of forms including online surveys and attendance at meetings as well as providing an opportunity for feedback through the usual contact points. In addition Coventry held drop in sessions, conducted telephone interviews, held focus groups and other forums for increased engagement.
108. The consultation documents are set out in:
109. <https://westmidlandscombinedauthority.org.uk/media/1048/26-october-2015-appendix-2-combined-authority-engagement-analysis.pdf>
110. <http://democraticservices.coventry.gov.uk/documents/s25784/Devolution%20and%20Economic%20Growth%20-%20Scheme%20for%20Setting%20Up%20a%20West%20Midlands%20Combined%20Authority%20-%20Appendix.pdf>
111. The engagement summary within the links provided above shows responses to certain questions as well as other comments made. There are some differences in responses from the different areas within the CA geography. In Coventry a summary of the engagement process was submitted to the Council in October 2015. The overall engagement summary is supported by a signed letter of support from the Chief Executives of the Black Country, Coventry and Warwickshire and Greater Birmingham Chambers of Commerce.
112. The engagement conclusions were incorporated where appropriate into the Governance Review.

Shadow Board, Programme Board and governance arrangements

113. Throughout the early stages of establishing the CA, regular meetings were held between the Leaders of the Metropolitan districts and the LEP Chairs and with the district and borough councils within the 3 LEP areas. These meetings established the governance process followed throughout the formation of the CA prior to the establishment of the Shadow Board. Leaders and LEP Chairs meetings have continued following the creation of the Shadow Board.
114. The Shadow Board held its inaugural meeting on 21st August 2015. At that meeting, a number of key decisions were taken including:
 115. Appointment of Chair – Bob Sleight, Leader of Solihull MBC
 116. Vice chair – Darren Cooper, Leader of Sandwell MBC
 117. Clerk to the Shadow Board – Keith Ireland, Managing Director Wolverhampton MBC
 118. Legal Adviser – Stuart Portman, Walsall MBC
 119. Finance Adviser – Paul Dransfield, Birmingham CC
120. In addition the Terms of Reference for the Board were agreed as was the decision for the meetings to be in private until the date of vesting. The CA branding was also agreed.
121. The Shadow Board also received updates on the three commissions it had set up in relation to Mental Health, Land and Productivity as well as updates on other work streams associated with the CA. It was evident that there was an effective segregation of duties and roles across the key work streams of the CA by the respective Chief Executives.
122. The Shadow Board meets approximately once a month and is complimented by the Leaders meetings and also the Programme Board meetings.
123. The Programme Board meets weekly and includes the Chief Executive (or equivalent) from each of the constituent Members as well as representatives from the non-constituent Districts and LEPs. These meetings are supported by officers, advisers and the Programme Team.

Draft scheme for the establishment of a CA

124. Following the conclusion of the engagement process and the updating of the Governance Review, the Scheme for the Establishment of a CA for the West Midlands (the Scheme) was finalised.
125. The Scheme was compared to schemes submitted by other authorities in the process of establishing a CA and found to be broadly similar. The Scheme sets out the following:
 - Intention to establish a CA
 - Establishment of a CA
 - Area of the CA
 - Name of the Authority
 - Membership of the Authority
 - Voting
 - Executive arrangements
 - Dissolution of the Integrated Transport Authority
 - Passenger Transport Executive and ancillary functions
 - Scrutiny arrangements

- Functions, Powers and Duties of the CA
 - Functions – economic growth
 - Functions – Transport
 - Incidental provisions
- Funding, transfer of property, rights and liabilities
- Substructures and internal scheme of delegation

126. The Governance Review and the Scheme for the establishment of the WMCA was reviewed and approved by the Shadow Board on 9th October 2015.

127. Following this approval, the Scheme was submitted to all of the constituent members for approval prior to submission to DCLG. District and borough councils, and the 3 LEPS, were invited to join the CA with 5 districts and 3 LEPS joining as non-constituent members.

128. Approval was given as follows:

Council	Cabinet date	Council date	Decision
Birmingham		15.09.15	<p>Towards a CA</p> <p>The Leader to move the following Motion:</p> <p>"1 Note the draft report of the Governance Review which has reviewed the proposed area and assessed the functional economy (Appendix 1).</p> <p>2 Approve the current draft scheme which is being considered by Councils who will form the CA (Appendix 2).</p> <p>3 Authorise the Council Leader and the Chief Executive to agree the version of the scheme for the establishment of a CA which will be submitted to Government for consideration in October.</p> <p>4 To note that the final proposal to establish a West Midlands CA will be presented to Full Council in April 2016."</p>
Coventry	06.10.15	13.10.15	<p>Devolution and Economic Growth – Scheme for setting up a West Midlands CA</p> <p>RESOLVED that Council agree:</p> <p>1. That Coventry City Council should join the proposed West Midlands CA after considering the information available including the West Midlands statutory governance review and Statement of Intent for the CA (appendices 1 and 2) and the results of the local engagement and consultation process (appendices 3 and 4)</p> <p>2. That Coventry City Council should approve the Scheme for a West Midlands CA for submission to the Secretary of State for Communities and Local Government.</p> <p>3. That any Devolution Deal would be subject to a separate and detailed decision by Cabinet and Full Council which would include an analysis of the benefits and risks and the</p>

Council	Cabinet date	Council date	Decision
			<p>value of the deal to the city of Coventry along with any proposed changes in governance including whether or not to have an elected metro mayor.</p> <p>4. That any Devolution Deal for the seven West Midlands metropolitan councils must require a unanimous decision by all the councils concerned.</p> <p>5. To undertake continued engagement across the city on the development of a CA and devolution.</p> <p>6. To continue to take a full part in the Coventry and Warwickshire Local Enterprise Partnership.</p> <p>7. To take a full part in and develop the Coventry and Warwickshire sub-regional local authority arrangements jointly with the other councils.</p> <p>8. That the Executive Director of Resources be given delegated authority in consultation with the Cabinet Member for Strategic Finance and Resources to make decisions on the Council's behalf to withdraw from the existing Coventry and Warwickshire Business Rates Pool and agree the terms for entering a new wider West Midlands business rates pool where appropriate.</p>
Dudley	13.07.15	(delegated)	<p>Resolved</p> <p>(2) That subject to (1) above, report and recommendations of Cabinet be approved and adopted, namely:</p> <ul style="list-style-type: none"> a. That the decisions of the Cabinet, as set out in the report, be noted b. That the Leader of the Council and the Chief Executive be authorised to agree the draft and final governance review findings and scheme for the purposes of public consultation and submission to the Department of Communities and Local Government; and c. That Officers be instructed to continue to progress the necessary feasibility work associated with (i) creating a potential CA and (ii) delivering the potential economic benefits detailed in the report
Solihull	30.09.15	13.10.15	<p>Resolved</p> <p>(i) That subject to the successful conclusion of the ongoing negotiations, the Direct Scheme for the establishment of a CA for the West Midlands be approved for submission to the Secretary of State;</p> <p>(ii) That subject to no material change being made to the Scheme by other Member authorities following the Council meeting, the Chief Executive, in consultation with the Leader of the Council be authorised to sign the final version of the Scheme for submission to the Secretary of State; and</p> <p>(iii) That it be noted that the acceptance of any Devolution Deal, as a whole or in parts depending on how</p>

Council	Cabinet date	Council date	Decision
			<p>announcements are made by Government, will require a future decision of the Council, and that the creation of a CA is separate to any Devolution Deal agreed by the Government</p> <p>(Noted: In approving the Scheme for submission, this meant that Solihull MBC will have agreed to be a constituent member of the WMCA from 1 April 2016)</p>
Sandwell	30.09.15	20.10.15	<p>It was unanimously resolved :-</p> <p>(1) that the Council confirms its commitment to become a constituent member of the West Midlands CA and endorses the draft Scheme for the CA and the Governance Review as the basis for the submission to the Secretary of State for Communities and Local Government;</p> <p>(2) that the Leader of the Council and the Chief Executive be authorised to agree, on behalf of the Council, the version of the Scheme for the CA which will be submitted to Government for consideration;</p> <p>(3) that, in order to further progress the Council's interests in the creation of a CA, the Leader of the Council and the Chief Executive be authorised to determine all matters appropriate to their respective position, that are required to progress the development of a CA;</p> <p>(4) that the authority vested in the Leader of the Council to determine and commit the Council to joint decisions required to be made by the Shadow Board as necessary to secure the delivery of a CA be reaffirmed</p> <p>(5) that, should it prove necessary in order to meet required timescales, the Chief Executive, in consultation with the Mayor, be authorised to call an extraordinary meeting of the Council for the purpose of receiving the final proposals and to determine if the Council should become a constituent member of the CA.</p>
Walsall	19.10.15	19.10.15	<p>Resolved</p> <p>That the final 'Governance Review' and 'Scheme' for the West Midlands CA be approved and submitted to the Secretary of State for Communities and Local Government; confirming that Walsall Council will join the West Midlands CA as a 'Constituent Member'.</p>
Wolverhampton	16.10.15	23.09.15	<p>It was resolved :</p> <ol style="list-style-type: none"> 1. That Council approve the current draft of the scheme (Appendix 1) and Governance Review (Appendix 2). 2. That Council approve delegation for the final approval of the Governance Review Scheme to the Leader of the Council (to allow timescales to be achieved). 3. That Council note a paper outlining the Devolution Deal progress to date (Appendix 3).
We have also noted the approvals of the ITA and PTE as follows:			

Council	Cabinet date	Council date	Decision
West Midlands Integrated Transport Authority	Board meeting 17.09.15		<p>Resolved:</p> <ol style="list-style-type: none"> 1. That the establishment of a West Midlands Combined Authority (WMCA) as recommended in the Governance Review and detailed in the proposed Scheme, subject to the approval in Parliament, be agreed; 2. That the Chair of the ITA in conjunction with the Clerk to the Authority be authorised to agree any further changes to the Scheme prior to its submission to the Secretary of State; 3. That subject to the formation of the CA and recommendation 1. above: <ol style="list-style-type: none"> a. the West Midlands Integrated Transport Authority (WMITA) be dissolved, its property, functions, rights and liabilities be transferred to the CA by Order; b. the West Midlands Passenger Transport Executive (Centro) (“the PTE”) be dissolved and its powers, functions, rights and liabilities be transferred to the CA by Order; c. the staff of the PTE be transferred to the CA pursuant to the Transfer of Undertakings (protection of Employment) Regulations (TUPE); d. the ITA Policy and Strategy Team (currently employed by Solihull MBC) be TUPE transferred to the CA; e. the employment terms and conditions (including Job Evaluation scheme) for the CA initially be the terms and conditions currently used by the PTE; f. the CA offices being initially based in Centro House; g. the current Transport Delivery Committee of the ITA be dissolved on dissolution of the ITA and reconstituted as the Transport Delivery Committee of the CA; 4. That the following being subject to further detailed work with appropriate reports being presented to future meetings: <ul style="list-style-type: none"> • The CA seeking concurrent Street, Highway and Transportation Powers with the seven Constituent Authorities; • Consideration being given to the development of a Strategic Transport Network (as per the proposals within the Devo Deal) and Transport Hub as detailed in paragraph 3.7 of the report.
West Midlands Passenger Transport Executive - CENTRO	Executive Board 24.09.15		<p>RESOLVED that</p> <ol style="list-style-type: none"> (1) the decision of the district councils and the ITA to form a CA and to seek devolved powers for the CA be welcomed ; (2) the proposal that the Secretary of State will be requested to abolish the PTE and transfer all powers and obligations of the PTE to the ITA immediately prior to the ITA powers being transferred to the CA be supported and (3) the timetable for the establishment of the CA including the submission to the Secretary of State for Transport be noted.

Council	Cabinet date	Council date	Decision

129. The Governance Review and approved Scheme were submitted to DCLG on 26th October 2015. At this point, it was expected – and set out in the Act (LDEDCA) – that any consultation would be undertaken by the Secretary of State. However, following discussions with DCLG, and in response to changing legislation under the Cities and Local Government Devolution Act 2016, this was deemed to be no longer the case. Following legal advice including QC advice, the constituent councils agreed to undertake consultation to inform the Secretary of State’s decision to establish a CA.

Consultation

130. The constituent councils of the proposed West Midlands CA carried out a public consultation, in connection with the proposals in the Scheme, to inform the Secretary of State for Communities and Local Government’s decision regarding the establishment of a CA in the West Midlands. The consultation summary is available on the West Midlands CA website.

131. <https://westmidlandscombinedauthority.org.uk/about/documents/>

132. Building on earlier engagement and in response to changing legislation, whereby if the constituent councils carry out a consultation that is deemed sufficient no further government consultation is required, the constituent councils carried out a consultation between 18th January and 8th February 2016.

133. This consultation has now closed and a summary of the consultation has been submitted to the Secretary of State and DCLG.

Consent to the draft Order to establish the CA

134. Following submission of the consultation summary responses, the Secretary of State has now confirmed to the constituent councils his intention to establish the West Midlands CA.

135. The draft Order was provided on February 22nd and each Council will then be asked to confirm its previous decision that the Council should formally become a constituent member of the WMCA. All Councils need to consent to the CA establishment Order by the 8th March in order to meet the Shadow Board required creation date of 1st June 2016. Final drafting amendments are likely to be delegated to the Chief Executive (or equivalent) and the Leader to avoid any delays in laying the Order before Parliament.

136. The expected date for each organisation to receive the CA Order is:

- Coventry – 23 February
- Passenger Transport Executive – 25 February
- Dudley – 29 February
- Solihull – 1 March
- Birmingham – 1 March
- Wolverhampton – 2 March
- Walsall – 7 March
- Sandwell – 8 March
- Integrated Transport Authority – 18 March

137. The CA order will also be received by the non-constituent members.

138. Subject to approval the WMCA will be formally established from 1st June 2016 at which point it will hold its inaugural meeting and agree its Constitution and ways of working. The functions of the West

Midlands Integrated Transport Authority and the Passenger Transport Executive (CENTRO) will be subsumed into the CA at that point.

139. Each constituent member will be represented on the CA by two members of its cabinet. Each non constituent member will be represented by one member of its authority.

Risks

140. Although the actions taken to date have been subject to considerable scrutiny and governance, there are still risks to be faced by the CA and its constituent members.
141. The possibility of a Judicial Review cannot be discounted. The Shadow Board legal adviser submitted a paper outlining the implications of a Judicial Review and the Shadow Board are aware of the possibility of this. It would seem that the most likely opportunity for a Judicial Review to be requested is at the point the Secretary of State determines if the consultation is satisfactory and drafts the Order. As the draft Scheme has been in the public domain for some time now (published by each Council in September/October 2015) and the draft Order has been published it would seem unlikely that a Review will be requested now but again, this cannot be fully discounted.
142. Although the draft Scheme has already been passed through each Council, there is still a possibility that one or more Councils may decide not to consent to the draft Order. This cannot be discounted and recent publicity around the future Mayoral election has seen increased publicity and increases the potential for challenge at the Council meetings.
143. Any of these risks materialising could have serious consequences with regard to the establishment of the CA. The timescales are very tight with a desire to ensure that the CA is established as soon as possible. At the moment these timescales are on track but there is very little leeway.

Looking forward

144. The decision to establish the CA, and the commitment from each of the constituent and non-constituent authorities, is a significant landmark in itself, but there is much to be done between the approval and day 1 of the new CA.
145. The Scheme itself sets out some of the functions and governance of the new CA such as Board membership, Executive arrangements and Scrutiny arrangements, but the words will need to be translated into actions. A new constitution has been drafted which Councils are due to note and/or ratifying shortly before final approval by the new CA Board. This constitution has been drafted by the legal representatives from the constituent councils under the supervision of the Shadow Board legal adviser.
146. The draft constitution has been prepared in parallel with the CA establishment process and was approved as a working draft at the Shadow CA Board meeting on 12th February 2016. It is intended that the constitution will be formally approved at the inaugural board meeting of the CA on vesting day.
147. There will be no let-up in the pace of change. The fact that the ITA and PTE staff will have TUPED into the CA and therefore there will be a full functioning operation covering all standard operations including HR, Finance, Legal, ICT, strategy, and transport services addresses many practical issues but there will be a lot of focus on the new body and it is important to be performing from day 1 across all these business critical functions.
148. The Mayoral Order will need to be drafted and all Councils need to consent to this and the Devolution Deal by 31st May in order to meet the timetable agreed with the Government. Real care needs to be taken locally in working with CLG to finalised the Order so that arrangements meet local requirements as far as possible.
149. Appointments need to be made, particularly for key post holders and statutory positions.

150. Committee structures and terms of reference have to be considered in order to ensure that there is effective governance from day 1.
151. At the same time the individual Councils will be dealing with business as usual activities as well as elections in some cases.
152. There is also the possibility of changes to the CA in the longer term. This possibility does highlight the need for governance arrangements to be sufficiently flexible to accommodate new members within the 3 LEP geography. The administration and operation of the CA needs to be agile enough to ensure that an expanded membership does not dilute the effectiveness of the CA.
153. The political implications of an expanded membership will need to be understood and worked through, particularly if member Council leaders are to have distinct responsibilities for programmes, initiatives or projects.
154. The past 18 months has seen an unprecedented level of engagement and agreement between the member councils and significant input and commitment from each one, this level of commitment will need to be sustained if the new CA is to be successful from its inception.

Findings – Approving the Devolution Deal

Background, content and timetable

155. In July 2015 the Leaders of the seven Metropolitan Councils of the West Midlands launched a vision for the West Midlands CA called the Statement of Intent and in the following months worked closely with government to develop a draft Devolution Deal agreement based on the founding principles that it:

- ‘confirms and endorses our commitment to work together across a three-LEP geography to secure our objectives;
- focuses on the issues that really matter to the people and businesses of the West Midlands: growth, jobs, skills, transport and homes;
- recognises that economic growth for the West Midlands is part of the wider Midlands Engine;
- gives us the ability to create a substantial investment programme and to make the investments that we decide will have the biggest benefit for the West Midlands;
- enables us to start work with government on our public service reform agenda; and
- supports and strengthens our commitment to partnership with the private sector’.

Deal approval – in principle

156. On 17 November 2015, the West Midlands Devolution Deal (“the Deal”) was signed by the Chancellor of the Exchequer, Secretary of State for Business, Innovation and Skills, all seven of the West Midlands Metropolitan Boroughs and three Local Enterprise Partnerships (LEPs).

157. A summary of the Agreement is available on the WMCA website:

<https://westmidlandscombinedauthority.org.uk/media/1044/17-november-2015-west-midlands-combined-authority-deal-summary.pdf>

From principle to formal approval

158. The deal was contingent on a number of factors, including the legislative process to establish the CA; the establishment of a mayor for the West Midlands CA area; agreement by the constituent councils; agreement by Ministers; the outcome of the Spending Review; and further public engagement.

159. As detailed in the CA section of this report, consent was received from DCLG in January 2016 that the establishment of the CA could be done in two phases with the incorporation of the mayor subject to a separate process.

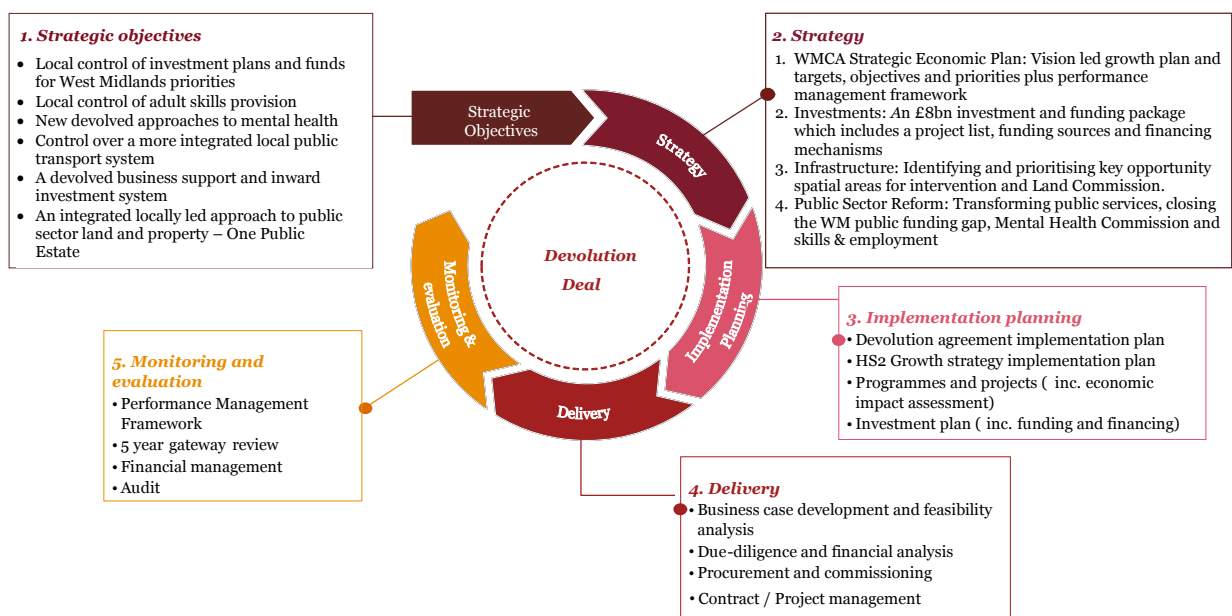
160. At its meeting on 20 November 2015, the WMCA Programme Board considered a paper which set out a series of issues in the proposed Deal that needed clarifying that had previously been raised by Leaders and LEP Chairs. The Programme Board was resolving these issues in early 2016 by clarifying outstanding matters through a ‘super-clarification’ process.

161. The Programme Board has continued at pace to develop a detailed understanding of each element of the Deal testing, where possible, the financial viability and profiling of the schemes. The vast majority of the issues outlined at the 20 November 2015 Programme Board meeting have been addressed fully during the ‘super clarification’ process but a number are still outstanding, either as a result of ongoing work within the WMCA or within government departments.

- 162. Some of the constituent Councils will seek approval of the Devolution Deal in the coming weeks and others will seek approval in May 2016. This split timetable meets the requirements of the Parliamentary timetable and the commitments set out in the Devolution Deal.
- 163. The outstanding ‘super-clarification’ issues are being resolved as soon as possible but some of the constituent authorities are likely to formally consider the Devolution Deal before all matters are resolved fully.

Our review

- 164. The scope of our review is to provide assurance at a point in time as well as highlighting what work is still in progress and what is to be done going forward. The following diagram sets out five stages in a delivery programme such as this which Chief Officers have been presented with previously. To date the vast majority of efforts have, rightly, been on addressing the strategic objectives, strategy and implementation planning required before approving the deal, reflected in steps 1 to 3:



- 165. In the coming months the focus must now switch to delivering at pace and addressing business process, capacity and capability matters of delivery.
- 166. ***Significant progress has been made in a relatively short time period and the direction of travel in relation to the Devolution Deal is positive. Given the scale of the Devolution Deal and the complexities involved it is to be expected that the resolution of some matters is still ongoing and it is important to ensure that processes are established to monitor the effective resolution of these outstanding issues in the required timescales.***

Strategic objectives

Exploring a Devolution Deal

167. It was widely acknowledged by all stakeholders we interviewed that the creation of the CA and the signing of the proposed Devolution Deal has required collaboration in a fundamentally different way and on a different scale than ever before. The proposed Devolution Agreement represents a radical devolution of funding, powers and responsibilities to the region.
168. Interviews with stakeholders identified a number of economic and other benefits that resulted in a step-change in collaborative efforts:
- a Functional Economic Market Area (FEMA) assessment, which tested whether the geographic area covered by the three LEPs was markedly more coherent in economic terms than each of the individual LEP areas separately. This showed that the region was a functioning economic area that is even more inter-dependent than previously recognised;
 - the region can collaborate on matters of strategic importance to be greater than its consistent parts;
 - the economic benefits of agglomeration were significant and the links between the LEP areas had been growing recently;
 - growth in Gross Value Add (GVA) is not a zero-sum game as it was sometimes seen in the past. One area within the region benefitting significantly does not mean other areas losing out. On the contrary, the indirect benefits for the whole region can be significant;
 - supply chain value and indirect benefits – access to jobs, connectivity, cross-authority border job creation, economic development, housing growth, access to funding
 - this is not about jobs for each authority area. The focus is on the supply chain and ‘hub and spoke’ benefits with a recognition that job creation may not be evenly distributed but the whole region will benefit from growth in the region as whole;
 - Government policy led authorities to believe that the direction of travel toward further devolution was clear and that those failing to follow this direction would miss out on the opportunities it provided; and
 - there was also a firm belief that further devolution of power and funding would come in the future.
169. By the spring of 2015 there was a common understanding amongst the local authorities and LEPs that for better outcomes for local people and businesses the Devolution Deal needed to be considered further. The evidence increasingly pointed to a binary choice between what the individual entities could achieve on their own against what they could achieve through a combined effort.
170. In the summer of 2015, driven by the economic data summarised in the governance review and the shared common aspirations, the Leaders of the constituent members agreed a number of founding principles which drove the initial decision making in the run up to agreeing a Devolution Deal agreement and expansion of the membership of the emerging CA:
1. All leaders are committed to working together to deliver the vision behind the CA.
 2. All communities will benefit from the CA, but not all communities will necessarily benefit at the same time or in the same way.
 3. The CA should facilitate smarter investment decisions with better outcomes.
 4. The CA should deliver economic growth for the benefit of its communities.
 5. The CA should reform fragmented public services.
 6. The CA should walk before it can run and the initial focus should be on the ‘quick wins’.
171. These principles have remained fundamental to decisions taken since the proposed Devolution Deal was approved and are continuing to drive the arrangements that are being developed to implement the deal.
172. It is clear from discussions with all constituent and non-constituent Members that engaged with us, that the establishment of the West Midlands CA and the negotiation of a Devolution Agreement with

the Government provided Councils with the ability to go further and faster in exploiting the economic potential of the area. It also enables authorities to take more concerted action on productivity in the public and private sectors, including a programme of ambitious public service reform.

- 173. Our review of the economic market assessment information available to the constituent authorities supports this conclusion and would appear to be a sound basis on which to develop proposals.**

Agreeing the strategic intent for a Devolution Deal (Stage 1)

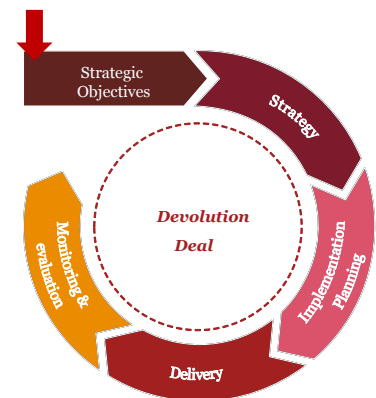
174. Between July 2015 and the signing of the Devolution Agreement in November 2015 significant progress was made toward finalising the desired outcomes from a Devolution Deal that must be present for the constituent councils to agree to the deal.

175. These were:

- Local control of investment plans and funds for West Midlands priorities (transport and land reclamation for housing and employment)
- Local control of adult skills provision
- A local employment service
- The development of new devolved approaches to mental health, troubled individuals and youth justice services
- Control over a more integrated local public transport system and influence over strategic road network planning
- A devolved business support and inward investment system
- An integrated locally led approach to public sector land and property – One Public Estate.

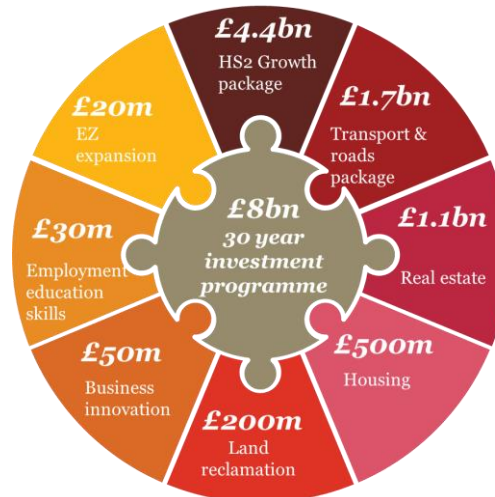
176. The Devolution Agreement agreed with Government in November 2015 set these out under four overarching themes:

- Collaborating to make the region act as one place
- Creating the jobs of the future
- Reforming public services to give people the help they need to succeed
- Connecting the region more effectively internationally, internally and with neighbouring areas.



Additional funding for economic growth

177. In addition to the direct devolution funding package, the WMCA has considered other benefits of devolution in achieving its objectives. These include significant devolved funding streams which are to be invested in support of local economic growth. At present an £8bn investment programme is being developed comprising over 13 programmes and over 50 projects:



178. Key elements of the Devolution Deal look to address some of the wider regional requirements to develop and sustain economic growth across the West Midlands region. The schemes below focus on key themes or areas within the region that will assist in the delivery of this growth:

- Coventry UK Central Plus – Connectivity
- Devolved Transportation Funding
- West Midlands Revolving Housing Fund
- Collective Investment Vehicle
- Coventry City Centre Regeneration
- Land Reclamation
- Business Innovation
- Employment, Education & Skills
- Enterprise Zone (EZ) Expansion excluding Curzon Street

179. Further details of these schemes and funding are set out below in the Finance section below.

180. It is expected that the combined package of funding fed by the Devolution Deal will bring:

- Benefits for every part of the area
- Our local investment priorities
- Half a million new jobs
- Better training and improved skills – enabling local people to get the jobs on offer
- Better public services – helping people into the labour market and reducing the public finance gap
- Better business support services to accelerate innovation and growth
- More and better homes
- Faster, more convenient and affordable transport

181. Although the provisional Devolution Agreement was subject to approval by each Authority and further work was required to refine exactly what was meant by each section of the Agreement, the Leaders of each of the seven West Midlands Metropolitan Boroughs agreed the provisional Agreement as a statement of intent to work with the government on what devotion could look like.

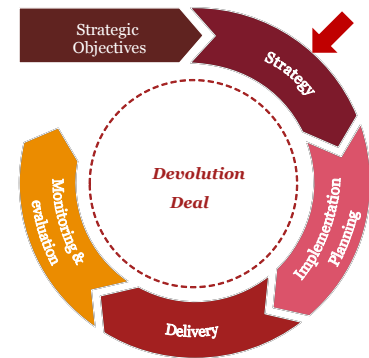
182. Our review supports the conclusion that the content of the Deal sufficiently met its objectives and, subject to its ongoing clarification, this appears to be a sound basis on which to sign the provisional agreement.

Finalising the Devolution Deal

183. The Programme Board has received updates on relevant government announcements made subsequently to ensure that any other matters arising from changes in policy are understood and considered, including on skills and apprenticeships, transport, devolution, housing and business rate retention. Where matters have required further consideration these have been incorporated into existing processes such as the super-clarification process.
184. At the end of January 2016 the WMCA Programme Board received a paper from the Chief Executive with responsibility for finalising the super-clarification process which summarised progress made.
185. Many of the issues outlined in November 2016 immediately after signing the Devolution Agreement have been addressed fully. A number of matters were still outstanding, either as a result of further decisions needed by the WMCA or, we understand, because of work ongoing within Government departments.
186. The most notable outstanding issues relate to:
- Governance across the three LEP geography: the Shadow Board is in continuing dialogue with HMT, and DCLG where appropriate, to confirm how powers would apply to different types of constituent members and to non-constituent members;
 - CPO powers: the Shadow Board is considering how the proposed devolution to the WMCA of the Homes and Communities Agency Compulsory Purchase Order powers should be exercised within the WMCA area; and
 - Reform of local government funding; the arrangements for the retention of growth in Business Rates are not yet certain, in particular the government's plan to allow Councils to retain 100% of the growth in business rates. The Investment Plan assumes that the CA will retain 0.3% in the growth of business rates over the 50% that is currently retained centrally. The CA have assumed this will generate £697 million over the life of the plan. If this growth is not secured for the CA as part of the future changes to Business Rates retention arrangements, the capital investment it supports may not proceed as planned. The impact of the existing Enterprise Zone arrangements on Business Rate growth will also need to be taken into account.
187. The intention of the Programme Board is to complete the 'super clarification' process by the end of February which should provide constituent and non-constituent members of the CA with sufficient information to make an informed decision on approving the Deal. We understand that there may be some slippage in this timetable although an exact date for completion is not known.
- 188. Each Council will need to determine whether or not the outstanding matters are of such significance that the Devolution Agreement cannot be approved in accordance with the proposed timetable. Ratification of the draft Deal is required for the first tranche of £36.5m to be released. Some, if not all, of the Metropolitan Councils are looking to consent to the Devolution Deal in March to meet the CA's commitments, as set out in the provisional Devolution Agreement.**

Strategy

189. Once the strategic objectives had been set, underpinned by the market assessment, economic work and governance review, the Shadow Board set about developing a strategic plan that will allow the vision to be achieved and the Devolution Deal to be fulfilled.



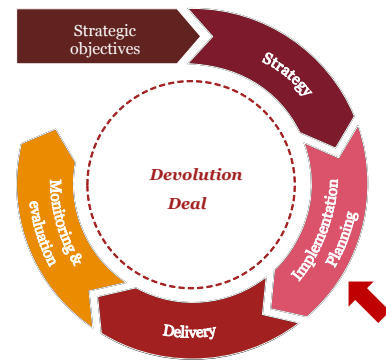
The Strategic Economic Plan

190. The WMCA has commissioned a Strategic Economic Plan (SEP) for the West Midlands region, taking as its starting point the individual economic plans for each of the LEP areas. This establishes the economic targets for the region, and is underpinned by an economic forecasting model and detailed delivery plans. It is designed to be a vision led document supported by technical papers and economic modelling.
191. The draft SEP sets out the action required to deliver the vision and in particular how the Devolution Agreement can be used to enable the region to 'go further, faster in doing so'.
192. The development of the SEP has been led by the three Local Enterprise Partnerships and Local Authority Leaders. The inaugural SEP is intended to complement and sit alongside the LEPs' individual SEPs and therefore focuses on action which:
- Exploits the provisions in the devolution agreement to enable the CA to go further and faster in enabling economic growth;
 - Is of strategic importance across the CA area and the wider LEP geography;
 - Is of sufficient scale to warrant attention at a CA level.
193. We have seen evidence of significant progress towards the development of a SEP to support the content of the WMCA Devolution Deal, as clarified by the super-clarification. The Sub-Board has continued to meet to develop a SEP for the CA area in accordance with the timetable set out by the Shadow Board. The Board:
- Established the structure of the Plan around which the Plan narrative will be built.
 - Is in the process of drafting an initial set of cross cutting programme propositions;
 - Is developing a critical path for the relevant communications and engagement required for the WMCA SEP taking it from draft to adoption via the CA Governance arrangements; and
 - Is developing SMART objectives which translate the vision into key measures and their relationship to the Balance Metrics previously approved by the Shadow Board.
194. The draft SEP set out eight strategic priorities as follows:
- *New Manufacturing Excellence*: to build on one of the biggest concentrations of high value manufacturing businesses in Europe, with global companies supplied by clusters of local businesses;
 - *Digital and Creative*: a programme to ensure that the level of business start-ups, growth and survival matches the best in the country with a particular focus on the digital and creative sectors;
 - *Environmental Technologies*: action to secure environmental improvements and contribute to low carbon sustainability and by doing so enable the growth of the environmental technologies sector.
 - *HS2 Growth*: a programme to maximise the benefits of the largest infrastructure project in Europe to drive economic growth across the Midlands.
 - *Housing*: action to accelerate the delivery of current housing plan and enable an increase in the level of house building to support the level of growth envisaged in this SEP;
 - *Skills for the Supply Chain and Employment for All*: a programme of activity to ensure that the skills of businesses are met and that everybody has the opportunity to benefit from economic growth;

- *Medical, health and wellbeing*: enable the growth of the health and care sectors to improve the health and wellbeing of the area, reduce demand on public services and enable economic growth;
 - *Exploiting the economic geography*: making the most of the scale and diversity of the West Midlands geography to enable economic growth and community wellbeing.’
195. Key implementation decisions arising from the SEP will be part of the central business of the CA. This process is expected to be supported by a decision making tool – the Dynamic Economic Impact Model (DEIM) – to ensure decisions are taken on the basis of a legitimate authorised process that all have signed up to. More detail on this mechanism is set out in the ‘*Balance*’ section later in this report.
196. The draft SEP reflects the draft Performance Management Framework and a further table of desirable programme impact and ambitions to deliver the vision. This work stems from the economic modelling previously commissioned by the CA.
197. Updates have been presented to the Programme Board and the approved timeline for finalising the SEP is:
- Endorsement by the WMCA SEP Sub Board at its March meeting;
 - Final sign-off by WMCA Programme Board in early April; and
 - Final sign-off by WMCA Shadow Board in early April.
198. A Devolution Strategy Group has recently been established, in part to ensure that all future Devolution negotiations are driven by the SEP.
- 199. The WMCA has commissioned the production of a vision-led Strategic Economic Plan that sets out the action that needs to be taken in order to deliver the vision and the detail of the Devolution Agreement. The development of the SEP has been subject to a rigorous governance process and is expected to be delivered on time to allow Shadow Board sign off before the CA vesting day. The development of the SEP is being delivered alongside the development of associated implementation plans and supporting documents.**

Implementation planning

200. The Devolution Agreement presents the WMCA with a range of opportunities and challenges summarised in the table below.
201. A significant programme of work has taken place since signing the Devolution Agreement to maximise the opportunities and minimise the challenges faced to achieving the WMCA’s strategic objectives. Underpinning the programme of work have been regular meetings of the Shadow Board and Programme Board.



The opportunity	The Challenge
<ul style="list-style-type: none"> • Devolved funding and powers – likely to increase as Government confidence in WMCA grows. • Increased local decision making • Whole place / whole system approach. Greater alignment of local and national partner agendas, priorities, funding, resources – the optimal complimentary investment programme. • Local investment planning and prioritisation • Local service redesign and commissioning • A programme approach – use funding more flexibly – no ring-fencing? • Leverage private sector investment • Minimise / transfer risk • Use of spending power to grow local businesses and leverage the supply chain of delivery partners. 	<ul style="list-style-type: none"> • Delivering the scale and ambition • Operating within a new and changing governance model • Mix of capital projects, revenue projects and service delivery • Projects at different stages of development • Delivery risk linked to economic and financial success of other projects • Need for increased resources • Partner budget pressures • Reputational and financial risks of non/delayed delivery • Devolved funding dependent on 5 year gateway review to assess that the investment has contributed to economic growth.

Decision making arrangements

202. The Shadow Board meets approximately once a month and is complimented by the Leaders meetings. The Shadow Board comprises the Leaders of the constituent and non-constituent local authorities and the Chairs of the 3 LEPs.
203. Review of Shadow Board minutes reveal that regular updates are provided on, and decisions taken in relation to:
- The Devolution Implementation Plan
 - The Super Clarification process
 - The Strategic Economic Plan (fed in from the Super SEP Board)
 - Individual work streams that are focussing on specific elements of the Devolution Deal such as Transportation matters
 - All three Commissions
 - Matters arising from the Programme Management Office such as finance update
 - Summary updates of governance announcements such as Spending Review 2015

204. These arrangements are supported by the Programme Board which meets weekly and includes the Chief Executive (or equivalent) from each of the constituent members as well as representatives from the non-constituent Districts and LEPs. These meetings are supported by officers, advisers and the Programme Team.
205. Review of Programme Board minutes reveals that regular updates are provided on, and actions agreed in relation to all of the above topics but with more in-depth discussion about programme management matters and updates on individual pieces of work that are being commissioned and managed by the Programme Board. Progress on discussions with government ministers and departments is also provided.
206. It is evident that responsibilities for different work streams and strands of work have been shared between Officers of each of the constituent members which has allowed a degree of specialism and provided balance and representation.
207. It also became apparent during discussions with stakeholders that being able to share the strategic intent, needs, wants and concerns of individual Board Members has continued to build trust and understanding across the constituent and non-constituent members.

Devolution Agreement Implementation plans

208. Many of the arrangements above focus on the Devolution Deal but other matters with less clear links to the Devolution Agreement are also covered. A specific programme of work is in place to ensure that the CA is ready for vesting day.
209. A high level Devolution Agreement Implementation Plan has been developed in partnership with government to identify lead accountabilities and milestones for each element of the Agreement. This document is a detailed plan which translates everything contained in the West Midlands CA Devolution Agreement into clear actions. This is an important tool for giving the CA and government departments the assurance needed that implementation arrangements for the Devolution Deal are robust. A summary version has also been prepared.
210. While it is considered necessary for the WMCA to have such a detailed plan in place, the CA and government departments also need a mechanism for monitoring delivery against the plan.
211. These documents have been presented to the CA Programme Board and are now being populated in full with a view to having a readily available tool against which to monitor progress by 4 March 2016. After this date regular monitoring of progress against plans will begin.
212. A specific implementation plan has also been developed for the HS2 Growth Strategy, setting out timescales and resources for the various parts of the strategy. The HS2 related projects in the broader funding package have sponsors and project leads from across the region and the projects are currently overseen by a separate Steering group.

Implementation progress to date

213. The arrangements set out above have already led to progress being reported to Board meetings. In later sections of the report we set out what further action is required to ensure delivery success but during our review we have identified a significant body of work in progress that has gone a long way to addressing issues covering the following topics:

Finance, funding and investment strategy

- An assessment of all the existing plans for infrastructure development in the region and their potential for generating growth has been undertaken.
- This work provides a basis for the next stage which is the development of an Infrastructure Plan for the WMCA, which meets the strategic aspirations of the SEP. This work is underway as is a validation of the investment strategy.
- Discussions are continuing to take place to clarify implications for changes regarding business rates.

Balance

- A Dynamic Economic Impact Model (DEIM?) review group has overseen the development of a bespoke model to support a full economic investment prioritisation exercise and integrated spatial strategy. This is designed to provide a clear mechanism to enable the objective assessment of a range of interventions across the 3 WM LEP areas in order for the WM CA Board to understand the impact of the intervention being proposed, its ability to deliver the Vision and how investment should be prioritised.
- DEIM is expected to be ready for the largest projects from April/May in line with the SEP and the expectation of the CA is that it will give the CA the tools and mechanisms to demonstrate how benefits flow fairly and effectively.

Joining up linked work streams

- Efforts have been made to ensure coordination and linkage with the Balance, Infrastructure Work streams, and the SEP.
- A Steering Group has been convened to join up key work streams to work in unison under one overarching working group incorporating outcomes from:
 - WMCA SEP (Coventry City Council’s CEO is overall lead, Walsall Council’s CEO leads on balance, Economic Work stream own this work)
 - Investments (The Finance Officer group together with Sandwell Council’s CEO owns this work)
 - Infrastructure (Sandwell Council’s CEO and the Infrastructure work stream own this work) plus
 - Public Sector Reform
- A CA Infrastructure and Investment Strategy is being developed that links the Strategic Economic Plan (SEP), Dynamic Economic Impact Model (DEIM) that will enable the development of the SEP Delivery Plan.

Appraisal and performance frameworks

- Work is underway to develop a robust performance management framework and an assurance framework. Further details are set out elsewhere in this report.

Governance planning for delivery

- Governance arrangements have been put in place for the operation of the Shadow CA and the CA Shadow Board receives proposals from Programme Board over what effective governance arrangements could be before and after vesting day. Work is continuing to finalise governance arrangements that are effective both for the CA and for the associated entities and delivery agents. A draft constitution has been drafted.
- Agreement in principle has been reached regarding future arrangements for entities such as Finance Birmingham and Marketing Birmingham.

Practical and technical factors

- There are a significant number of practical and technical matters which have been, and continue to be, addressed. Earlier sections of this report set out progress on legal and constitutional matters such as the Constitution. Other matters that have been progressed include:
 - There has been some progress on filling key interim Officer roles and work is ongoing towards identifying what other roles are required and how they will be filled.
 - Changes in working relationships between the CA, the Integrated Transport Authority and the Passenger Transport Executive have been identified and managed. Resolutions have been reached regarding future changes and key reports have been considered by both ITA and Shadow Board.
 - Functions, officers and systems in existence within the ITA and PTE are expected to automatically role into the CA.
 - Discussions have taken place with DCLG and Treasury on VAT and Corporation Tax.
 - A fund has been created from contributions from constituent and non-constituent members to fund activities that are required by the Shadow Board.
 - The process has begun to develop a CA budget for 2016/17 in both shadow and fully constituted form. It is expected that a CA draft budget will be endorsed at a Shadow CA meeting prior to 1 April

2016 and subsequently a formal budget approved by the full CA as soon as possible after its formation.

Commissions – from Strategy to Delivery

214. The WMCA committed to establish three major independent Commissions to inform future work that it expects to be co-commissioned with central government as they represent critical shared challenges. These are:

- A Land Commission to ensure that the pipeline of appropriate land for development should not become a brake on the delivery of the new SEP.
- A Mental Health Commission to identify the contribution that devolution can make to addressing poor mental health and wellbeing with a view toward transforming mental health and wellbeing services and re-balance them to prevent demand for public services and critically to improve outcomes.
- A Productivity Commission to increase productivity in both public and private sectors and increase the opportunities to transfer best practice between the sector types.

215. Progress has been reported regularly to Board and we understand the current status to be as follows:

Land Commission:

- Draft Terms of Reference have been prepared and a Chair identified.
- Progress is being made toward recruiting for and convening a commission.
- A technical brief has been issued to the market to scope the potential toolbox of initiatives that will accelerate the pace, scope and quality of delivery of residential and commercial development across the three LEP geography.
- A timetable for the Commission has been agreed with an expected publication date for the Commission's findings of September 2016.

Mental Health Commission:

- The membership of the Commission has been resolved and a Chair identified.
- A steering group for the Commission has been established.
- The Commission has developed a set of key lines of enquiry (KLOE).
- The Commission has met a number of times so far and has plans to meet regularly over the coming months.
- A timetable for the Commission has been agreed with an expected publication date for the Commission's findings of July 2016.

Productivity Commission:

- Members of the Programme Board have met with representatives of the UK Commission for Employment and Skills (*UKCES*) to explore potential Productivity Commission approaches.
- Productivity Terms of Reference have been drafted.
- Further work is ongoing to agree the approach and scope of the commission.

216. *A significant programme of work has taken place since signing the proposed Devolution Deal in November 2015 to maximise the opportunities and minimise the challenges faced to achieving the WMCA's strategic objectives. The politicians and officers should be commended for the achievements to date. We have seen evidence of the decision making arrangements put in place operating on a regular basis and we have identified a significant number of developments that indicate the arrangements are working.*

217. *Many of the developments are live and current so we cannot reach final conclusions on outcomes but the direction of travel is positive.*

- 218. *By developing a Devolution Agreement Implementation plan with support from government the WMCA is well positioned to monitor ongoing implementation plans and quickly identify any areas of slippage so that action can be taken.***
- 219. *It is important that the pace of implementation continues and does not slow due to distractions arising from the formation of the CA or the upcoming elections.***

Finance

The CA Investment Programme has been developed to plan the proposed investments. It covers a wide range of projects, and analyses the programme by both scheme and funding mechanism. The source of this data is information supplied by the Shadow CA. It represents a snapshot of the plan at this point in time and it is therefore work in progress. There are a range of schemes included, from fixed shorter-term schemes to others which are broader in nature:

CA Investment Programme Theme	Devolution Deal					Partner Funding				Investment Funds			Total
	Borrowing funded from rev grant, precept, BR Supp't & BR growth	EZ	Transport Capital Grant	Existing DfT/HS2 funding	Metro Capital Funding	Local Contributions	Public Sector Major Partner Contributions	ESIF	Other Private Sector Contributions	Collective Investment Vehicle	Productivity Fund	Revolving Housing Fund	
		£m	£m	£m	£m	£m	£m	£m	£m	£m	£m	£m	£m
HS2 - UK Central Interchange	317			216		139							672
HS2 - Curzon Street Station Masterplan	51	559											610
HS2 Curzon - Bull Street to Curzon Street Metro Extension				41									41
HS2 Curzon - Adderley Street Digbeth Metro Extension					97								97
HS2 - Metro Birmingham Interchange		183			492								675
UK Central Infrastructure Package	319						395						714
HS2 Wider Connectivity Package exc Metro Birmingham Interchange	570			95			273						938
Brierly Hill Metro Extension	103				207		0						310
High Speed Supply Chain and Business Support						12		13			325		350
HS2 Growth Strategy	1,360	742	0	351	795	151	668	13	0	0	325	0	4,406
Coventry UK Central Plus - Connectivity	247			89		27	8						370
Devolved Transport Investment			1,299										1,299
West Midlands Revolving Housing Fund												500	500
Collective Investment Vehicle										1,000			1,000
Coventry City Centre Regeneration	150												150
Land Reclamation	200												200
Business Innovation	50												50
Employment, Education & Skills	20					10							30
EZ Expansion excluding Curzon St		20											20
WM CA TOTAL CAPITAL	2,026	762	1,299	440	795	188	676	13	0	1,000	325	500	8,025
Plus interest Costs	1,006												
Repaid from revenue resources over 30 years*	2,918												

220. The CA Investment Programme has been developed to plan the proposed investments. It covers a wide range of projects, and analyses the programme by both scheme and funding mechanism. The plan is split into two main sections; the HS2 Growth Strategy and the rest of the CA Investment Programme.
221. A number of projects were specifically mentioned in the Devolution Deal, in particular:
- The HS2 Growth Strategy;
 - Eastside Metro extension to Digbeth; and
 - The Metro extensions from Curzon to Interchange and from Brierley Hill.
222. The Investment Programme includes these schemes, in addition to a number of other planned investments.
223. Business Cases for each of the projects in the programme are at varying stages of development. Further assurance and/or due diligence may be required once the cases are fully developed. We have considered the individual schemes as they stand along with their funding streams, and have raised comments as appropriate.

Projects

224. The Investment Programme outlines a number of key projects which are planned to be delivered by the CA. The nature of the Investment Programme is that it is a long-term plan, up to a 30-year period, for capital investment in the region. As a result, the status of the specific projects in the programme are inevitably at varying stages of development and certainty. This includes the degree to which the following are in place:
- detailed plans, such as an Outline or Full Business Case;
 - confirmation of planned costs;
 - the timing and sequencing of projects;
 - accessibility and confirmation of funding;
 - how the projects score against the emerging SEP objectives and Balance metrics; and
 - the level of risk associated with delivery.
225. The Investment Programme presents the HS2 Growth Strategy schemes in the top half of the table which amount to £4.4 billion of proposed investment. Work to ensure the area benefits from HS2 has been ongoing for a number of years prior to inclusion in the Investment Programme. The schemes are supported by a draft HS2 Growth Strategy Implementation Plan which has been developed by the Greater Birmingham and Solihull Local Enterprise Partnership in conjunction with a number of other stakeholders.
226. The plan outlines the individual schemes and the proposed programme governance arrangements. The projects have sponsors and project leads, and are overseen by a steering group currently chaired by the Chair of the GBS LEP. The governance arrangements are relatively well developed considering the timescales involved.
227. We have considered the main projects in the HS2 Growth Strategy and summarised them in the table below:

Project	Value £m	Comments
HS2 – UK Central Interchange	672	<p>The ‘UK Central – Hub’ Preliminary Concept Masterplan was launched in August 2014. It highlights the opportunity for development surrounding the proposed HS2 station.</p> <p>The HS2 Growth Strategy refers to a fully integrated approach being necessary to fully realise the benefits of the Interchange Station. This will include:</p> <ul style="list-style-type: none"> • delivery of a new international landmark gateway; • enhanced access and connectivity; • provision of a highly connected economic ‘growth hub’; • creation of a residential community with 1,900 new homes; and • creation of a linear park through the development. <p>Solihull Metropolitan Borough Council is establishing an Urban Growth Company (UGC) to lead and co-ordinate the delivery of the infrastructure to support development of Interchange Station site, beyond that which will be delivered by HS2.</p> <p>The plans for the development of the Interchange Station and the associated infrastructure are in development and these will need to be finalised for the impact on the Investment Programme to be confirmed. Close working with HS2 and the relevant land owners will be required to ensure that the required capital works will be appropriately sequenced and co-ordinated.</p>
HS2 – Curzon Street Station Masterplan	610	<p>The Birmingham Curzon HS2 Masterplan was launched in February 2014 and set out the wider development opportunities from securing a well-integrated station and unlocking other development opportunities in the vicinity. The vision is well established.</p> <p>This element of the HS2 Growth Strategy is proposed to be mostly funded (91%) by the Enterprise Zone which has been agreed with government to surround the station. The remainder of the funding is provided by borrowing supported by the revenue stream secured in the Devolution Deal.</p> <p>The Investment Programme outlines the following individual schemes:</p> <ul style="list-style-type: none"> • HS2 Station Environment; • Site Enabling Works; • Local Transport Improvements; • Connecting Economic Opportunities; • Duddeston Viaduct Sky Park; • Social Infrastructure; • Unlocking Strategic Development Sites; and • Delivery Vehicle Operating Costs. <p>The HS2 Growth Strategy Draft Implementation Plan states that because the primary funding source is via the Enterprise Zone it is anticipated that the existing Accountable Body function, currently</p>

Project	Value £m	Comments
		<p>performed by Birmingham City Council, will be extended to cover Curzon.</p> <p>A detailed business plan is being prepared for Curzon that will set out the strategic programme for Curzon covering the Curzon Infrastructure Investment Programme, the priorities, strategy, future governance structure, investment programme, funding and resource requirements. This plan needs to be prepared, with ongoing engagement with stakeholders including HS2, in order for the proposed benefits outlined in the Growth Strategy to be realised.</p>
HS2 Curzon – Bull Street to Curzon Street Metro Extension	41	<p>The extension of the Metro from Bull Street through to Curzon Street Station is part of a wider plan to extend the Midland Metro. Funding for this part of the Metro extension was secured as part of the Greater Birmingham and Solihull LEP Growth Deal secured in July 2014, comprising £5.5m for development and preparatory works and a provisional amount of £35 million to help deliver the extension to Curzon Street, which has now been secured.</p> <p>A Transport and Works Act Order (TWAo) application will need to be made to the Secretary of State. Any objections received will need to be satisfactorily addressed before approval is received.</p>
HS2 Curzon – Adderley Street Digbeth Metro Extension	97	<p>The Metro line is planned to be extended from Curzon Street station to Adderley Street via Digbeth High Street. This was not funded by the 2014 Growth Deal. The Devolution Deal stated that the government ‘commits to funding the Eastside Metro extension to Digbeth, subject to a business case, to support the first part of the HS2 Growth Strategy.’</p> <p>A robust business case will need to be developed and approved by the government in order for the funding to be released. A TWAo will also need to be secured.</p>
HS2 – Metro Birmingham Interchange	675	<p>The Metro is planned to be further extended from Adderley Street to the HS2 Interchange site. Work on establishing the proposed route of the line is ongoing.</p> <p>A proportion of the funding for this line is planned to be provided by funding from the Curzon Street Enterprise Zone (£183 million). The current working assumption of the CA is that the remainder of the required funding (£492 million) will need to be funded by the government through a future capital grant. The Devolution Deal stated that the government ‘supports the work of the Shadow Board to develop a delivery plan, encompassing the Metro extensions from Curzon to Interchange’.</p> <p>The CA will need to develop and present a robust business case to government, demonstrating clear economic benefits, in order for any future funding to be allocated to the scheme. A TWAo will also need to be secured, which given the length and nature of the potential route will require sufficient time to be built in to the project plan.</p>
UK Central Infrastructure Package	714	<p>To realise the UK Central vision a UK Central Infrastructure Package is being developed that will involve local network improvements, public realm and town centre enhancements, green infrastructure and digital connectivity. In particular, this includes:</p>

Project	Value £m	Comments
		<ul style="list-style-type: none"> • Improvements to Junction 6 of the M42, to be delivered by Highways England; • A45 Damson Parkway junction improvements; • Parking improvements; • NEC / Airport interventions; • A UK Central people mover to provide access between the HS2 Interchange site and the NEC / Airport; • North Solihull public realm and regeneration projects; • Improvements to Solihull town centre; • Blythe Valley Park improvements; and • Wider connectivity improvement, including digital. <p>The schemes are planned to be funded through a mix of public sector partner contributions, and borrowing supported by CA revenue streams.</p> <p>The plans for the development of the Interchange Station and the associated infrastructure are in development and these will need to be finalised for the impact on the Investment Programme to be confirmed. Close working with HS2 and the relevant land owners will be required to ensure that the required capital works will be appropriately sequenced and co-ordinated.</p>
HS2 Wider Connectivity Package exc Metro Birmingham Interchange	938	<p>A wider connectivity package is also proposed to deliver local and sub-regional connectivity to HS2 stations. The schemes focus on improving labour access to the station masterplan sites, access to HS2 for key business sectors, and improving access for deprived areas of the area. An HS2 'Connectivity Package' has been developed by the West Midlands Integrated Transport Authority, from which the schemes in this package are derived.</p> <p>The schemes in the package include:</p> <ul style="list-style-type: none"> • The Metro extension from Centenary Square to Edgbaston in Birmingham; • A number of 'Sprint' bus schemes; and • A series of rail schemes, including the Camp Hill Chords, Water Orton enhancements and other rail investments in the region. <p>The Edgbaston Metro extension and one Sprint route on the A45 to the Airport were provisionally funded as part of the 2014 Growth Deal. Outline timescales and business cases are being developed, or have been developed, for the majority of these schemes. The delivery will be dependent on satisfactory final business cases being developed and the WMCA obtaining at least part funding from others. The current working assumption in the Investment Plan is that 1/3 will be funded by Public Sector Partners, and 2/3 from local sources.</p> <p>The current working assumption is that the rail schemes in the Investment Plan will be 1/3 funded by Network Rail and 2/3 locally. These schemes will need to be prioritised for delivery by Network Rail in their future Control Periods if they are to be funded and successfully delivered.</p>

Project	Value £m	Comments
Brierley Hill Metro Extension	310	<p>The proposed extension of the Metro from Wednesbury to Brierley Hill via Dudley is part of the Investment Programme. The Devolution Deal states that ‘As part of establishing their prioritised investment programme, the CA Shadow Board will bring forward business cases for individual transport projects for the government to consider, where required in line with existing agreements and processes, including the interlinked Metro extensions to Brierley Hill and HS2 Interchange’.</p> <p>The scheme has been planned for a number of years and is for 11km of new tramway with up to 17 stops. A TWAO is already in place, having been approved in 2005 and implemented through works in 2009. Compulsory Purchase Orders may be required to implement the route. Any deviations from the approved TWAO would require an amendment to the existing order to be approved.</p> <p>The current funding assumptions in the Investment Programme are for 1/3 to be funded through borrowing against WMCA revenue streams, with 2/3 to be funded by a future capital grant from government. The CA will need to develop and present a robust business case to government, demonstrating clear economic benefits, in order for any funding to be allocated to the scheme.</p>
High Speed Supply Chain and Business Support	350	<p>The objective of this programme is to develop and support all supply chain companies who seek out business support and assistance to capitalise upon the opportunities presented by the delivery of the HS2 programme. It focusses on 4 key areas:</p> <ul style="list-style-type: none"> • Business Engagement & Diagnostics; • Market Development; • Building Information Modelling (BIM); and • Developing Capability and Capacity. <p>Initial funding of £20m has been secured for a pilot, which has started in February 2016. Discussions are underway with a view to enlarging the pilot fund with planned private sector leverage of £350m.</p>
HS2 Growth Strategy	4,406*	The schemes above form the HS2 Growth Strategy

*The casting error in the table is due to rounding on the individual schemes in the Investment Programme. We have presented the same figures as appear in the Investment Programme for consistency.

228. The remaining schemes in the Investment Programme are the bottom half of the table and are worth £3.6 billion. We have reviewed the main projects in the remainder of the Investment Programme and summarised them in the table below:

Project	Value £m	Comments
Coventry UK Central Plus – Connectivity	370	<p>The Coventry UK Central Plus investment focusses on a number of infrastructure schemes, including:</p> <ul style="list-style-type: none"> • A46 Expressway Junction Enhancements to improve its resilience and reliability; • A City Centre First Programme to unlock University and Friargate growth access; • The Coventry South Growth Zone, to unlock the further expansion of housing, employment and higher education. To include new road connectivity and land remediation; • Improved connectivity to the UK Central HS2 Hub and Birmingham Airport; and • A Western Urban Corridor Capacity Major Scheme, to upgrade to the main urban corridors to the west of the City Centre. <p>An outline business case and full business case will need to be developed for all of these schemes. The schemes will need to continue to be developed in conjunction with stakeholders to ensure they are consistent with other proposals. The phasing of the schemes needs to be agreed ensure the funding required can be accessed.</p>
Devolved Transport Investment	1,299	<p>The Investment Programme includes an estimated £1.3bn of Transportation funding which is due to be devolved to the area over the next 10 years. This is comprised of the following existing funding streams:</p> <ul style="list-style-type: none"> • Growth Deal; • Highways Maintenance Block; • Integrated Transport Block; • Active Travel, Smart Ticketing, Low Emissions Funding; and • Cycling & Walking. <p>Negotiations with central government need to be progressed and the arrangements for the flow of these funds finalised.</p>
West Midlands Revolving Housing Fund	500	<p>The West Midlands has a significant requirement for new homes each year to meet demand. The Investment Programme includes a revolving housing fund to address the shortfalls faced by developers in the funds they can raise from the private sector. A fund of £500 million is proposed, with an ambition for private sector loans to at least match the fund to provide £1 billion in total.</p> <p>The CA is in the process of developing a Housing Strategy which will need to be finalised and approved so that it can drive the way this proposed fund will be utilised. The exact details of how the fund will be established and accessed, and how private sector funding will be successfully leveraged also need to be developed.</p>
Collective Investment Vehicle	1,000	<p>The ‘Collective Investment Vehicle’ (CIV) will be an evergreen fund to provide senior debt and mezzanine loans for commercial real estate development where commercial lending is not currently able to meet the demand. The Investment Strategy will target an economic return and will be focused on a range of outputs including GVA, area of brownfield land regenerated, and new employment space provided. The plan is for an initial capitalisation of £70 million (secured through prudential</p>

Project	Value £m	Comments
		<p>borrowing) to leverage at least £1billion of additional private sector and applicant investment over the 10 year life of the fund.</p> <p>The plans for the CIV are already in development. The details of how the fund is going to be established and accessed, how private sector funding will be successfully leveraged, and the profile of the investment fund need to be finalised.</p>
Coventry City Centre Regeneration	150	<p>The Investment Programme includes £150 million for the regeneration of Coventry City Centre. The main schemes are the development of Coventry City Centre South and Friargate and are supported by a proposed funding profile.</p> <p>The status of these schemes will need to be confirmed; in particular, a green book compliant business case and a funding profile are likely to be required in order for funding to be allocated.</p>
Land Reclamation	200	<p>The Investment Plan allocates a £200 million fund for land reclamation. The delivery of the CA's ambitions will depend the ability to reuse brownfield sites to accommodate both housing and employment growth. This will be an important aspect of the Investment Programme.</p> <p>The cost of the land reclamation scheme is to be met through borrowing funded by the CA's revenue streams. The proposed 'West Midlands Land Commission' will need to be established and a detailed plan developed which outlines the framework through which individual land reclamation projects will be prioritised.</p>
Business Innovation	50	<p>The CA has a number of aims in the facilitation of business innovation. This includes an 'innovation audit' and supporting the provision of economic modelling, analysis and prediction.</p> <p>The cost of the scheme is to be met through borrowing funded by the CA's revenue streams. More detailed plans will need to be developed to demonstrate how this proposed scheme will be delivered.</p>
Employment, Education & Skills	30	<p>The cost of the scheme is to be met through borrowing funded by the CA's revenue streams. Plans have recently been developed to demonstrate how this proposed scheme will be delivered. We have not reviewed these plans.</p>
EZ Expansion excluding Curzon Street	20	<p>This scheme represents the balance of the Enterprise Zone funding generated from its expansion, excluding Curzon Street. The detailed schemes which relate to this scheme will need to be developed.</p>
Total	3,620	The value of the non-HS2 Growth Strategy schemes.

*The casting error in the table is due to rounding on the individual schemes in the Investment Programme. We have presented the same figures as appear in the Investment Programme for consistency.

Funding

229. The Devolution Deal document sets out the terms of a proposed agreement between the West Midlands CA Shadow Board and the government to progress the devolution of funding, powers and responsibilities. The Devolution Deal provides for:

- £36.5 million a year of revenue funding provided over 30 years; and
- The ability for a CA Mayor to place a supplement on business rates to fund infrastructure, with the agreement of the relevant local enterprise partnership boards, up to a cap.

230. It is these funding streams which will be used to fund borrowing to invest to drive growth, supplemented by other sources of funding, including from a potential precept on Council Tax, Enterprise Zones, transport grants and local contributions. These funding streams are planned to support the CA Investment Programme. The Shadow CA Board has undertaken a process of identifying which projects should be funded from these revenue streams and those projects have been described above.

231. The main funding streams in the current version of the CA Investment Programme are as follows:

Funding Stream	Value £m	Comments
Borrowing (funded from Devolution Deal)	2,026	<p>The Devolution Deal provides the opportunity for revenue streams to be used to fund the borrowing necessary for capital investment programmes. The revenue streams primarily relate to:</p> <ul style="list-style-type: none"> • £36.5 million of revenue funding per year over 30 years from the Devolution Deal; and • Revenue raised from Mayoral revenue, comprising: <ul style="list-style-type: none"> ○ a £10 Band D Council Tax precept, raising £6 million in 2017/18 and rising by 2% each year; ○ a Business Rate supplement of 2%, raising £30 million each year; and ○ Business Rate growth of 0.3% on the 50% of currently retained by government, raising £1.5 million each year and growing cumulatively. <p>The Investment Programme assumes that the revenue raised supports borrowing for capital investment of £2,026 million, with interest costs of £1,006 million. The main assumptions are that:</p> <ul style="list-style-type: none"> • The Mayor will generate the revenue stated above. If decisions are not made to raise the revenue, the available funding to support investment will be lower; • The Local Enterprise Partnerships approve any Business Rate supplement, as required by the Devolution Deal; and • Prudential borrowing is to be accessed based on an affordable rate. <p>If these assumptions change, the level of capital investment that can be made would also be subject to change. For example, the arrangements for the 100% retention of the growth in business rates by Local Authorities has not yet been confirmed. The Investment Programme will need to be reviewed in light of any changes.</p>

Funding Stream	Value £m	Comments
Enterprise Zone (EZ)	762	<p>Funding relating to the Curzon Street Enterprise Zone has been included as part of the CA Investment Programme. This relates to capital investment that is planned to be paid for through the increase in Business Rates assumed over the life of the Enterprise Zone. The funding primarily contributes to the Curzon Street Station Masterplan and the Metro extension to Interchange.</p> <p>The arrangements for the ring-fencing the revenue gained from growth in business rates for an Enterprise Zone, when the government is also looking to devolve 100% of business rate growth to local councils, has not yet been confirmed. The impact of the Enterprise Zone on the wider business rates growth available to individual Councils will also need to be considered.</p>
Transport Capital Grant	1,299	<p>Devolved funding for transport across the CA is included in the Investment Programme. It is split across a number of categories – Growth Deal, Highways Maintenance Block, Integrated Transport Block, Active Travel – Smart Ticketing – Low Emissions Funding and Cycling & Walking.</p> <p>This primarily represents funding streams that are currently devolved to individual Councils, and assumes a continuing level of investment over the life of the Devolution Deal. The phasing of the capital spend will need to be agreed.</p>
Existing DfT/HS2 funding	440	<p>A number of projects in the Investment Plan refer to pre-existing funding arrangements from central government. Primarily this relates to:</p> <ul style="list-style-type: none"> • £216 million of funding for UK Central Interchange; • £41 million for the Bull Street to Curzon Street Metro extension; • £95 million for the HS2 Wider Connectivity Package – £60 million for a Metro extension from Centenary Square to Edgbaston, and £35 million for the A45 Sprint Scheme; and • £89 million for expressway junction enhancements and connectivity to UK Central. <p>The majority of this funding has been confirmed, in some instances subject to a business case being approved.</p>
Metro Capital Funding	795	<p>The Investment Plan includes £795 million of Metro Capital Funding. The current working assumption is that this will fund approximately 70% of the total cost of each the following proposed Metro schemes:</p> <ul style="list-style-type: none"> • £96.7 million – Curzon Street Station to Digbeth; • £492 million – East Birmingham to Interchange; and • £206.7 million – Wednesbury to Brierley Hill. <p>The balance of the funding for the schemes is funded from existing agreed funding (Bull Street to Curzon Street Station), Enterprise Zone funding (East Birmingham) and CA Borrowing (Wednesbury to Brierley Hill).</p>

Funding Stream	Value £m	Comments
		The Devolution Deal states that the government ‘supports the work of the Shadow Board to develop a delivery plan, encompassing the Metro extensions from Curzon to Interchange and from Brierley Hill’. Any future funding will be subject to the approval of a satisfactory Business Case by central government.
Local Contributions	188	<p>Local contributions of £188 million have been identified in total in the Investment Plan.</p> <p>The most significant of these is a contribution of £139 million towards HS2 UK Central Interchange from interested parties. The source and nature of this funding stream will need to be confirmed and secured as part of ongoing negotiations with the relevant stakeholders.</p>
Public Sector Partner Contributions	676	<p>Contributions from other public sector bodies have been assumed in the Investment Plan. The most significant assumed funding is:</p> <ul style="list-style-type: none"> • £395 million towards the UK Central Infrastructure Package. This is for improvements to Junction 6 of the M42 by Highways England, and a contribution to the ‘People Mover’ at UK Central; and • £273 million towards the HS2 Wider Connectivity Package, from both the Department for Transport and Network Rail; <p>Funding towards the UK Central Infrastructure Package reflects stated intentions from Public Sector partners.</p> <p>Funding towards the HS2 Wider Connectivity Package will be dependent on government decisions on funding for such schemes, for example through a future Local Growth Fund bid, and through Network Rail’s investment plans in Control period 6 and beyond. The availability of funding is dependent on the ability of individual schemes to meet the criteria for prioritisation set out by the relevant funding body.</p>
European Structural and Investment Fund (ESIF)	13	Funding of £13 million from the ESIF has been included in the Investment Plan to support the wider HS2 Supply Chain and Business Support programme.
Private Sector Contributions	-	No direct private sector contributions to individual projects have been assumed in the funding for the Investment Plan. This position could change, subject to successful negotiations with the private sector in relation to specific schemes.
Collective Investment Vehicle (CIV)	1,000	<p>A Collective Investment Vehicle is planned as an evergreen fund to provide senior debt and/or mezzanine loans for commercial real estate development. This revolving fund will be targeted at commercial real estate projects which will require a level of funding support which the commercial lending sector is not presently able to meet.</p> <p>The Investment Plan has assumed that an initial capitalisation of £70 million from prudential borrowing could deliver in excess of £1billion of additional private sector and applicant investment over the 10 year life of the fund. The details of the fund are currently being developed and the exact profile and arrangements for the CIV need to be finalised and agreed.</p>

Funding Stream	Value £m	Comments
Productivity Fund	325	This a new WM Productivity Fund which will be designed to bring benefits to smaller businesses. Relationships are being developed with the banking sector to provide a £325m private funding resource, though formal agreements will need to be progressed.
Revolving Housing Fund	500	The supply of new homes in the West Midlands is currently less than half of demand. Developers are faced with shortfalls in the funds they can raise from private sector lenders as at the outset of a project. A loan fund of £500m has been identified as being required to assist in bridging the gap. It is envisaged that private sector loans will at least match the fund to provide £1bn of total resource. The source of this fund and its profile has not yet been finalised.
Total	8,024	

*The casting error in the table is due to rounding on the individual schemes in the Investment Programme. We have presented the same figures as appear in the Investment Programme for consistency.

Future actions

232. The potential for the West Midlands CA to invest up to £8 billion through the Investment Programme is a very significant opportunity for the area. The Investment Programme is a work in progress, reflecting intended schemes and associated funding at this point in time. A number of risks have been highlighted through our review of the programme schemes and funding mechanisms:

Timescales

233. Given the timescales involved and the varying status of the individual schemes, the cost of individual projects has the potential to increase from the estimates included in the Investment Plan. It will be important for WMCA to monitor and review the cost of schemes on a regular basis, and to update the Investment Programme accordingly.

Funding

234. The funding for a number of the schemes in the Investment Plan is not certain. The CA will need to review the funding streams regularly, and update the Investment Plan to reflect any changes in assumptions. In particular:

- The £36.5 million annual revenue funding from the Devolution Deal, to create an investment of over £1 billion, is subject to a jointly agreed 5-yearly gateway assessment process to confirm the investment has contributed to economic growth. Refer to the section on Balance for more details. This revenue stream of £1,095 million over a 30 year period supports in the region of £692 million of investment in the current plan.
- A significant proportion of planned borrowing is supported by Mayoral revenue streams. Once a Mayor is elected, decisions will need to be made on whether a £10 Band D Council tax precept and a 2% Business Rate levy will be introduced. The Mayoral revenue streams are currently planned to generate the following funds over the life of the Investment Programme; if these are not progressed, the capital investment they support may not proceed as planned:
 - £10 Band D Council Tax precept – Revenue of £233 million over 30 years, currently assumed to support capital investment of £135 million; and
 - Supplementary business rate - Revenue of £870 million over 30 years, currently assumed to support capital investment of £535 million.
- The arrangements for the retention of growth in Business Rates are not yet certain, in particular the government's plan to allow Councils to retain 100% of the growth in business rates. The

Investment Plan assumes that the CA will retain 0.3% in the growth of business rates over the 50% that is currently retained centrally. The CA have assumed this will generate £697 million in revenue over the life of the plan to support £349 million of capital investment. If this growth is not secured for the CA as part of the future changes to Business Rates retention arrangements, the capital investment it supports may not proceed as planned. The impact of the existing Enterprise Zone arrangements on Business Rate growth will also need to be taken into account.

- A number of Metro extensions are currently assumed to be reliant on capital funding being made available in future by government. In order for the required funding to be accessed, an effective approach to developing compelling business cases and presenting them to government will be required.
- Local Contributions of £188 million in the Investment Programme will need to be identified and agreed with relevant parties.
- Public Sector Partner Contributions of £676 million are required to deliver a number of the transport schemes in the Investment Plan. The CA will need to influence the funding and prioritisation decisions made by partners, including central government, Highways England and Network Rail. Effectively delivering schemes which already have funding will be an important factor in the ability of the CA to access future funding.
- The CA should continue to review the opportunity for private sector contributions to contribute to the Investment Programme.
- A number of investment vehicles and revolving funds are planned as part of the Investment Programme. The funding mechanisms and governance arrangements for these funds, and a process for measuring the benefits delivered, need to be agreed.

Sequencing

235. The sequencing of projects and timing of cash flows is a significant factor. The CA will not be able to fund or deliver all of the capital investment in the early years of the programme. The timing of borrowing requirements also impacts on affordability of overall borrowing. The prioritisation and phasing of schemes needs to be agreed in the context of the overall programme.

Profile

236. The borrowing profile in the Investment Plan is a cautious estimate of when the funds may be required. This profile is likely to change as planned investments become more certain.

Slippage

237. Slippage is possible in any capital investment scheme. Significant slippage in the Investment Programme would have a considerable impact on the planned timing of borrowing and capital investment. It may also undermine stakeholders' confidence in the CA to deliver what it plans. A clear focus on delivery of what is planned and when is therefore required.

Re-prioritisation

238. Preparing the Investment Programme is an ongoing iterative process. As a result it is subject to the potential for change, particularly if the other risks noted here materialise. Prioritisation of schemes using an agreed transparent methodology will be required.

Business cases

239. Green Book compliant full business cases are likely to be required for all of the proposed schemes in the Investment Programme. Further development of the proposed schemes is required, particularly for the non-HS2 Growth Strategy schemes. The CA will need to agree on how the development costs of these schemes are to be funded. Whether development costs can be capitalised will also need to be considered.

Supply chain

240. The Investment Programme represents a significant demand on the supply chain. In addition, the draw of nationally significant investment such as HS2 will impact on the spare capacity of the private

sector to deliver on all the schemes when planned. This may also create cost inflation over and above the assumptions made in the Investment Plan.

Stakeholders

241. A large number of funders and stakeholders are involved in the delivery of the Investment Plan. Good stakeholder management by the CA and effective collaboration with partners will be critical success factors.

Financial and operational expertise

242. The demands of continuing to develop the Investment Programme, in addition to the other duties of the CA, will require access to financial expertise. This will be dependent on the ability of the CA to access the right capacity and capability for financial support.
243. The responsibility for operational delivery of the proposed schemes needs to be agreed and understood by all relevant parties.

Programme governance

244. Programme governance arrangements need to be agreed which are consistent across all of the schemes in the Investment Programme. The arrangements for the governance of the HS2 growth strategy schemes are relatively well developed. The CA should consider establishing consistent governance arrangements across the whole Investment Programme.

Passenger Transport Executive (Centro) and Integrated Transport Authority (ITA)

245. Separately to the matters noted above, the CA will inherit the ITA levy, currently amounting to £124.8m, and an associated capital program of £34.4m, for which funding mechanisms are already in place. The CA needs to ensure there is smooth transition, and that the current funding and capital programme continue to be monitored and reviewed.

Summary

246. A significant amount of work has been undertaken in a relatively short period of time. The Investment Programme sets out a set of schemes and funding streams which will inevitably be subject to change and further iteration as proposals develop.
247. **The range of risks which exist, the number of future actions that are required and the wide scope of the Investment Programme, mean that establishing an effective, proportionate CA governance structure will be critical to ensure that appropriate decisions are made. The ability of the CA to make well-informed decisions, and to deliver against its stated priorities, will be fundamental to its future success.**

Prioritisation and Balance

Background

248. The concept of Prioritisation and ‘Balance’ were identified in the [West Midlands CA Statement of Intent](#) from July 2015, which outlined that ‘of our agreed principles, one of which is to ensure that all communities benefit. To seek to achieve this, we will demonstrate an objective means with which to assess interventions, or the design of interventions, so that these are aligned to our balanced economic outcomes for the West Midlands CA’. It also states that ‘all communities will benefit from growth, but not necessarily at the same time or in the same way’.
249. The purpose of the workstream is to direct the design and prioritisation of CA interventions, and to measure the impact of those interventions. This is a critical concept in ensuring that the CA has an open, transparent and agreed process for the evidence based prioritisation of projects which may be competing for limited resources.
250. To test the Balance principle that ‘all communities will benefit’, and to define the basis from which the design and assessment of interventions are aligned to balanced outcomes, five balance objectives were identified and aligned to the emerging draft Strategic Economic Plan (‘SEP’) as part of the SEP work stream:
- Economic Growth – To improve GVA for the region in line with the UK average;
 - Skills – To improve skills levels so that people have the skills and qualifications to access jobs;
 - Accessibility – To improve the connectivity of people and business to jobs and markets respectively;
 - Business Competitiveness – To improve the productivity (GVA) of our businesses focusing on our growth sectors; and
 - Land – To improve the quantity of high quality, readily available development sites; turning brownfield sites to high quality locations that meet our housing and business needs.
251. Each of these objectives is being developed into a SMART objective for inclusion in the Strategic Economic Plan. The timescales set by the CA for the development of this work stream have been met to date.

Prioritisation

252. Prioritisation is a fundamental aspect of any programme of investment. The CA is unlikely to have the capacity or finance to do everything it wishes to. In order to prioritise CA interventions, a robust and transparent decision making process is required. This process needs to be balanced and evidence-based to deliver the outcomes sought by the CA, not solely driven by political or other factors. The planned Prioritisation & Appraisal Framework will follow three filters:
- First filter of interventions assessed against criteria – a mechanism to decide if the project is sufficiently developed to progress, which will require an Outline Business Case;
 - Second filter – using the Dynamic Economic Impact Model (DEIM), a green book appraisal of a Full Business Case and a detailed assessment of the funding plan; and
 - Third filter – the agreement of steps to implementation, agreement of monitoring and reporting processes, final sign-off and due diligence.
253. The Balance metrics are required to enable the prioritisation process to take place and to measure the subsequent impact of interventions. The metrics need to be driven by the Strategy of WMCA, and as a result are aligned to the balance objectives noted above. Developing a set of metrics, aligned to the objectives, will allow the CA to measure the impact of interventions at the planning and execution stages of individual projects. The metrics will be designed to be:

- Aligned to WMCA strategic priorities;
- Measureable, accurate & specific;
- Based upon reliable and consistent data sources;
- Not complex or costly in the collection of information; and
- Ensure accountability for monitoring and reporting purposes.

Actions to date

254. A Balance work stream has been established, overseen by the Shadow WMCA Board, to progress the development of the metrics and model by which the impact of interventions will be assessed. The established working group includes representatives from key stakeholder groups including relevant Councils, the Department for Business, Innovation & Skills and the Treasury. The Programme Board approved the approach to Balance, and the Performance Management Framework, on 24 July 2015.

255. A number of actions have been taken to date:

- A separate work stream is in place to develop the WMCA Strategic Economic Plan (SEP) and Performance Management Framework as set out earlier in this report.
- The SMART objective indicators will be the basis upon which the WMCA appraise and prioritise the programme of interventions to deliver the WMCA SEP. Prioritisation will be driven by the performance of interventions against the agreed metrics, to deliver the greatest economic benefits to the area and allow balance to be achieved in terms of opportunities created across the WMCA.
- A single investment appraisal framework is being developed in conjunction with the Balance and SEP work streams. It is important that this is designed to ensure consistency in the promotion of individual schemes. It needs test the readiness and deliverability of individual schemes before WMCA approves programme entry.
- A Dynamic Economic Impact Model is being developed to measure the impact of interventions. The model was commissioned by the Shadow CA and is a bespoke economic modelling framework to be finalised in April 2016. It will measure the economic impact of investments in a spatial context and their impact on a programme level. It will help to:
 - Understand the impact of individual investments in terms of their economic impact (as measured by GVA) in order to robustly and transparently prioritise investment across the three WM LEP areas; and
 - Appraise and prioritise different types of interventions (e.g. housing versus transport) on a level playing field.
- The Balance metrics will be agreed and set so that individual projects and groups of projects can be tested in the DEIM against them. Some initial modelling has been undertaken to test schemes in the DEIM against emerging Balance metrics, and this needs to be progressed to ensure there is confidence in the model before it is approved.
- The DIEM work will aim to provide an overarching metric to assess programme interventions. Within the programmes individual projects will be expected to demonstrate through a business case that the project in questions can deliver outcomes across the range of 'balance' metrics and performance management framework indicators.

256. Good progress has been made in drafting a SEP, developing a Performance Management Framework and progressing the DEIM and Balance work stream in accordance with the planned timescales. The direction of travel is positive. All of these elements continue to be in progress and their successful ongoing development and subsequent approval are critical to the overall Investment Programme.

Future actions

257. As noted above, the development of the Balance work stream is still ongoing and a number of actions are planned:

- Finalising and approving the draft SEP, including the Performance Management Framework;
- Ensuring there is clarity on the SMART objectives which will measure the CA's progress against its stated vision. The devolved revenue funding from the Devolution Deal is dependent on a 5 year gateway review to assess that the investment has contributed to economic growth, and the monitoring arrangements need to be designed with this in mind;
- Primary and secondary Balance metrics are not yet embedded and in operation. They need to be agreed to inform the assessment of individual schemes, and investment programmes, in the DEIM. The balance metrics exist to inform decisions about the extent and location of interventions at both the planning and investment decision stage. The potential metrics need to be identified, tested and agreed to ensure they are appropriate and deliver against the proposed outcomes in the SEP. This is important to avoid the potential for later disagreement on the prioritisation the model recommends;
- A process needs to be agreed for the identification and assessment of individual schemes. This needs to be approved and communicated to key stakeholders, including potential private sector promoters;
- The decision-making process for investments needs to be agreed so that all stakeholders are clear on what basis this will be done. This should include how the WMCA Board will be supported in their decision-making, for example through the involvement of specialists, and how the constitution drives the decision-making process; and
- The Balance metrics and DEIM may need to be subject to refinement and iteration in future periods. A process for updating them should be agreed.

258. The CA has made good progress in developing the Prioritisation and Balance work stream. The emerging mechanisms are on track to meet the objective of ensuring that all communities benefit from growth, but not necessarily at the same time or in the same way. It is critical that the CA agrees an open, transparent and fair process through which individual schemes, and programmes of interventions, will be identified, assessed, prioritised and their success monitored. There needs to be clarity and agreement amongst all key stakeholders on the process to be followed, and on the specific metrics by which schemes will be analysed. Once this is agreed, the decision-making process should be the primary way in which investments are prioritised.

259. Once the Balance metrics and DEIM model have been finalised, the extent to which the existing Investment Programme is consistent with the emerging SEP, and the degree to which the proposed interventions will deliver the intended outcomes, will need to be established. In particular, the SEP will have an increasingly significant role in influencing ongoing devolution and funding decisions. Given the range of risks associated with the Investment Programme it is also likely that re-prioritisation will need to occur. This should be driven by the agreed process for decision-making referred to above.

Delivery

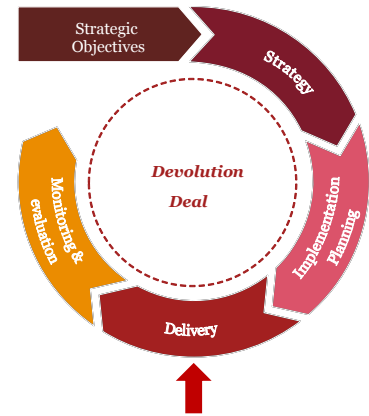
260. As the CA vesting day approaches attention will need to focus increasingly on delivery rather than strategy and implementation planning. The scale of this task is considerable.

261. We see a number of areas that will need to be addressed during this phase and have grouped them in to three categories:

- Financial
- Legal and governance
- Technical and practical

262. From our stakeholder interviews it is clear that these issues are well known and there is a broad acceptance that it is acceptable for these matters to be ongoing at the time of approving the Devolution Agreement.

263. The main future actions required to minimise delivery risk in relation to financial matters are set out in ‘Future Actions’ headings of the Finance and Balance sections above. The main future legal, governance, technical and practical actions are set out below.



Legal and Governance

Structure for delivering the deal as a whole

264. Many of our comments on the governance arrangements for the CA are applicable here. There are some additional considerations that the CA will need to address:

- The historical establishment of the region’s ITA demonstrated the desire to work together on strategic issues and the Devolution Deal creates an opportunity to build on this example and for governance to be joined up more effectively and transparently in relation to economic development, regeneration and transport. Approving a governance model that is effective before and after a Mayor is in post is of vital importance.
- Once the organisation design is finalised then the roles will need to be filled. The CA has made good progress on filling some interim statutory posts but further work is required to fill all statutory roles and identify Cabinet Lead roles and Portfolios.
- Decisions are required regarding the arrangements below the CA Board level (such as Steering Groups and Project Boards).
- The options for governance structures and resourcing need to be reviewed in consultation with the local authorities, local enterprise partnerships and the Secretary of State.
- Governance needs to operate at a programme and project level to address matters such as project prioritisation, funding, funding allocations and sequencing.
- Operational responsibilities for decisions on projects need to be clearly defined, referenced and understood.
- Pending further information from the Super-clarification process, arrangements will need to be finalised for non-constituent members and, potentially, for different types of constituent members (e.g. District, Metropolitan and County) before and after a Mayor is in post. We understand that a draft constitution is written and ready for approval.

Ensuring the governance arrangements for component parts are joined up and flexible enough to allow for further devolution

265. There are a number of existing governance arrangements for entities that currently come under the CA or may do so in the future. Examples include Centro (the Passenger Transport Executive), Integrated Transport Authority, Super-SEP Board, HS2 Programme Boards and LEPs. The CA will need to ensure that arrangements to implement the Devolution Deal effectively do not adversely impact, and are not adversely impacted by, other arrangements. The CA should ensure that all governance options and structures are considered for their suitability for delivery at pace.
266. The Super-SEP that is being developed is expected to sit alongside the SEPs of the three LEPs. Success in implementing the Devolution Agreement will be enhanced if all four SEPs are aligned.
267. The Devolution Agreement is expected to be the first of many agreements. The CA should endeavour to ensure that the arrangements put in place for the implementation of the Devolution Deal are likely to be fit for purpose for further devolution arrangements.
268. There is a strong possibility that the CA will be extended to cover additional constituent or con-constituent Members. The governance arrangements need to be flexible enough to absorb future changes whilst maintaining the ability to make speedy and robust decisions.

Capacity and capability to take robust decisions quickly

269. A very strong and recurring theme from our stakeholder discussions was an appetite for light and transparent 'bureaucracy'. Any new governance arrangements must be robust but allow for responsive decisions, informed by advice from statutory officers amongst others.
- 270. *The governance arrangements for the CA are now well established. As the delivery of the Devolution Deal develops, and if membership of the WMCA evolves, it is critical that the governance arrangements for delivery are integrated, agile and robust.***

Technical and practical

Practical matters

271. There are a number of very practical matters that will need to be resolved to benefit from the Devolution Agreement; many by the CA vesting day. These include, but are not limited to:
- Filling key roles whether statutory or non-statutory in nature. These include the Section 151 Officer and Monitoring Officer as well as roles such as Clerk or Secretarial roles.
 - Endorsing a CA draft budget at a Shadow CA meeting prior to 1 April 2016 and subsequently a formal budget approved by the full CA as soon as possible after its formation or on the vesting day.
 - Gaining clarity over the timescales and process involved in securing WMCA borrowing capabilities for non-transport related borrowing.
 - Identification of formal sources of assurance (Internal and External Audit). We have met with the Appointed Auditor of each constituent Member and they have requested to be informed of progress in April 2016 and thereafter.
 - Confirmation of VAT status after technical consultation and HMT Procedure. A Statutory Instrument may make the Authority VAT exempt but this will need to be confirmed.

Financial package

272. The scale, breadth and delivery timeframe of the current £8bn investment programme is still being developed. Some projects are more advanced than others. There is a need to review each of the projects in the programme to ensure that for each project the following are identified:
- The status of their development (e.g.: conception, design, OBC, FBC, procurement, delivery);
 - The certainty of the costs allocated to them;
 - The sequencing and timing of their delivery and other project interdependencies;
 - The availability of and type of funding they will need;
 - The project sponsor(s) within the region and in Central Government;

- Specific criteria they may need to meet for third party sign off;
- The requirement for them to be tested against any WMCA project appraisal framework;
- Key risks associated with their delivery;
- The adequacy or not of the current approval processes and governance arrangements; and
- Key matters that need to be actioned at both project and programme level to address delivery risks.

Delivery vehicle

273. The CA is working towards identifying the most appropriate delivery vehicle for the proposed investments. The model will need to balance the following factors:

- Capacity
- Capability
- De-risking
- Control
- Funding
- Efficiency gains
- Speed
- Incentivisation
- Agility
- Maximising private sector leverage
- Reporting and accountability

274. There are pros and cons associated with single delivery vehicles and a mixed approach. A thorough options appraisal is advised and the appropriateness of different arrangements should be considered for the investment vehicle.

Capacity and capability

275. Delivering such a significant programme is a huge undertaking and the CA needs to demonstrate the deliverability of the Devolution Agreement every five years. Our stakeholder engagement identified that delivering at pace in the first 5 years is a concern and there was a real appetite to assess and demonstrate the ability of the CA to deliver the Deal based on more information. It is suggested that:

- A capacity and capability gap analysis is required within the CA to determine what additional resources are required.
- A capacity and capability gap analysis is required in the market to determine what risks there are to delivery given the significance of the additional demand that the programme will generate.

Risk sharing mechanisms

276. Formal agreement is due to be sought from the CA Shadow Board that all current and future projects are subject to the proposed new regional economic prioritisation process, 'Dynamic Economic Investment Modelling' (DEIM) following the development, testing and sign off of the new financial modelling tool. There needs to be very clear expectations and parameters around the use of this tool and the accompanying approval process before decisions are made about individual projects.

Assurance Framework

277. The development of a WMCA Assurance Framework is expected to be approved by BIS before funds are made available to the CA. It is expected that the framework will:

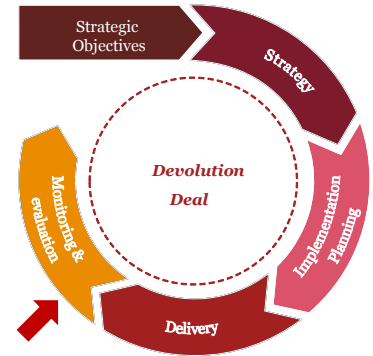
- Describe the governance and decision making process for investment made by the WMCA;
- Describe the role of different stakeholder groups;

- Set out the agreed principles of WMCA investments;
 - Describe the project lifecycle appraisal process and how the DEIM model fits in the process; and
 - Need to link to the 5 year gateway process development.
278. The need to set the scope of the framework and generate sufficient detail will have to be balanced against the time available to secure BIS approval on a timely basis.
279. ***Establishing the CA and clarifying the Devolution Deal have been the main priorities to date. This has taken significant commitment and drive and the pace of change is continuing to accelerate. More focus can now be given to implementing and embedding effective working practices to support the delivery plan and the achievement of objectives.***

Monitoring and evaluation

Assurance and Performance Management frameworks

280. The Assurance Framework and Project Lifecycle Review is currently underway. As part of that review consideration needs to be given to other assurance frameworks that projects could be subject to. The role of central government in the Assurance Framework also needs to be understood.
281. The Assurance Framework will need to be developed alongside the Government 5 year gateway review process so that it tests the projects against the agreed gateway metrics to mitigate the risk on underachievement of outcomes and loss of future funding.
282. The need to develop a robust framework to satisfy BIS's requirements for the annual £36.5m devolved funding to be released mean that timescales for completing this work are tight.
283. Every year performance will be assessed against the SMART objectives in the SEP's Performance Management Framework. Progress must be measured, monitored and reported on a timely basis to allow action to be taken to address any under-performance.



Audit

284. Formal sources of assurance (Internal and External Audit) for the CA need to be finalised. The relationship between the roles and responsibilities of Auditors of the constituent Members and non-constituent Members compared to those of the CA will also need to be understood. The risks to the Audit and Value for Money conclusions will be different for the two types of entity.
285. We met with the Appointed Auditor of each constituent Member and had very positive, constructive discussions. They were highly engaged with the process to date and have requested to be consulted further in April 2016 and regularly thereafter.
- 286. Formal detailed monitoring and reporting of progress in delivery the Deal will only be required once the CA is formed. However, the requirements for a robust Assurance Framework to be approved by BIS before devolution funds are released mean that this task is time critical. There are a number of decisions that need to be taken for the Assurance and Performance Management frameworks to be finalised and the Board needs to ensure that the key decisions that need to be taken to inform the Assurance framework are understood and can be taken before vesting day.**

Conclusion

287. Councils are expecting to make key decisions over the coming months:

- Whether to consent to the order to create the West Midlands Combined Authority (WMCA).
- Whether to approve the Devolution Deal.

288. The WMCA has made considerable progress in a short space of time to enable these decisions to be taken safely. The work undertaken to date in the following areas should enable Members to take those decisions on the back of a body of evidence and with some confidence that the areas of future work are being planned effectively and that a robust and balanced process has been followed to date:

- Identification and resolution of legal matters relating to the approval and formation of the CA.
- Development of strategic objectives and a strategic economic plan supported by financial and non-financial evidence.
- Development of a detailed implementation plan and commencing planning for delivery.

289. We have been provided with sufficient evidence to conclude that, at this point in the process, enough has been done to prepare Councils for the decisions they need to take. There are some significant risks to the delivery of the Investment Programme, many of which would be faced without the Devolution Deal, which will need careful management as the Programme moves forward.



This document has been prepared only for the Wolverhampton City Council and the other Constituent Councils of the proposed West Midlands Combined Authority and solely for the purpose and on the terms agreed with Wolverhampton City Council. We accept no liability (including for negligence) to anyone else in connection with this document, and it may not be provided to anyone else. If you receive a request under freedom of information legislation to disclose any information we provided to you, you will consult with us promptly before any disclosure.

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Council

31 May 2016

Name of Cabinet Member:

Policing and Equalities, Councillor A Khan

Director Approving Submission of the report:

Executive Director of Resources

Ward(s) affected: All

Title:

Ricoh Arena Judicial Review

Is this a key decision?

No.

Executive Summary:

The appeal brought by Sky Blue Sports & Leisure Limited and Arvo Master Fund Limited (collectively '**the Appellants**') against the judgment of Mr Justice Hickinbottom was heard in the Court of Appeal on 3 – 4 February 2016. The City Council was named as the Respondent in the appeal and Arena Coventry Limited and the Alan Edwards Higgs Charity were named as interested parties. The Judgment of the Court of Appeal was handed down on 13 May 2016, dismissing the appeal in its entirety.

The Appellants have indicated that they will seek permission to appeal the decision to the Supreme Court. This report seeks authorisation from Members for Officers to defend any such application to appeal, and any subsequent appeal in the event permission is granted.

Recommendations:

Council is recommended to authorise the Assistant Director for Finance and Legal Services Manager (Place & Regulatory) to:-

- (1) defend on behalf of the City Council any application submitted to the Court of Appeal for permission to appeal the judgment dated 13 May 2016 to the Supreme Court.
- (2) defend on behalf of the City Council any application to the Supreme Court for permission to appeal the judgment dated 13 May 2016 if leave to appeal is refused by the Court of Appeal.

- (3) defend the appeal on behalf of the Council if permission to appeal to the Supreme Court is granted
- (4) defend any subsequent and/or associated legal action brought by the Appellants against the Council
- (5) to make any consequential applications considered necessary as a result of recommendations (1), (2), (3) or (4)
- (6) to update the ACL Panel as appropriate on developments as to any appeal and estimates on future costs to be incurred

List of Appendices included:

Judgment of Lord Justices Tomlinson, Treacy and Floyd dated 13 May 2016

Other useful background papers:

Judgment of Mr Justice Hickinbottom dated 30 June 2014

Has it been or will it be considered by Scrutiny?

No

Has it been or will it be considered by any other Council Committee, Advisory Panel or other body?

No

Will this report go to Council?

Yes, 31 May 2016

1. Context (or background)

- 1.1 In April 2013, Sky Blue Sports and Leisure Limited and two other companies within the Sisu Group (collectively '**the Claimants**') commenced Judicial Review proceedings against Coventry City Council as the Defendant, naming Arena Coventry Limited ('**ACL**') and the Alan Edward Higgs Charity ('**AEHC**') as interested parties. The Claimants sought to challenge the decision by the City Council on 15 January 2013 to grant a £14.4m loan to ACL in order to protect its commercial interests in ACL and the Ricoh Arena.
- 1.2 In June 2014, Mr Justice Hickinbottom dismissed the Claimants' application for Judicial Review. Two of the Claimants, Sky Blue Sports and Leisure Limited and Arvo Master Fund Limited (collectively '**the Appellants**'), then applied for permission to appeal that decision. Permission to appeal was refused on the papers first by Mr Justice Hickinbottom and then by Lord Justice Burnett. However, the Appellants renewed their application for permission at an oral hearing before Lord Justices Ryder and Briggs, who granted permission to appeal. The appeal was heard by the Court of Appeal on 3-4 February 2016.
- 1.3 The Court of Appeal's Judgment was handed down on Friday 13 June 2016 and a copy is attached at Appendix 1. The Court of Appeal dismissed the appeal, Lord Justice Tomlinson (giving judgment for the Court) stating that, 'The Appellants have not in my view come close to demonstrating that the judge reached an impermissible conclusion.'
- 1.4 Following the Judgment the Appellants have publicly indicated to the media that they will be applying for permission to appeal the Judgment to the Supreme Court. The Court of Appeal has ordered that any such application should be made to the Court of Appeal by 4pm on Friday 20 May 2016 and that any response to the application by the Council as Respondent must be filed by 4pm on 25 May 2016.

2. Options considered and recommended proposal

- 2.1 **Option 1: Not to oppose the Appellants' application for permission to appeal (if any) and any subsequent appeal (if permission is granted).** This is not the recommended option. In the absence of any submissions by the Council, the Court would still need to consider the Appellants' application(s) for permission and any subsequent appeal. The Appellants have said that if any appeal is upheld and the Council is found to have acted unlawfully by making the loan to ACL, then they will seek damages from the Council for losses that they claim to have suffered as a result of the loan. For example, during the oral permission hearing before Lord Justices Ryder and Briggs, the Appellants argued that:

'... there was a breakdown of the ongoing consensual discussions with the bank, which we hoped to conclude considerably to our advantage ... there was an application to put us into administration ... by ACL, and we had to respond to that, we incurred a lot of money [sic]. We had to move out of our ground for a year, which meant that we moved into a much smaller ground and had very heavily adverse publicity. ... there were ... the points deductions which have actually been pretty drastic and have left us bumping along the bottom of Division One and facing commercial disaster if we were to be relegated.'

The Appellants have not quantified these claims, but there have been reports in the media that SISU claim they could run into millions (or even 'hundreds of millions') of pounds. It is therefore vitally important that the Council continues to resist any appeal brought by the

Appellants. The Council can only do so effectively by continuing to play an active part in the proceedings.

2.2 Option 2: Oppose any application for permission to appeal and defend any subsequent appeal (recommended option). The judgments from the High Court and the Court of Appeal are very robust and Officers remain confident of the Council's position. It is important that the Council continues to protect its position by continuing to defend any applications made by the Appellants and any subsequent appeal in the strongest possible terms. The recommendations seek delegated authority to the Assistant Director Finance who is also the Section 151 Officer in this particular matter and the Legal Services Manager (Place & Regulatory).

3. Results of consultation undertaken

3.1 It is not necessary for the Council to conduct a consultation in respect of this matter.

4. Timetable for implementing this decision

4.1 The Appellants have until 4pm on Friday 20 May 2016 to file any application for permission to appeal the Court of Appeal's Judgment. If they do so, then the Council will have until 4pm on 25 May 2016 to respond. Assuming an application for permission is received, the Council will ensure that the directions are complied with. It is not clear how long it will take for the Court of Appeal to determine the Appellants' application.

4.2 If the Court of Appeal refuses any such application for permission to appeal, then the Appellants may renew their application to the Supreme Court. Any such application must be filed within 28 days from the date of the Court of Appeal's Judgment of 13 May 2016 (although the Appellants could apply to the Supreme Court to extend this time limit). The ordinary 28-day time limit will expire on 10 June 2016. It is again not clear how long it would take the Supreme Court to determine any such application.

5. Comments from Executive Director, Resources

5.1 Financial implications

It is currently difficult to estimate how much it will cost to defend an appeal at this stage but the costs of defending an appeal will need to be met from existing budgets. The Council has incurred substantial legal costs to date in the region of £650,000 (for defending the substantive hearing and the appeal to the Court of Appeal). The Court has ordered that the Appellants pay the Council's costs of the proceedings. Accordingly, the Council will be seeking recoupment of as much of those costs as possible from the Appellants. It is likely that the Costs Orders in favour of the Council would be reversed in the event of a successful appeal by the Appellants. In those circumstances, the Council would be liable to pay the Appellants costs of the proceedings.

5.2 Legal implications

Should any application be made to appeal the decision, the Council will instruct Leading and Junior Counsel to provide advice, guidance and support; draft any necessary legal documents; and provide representation at any hearing if necessary.

6. Other implications

6.1 How will this contribute to achievement of the Council's key objectives / corporate priorities (corporate plan/scorecard) / organisational blueprint / Local Area Agreement (or Coventry Sustainable Community Strategy)?

Whilst the Council is no longer a shareholder in Arena Coventry Limited, having succeeded in the High Court and the Court of Appeal, it is important that the Council continues to defend its position and protect its interests, not least because the Appellants have expressed an intention to bring claims for damages against the Council if any appeal is upheld.

6.2 How is risk being managed?

The key risk is that if the Appellants' application for permission to appeal is granted, and any subsequent appeal is upheld, then the Council would be potentially liable for the Appellants' costs, as well as facing further claims for damages brought by the Appellants. Alternatively, even if the Appellants are not granted permission to appeal, or any subsequent appeal is dismissed, the Council may not be able to recover its legal costs of defending the appeal in full. These risks will be managed through reviews of the Council's case and by having regard to advice from the legal team.

6.3 What is the impact on the organisation?

None

6.4 Equalities / EIA

No Public Sector Equality Duty implications arise from the content/recommendations in this report.

6.5 Implications for (or impact on) the environment

None

6.6 Implications for partner organisations?

It will be for ACL and AEHC as interested parties in these proceedings to determine whether they intend to take an active role in defending any appeal by the Appellants.

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Neutral Citation Number: [2016] EWCA Civ 453

Case No: C1/2014/2726

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN BIRMINGHAM
MR JUSTICE HICKINBOTTOM
[2014] EWHC 2089 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2016

Before :

LORD JUSTICE TOMLINSON
LORD JUSTICE TREACY
and
LORD JUSTICE FLOYD

Between :

THE QUEEN
(on the application of)
(1) SKY BLUE SPORTS & LEISURE LIMITED
(2) ARVO MASTER FUND LIMITED

**Appellants/
Claimants**

- and -
COVENTRY CITY COUNCIL

**Respondent/
Defendant**

- and -
(1) ARENA COVENTRY LIMITED
**(2) TRUSTEES OF THE ALAN EDWARD HIGGS
CHARITY**

**Interested
Parties**

**Rhodri Thompson QC and Nicholas Gibson (instructed by Brown Rudnick LLP) for the
Appellants/Claimants**
**James Goudie QC and Ronnie Dennis (instructed by the Solicitor, Coventry City Council)
for the Respondent/Defendant**

Hearing dates : 3 and 4 February 2016

Approved Judgment



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Lord Justice Tomlinson :

1. This is an appeal in judicial review proceedings. The circumstances in which the challenge to the underlying decision of Coventry City Council has been brought are complex and are set out in the comprehensive judgment of Hickinbottom J below, available on the Bailii website at [2014] EWHC 2089 (Admin). No purpose whatever would be served by my reproducing here his exegesis, whether in his words or my own. For the detailed background resort may therefore be had to that judgment. Insofar as it is suggested that the judge reached conclusions of fact inconsistent with the contemporary documentary evidence, or drew inferences unsupported by that primary evidence, I shall discuss those criticisms, but subject thereto the judge's account of the history is largely uncontroversial. What follows is intended as only the barest outline by way of laying the ground for discussion of the challenges made to the judge's judgment.
2. On 15 January 2013 Coventry City Council, ("CCC" or "the Council"), resolved to make a loan of £14.4 million to Arena Coventry Limited, ("ACL"), the operating company of The Ricoh Arena, ("the Arena"), a substantial multi-purpose arena in the north eastern part of the city. The Arena comprises a significant sports stadium, of sufficient quality to have been successfully used as a venue during the 2012 Olympic Games, capable also of being used for other events such as concerts by performers of international renown, combined with an exhibition hall, conference suite, a hotel, casino and health spa. As planned, it was at its inception the home of Coventry City Football Club, ("CCFC"), a founder member of the Premiership in 1992 although sadly in 2001 relegated to the Championship, the second flight of English football. CCC was at the material time, January 2013, a 50% shareholder in ACL, through its wholly owned company North Coventry Holdings Limited. The building of the Arena on the site of a former gas works was an important regenerative project in which both civic pride and public funds were invested. CCC is and was at all material times the freeholder of the Arena site.
3. In December 2003 CCC let the site to Coventry North Regeneration Limited ("CNR") for a term of 50 years in order that CNR could build the Arena. At the same time CCC lent £21 million to CNR for this purpose. CNR is 100% owned by North Coventry Holdings Limited. In January 2006 CNR sub-let the site to ACL for a term of 50 years (less 3 days) calculated from 19 December 2003. In January 2013 therefore the sub-lease had about 41 years to run. The sub-lease gave to ACL the option of paying a rental of £1.9 million per annum or a premium of £21 million.
4. In February 2006 ACL secured from Clydesdale Bank plc, trading as Yorkshire Bank ("the Bank"), a loan of £22 million repayable over 23 years, which was drawn down in 2006. Initially ACL's repayments to the Bank were approximately £1.8 million per year, but by 2012 they had dropped to about £1.6 million per year. The loan was used to pay a premium of £21 million to CNR in respect of the sub-lease. CNR used that money to repay its loan from CCC. CNR assigned its leasehold interest to Arena Coventry (2006) Limited, a wholly-owned subsidiary of ACL.
5. On 29 March 2006 ACL granted to CCFC a licence to use the ground and a sub-lease of the offices etc at the stadium for a term of 25 years at a rental plus licence fee of approximately £1 million per annum. This rent and licence fee was subject to annual review and variation in accordance with inflation but did not reduce upon the Club

being relegated to play its football in a lower division. The agreement was to expire in August 2030. CCFC in fact played its home games at the Arena from the start of the 2005/2006 season.

6. Unhappily the fortunes of CCFC did not prosper. In the Championship it incurred financial losses of the order of £4-6 million per year. By the spring of 2012 the club was doomed to relegation to the third flight of English football, Football League Division One, with effect from the start of the 2012/2013 season. Relegation meant significantly reduced television revenue, with income reducing to about £5 million per annum, about half of what it had previously been.
7. As from 2008 CCFC had been in the ownership of the Appellants, companies in the SISU group of companies, ("SISU"). SISU manages hedge funds and private equity funds.
8. By the spring of 2012 the financial situation of CCFC was parlous. As at April 2012 it owed rent arrears to ACL of about £89,000. As from that date CCFC declined to pay further rent to ACL. In reality it could not do so unless funded by SISU. SISU had already invested about £40 million in an unprofitable venture. SISU was of course under no obligation to fund rental payments. SISU made clear that it would do so only pursuant to a fundamental restructuring of the business of both CCFC and ACL.
9. Non-receipt of rent from CCFC caused ACL to default on its obligations to the Bank. On 21 December 2012 the Bank served notice of default under the loan agreement. The Bank had extensive security and step-in rights pursuant to which the operating sub-lease of the Arena was at risk. It was in these circumstances that CCC made the loan to ACL to which I referred at paragraph 2 above. The loan was of £14.4 million, for a similar term to the lease (nearly 41 years, the final repayment date being 16 December 2053), at a rate of 5% per annum for the first five years of the facility, and thereafter at the discretion of the Council but no less than 5% nor more than 2% above PWLB rate (the PWLB rate being, in effect, the rate at which the Council could borrow money). The annual repayments amounted to approximately £0.8 million compared with the £1.6 million which ACL had been paying and the £1.3 million which ACL would have paid under a restructuring proposal put forward by the Bank on 3 December 2012, which ACL had rejected both because it regarded it as unaffordable but also because, under the proposal, half of the debt would remain in place at the term of the loan because it would have been serviced on an interest only basis. The loan from CCC enabled ACL to pay off the Bank at a discount, safeguarded the operating sub-lease of the Arena and, in the view of the Council, protected the Council's interests and the value of its shareholding in ACL. CCC was at the material time controlled by the Labour group of councillors, but the decision of the Council was unanimous, with cross-party support.
10. The Council had before it when making its decision a report prepared by its Assistant Director of Financial Management, Mr Barry Hastie. Included in his report is the following passage:

“As part of its due diligence the Council has current valuations of the income stream received by ACL for commercial activities at the Arena which acts as a valuation of the Arena buildings and grounds. The Council

has the latest business plan for ACL to demonstrate how it will grow and develop the business over the next 3 years and maintain payment of the loan and all its other outgoings.

Under EU legislation the public sector cannot support commercial organisations, such action would be seen as disadvantaging EU competitors and is referred to as state aid. In 2003 when the Council approved the delivery of the Arena by its 100% owned company, Coventry North Regeneration Limited, the structure of the Companies involved in the Arena was carefully put in place to ensure compliance with EU legislation.

The structure of the companies remain [sic] in place and the only difference is that the Council will become the mortgagee of the Arena company in place of the Clydesdale Bank. This change does not affect the status of the advice taken in 2003 that the company structure and involvement of the Council did not contravene state aid under EU legislation.

The new loan from the Council to ACL is not at an abnormally low rate because of the company relationship. It is at a commercial rate and the loan will be fully secured against the assets of ACL. The Council's position is secured because it is the landlord of the freehold reversionary interest so it cannot lose control of the asset should ACL default on the loan repayments.

The Council will put in place a cross guarantee in the Council's favour between ACL and ACL 2006, a first ranking legal charge from ACL over the lease between the Council and ACL 2006, a first ranking debenture to the Council from ACL and a first ranking debenture from ACL 2006 as security for the loan.

There is a small risk that will exist for 2 years from the date of the loan from the Council in the unlikely event that ACL goes into insolvency. This is due to ACL and the Council being "connected parties" and an administrator or other insolvency practitioner that was appointed by ACL's creditors may challenge the basis on which the loan was made. It would be for the Council to satisfy any court that the provision of the loan was made on a commercial basis and this report and its proposals is on the basis that the loan is commercial.

External legal advice has been sought on the legalities and structure of the proposals before the Council."

The external legal advice considered by the Council has not been disclosed, but it may fairly be inferred that the Council considered, on advice from these two sources, that in making the loan it was acting lawfully.

11. The question which Hickinbottom J had to resolve, in the context of an application by SISU for judicial review and quashing of the decision by the Council to make the loan, is whether the loan approved by the Council on 15 January 2013 was state aid in terms of Article 107 of the Treaty on the Functioning of the European Union ("TFEU") which, by reason of Article 108(3), is incapable of lawful implementation without notification to the Commission. The making of the loan was not notified to

the Commission, and accordingly the Council acted unlawfully if the loan constituted state aid. Hickinbottom J directed himself, correctly, to the effect that the local authority is, pursuant to the European learning, afforded a wide margin of judgment when making an entrepreneurial investment decision. He “firmly concluded” that the loan fell clearly within the permitted ambit and that it was not state aid - [130] and [132].

12. The exercise conducted by the judge consisted in the main in an evaluation of the primary facts or inferences which were themselves collected from the documentary material before him. Insofar as the judge made findings or drew inferences from the documents, we are as well-placed as was he to examine the material, and I would accept that insofar as he derived factual conclusions or inferences which are demonstrably wrong, that may affect the reliability of his overall evaluation of the legality of the loan, and we may revisit both the factual conclusions or inferences and the judge’s overall evaluation. However insofar as his conclusions “involve an assessment of a number of different factors which have to be weighed against each other” and where such assessment or evaluation is “a matter of degree upon which different judges can legitimately differ”, we should I believe proceed with great caution and only interfere with the judge’s evaluation if it falls outside the bounds of reasonable decision-making – see *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2003] 1 WLR 577 at pages 579-583 per Clarke LJ and *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325 at pages 1347-1349 per Lord Mance. Thus I do not agree with the submission of Mr Rhodri Thompson QC, for SISU, that the question for this court is whether Hickinbottom J was wrong, either on the law or on the facts or both. Of course we are concerned with the question whether the judge was wrong on the law, but his self-direction on that score is so far as relevant largely accepted to have been accurate. As to the facts, our approach must be more nuanced and is to some extent a hybrid of the extremes discussed in the authorities to which I have referred above.
13. It follows that, in my judgment, the Appellants have a difficult task to the extent that they seek to persuade us that both the Council and the judge exceeded the respective generous margin of judgment or appreciation afforded to them.
14. Articles 107 and 108 of the TFEU provide, so far as is material:
 - “Article 107 (Ex Article 87 TEC)
 1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market.

Article 108 (Ex Article 88 TEC)

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.”

15. It is common ground that CCC is for present purposes a manifestation of the Member State. Despite my reservations on the point the parties were also agreed that the proceedings are properly constituted without the involvement of the UK or any branch of central government. The Appellants assert that CCC breached the EU standstill obligation. Left to my own devices my instinctive reaction is that, assuming that the loan constituted state aid, the action of CCC resulted in the UK being in breach of the standstill obligation. The Appellants submit however that it is unnecessary to involve the UK or any branch of central government in the process for recovery of any unlawful advantage resulting from the loan. They point out that it is clear as a matter of EU law that it is for the national courts and administrative authorities to make effective provision for the recovery of such aid under their own national procedures. They point to the Commission’s 2007 *Notice on recovery of unlawful and incompatible State aid* (“the Recovery Notice”), which at paragraph 46 records the findings of an Enforcement Study of various EU Member States that, while it is a matter of national procedure for each Member State, “a principle common to all countries reviewed is that recovery must be effected by the authority that granted the aid.” The Appellants also submit that there are numerous cases in the UK courts where subsidies unlawfully granted under EU aid schemes have been the subject of recovery action, notably under the Common Agricultural Policy, by the relevant body responsible for administration of the relevant EU scheme within the United Kingdom: see e.g. *Wood v Intervention Board Agricultural Produce* [2001] EWCA Civ 1569. The unspoken assertion is that this holds good for an autonomous local authority such as CCC. In summary, the submission is that while the United Kingdom must have effective procedures for the recovery of unlawful state aid, there is no reason for HM Treasury or any other arm of central government to be involved in such procedures unless they are themselves implicated in the breach of EU law. That is not the case here. CCC agreed with the Appellants that it is not necessary for the UK Government to be a party to these proceedings. Since both parties are agreed on the point, and since in the light of my conclusions on the state aid issue the point is in any event academic, I need not explore my reservations further.

16. The judge recorded the following principles which he derived from the authorities and other materials as uncontroversial:
 - “88....
 - i) A public authority such as the Council is elected to serve the overall public interest in the area it serves. In pursuit of that obligation it is required to act prudently with regard to public money.
 - ii) In exercising its functions, a public authority may undertake and invest in economic operations in the same way as private companies.

- iii) However, when it does so, articles 107-109 TFEU prohibit the State engaging in "State aid". Whether action by the State amounts to State aid is a "global question" (R v Customs & Excise Commissioners ex parte Lunn Poly [1999] 350 at 360); but it has several well-recognised characteristics set out in cases such as R (Professional Contractors Group Limited) v Inland Revenue Commissioners [2001] EWCA Civ 1945 at [28], and in guidance prepared by the European Commission (e.g. Commission Communication – Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of the Commission Directive 80/723/EEC to Public Undertakings in the Manufacturing Sector (1993) (OJ C307/3) ("the 1993 Communication") and Draft Commission Notice on the Notion of State Aid pursuant to Article 107(1) TFEU (2014) ("the 2014 Draft Communication")), and by the Department for Business, Innovation and Skills ("BIS") (e.g. The State Aid Guide: Guidance for State Aid Practitioners (June 2011), especially at paragraphs 76 and following). The BIS guidance (at page 2) identifies the characteristics in these terms, namely that, so far as the aid is concerned:
- a) it is granted by the State or through the State resources;
 - b) it favours certain undertakings;
 - c) it distorts or threatens to distort competition; and
 - d) it affects trade between Member States.
- iv) Whether aid distorts or threatens to distort competition, depends upon the objective test of whether a rational private investor, creditor or vendor (as the case may be) might have entered into the transaction in question on the same terms, having regard to the foreseeability of obtaining a return and leaving aside all social and policy considerations (Cityflyer Express Limited v Commission [1998] ECR II-757, [1998] 2 CMLR 537 at [51], and Neue Maxhütte Stahlwerke GmbH v Commission [1999] ECR-II 17 at [120]-[122], and [131]-[133]) ("the private investor test" or "the market economy operator test"). Where the State acts in a way that corresponds to normal market conditions, its transactions cannot be regarded as State aid.
- v) The court is concerned with whether a transaction is or is not State aid. It is not concerned with the different question of whether, if it is State aid, it is justified. That is a question for the Commission; hence the standstill provisions whilst the Commission makes such a determination, in article 108 TFEU.
- vi) Whether the transaction was one which a rational private market operator might have entered into in the same circumstances is a question for the court to consider objectively and to decide, on the basis of the information available at the time of the decision, and developments then foreseeable (Commission v Électricité de France [2012] 3 CMLR 17 at [105]). Therefore, where a Member State seeks to

argue that a transaction was one which a market operator might have entered upon, it must be on the basis of evidence showing that the decision to carry out the transaction was taken at the time on the basis of economic evaluations comparable with those which a rational market investor would have carried out in the same circumstances, which will normally include a business plan justifying the decision (the 2014 Draft Communication at paragraphs 81-82). Subsequent justification is irrelevant: the transaction cannot be evaluated on the basis of whether it was in the event actually profitable or not.

- vii) The market economy operator comparator is, of course, hypothetical; but whilst, for the purposes of applying this test, all policy considerations relating to the State's role as a public authority have to be ignored, the comparator rational private operator must be assumed to have similar operational characteristics to the public body concerned. For example, if the transaction is a loan by a public authority with a shareholding in the relevant undertaking, then the comparator is, not a new incoming private investor, but a private investor with a similar shareholding.
- viii) Some private investors look to speculative or other short-term profit. However, some have long-term objectives with a structural policy and are guided by a longer-term view of profitability; and, if an investor is a shareholder in the relevant undertaking, he may be more likely to have such long-term objectives (see 1993 Communication, paragraph 20). As the General Court put it in Corsica Ferries France SAS v Commission (2012) Case T-565/08, ECLI:EU:T:2012:415:

"However, in making that distinction between economic activities, on the one hand, and public authority intervention, on the other hand, it is necessary to take account of the fact that the conduct of a private investor, with which the intervention of a public investor must be compared, need not necessarily be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term. That conduct must, at least, be the conduct of a private holding company or a private group of undertakings pursuing a structural policy – whether general or sectoral – and guided by prospects of profitability in the longer term...".

State investment may therefore satisfy the market economy operator test where there is a "reasonable likelihood" that the assisted undertaking will become profitable again (Neue Maxhütte at [116]).

- ix) In particular, the European cases draw a distinction between a private creditor and a private investor: the creditor is primarily concerned with the most effective means of recovering his debt, whereas the investor's commercial interests may well include ensuring that the undertaking concerned avoids going into liquidation because, in the investor's view, profitability might reasonably return in the future (see, e.g. Re Déménagements-Manutention Transport SA [1999] ECR I-3913;

[1999] 3 CMLR 1: Advocate General Jacobs' Opinion at [35]-[36], and Court Judgment at [24]-[25]). Summarising the relevant jurisprudence, the 1993 Communication therefore says:

"20. ... A private investor may well inject new capital to ensure the survival of a company experiencing temporary difficulties, but which after, if necessary, a restructuring will become profitable again...

30. ... Where this call for finance is necessary to protect the value of the whole investment the public authority like a private investor can be expected to take account of this wider context when examining whether the commitment of new funds is commercially justified...".

- x) Although the test is an objective one, the law recognises that there is a wide spectrum of reasonable reaction to commercial circumstances in the private market. Consequently, a public authority has a wide margin of judgment (see, e.g. the 1993 Communication at [27] and [29] ("... a wide margin of judgment must come into entrepreneurial investment decisions...")); or, to put that another way, the transaction will not fall within the scope of State aid unless the recipient "would manifestly have been unable to obtain comparable facilities from a private creditor in the same situation..." (Déménagements-Manutention Transport at [30]; see also Westdeutsche Landesbank Girozentrale v Commission [2003] ECR II-435 at [260]-[261]). Therefore, in practice, State aid will only be found where it is clear that the relevant transaction would not have been entered into, on such terms as the State in fact entered into it, by any rational private market operator in the circumstances of the case."

17. At paragraph [89] the judge said:

"89. Mr Quigley submitted that the loan transaction in this case was not State aid because it did not favour ACL, nor did it affect trade between Member States. However, the main ground of contention between Mr Thompson for the Claimants and Mr Goudie for the Council (fully supported by Mr Quigley) was whether the transaction distorted or threatened to distort competition. I shall deal with that issue first."

18. Mr Thompson submitted that paragraphs [88(iv)] and [89] of the judgment reflect some confusion on the part of the judge, and I agree that that is so. However I do not think that this confusion in the event deflected the judge from his task.

19. We were shown the EU Commission decision letter to The Netherlands re: initiation of Art. 108(2) procedure in respect of public funding of certain Dutch professional football clubs (incl. PSV) (C(2013)1152 final) in which at paragraph 38 the Commission said this:

"Assessment under Article 107(1) TFEU

38. For a measure to constitute State aid in the meaning of Article 107(1) TFEU, the following cumulative conditions needs (sic) to be fulfilled:
- There needs to be a selective advantage in favour of certain undertakings or the production of certain goods;
 - There needs to be a use of State resources for this;
 - The aid must distort or threaten to distort competition;
 - The aid must affect trade between Member States.”
20. Further guidance as to what is meant by “selective advantage” is to be found in the EU Commission’s draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU issued on 17 January 2014. Although the consultation has apparently closed the final Notice is not yet published. At paragraph 67 the Commission said:

“4. ADVANTAGE

4.1 The notion of advantage in general

4.1.1 General principles

67. An advantage within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of State intervention. Section 4.2 of this Communication provides detailed guidance on the question of whether a benefit can be considered to be obtained under normal market conditions.”

Section 4.2 continues:

“4.2 The market economy operator (MEO) test.

4.2.1 Introduction

76. The Union legal order is neutral with regard to the system of property ownership and does not in any way prejudice the right of Member States to act as economic operators. However, when public authorities directly or indirectly carry out economic transactions in any form, they are subject to the Union State aid rules.
77. Economic transactions carried out by a public body or a public undertaking do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions. This principle has been developed with regard to different economic transactions. The Union Courts have developed the ‘market economy investor principle’ to identify the presence of State aid in cases of public investment (in particular, capital injections): to determine whether a public body’s investment constitutes State aid, it is necessary to assess whether, in similar

circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question. Similarly, the Union Courts have developed the 'private creditor test' to examine whether debt renegotiations by public creditors involve State aid, comparing the behaviour of a public creditor to that of hypothetical private creditors that find themselves in a similar situation. Finally, the Union Courts have developed the 'private vendor test' to assess whether a sale carried out by a public body involves State aid, considering whether a private vendor, under normal market conditions, could have obtained the same or a better price.

78. These principles or tests are variations of the same basic concept that the behaviour of public authorities or undertakings should be compared to that of similar private economic operators under normal market conditions to determine whether the economic transactions carried out by such authorities or undertakings grant an advantage to their counterparts. In this Communication, the Commission will therefore refer, in general terms, to the 'market economy operator' ("MEO") test as the relevant method to assess whether a range of economic transactions carried out by public authorities, public bodies or public undertakings take place under normal market conditions and, therefore, whether they involve the granting of an advantage (which would not have occurred in normal market conditions) to the undertakings concerned. The general principles and the relevant criteria for applying the MEO test are detailed below.

4.2.2 *General principles*

79. The purpose of the MEO test is to assess whether the State has granted an advantage to an undertaking by not acting like a market economy operator with regard to a certain transaction. In that respect, it is not relevant whether the intervention constitutes a rational means for the public authorities in order to pursue public policy (e.g. employment) considerations. Similarly, the profitability or unprofitability of the beneficiary is not in itself a decisive indicator for establishing whether or not the economic transaction in question is in line with market conditions. The decisive element is whether the public authorities acted as a market economy operator would have done in a similar situation. If this is not the case, the beneficiary undertaking has received an economic advantage which it would not have obtained under normal market conditions, placing it in a more favourable position to that of its competitors."
21. It follows from this authoritative guidance that the judge was wrong at [88(iv)] to confuse the distinct issues (1) whether the Council had acted like a market economy operator and (2) whether the loan distorted or threatened to distort competition. These are separate enquiries, and moreover, notwithstanding what the judge said at [89], the main ground of contention at the hearing before the judge was the first issue, not the second, as indeed the judge seemingly recognised in the next paragraph, [90], where

he summarises Mr Thompson's submissions on the respects in which the Council's loan failed to meet the criteria imposed by the market economy operator principle. The judge then dealt with those submissions at [91] – [132]. At [136] and [137] he dealt very briefly with the second issue, which he recognised that, in the light of his decision on the first issue he did not need to decide, and provisionally concluded that had the loan distorted or threatened to distort competition, which he recognised was likely to be the case, then it would have affected trade as between Member States.

22. In the event therefore I do not consider that the judge's confusion in exposition was carried through into his essential analysis, indeed I do not think that Mr Thompson suggested that it had been.
23. At paragraph 77 of the draft Guidance cited above the Commission describes the essential exercise as being "to assess whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could (my emphasis) have been prompted to make the investment in question." That, as I see it, is exactly the assessment which the judge conducted, reflected in the manner in which he expressed his conclusion:

"132. Whilst I accept that the Council were put to some hard decision-making over this commercial enterprise in 2012, in all of the circumstances and given the wide margin properly allowed in such matters, I simply cannot say that the loan extended by the Council to ACL would not have been entered into, on the terms in fact agreed, by any rational private market operator in the circumstances of the case. In my judgment, the transaction fell within the wide ambit extended to public authorities in this area; and clearly so. It was not State aid."

The only question on this appeal is whether that assessment was vitiated by demonstrably wrong findings of primary fact or, if not, whether it in turn fell outside the generous ambit of reasonable decision-making.

24. In that regard I would make three preliminary observations.
25. First, the learning recognises that the analysis of risk involved in the application of the market economy investor principle requires public undertakings, like private undertakings, to exercise entrepreneurial skills which, by the very nature of the problem, implies a wide margin of judgment on the part of the investor – see the EU Commission's Communication on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of the Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307/3) at paragraph 27. That paragraph continues:

"27. Only where there are no objective grounds to reasonably expect that an investment will give an adequate rate of return that would be acceptable to a private investor in a comparable private undertaking operating under normal market conditions, is State aid involved even when this is financed wholly or partially by public funds."

The guidance given by the Commission continues:

- “28. There is no question of the Commission using the benefit of hindsight to state that the provision of public funds constituted State aid on the sole basis that the out-turn rate of return was not adequate. Only projects where the Commission considers that there were no objective or bona fide grounds to reasonably expect an adequate rate of return in a comparable private undertaking at the moment the investment/financing decision is made can be treated as State aid. It is only in such cases that funds are being provided more cheaply than would be available to a private undertaking, i.e. a subsidy is involved. It is obvious that, because of the inherent risks involved in any investment, not all projects will be successful and certain investments may produce a sub-normal rate of return or even be a complete failure. This is also the case for private investors whose investment can result in sub-normal rates of return or failures. Moreover such an approach makes no discrimination between projects which have short or long-term pay-back periods, as long as the risks are adequately and objectively assessed and discounted at the time the decision to invest is made, in the way that a private inventor would.
29. This communication, by making clearer how the Commission applies the market economy investor principle and the criteria used to determine when aid is involved, will reduce uncertainty in this field. It is not the Commission’s intention to apply the principles in this communication (in what is necessarily a complex field) in a dogmatic or doctrinaire fashion. It understands that a wide margin of judgment must come into entrepreneurial investment decisions. The principles have however to be applied when it is beyond reasonable doubt that there is no other plausible explanation for the provision of public funds other than considering them as State aid.” (My emphasis)
26. As the judge noted, [88(x)], the same approach is inherent in the guidance given by the European Court of Justice in Case C-256/97 Proceedings concerning *Déménagements-Manutention Transport SA (DMT)* at paragraph 30 as follows:
- “Consequently, the answer to the first question must be that payment facilities in respect of social security contributions granted in a discretionary manner to an undertaking by the body responsible for collecting such contributions constitute State aid for the purposes of Article 92(1) of the Treaty if, having regard to the size of the economic advantage so conferred, the undertaking would manifestly have been unable to obtain comparable facilities from a private creditor in the same situation vis à vis that undertaking as the collecting body.”
27. The language of “manifest” unavailability of the facilities and “no other plausible explanation” makes clear that it is not enough for this purpose to conduct an economic analysis which appears to indicate that the terms of the transaction in question are out of line with what ordinarily would be expected to be available in the market. Many prudent investors are moved to trade risk for reward, and it cannot be the touchstone that a prudent investor would not ordinarily be expected to have entered into the

transaction. The test is rather whether he could have been prompted to do it, because it is only when such conduct can be entirely ruled out as inconceivable that the only remaining plausible explanation for the provision of the [public] funds is that it must be regarded as State aid.

28. Second, in the present case it is of the utmost importance to bear in mind that the notional comparator private investor here is (a) the freeholder of the Arena, (b) has invested admittedly unspecified sums in the development of that Arena and (c) has a 50% shareholding in ACL which, even if without value as at January 2013, was not without reasonable prospect of acquiring value and delivering a return in the future, although I recognise of course that the Appellants say that this last point is not made out on the evidence. For the reasons already given, that prospect is not to be analysed without reference to permissible optimism, nor to the exclusion of calculated risk-taking, unless the risk is one which no prudent investor would conceivably countenance. To this extent the present case is factually very different from that considered by the European Court of Justice in *Neue Maxhütte Stahlwerke GmbH v Commission* [1999] ECR II-17, from the judgment of the court in which case these general considerations emerge. Moreover, leaving aside all impermissible considerations relating to the benefits to be derived from the transaction by the Council in its essentially public capacity, such as regeneration and the preservation of a civic amenity, it might be enough to justify the loan that there was available to the Council no viable alternative strategy which would have both protected its shareholding and safeguarded its future profits from the letting of the Arena. However, it is unnecessary in the present case to go so far, as the Appellants cannot in my judgment satisfy the rigorous criteria implied by the language of “manifest unavailability” and “no other plausible explanation”.
29. Thirdly, the judge in my view in one respect imposed upon CCC a burden which it did not in fact bear. The judge concluded that the transaction “fell within the wide ambit extended to public authorities in this area; and clearly so.” [132] (my emphasis). In the light of that, the judge’s formulation at [88(vi)] concerning the necessity to show that the decision was taken on the basis of economic evaluations comparable with those which a rational market investor would have carried out in the same circumstances is in my view too dogmatically stated. Paragraph 82 of the Commission’s draft Notice, to which the judge refers at [88(vi)], refers only to the necessity to provide such evidence where there is doubt whether the transaction is, as argued by the Member State, in line with the MEO test. That reflects the ruling of the European Court of Justice in Case C-124/10P *Commission v EdF and France* [2012] 3 CMLR 17 at paragraph 84 to the effect that “it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have carried out, before making the investment, in order to determine its future profitability.” I would also draw attention to footnote 129 to paragraph 82 of the draft Commission Notice which, whilst it emphasises that such “ex-ante” assessments should normally be carried out by experts with appropriate skill and experience, also points out that “the level of sophistication of such ex-ante assessment may vary depending on the complexity of the transaction concerned and the value of the assets, goods or services involved.” The footnote goes on to emphasise that “such evaluations should always be based on objective criteria and should not be affected by policy considerations.” The footnote concludes:

“Evaluations conducted by independent experts may provide an additional corroboration for the credibility of the assessment.” To the extent that it sought to undermine the objective criteria which underlay the evaluations upon which CCC relied the exercise conducted by the Appellants was entirely legitimate, but it is to my mind clear that it is not enough for the Appellants’ purposes to show that appropriately qualified and experienced persons could equally have given different advice. At paragraph 27 of the Commission’s Communication on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of the Commission Directive 80.723/EEC to public undertakings in the manufacturing sector (OJ C 307/3) of 13 November 1993 the Commission emphasises that it is not its aim “to replace the investor’s judgment”. To admit as relevant mere differences of opinion as between appropriately qualified and experienced persons would amount to just that, since it would involve an examination of the Member State’s, or here the Council’s, judgment in choosing the source from which it took advice.

30. In this regard I am not sure that sufficient emphasis was placed at the hearing, at any rate by me, on the significance of the Witness Statement prepared for these proceedings on 13 January 2014 by Mr Barry Hastie, to whom I referred at paragraph 10 above. In that statement Mr Hastie sets out in considerable detail the manner in which he evaluated the proposal which he put before and recommended to the Council. In particular he discusses the Business Plan provided to CCC by ACL in December 2012/January 2013. It is said by the Appellants, although I am not sure that the assertion is made good in the evidence, that Mr Hastie was himself involved in the preparation of this plan, under the direction of Mr West, CCC’s Director of Finance and Legal Services. The gravamen of the criticism seems to be that Mr Hastie did not mention this point in his witness statement, not that there was anything inappropriate in Mr Hastie being involved in the preparation of the plan, if he was. In his witness statement Mr Hastie explained how he relied upon the cash flow forecast in ACL’s Business Plan in order to assess ACL’s ability to service the proposed loan from CCC. He also explains that he regarded the revised set of financial assumptions on which ACL’s Business Plan was based as prudent. The Business Plan demonstrated that over the ensuing 3 year period ACL could meet the proposed loan repayments irrespective of whether it received any rent either from CCFC or from any other anchor tenant of the stadium.
31. In April 2012 ACL formed a new Joint Venture subsidiary, IECE Limited, with Compass Catering as a minority shareholder. Compass made a £4 million investment to buy its shares in IECE Limited, and those funds were invested in improving and providing additional facilities at the Arena including, for example, more hotel rooms. As Mr Hastie records at paragraph 99 of his witness statement, this arrangement also provided an opportunity to derive significantly increased revenues from the catering and hospitality areas of ACL’s business. The Business Plan assumed that ACL’s income projections through its Joint Venture arrangement with Compass would be achieved and that one indoor and two outdoor concerts would be held every year. The Business Plan assumed that ACL would make savings to its running costs, including a significant staff saving, prominent in which was a saving of £180,000 per annum through non-replacement of the Chief Executive Officer. The Business Plan also assumed the maintenance of naming rights and sponsorship revenues at current levels and that office rental streams were maintained.

32. In extremely detailed submissions Mr Thompson has submitted that no MEO would have accepted these “very optimistic and unwarranted assumptions” as “providing assurance adequate to support making a £14.4 million loan in January 2013.” I cannot believe that the European learning to which I have referred above justifies the minute analysis to which this Business Plan was subjected at the hearing before us. Of course it is legitimate to attempt to show that the Plan is demonstrably flawed, and I shall attempt to deal with Mr Thompson’s main points. It is however important not to lose sight of a point stressed by the judge, that whether the loan amounts to State aid is a question which must be considered in the round. If the assumptions underlying an evaluation such as the Business Plan are demonstrably flawed, that may well assist in showing that there is no other plausible explanation for the provision of public funds other than considering them as State aid. But if the reasonableness of the assumptions is a matter on which views may legitimately differ, or which is dependent on the degree of optimism which it is considered appropriate to attribute to the hypothetical market economic operator, it is plain that it does not advance the Appellants’ case to demonstrate that a different view could have been taken. Mr Hastie’s evidence is that in considering whether the proposed arrangement was one that a private investor would have entered into he considered ACL’s ability to service a loan, the value of ACL and the Council’s potential security for the loan, the interest rate which could be applied and the likely return on the Council’s investment. Mr Hastie is not accused of bad faith, nor is there attributed to him the “subjective animosity” towards SISU of which the Appellants accuse his political masters. In all these circumstances the advice of Mr Hastie is plainly something to which the Council was entitled, if not bound, to pay careful regard.
33. I am prepared to accept that the assumptions in the Business Plan which I have summarised above are optimistic, although I do not accept that optimism has no place in the assessment of risk by prudent businessmen. Nor do I accept that any one of the assumptions should be looked at in isolation. The assumption that CCFC would be lost as an anchor tenant and not replaced over the life of the loan was an extremely pessimistic assumption which the judge regarded as unrealistic. The assumption concerning the extension of naming rights was obviously in part dependent upon the attraction of the Arena as a venue for a relatively high profile team in a popular sport. However I cannot conclude, on the strength of mere assertion, that no MEO could have considered it reasonable to assess the future profitability of ACL on the basis set out in the Business Plan and adopted by Mr Hastie. That basis was to assume a complete absence of the core revenue stream, rent, but not to carry through that unrealistic assumption to its logical conclusion, a complete absence of use of the sports stadium and therefore a complete absence of revenue streams associated therewith. I cannot conclude without more that this method of giving effect to the obvious uncertainties is simply one that could not have been countenanced by a MEO having the necessary hypothetical attributes. Similar considerations apply to revenues dependent upon the sale of food and beverages. As to the assumptions concerning reductions in overheads, including employment costs, I have no doubt that the targets set, implicit in the assumptions made, which are openly itemised in the Business Plan, were challenging. As a 50% shareholder the Council was of course well placed to see that they were implemented, and they could expect support from the other 50% shareholder, the Trustees of the Higgs Charity, who were critical of the conduct of the business in 2012. In recent times of austerity many companies faced with new and more challenging trading conditions have adopted rigorous and

extensive measures to reduce overheads which, on their announcement, have been condemned by one or other interest groups as unrealistic or unachievable. Successful management often confounds expectations, albeit often at the expense of cuts to the workforce.

34. Mr Thompson helpfully summarised his main criticisms of the Council's loan to ACL in a document handed in at the hearing which I reproduce below:

“MISAPPLICATION OF THE MARKET ECONOMIC OPERATOR (“MEO”) PRINCIPLE

1. No MEO would have made a new loan to a company on the brink of insolvency where that new loan was significantly greater than the total value of that company.
2. Given that an event of default for want of security had just been declared in respect of an existing commercial loan, no MEO would have made a new loan to such a company, in order to enable the company to discharge that existing loan, without obtaining additional security for the loan.
3. No MEO considering such a new loan would have relied on the terms that had been offered by an existing commercial creditor to restructure the existing loan to address the company's inability to service, or to provide adequate security for, that existing loan.
4. No MEO would have made such a new loan to the operating company of a sports arena when:
 - a. the company was in dispute with its anchor sub-tenant and had issued a statutory demand for non-payment of rent; and
 - b. that sub-tenant was unable to pay the existing rent and had publicly declared that it was prepared to relocate to another venue if the dispute was not resolved.
5. No MEO that was a freeholder of the sports arena would have made such a new loan to an insolvent tenant company that was paying no ongoing rent for occupation of the property (the effect of the new loan being to discharge a commercial debt incurred to fund the up-front rental premium paid by the tenant company to the MEO) rather than acquiring or foreclosing on the head lease and re-letting the property at a profit.
6. No MEO that was a 50% shareholder in the tenant company would have made such a new loan where:
 - a. there was no realistic prospect of positive equity value or other shareholder benefits resulting from the loan;

- and (even if there had been any realistic prospect of any such benefits resulting from the loan)
- b. 50% of any such shareholder benefits would accrue equally to the MEO's fellow 50% shareholder without that fellow shareholder making any material contribution to the transaction or compensating payment to the MEO.
7. In determining whether or not to make the new loan and, if so, on what terms, no MEO, considering the matter objectively and by reference to its own commercial interests, would have made such a new loan:
- a. without independent advice; and
 - b. on the basis of a business plan significantly amended by the company (i) under the direction of the MEO (ii) after the offer to make the loan had already been made and (iii) with obvious and fundamental defects and uncertainties in the cash forecasts within the plan; and
 - c. on the basis of issues of public policy and subjective animosity of its political masters.
8. If, contrary to 1-7 above, it is nonetheless considered that an MEO *might* have made such a new loan, no MEO making such a loan would have:
- a. extended the outstanding term of the loan from 15 to 42 years, the full term of the only significant and depreciating asset owned by the company, the lease of the sports arena; or
 - b. accepted a lower interest rate than that paid under the existing commercial loan that had been made to the company at a time when:
 - i. the company was solvent;
 - ii. the original loan was secured by guaranteed independent valuations of the sports arena at values substantially in excess of the existing loan;
 - iii. the term of the original loan was 20 years, less than $\frac{1}{2}$ of the outstanding term of the lease of the sports arena."
35. These submissions are essentially the same as those addressed and rejected by the judge at [90] to [132] of his judgment. In my judgment both the judge and Mr James Goudie QC for the Council gave convincing rebuttals of these points, the latter in a

responsive document dated 4 February 2016 which was handed in on the second day of the hearing.

36. A first and central point relates to the value of the company. Mr Thompson is critical of the judge's finding that it was not less than £10.8 million but less than £14.4 million, the amount of the loan – [105] to [106]. The valuation was derived from a CBRE valuation and sensitivity analysis carried out in 2011 in which the variable was the assumed annual rent from the anchor tenant, then CCFC. A value of £10.8 million presupposes an annual rental of £400,000. As the judge records, SISU had on 11 December 2012 on behalf of CCFC offered to pay a rent of £400,000 per annum for the rest of the lease period, a level which the Council plainly thought was achievable since in formulating its own proposal to the Bank three days later it relied upon this offer, in part, as justifying its proposal to buy out ACL's indebtedness to the Bank for £12 million. The judge found that the Council reasonably considered that, by solving the problem of loan repayments to the Bank, that would remove the impasse in the rent negotiations between ACL and SISU/CCFC. I am not sure that Mr Thompson has challenged that finding. Even if the finding is wrong, or if it simply turned out not to be the case, the Council was plainly entitled to take the view that, even if a deal was not ultimately struck with SISU/CCFC, it was reasonable to believe that, over the balance of the lease, another anchor tenant could be found who would be willing to pay a rental of that order.
37. The judge also noted that the CBRE valuation of March 2011, the foundation for the £10.8 million figure, did not take into account, unsurprisingly, the ability of ACL both to increase revenue and to decrease expenditure in the manner contemplated by ACL's Business Plan. Since 2011 revenue from non-football related activities had increased, largely as a result of the Joint Venture with Compass to which I have referred above. These revenues are reflected in a comparison of the cash available to the ACL Group as a whole and that available to ACL alone. As at 31 December 2012 cash available to ACL was £1.0 million but that available to the Group £2.1 million.
38. The judge sounded a note of caution that creditors other than the Bank were shown as nearly £1.7 million whilst debtors at £1.25 million must have included the CCFC arrears of rent, not all of which might be recovered. Nonetheless, there was here significant value.
39. Furthermore the judge was in my view right, and certainly not obviously wrong, to observe that a private investor in the position of the Council would not focus exclusively on the loan to value ratio. The judge accepted that a new investor would not have made a £14.4 million loan to ACL on the terms that the Council did, but that is not the enquiry. As stated by the European Court of Justice in *Neue Maxhütte*, above, at paragraph 133:

“A private shareholder may reasonably subscribe the funds necessary to secure the survival of an undertaking which is experiencing temporary difficulties but would be capable of becoming profitable again, possibly after a reorganisation.”
40. A MEO would also have regard to the rate of return on the proposed loan. It is accepted by the Appellants that the interest rate charged by the Council was both commercial in nature and that it satisfied the relevant Commission guidelines.

41. It is convenient at this stage to deal with Mr Thompson's other principal criticisms of the assumptions underlying the ACL Business Plan. As the judge pointed out at [109] the significance of the ACL Business Plan is that it indicated that, on the basis of the adopted assumptions, which included the extremely pessimistic assumption that ACL received no rent from the Arena over the term of the loan, ACL could service the loan interest and repayments.
42. The Appellants are obviously correct to say that the forecast of available funds in the later months of the cash flow is dependent upon a positive starting position in January 2013. It is also true that (a) the starting figure includes the cash injection of £400,000 which is itself part of the impugned loan and that (b) without that proposed injection of working capital, the anticipated available funds would become negative from the start of FY13. However I do not understand on what basis it is asserted that "a MEO considering whether to make such a loan would be concerned to ensure that the business could generate sufficient cash *by itself* to service its debts, so would clearly have considered the position *absent* this cash injection." The cash injection is, in the overall scheme of things, a relatively modest sum, however it prevented the forecast available funds from becoming negative and produced a situation in which, after losing money in financial years 13, 14 and 15, but remaining cash positive, ACL would return to profitability in FY16. With the funds available forecast to be only £28,000 at the end of FY15, the injection of working capital was plainly carefully judged. Since it was an integral part of the proposed overall loan, it seems to me entirely in accordance with prudent business practice for the putative 50% shareholder MEO to assess the revenue generating potential of the business with the benefit of the whole of the proposed facility. Indeed, since the necessity for the exercise had been brought about by the inability of ACL *by itself* to generate sufficient cash to service its existing debts, the approach advocated by the Appellants makes little sense.
43. The judge was alive to the circumstance that the £3.4m debtors and cash shown in the ACL balance sheet as at 31 December 2012 included CCFC arrears of rent, not all of which might be recovered, although I would note in this regard that I do not think that the Appellants are assisted by referring to the circumstance that ACL had already received £780,000 from the escrow account and from matchday payments. As the judge noted at paragraphs [24(ii)] and [33], these payments were not payments of rent and neither eliminated nor diminished CCFC's liability to pay the amount outstanding. As I have noted above, the cash available to the ACL Group was of the order of £2.1 million, and the fortunes of ACL were tied to achieving its income projections through the Joint Venture arrangement with Compass.
44. For all these reasons therefore Mr Thompson's first proposition above is thus too broadly stated and not here made out on the facts.
45. The security for the lease is as the judge observed closely linked to the value of ACL, albeit the Council acquired the benefit of two personal guarantees worth in aggregate £0.5 million. I see little significance in the circumstance that the Bank had declared an event of default in the light of a perceived shortfall in security. The Bank was bound to protect its own position, but it was also prepared to restructure the loan without requiring additional security, as recorded by the judge at [110]. I agree with the judge that the Council's status as a freeholder did not of itself enhance its security for the loan to ACL. But it was surely highly relevant to the decision to make the loan that in the event that ACL failed, the lease would revert to the Council, rather

than to a third party, and that the Council would with the benefit of its freehold be able simply to re-let the Arena. I therefore reject Mr Thompson's second submission.

46. Mr Thompson's third proposition is not a fair characterisation. The Council did not rely upon the restructuring terms offered by the Bank. The judge, rightly in my view, considered that in assessing whether the Council had acted in accordance with the MEO principle, it was at least relevant to note that the Bank's contemporary assessment appeared to be that ACL was capable of servicing a larger loan over a shorter period with an annual repayment of £1.3 million, rather than the £0.8 million payable to the Council under the proposed facility, amortising £8 million over 20 years whilst leaving £7.5 million to be serviced on an interest only basis as at 20 years. The judge regarded this as "noteworthy" at [110] whilst at [128] he noted that both Deloitte and the Bank were confident that, with restructuring steps, ACL would be able to service a loan at £1.3 million repayments per year for at least 20 years. It is true and indeed obvious that the Bank's proposal was made in a situation in which it was itself exposed. I do not understand however why that should be thought to deprive it of all relevance, particularly when its assessment was shared with Deloitte. I think it unlikely that even an exposed bank routinely puts forward loan restructuring terms with which it believes its customer will be unable to comply. It would make no business sense so to do. In my judgment the judge gave this factor appropriate weight.
47. I have already dealt with Mr Thompson's fourth proposition. The Council's assessment was that ACL could pay a commercial rate of interest on the proposed loan even if it received no income from letting the Arena. The judge regarded that latter hypothesis as an unrealistic basis upon which to proceed – [106] – and I am not sure that Mr Thompson expressly challenged that assessment. The Council was entitled to take the view that it was likely that CCFC would agree to a reduced rent of £400,000 per year, that if it did not, another anchor tenant would in due course be found.
48. Mr Thompson made little or nothing in oral argument of his fifth proposition, which I do not entirely understand. It was not in the Council's power unilaterally to acquire, or to sub-lease on, ACL's lease.
49. As to proposition 6(a), if it was reasonable to believe that ACL could both increase revenue, particularly from its non-football related sources, and decrease costs, then there was obviously a realistic prospect of the shareholding in ACL acquiring value. I have already dealt with those points.
50. Paragraph 6(b) of Mr Thompson's propositions is literally true but it overlooks that CCC acquired benefits other than as shareholder. First it received the interest payments, expected to be worth about £500,000 per annum for the first 3-5 years of the life of the loan – see Mr Hastie's witness statement at paragraphs 110-112. Secondly, the Council was to receive a very significant benefit in the shape of the transfer to it by ACL of ACL's leasehold interest in Car Park C. Mr Hastie's report to the Council set out his recommendation in relation to Car Park C as follows:
 - “3.5.1 The Plan at Appendix 1 shows the entirety of the Car Park marked as plots A, B and C. Two plots (A and B) are already within the Council's ownership and the remaining element (marked C) is leased to ACL 2006 under the same lease as the stadium . . . It is

intended . . . to accept a transfer back at nil consideration to the Council of area C which will complete land owned by the Council outside of the main Arena facility.

- 3.5.1.1 It has always been the aspiration of the Council and ACL to facilitate hotel and other complimentary (sic) development on the car park site, which would require the assembly of the entire site and may have required the Council to pay ACL to relinquish the lease or to share in premiums achieved from a hotel development. Acquisition of the remaining part of the car park means the Council will then be in a position to market and develop required elements of the entire site as financing/the market allows with resultant business rate growth, having not paid any cash consideration to ACL. The value of the site is estimated at £1.5 million. Any direct benefits arising from the site will accrue to the Council solely, rather than to ACL in which AEHC have an interest . . .”

It was I thought a surprising feature of Mr Thompson’s submissions that he consistently failed to recognise the obvious strategic importance of this aspect of the transaction. As Mr Hastie also observed at paragraph 117 of his witness statement:

“Any hotel development from the car park site would also have other financial benefits for ACL, for example it would “support growth in the currently under utilised ACL conference business” (Hastie report paragraph 5.1.6.3).”

51. Furthermore I do not accept the relevance of the observation that 50% of any shareholder benefits would accrue equally to the Higgs Charity, without contribution from that shareholder over and above its agreement to relinquish its interest in Car Park C at nil consideration. Before the judge, although not before us, the Appellants conceded that:

“These concerns only arise where a shareholder loan is being made otherwise than on commercial terms. If one shareholder is offering the loan on commercial terms, the other shareholder is no more advantaged than if the company took a loan from an arm’s length commercial lender, and the shareholder making the loan should be compensated by the commercial terms of any such loan . . .”

52. Thus if the loan was on commercial terms it is nothing to the point that the Higgs Charity made no, or no greater, contribution.
53. Proposition 7 is highly tendentious. I have already pointed out at paragraph 29 above that the European learning does not support the notion that independent advice must be sought in order to satisfy the MEO principle, although it may provide corroboration of the credibility of the assessment. In any event, as pointed out by Mr Goudie, it is the function of the Council’s professional officers such as the Director and Assistant Director of Finance to provide independent advice to the elected members of the Council, as they did. Furthermore, as noted by the judge, PWC were jointly instructed by the Council, the Trustees of the Higgs Charity and ACL to

provide an analysis of ACL's financial position and the options available to the Bank. As noted by Mr Hastie at paragraph 3.4.5.1 of his report, the PWC report provided the Council with an independent view on the sensitivity of ACL's business to risks post refinancing. It also appears from paragraph 5.1.4 of the Hastie report that the Council discussed with Grant Thornton the details of the proposed transaction, the financial implications for the Council and the accounting treatment, although I do not believe that any report from Grant Thornton was deployed in evidence. I shall revert briefly to the assumptions in the Business Plan, but the suggestion that the Council proceeded without taking appropriate advice is unsustainable. It does not advance the Appellants' case simply to demonstrate that other advisers might have given different advice.

54. The Business Plan was considered by the Council when it made its decision to make the loan on 15 January 2013. I am not sure that the evidence makes good the assertion that the Business Plan was amended at the direction of the Council, but even if it was the question is simply whether the plan considered by the Council was demonstrably flawed.
55. Proposition 8 is an optimistic assertion, given that the premise is that an MEO might have made a loan, presumably in the amount of £14.4 million, to ACL. The extension of the term of the loan to the full term of the borrower's sub-lease of the Arena might be thought to be a logical step to be taken by a 50% shareholder looking to a longer-term view of profitability. Extending the term of the loan increased the revenue to the Council in the shape of interest payments. As to the interest rate, the only question is whether it was a commercial rate, which it is conceded it was. The comparison with the terms upon which the loan was originally made seems to me meaningless bearing in mind that it was the substantial change of circumstances including the inability to service that loan which had brought about the need for refinancing.
56. Before the judge Mr Thompson's submission was that the Council's decision to make the loan was to a substantial extent based on policy objectives. Indeed at paragraph [122] the judge records a submission that the documents showed that the only reasons motivating the Council to make an offer to the Bank to purchase the loan for the amount that it did were political in nature. Before us the submission was that CCC's approach to the purchase of the bank debt was driven "primarily" by policy rather than commercial considerations. Furthermore, it was submitted that the willingness of CCC to bid a sum to acquire the bank debt "that was out of all proportion to the value of ACL" was clearly motivated not only by issues of policy, as CCC repeatedly stated, but also by subjective hostility to SISU as owner of CCFC on the part of CCC's representatives, and in particular of its leader and the ruling Labour Group.
57. Mr Thompson also submitted that, contrary to the understanding of the judge, SISU pursued a consistent and rational strategy intended to lead to the purchase of the bank debt at a substantial discount (to be written off, leaving ACL debt-free and thus able to agree a normal market rent for CCFC). Mr Thompson submitted that SISU's strategy sought to resolve the underlying commercial weakness of both ACL and CCFC, and in particular the inability of CCFC to continue to pay a rent of almost £1.3 million per year without access to any of the matchday revenues associated with its occupation of the Arena (and in the light of its relegation to League 1 and the introduction of "Financial Fair Play" regulation of professional football).

58. However that may be, the judge found that by September 2012 SISU's plan to buy the Higgs Charity share in ACL and its plan to buy out the bank debt at a substantial discount had irretrievably run aground. I did not understand Mr Thompson to challenge this conclusion. In those circumstances the fact that some councillors may have been delighted that the plan adopted in January 2013 excluded SISU from the possibility of sharing in the ownership of ACL or its assets is really nothing to the point. It was for this reason that I found merely distracting the Appellants' emphasis upon the apparent animosity towards SISU manifested by some in the controlling group on the Council. I found equally irrelevant the Council's apparent belief, or at any rate the belief of some of the Council, that SISU had behaved in an unacceptable or predatory manner. It is hardly surprising that SISU acted in what it perceived to be the best interests of its investors. The judge found that some of the Council's concerns about SISU's aims and motives were reasonably held at the time although with the benefit of hindsight they could be seen to have been unwarranted – [78(vii) – (ix)].
59. The circumstance that by September 2012 SISU's plan to buy out the bank debt had irretrievably run aground perhaps demonstrates that there was no viable alternative to the CCC plan, other than perhaps allowing ACL to go into insolvent liquidation, an alternative which the judge convincingly found the Council was entitled to reject - [128] and [129].
60. However even if one accepts that some councillors wanted nothing to do with SISU, and puts on one side the fact that the decision of the Council was in fact unanimous, still the focus of the enquiry is whether the transaction was one that could have been entered into by a MEO. It would only be if the Appellants could show that the transaction is simply inexplicable unless solely motivated by subjective animosity for SISU that this line of argument could advance the Appellants' case.
61. The judge regarded as misconceived the Appellants' criticism of the Council for being influenced by policy considerations. At paragraphs [120] – [123] he said:
- “120. This criticism is, at root, misconceived. The Council is responsible for the local government of its area and those who live in it, to which it owes substantial duties. For any decision it makes, it is likely to begin with its political objectives and aspirations. The Council adopted the Arena as part of its policy for the regeneration of North-East Coventry. It is entitled – if not bound – to have continuing regard to its policies in that regard. Even when, in pursuing its objectives, it considers entering the commercial arena, it is fully entitled to take into account its political agenda.
121. Of course, in determining a course of action, it is subject to the constraints of both EU law and domestic law – it cannot, for example, grant State aid. However, the Council is perfectly entitled to consider what transaction it wishes to enter into as a political matter, and then consider whether it would be constrained by EU law on State aid not to proceed with the course it wishes to follow. Only in considering whether a transaction is State aid, must the Council leave out of account matters of policy.

122. Mr Thompson submitted that the documents showed that the only reasons that the Council made an offer to the Bank to purchase the loan for the amount that it did were political in nature. For example, he referred to Mr West's note of the 6 November 2012 meeting with the Bank, which was in these terms:

"I stressed that we were in no way considering increasing our offer [of £6m] on the basis of the numbers available, and that the offer was at this size not on the basis of pure commercials, but because of the Council's policy desire to protect the jobs and business base of the Arena, and to use its continued survival as a stimulus for further regeneration in the North East of the City...".

123. However, this note was of a discussion with the Bank in which the Council was trying to persuade the Bank to sell the ACL loan cheaply: it is not an admission by the Council that the only reason it purchased the loan at over £6m was because of political considerations. The other documents – including the commercial justification of the loan in, e.g. the Hastie Report – belie that. These make clear that, from April 2012, the major driver for the Council was the protection of its commercial interest in ACL.”

62. I agree with the judge. In my view there was ample material upon the basis of which he could properly conclude:

“131.

- ii) In fact, as we now know, restructuring the Bank loan and the SISU plan were not viable options. Undoubtedly, even if the Council pursued them more than they did (as Mr Thompson suggested they ought to have done), they would have not borne fruit. The Council's options were to buy out the loan on the terms that they did – because there is no evidence that the Bank would have accepted any lesser terms, and plenty of evidence that they would not – or to wind up ACL.
- iii) Winding up ACL would have meant that, although the lease may have ultimately reverted to the Council as freeholder, the Council's investment in ACL would have failed. Although the worth of ACL on paper was, as at January 2013, nil, I consider a rational private market economic operator, with a view to longer-term returns, may have considered (as the Council in fact considered) that the failure of the company was temporary, brought on by the refusal of CCFC to pay any rent; and restructuring involving both the refinancing of the ACL debt by the investor himself and steps to improve ACL's cashflow – in terms of cutting costs and increasing revenue – would result in a realistic prospect and reasonable likelihood of future profits.”

63. The Appellants have not in my view come close to demonstrating that the judge reached an impermissible conclusion. I would dismiss the appeal. In doing so I would pay tribute to the judge's impressive judgment. My reasons are simply those which the judge developed in much greater detail with a sure eye to the principles by which his decision-making should be informed.

Lord Justice Treacy :

64. I agree.

Lord Justice Floyd :

65. I also agree.

