



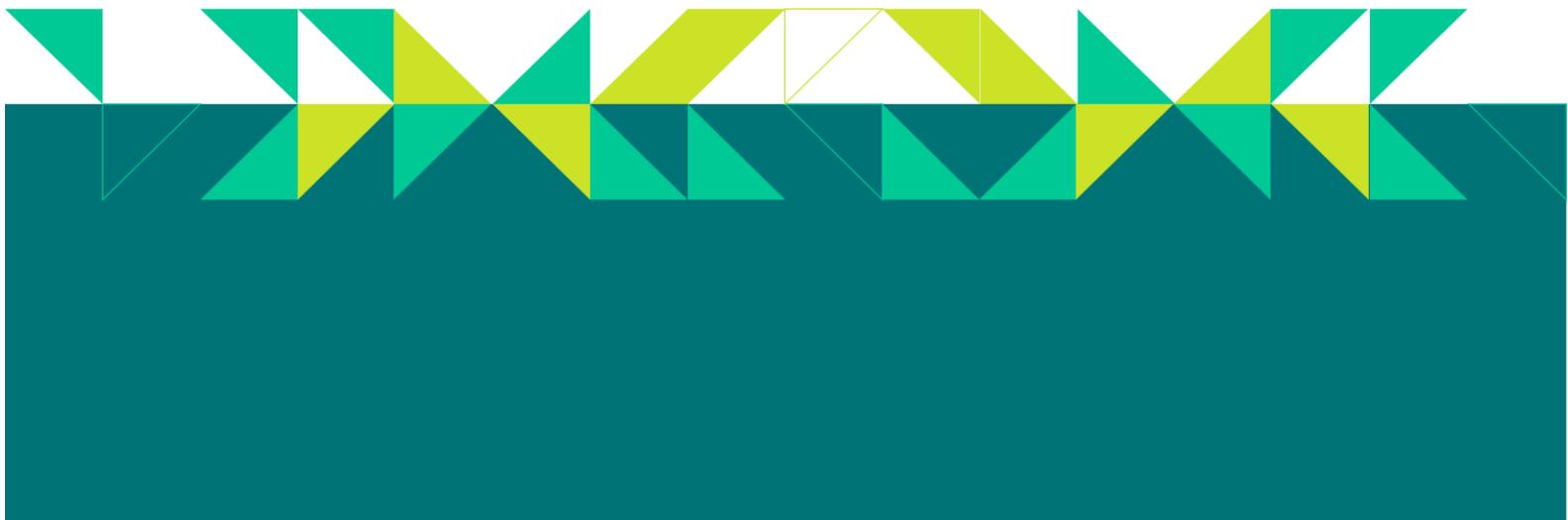
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# Organisational Options

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## Executive Summary

The full value of the initiatives discussed in this report can only be released if new ways of working are facilitated by a new organisational form. This should enable a delivery model that is simple to manage and free of the constraints of external transactional mechanisms e.g. the current levy, which creates a barrier to optimal delivery of a universal waste service. Similarly, the current internal budget constraints associated with differential service provision need to be removed and replaced with a universal service. Merging of current activity into a new organisational structure will reduce decision-making interfaces and enable greater efficiencies and effectiveness in the delivery of the overall regional service. This section of the review focuses solely on the organisational forms and the senior management arrangements to deliver cost savings.

The wider benefits of combining the waste services come from five key areas. These are savings;

- in operational management and delivery e.g. round optimisation, rationalisation of depots etc.
- that accrue from the enhanced scale of the operation, common purchasing, adopting best practice etc.
- leveraging new commercial opportunities e.g. delivering new recycling infrastructure to support the local circular economy
- appropriate use of the disposal facilities
- finally there are important decisions to be taken about the structuring of the services delivery organisation, its governance and management arrangements in order to realise these savings.

This section addresses the last of these.

The combining of the waste services can be achieved in several ways that can be summarised

- informally by collaborating on particular tasks or skills
- organisationally – using delegation of functions under administrative powers
- contractually through an inter-authority arrangement
- structurally in setting up a body that acts as a company and
- using new legislative powers under the Cities and Local Government Devolution Act 2016 to provide for waste collection and disposal functions to be delivered by the LCRCA.

Variants and combination of these arrangements, listed in the order of increasing benefit, have the potential to deliver savings but it is the last two which have the greatest potential. The choice of the preferred arrangement will be subject to several key considerations;

- fairness
- funding required including borrowing powers
- fit with the governance of the participating bodies and future bodies
- flexibility and longevity
- appropriate influence

- decision making and priorities etc.

The exact balance of these and other factors is an internal matter for participating bodies. However, critically the new organisational arrangement will either need to be: hosted by one of the existing Councils; established as a separate legal structure; or hosted by the Combined Authority. Given the pan Liverpool City Region impact the clear preference would be a transfer of waste functions to the Combined Authority. This would not only provide a stable platform for the delivery of savings but would generate the greatest overall savings while enabling the new body to respond more effectively to changes in the external waste environment and policy initiatives like the Circular Economy.

There are specific legal issues that will require detailed assessment (see Annex A attached), and financial issues that will need further work e.g. VAT charging on commercial waste services. Overall the costs savings from the reduced staff requirements and streamlined back office functions would be in the range of £400-£700k pa but the costs of the transition is likely to be in the range £500k-£1m.

The total waste service is split into six waste collection authorities residing within the constituent councils and one single purpose statutory waste disposal authority as illustrated below.

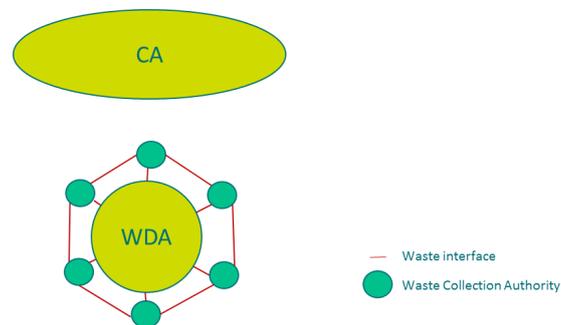


Figure 1

Historically there has been limited joint working across the waste collection authorities and particularly with the waste disposal authority. The current barriers to further joint waste working across the wider waste system (collection and disposal) are;

- differing priorities and costs in relation to the waste collection systems operated by the constituent councils
- lack of common standards, policies, vehicles, bins across the waste collection authorities
- limited formal forums to agree joint way forward
- a disposal levy arrangement that fails to adequately reward individual improved recycling performance
- too many interfaces in relation to decision making within the total waste system etc.

Added to this there are inefficiencies in way the current arrangements are undertaken

- duplication of resources in key tasks e.g. procurement, communications etc.
- lack of consolidation of key expertise in areas such as enforcement, training, growth of commercial opportunities etc.
- failure to take opportunities to keep waste disposal facilities full with public waste for the benefit of the public purse etc.

Further there are opportunities to

- rationalise depots

- optimise collection rounds
- improve fleet maintenance function
- streamline management resources etc.

Many of these issues have already been identified in the earlier sections of this review; this is simply setting them out clearly so that the benefits of moving towards a joint waste authority are set out in one place. The review considers four principal organisational forms with sub options for some of the areas. The various forms of joint working are;

- specific activities co-ordinated via voluntary arrangements
- shared procurement and contracting
- single waste collection authority
- a joint waste management authority

The financial savings related to changing the organisational form are modest, these relating solely to adjustments in management costs. It is the influence of the new organisational forms on scale, behaviours, common practices and decision making that is key in the delivery of savings. Financial savings in the management costs relate to

- legal and administrative costs of £10-50k per procurement
- 10% of the procurement team budget relating to the procurement budgets of vehicle, bins etc.
- £100-200k/year in support services costs
- £300k-£500k/year created from savings in fleet management team costs

Key savings are realised by the removal of organisational interfaces. A good example here is the saving of £2m/year that could arise if a joint WCA company could expand its functions in terms of commercial waste collections to fully exploit the spare capacity within the RRC contract.

We believe that value is created by new organisational forms in five key areas, these being

- the creation of a stable environment that enables a common cost effective approach, reduces interfaces, while simplifying transactional mechanisms between the parties and providing for clear governance and oversight
- efficiency e.g. standardisation, consolidating knowledge, rationalisations, productivity, management etc.
- developing trading potential e.g. commercial waste, charging, expanding geographical coverage etc.
- optimisation of the use of existing infrastructure with public waste e.g. EfW and other treatment facilities being fully used for the public benefit
- responsiveness to change e.g. changing working practices, processes, responding to legislative change, circular economy, changes in economic balance of solutions etc.

Each form is assessed against these headings in the report. The favoured organisational form is the creation of a joint waste management body, covering collection and disposal, within the Liverpool City Region Combined Authority as illustrated in the below.

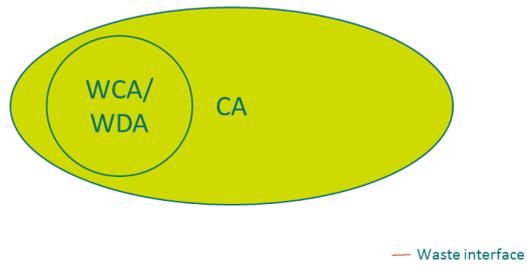


Figure 8

This enables all the savings opportunities identified in the report to be realised. Key to delivery is clarity of governance oversight, the removal of interfaces and distorting financial mechanisms, elimination of a local view of costs that is replaced by a whole system view of costs. This will also open new trading opportunities and it will allow the new joint body to concentrate resources on problem areas e.g. enforcement. It will further facilitate the consolidation of expertise to consider new infrastructure needs and new legislative powers that improve the potential for the circular economy

# 1 Introduction

The creation of Liverpool City Region as a Combined Authority creates opportunities for new models of delivery and savings across a range of services currently delivered discretely by the underlying bodies. For waste (disposal and collection) the current arrangements between the Waste Disposal Authority, the Waste Collection Authorities and the Combined Authority are illustrated below.

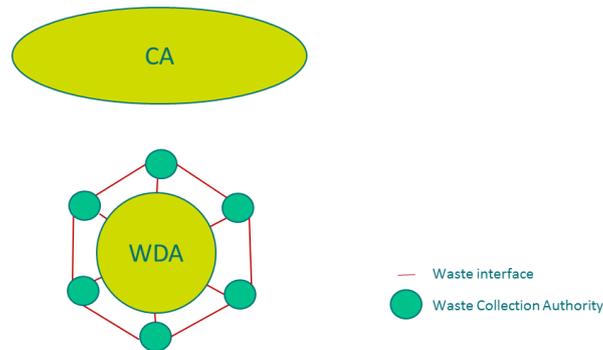


Figure 1

This organisational structure creates multiple waste collection arrangements and interfaces that generate barriers to effective working on waste related issues. Currently the Combined Authority has not applied for specific powers associated with waste and therefore has a limited role to play, but great potential. It has long been recognised by private sector contractor that a strong regional presence creates a very strong competitive position and commercial advantage. Waste disposal functions have been similarly consolidated into a single Waste Disposal Authority but waste collection remains fragmented and delivered by six local bodies. This element of the report focuses on new organisational arrangements. The success of new forms can be measured by their ability to deliver clarity and value in the following five areas

- The creation of a stable environment that enables a common cost effective approach, reduces interfaces, while simplifying transactional mechanisms between the parties
- Efficiency e.g. standardisation, consolidating knowledge, rationalisations, productivity, management etc.
- Trading potential e.g. commercial waste, charging, expanding geographical coverage etc.
- Optimisation of the use of existing infrastructure with public waste e.g. EfW and other treatment facilities being fully used for the public benefit
- Responsiveness to change e.g. changing working practices, processes, responding to legislative change, circular economy, changes in economic balance of solutions etc.

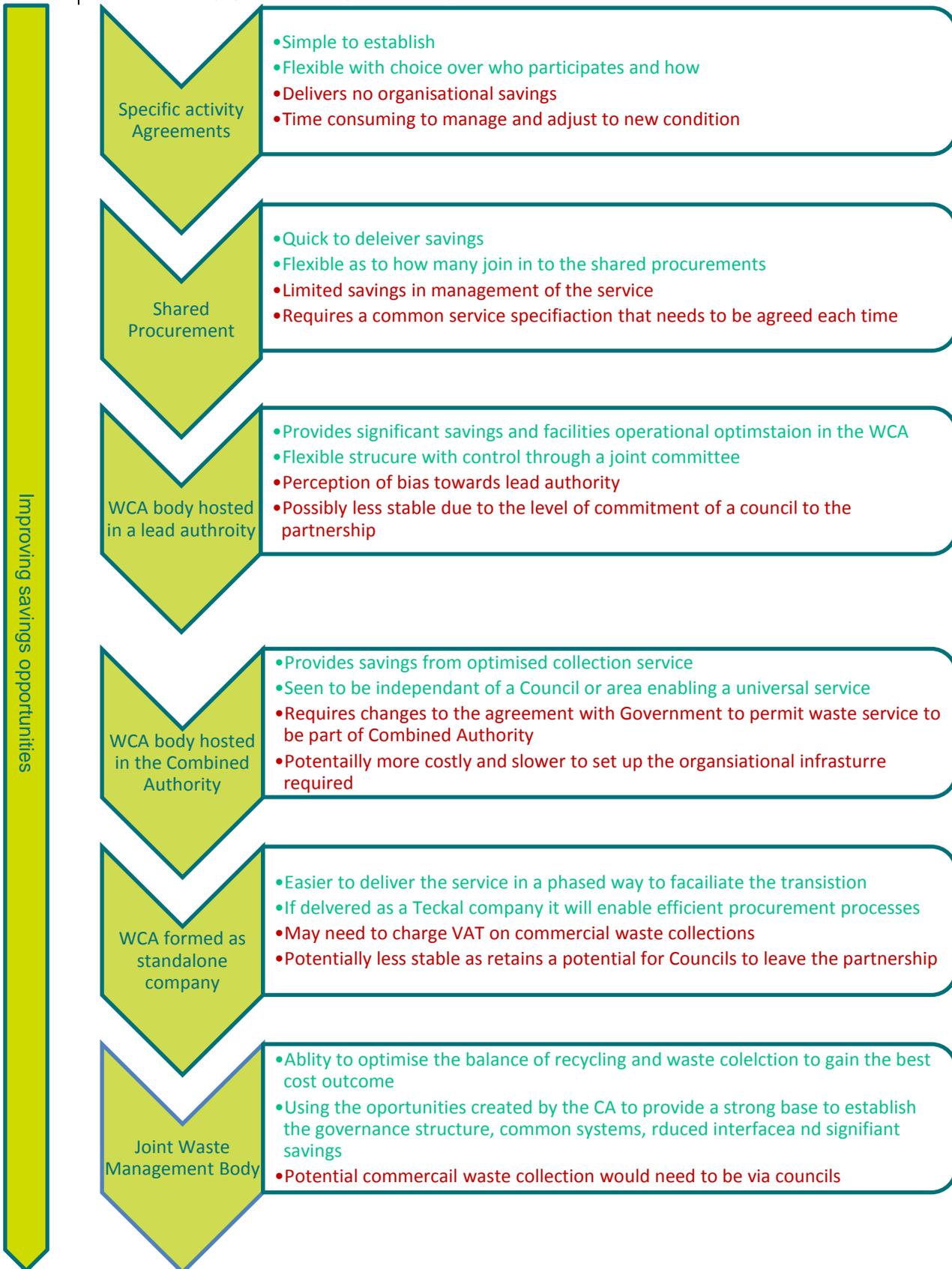
Local Partnerships have identified that savings are available from the co-ordination of activities in the waste collection function of the Councils and co-ordination across the waste collection function and the waste disposal functions within the Liverpool City Region (LCR). There are savings that come from the optimisation of the round structures and organisation of the frontline service. There are also savings that come from driving improved recycling performance and optimising the use of the disposal facilities with publicly collected waste. These are discussed elsewhere in this report but there are also potential savings that can accrue from the organisational restructuring. The joint initiatives discussed elsewhere can be delivered in several ways with differing effectiveness. These different approaches can be described as follows:

- Specific activities co-ordinated via voluntary arrangements

- Shared procurement and contracting
- Single Waste Collection Authority
  - hosted within a lead authority
  - hosted within the Combined Authority
  - formed as a standalone organisation
- Formation of a joint waste management body (including the WDA and WCA's function)
  - As a standalone organisation
  - Within the Combined Authority

The above list is ordered in terms of the increasing value delivered both in terms of savings potential and in terms of simplicity to administer. These are shown graphically in Chart 1 below.

Chart 1 Summary of new waste organisational options



These options will be discussed in more detail in the following sections.

## 2 Specific activities co-ordinated via voluntary arrangements

### 2.1.1 Description

The savings discussed in other sections of the report have identified various changes to the service where for example,

- vehicles could operate out of neighbouring depots
- as basing a vehicle and crew at a neighbouring depot,
- joint communications team
- sharing of particular knowledge, skills or best practice
- training events
- providing the collection of waste and recyclates from a set of households on behalf of the neighbouring Council
- opportunity to share skills, knowledge and good practice related to specific tasks
- common communications initiative

The above opportunities are possible under the current organisational arrangements illustrated below

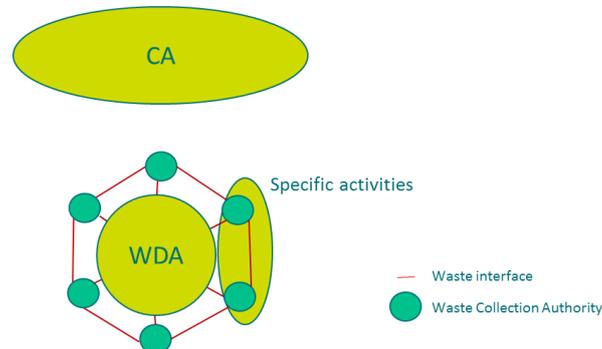


Figure 2

However, they tend to be driven by personal relationships and timing coincidences. They are unlikely to be delivered regionally and are likely to be of smaller value.

### 2.1.2 Governance and control

Each of these arrangements given their limited scope and inherent risks would be an agreement between the involved Councils. There would be limited need for a formal Governance structure in these circumstances as each agreement would be separate and controlled by the individual Councils involved. This would effectively be an operational relationship with the adjustments made as required on a piecemeal basis.

The nature of the agreements could be purely administrative or for more complex changes might require a contract (an inter-authority agreement (IAA)) to define all the responsibilities.

Overall there is no change in the organisational status of the Councils.

2.1.3 **Staffing and assets**

This type of sharing would be unlikely to involve the transfer of assets or staff between Councils but simply lead to Council’s sharing each other’s resource as needed on an adhoc basis. Overall there would be a requirement for minimal additional management resources to oversee and manage the arrangement whether informal, administrative or contractual matters.

2.1.4 **Legal and financial**

Under shared activities co-ordinated via voluntary arrangements the savings areas are minor and potentially transient and could be dealt with through informal agreements or administrative process. Please see the Annex A attached on some more detailed legal considerations. In some circumstances the parties may wish to document or contractualise the arrangements using a JWC or an IAA if the arrangements deal with longer term partnerships or higher value areas.

Under this approach all the responsibilities and management structures, are retained by the existing Councils and thus there would be no cost savings from the management aspects. However, these arrangements could facilitate the savings modelled elsewhere, for example under joint procurement arrangements or joint use of waste resources. If it was felt that these agreements had to be set up contractually rather than simple operational agreements, then there may be legal costs for drafting the agreements which may incur costs of £10-50k. However, such costs may be offset by savings from joint procurement or shared use arrangements as above.

2.1.5 **Service, performance and flexibility**

The widespread transfer and sharing of services is unlikely to be accommodated by this simple and ad hoc basis for collaboration. The nature of the agreement will limit the types of sharing that will take place involving bespoke agreements for narrowly defined and transient projects.

This could involve informal sharing of time and resources to assist with a short-term need, or the sharing of documents or expertise associated with a specific short term problem. It is therefore flexible, and if informal quick and easy to arrange, but are likely to be relationship based and will only be available other work pressures permitting. The challenge here is there needs to be some overarching logical re changes to the waste system operation if there are to be lasting benefits, they may breakdown if there is staff turnover or changes. Additionally, the level of take-up with neighbouring collection authorities will vary. Once the arrangement terminates there is a clear possibility that costs previously saved may revert to their historic levels. For these reasons, such arrangements are less likely to have long term value leading to difficulties in quantifying the overall impact.

2.1.6 **Sustainability against core criteria**

The key advantages of collaboration on specific tasks is that it is simple to set up and understand. They offer flexible solutions that can be established very quickly without having to wait for agreement of sharing arrangements across the region. Thus, low level savings can be delivered more quickly.

However, there are no organisational savings as the management systems in each of the partner Councils remain the same. Indeed, if formal arrangements are deemed necessary there may be some additional contract monitoring costs.

In terms of meeting the key criteria for success for a new structure this approaches achieve the following:

<p>Stable environment, common approach, fewer interfaces</p>	<p>Provides some benefits in delivering isolated savings in specific areas.</p> <p>Fails to deliver a stable platform for delivery of long term savings, with no common regional standards. Particularly existing interfaces between the WDA/WCAs which remain have not been improved or simplified, and no advantages are taken of the opportunities created by the formation of the Combined Authority</p>
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Efficiency	Provides some benefits in delivering the transient efficiencies for the specific focus areas
Opportunities for trading	Does not add any additional benefit to trading potential in the region
Optimal use of public infrastructure	Unlikely to deliver additional utilisation of public assets for public benefit
Responsiveness	These arrangements can be established relatively quickly

## 3 Shared procurement and contracting

### 3.1.1 Description

There are substantial opportunities to exploit the economies of scale that can be obtained by Councils working together to procure services and materials. If Councils combine and phase their procurements of key items via a single procurement or on an integrated regional basis scale opportunities will arise and this will attract greater market competition. A large scale for the procurement and a regular pipeline of work will deliver savings and greater engagement from the suppliers. Shared procurement and contracting areas may include:

- vehicles procurement
- vehicle maintenance
- bins, boxes, sacks
- joint call centre
- insurance providing better portfolio benefits

The above opportunities are possible under the current organisational arrangements illustrated below

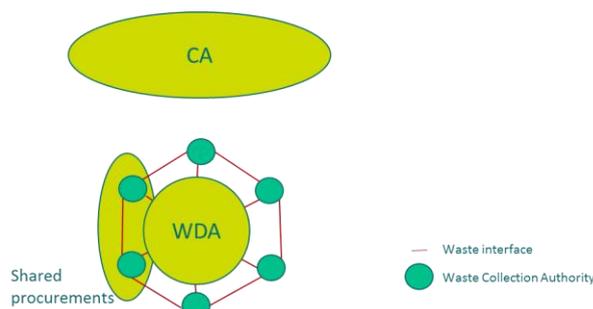


Figure 3

However, they tend to be driven by timing coincidences e.g. contracts are up for renewal at the same time. Little effort is currently made to standardise the current collection fleet or bins. In theory the number of commodity items that can be procured in this way is unlimited but practice is very different suggesting that there are a number of barriers to adoption. Once the commodities are bought and maintained the public service will still be delivered by original Councils.

### 3.1.2 Governance and control

Please see the attached Annex A on legal and governance issues. There is a need for a legal governance structure to oversee the risk management arrangements and the overall competence of the teams deployed. There may well be a need for some form of lead authority arrangement. This will get more complex as the number of participants increases and may require some formal governance as a regional solution evolves. Delivering a consensus across participating authorities will require positioning skills, influencing skills, good judgement and the effective engagement of influential parties. Agreeing a common specification, being a particularly challenging area, will require a series of meetings to gain consensus on what is wanted.

### 3.1.3 Staffing and assets

Overall there will be limited impact on the staffing and assets of the Councils since procurements of the larger commodities is a relatively infrequent task. Specific teams may need forming to create the procurement vehicles e.g. frameworks and for the development of the common specifications. If internal resources are suitable these should be used but it is likely that specific short term expertise will be needed from external consultants.

### 3.1.4 Legal and financial

Please see the attached Annex A on legal and governance issues. The joint procurement can be arranged in several ways:

- A lead Council takes on the procurement process and then subsequently delivers the purchased goods to the partner Councils
- A lead Council conducts the procurement which is constructed of “lots” which represent the requirements for each of the partners
- A framework contract that is put in place in order that partner Councils can purchase under the framework at the agreed rates

Where a lead Council takes on the responsibility for the purchasing of goods or services there will need to be an agreement that addresses the means for transferring the costs/payment for the goods or service as well as the rights in terms of guarantees and warranties that may be applied. Where this is for low value goods this is probably relatively simple. However where services are jointly procured or the value of the individual items is high e.g. vehicles, for which there may be a maintenance element then the agreements may need to be more complex in order to address the liabilities of participating Councils.

Savings from the joint procurement process would depend on the number of authorities that join up and the number of initiatives. However, evidence from other joint procurement processes<sup>1</sup> have shown 10% savings are derived from the competitive benefit of added scale and a further £10k per Council savings are made on the procurement costs.

### 3.1.5 Service, performance and flexibility

The scale of any savings is directly related to the number of participating authorities and level of standardisation achieved. High levels of standardisation will reduce the variation in the collections systems deployed and therefore the types of collection vehicles needed. This does not necessarily result in a reduction in recycling performance or the overall levels of diversion from landfill. Other areas for potential savings such as collection frequency and bin size, which should be considered as part of shared procurement, could result in overall improvements in performance. Procurement of commodities that have a long life will influence collection systems during this period, but of items with a short life e.g. fuel or sacks can be varied as soon as current stocks are used up. So the flexibility of the solution will be related to the product life for commodities. There will however be good geographic flexibility as the shared procurement can deal easily with increasing or decreasing numbers of participating authorities.

### 3.1.6 Sustainability against core criteria

The key benefit from this approach is that it can deliver savings relatively quickly as it does not require all Councils to participate although the savings are maximised when all participate. The downside of this approach is that there are limited savings from the management of the service other

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<sup>1</sup> DCLG, Household Waste Collection: Procurement Savings Opportunities, March 2015

than from the procurement costs. More importantly difficulties of the transaction mechanism (e.g. levy) and wider interfaces remain.

In terms of meeting the key criteria for success for a new structure this approaches achieve the following:

Stable environment, common approach, fewer interfaces	Provides some benefits in delivering aspects of a common collection system if a limited number of standard vehicles and bins/boxes are used with wide regional take up.  Fails to deliver a stable platform for delivery general long term savings across geographic boundaries. Particularly existing interfaces between the WDA/WCAs which remain have not been improved or simplified, and no advantages are taken of the opportunities created by the formation of the Combined Authority
Efficiency	Provides some benefits in delivering the transient efficiencies during procurement of commodities, potentially achieving discount prices and improved maintenance costs
Opportunities for trading	Does not add any additional benefit to trading potential in the region
Optimal use of public infrastructure	Unlikely to deliver additional utilisation of public assets for public benefit
Responsiveness	These arrangements can be established in the short to medium term once common standards for commodities are identified to reflect the number of participating authorities. However benefits will fall in proportion to the number of participants.

## 4 Single Waste Collection Authority

To capture opportunities in addition to those illustrated in the 'Specific activities co-ordinated via voluntary arrangements' and 'Share procurement and contracting' sections, organisational forms that reduce the waste collection interfaces and remove barriers to more extensive integration need to be explored. The types of savings that are enabled by a single waste collection authority are

- Depot rationalisations
- Round optimisations
- Combined fleet maintenance
- Harmonisation of collection system and policies
- Opportunities to trial or introduce new waste collection services
- Consolidation of expertise to enable focus on further improvements and delivery
- Optimisation of resources across a new management structure
- Growth of commercial opportunities including commercial waste
- Maintaining an advantageous position on VAT under administrative arrangement
- Controlling the delivery of waste streams to the WDA which may underpin new disposal arrangements
- Ensuring that the disposal facilities are filled with public waste for the public benefit

This is facilitated by taking a long-term view on legal structures and administrative arrangements, with local choice and political oversight being delivered by the committee structure. There are several options for delivering this type of arrangement;

- Single WCA body hosted within a lead Council on behalf of the others
- Single WCA body hosted within the Combined Authority
- Single WCA body formed as a standalone organisation

Forming as a single WCA will allow the services to be transferred as the services become available. Those that are currently operated in-house can transfer relatively quickly at an operationally appropriate time. Those Councils that have contracted out their service can wait until the contract naturally expires. The new single WCA can be assigned the service or bid in a formal procurement depending on its form.

### 4.1 Single WCA body hosted within a lead Council

#### 4.1.1 Description

The WCAs could be hosted by one of the partner Councils. This lead Council would take on the responsibility for the management of the joint assets, the management staff and potentially the employment of the staff associated with the management of the service. The host would also act as

the point for delivery of the aggregated WCA services but individual WCAs would remain responsible for the delivery of waste.

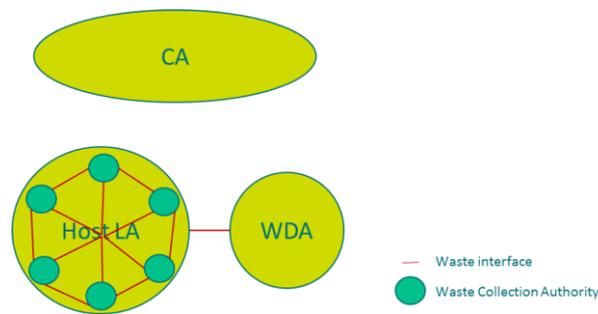


Figure 4

This arrangement is illustrated above and would facilitate the savings listed at the start of section 4 'Single Waste Collection Authority'

#### 4.1.2 Governance and control

The governance structure adopted to manage the WCA would need to allow the Councils shared control of the service. This governance structure could be standard Joint Committee structure. Typically, this comprises a member led strategic committee and an officer steering committee below this to implement the strategic direction from the members and address operational direction and oversight of the operational management team. This governance structure would be established through a single or series of inter authority agreements. These agreements would establish amongst other things the following issues:

- Whilst the lead Council would procure the necessary contracts, the junior partners will need a mechanism to join these inter authority agreements?
- How joint and several liability is dealt with for 3<sup>rd</sup> party contractors.
- How will staff and assets be handled when transferred or seconded
- Powers and control exercised through the joint committee structure
- The range of services to be joined, just waste collection, or expanded to include street cleansing, grounds maintenance and other similar functions
- How the funding of the body will be organised and how assets will be transferred in to the body and how the value or costs of these is dealt with if sold or released
- Managing the redistribution of costs as councils leave the joint arrangements
- How expiry of the inter authority agreements are to be managed

Examples of other joint waste authorities such as the Dorset or Shropshire waste partnerships have hosted the joint organisation within the County Council. This allowed the support functions such as HR and legal etc. to be provided. It also maintained oversight and control through a steering committee structure comprising the constituent Councils.

#### 4.1.3 Staffing and assets

Each of the councils currently has staff and assets employed in delivering the service either directly or via a contracted-out service. There are two options in transferring these to the new single WCA: they can be directly transferred to the host Council or they can be seconded with ultimate management being retained by the original council. Staff transferring would need to be transferred under the TUPE. If seconded appropriate mechanisms would need to be introduced to permit the management and control to be performed by the waste collection body.

Any assets, like vehicles or buildings may be transferred in other ways that retain the ownership with the original council or transferred with appropriate handling of the value. Property transfers would be most likely through the operation of a lease for the use of a site. Less durable assets such as the vehicles and bins could be “on loan” with the maintenance becoming the responsibility of the joint collection body but otherwise no funds changing hands. This allows the return of these assets if they are no longer needed but would prevent their disposal by the joint collection body.

It is essential that the collection body can reduce or reassign any resources used in the delivery of the services so that cost savings can be made through reduced staffing and the rationalisation of assets e.g. use of less vehicles and depots. Flow of monies for the redundancy payments and monies derived from the release or sale of assets will need to be agreed

Transition services will be a combination of direct service delivery and contracted out service. As each of these are brought in to the joint body they must be managed individually until a common service style is adopted at a convenient point in time.

The choice of either direct service delivery and contracted out service will be an early decision for the joint committee in deciding how the service will be managed. In the current market, there is little economic benefit between and well managed direct service delivery arrangement, with comparable terms of service and a contracted out service. A contracted out service may be a little cheaper but is likely to be less responsive to change.

#### 4.1.4 Legal and financial

The transfer of the service to the host Council will be through an administrative process of delegating powers so that they can perform the function on the others behalf. For the legal powers permitting this, please see the legal Annex A attached. The scheme of delegation would provide for clarity as to the range of functions and responsibilities which are to be in the control of the lead Council and those strategic roles which would continue to be performed by each individual Council.

As the legal entity for the single waste collection body would be a Council it would be required to comply with procurement rules and act within its powers. Please see further details in the legal Annex A attached. Lead authority delegations being limited by the detail of the inter authority agreement.

Once settled the future funding of a joint collection service, providing a common service with common policies should be relatively simple. It is anticipated that appropriate service costs can be shared through a new WCA levy. This levy being set on a population basis.

By entering into some long term arrangements this will provide some stability needed to deliver the anticipated savings. To further this stability it would be preferential for any leaving WCA to compensate the remaining WCAs for any adverse financial impact.

Estimating the cost benefits from integrating the waste collection functions requires detailed information. We have not been provided the detailed information on staff levels and associated costs, equally roles and responsibilities may be different or overlap between the services that would migrate and those that would remain with the Councils. Many of the functional roles will remain in either structure as the waste collectors, vehicle maintenance or other direct service providers are needed following work such as route optimisation discussed elsewhere in this report.

However, we can make estimates based on the reduction of management staff and the overhead functions associated with the operational data from similar operations elsewhere. It is assumed that operational staff directly monitoring services such as assessing missed bins and dealing with complaints would remain. However, there are contract overview and management staff, assuming 3-4 per council, and therefore 15-20 overall could be rationalised. Within a combined WCA body there would be a requirement to manage a larger fleet of collection crews and this would be 6-8 staff with the new arrangement allowing the specialisation of activities and the avoidance of duplicated roles. Thus, we anticipate a reduction of 10-12 staff providing an estimated £300k -£500k saving.

In addition, there would be the reduced needs for the support services such as finance, legal, HR etc. Initially there would be extra costs from the reorganisation and redundancy costs that might be

£500k -£1m<sup>2</sup> but the on-going savings by combining these support services in one body would be £100-200k.

4.1.5 Service, performance and flexibility

The underlying precept of a common specification is that all residents receive the same service. This is generally true but the service may vary with the type of property or demographic. For example whilst most low-rise properties will receive one agreed service, flats and other properties with difficult collections will receive a different service with potentially communal bins or sacks for example. Charging may vary for different demographics as another example. However, once the overarching specification is established it would be universally applied across the CA.

The service is not just the type of bins, when bins are collected and the range of recyclates accepted, it involves policies of side waste, lid closure, assisted collections, charging, enforcement, etc. All of these areas must be harmonised in a single waste collection authority.

Merging services provides the opportunity to

- concentrate attention on areas for service improvement e.g. side waste in urbanised areas
- fund new collection systems to deal with issues associated with high-rise properties
- target communications at particular demographics across the region more cost effectively than when each council tries to do this on their own
- fund trials of new systems or collection methods from the savings release, so enabling further improvements in the future
- invest in new in cab and operative communication systems that improve service monitoring and provide better real time evidence to accurately and quickly manage public observations

The range of services covered could also be flexible as there are a range of activities that have common aspects such as street cleaning, graffiti clean-up, green space management that could be integrated into the new arrangements.

4.1.6 Sustainability against core criteria

The key advantage of a single WCA body hosted with a lead authority is creation of a stable platform for the creation of a universal service at reduced cost while maintaining democratic input.

In terms of meeting the key criteria for success for a new structure this approaches achieve the following

<p>Stable environment, common approach, fewer interfaces</p>	<p>Provides aspects of a stable platform for the delivery of benefits in waste collection. A common collection system is possible in terms of methods and policies, however budget setting issues and harmonisation problems would remain.</p> <p>It enables savings across geographic boundaries and improves WCA collaboration. The WCA interfaces still exist under this arrangement and the key interface remains with the WDA. Care will needed to optimise costs for the disposal and collection systems.</p>
<p>Efficiency</p>	<p>Provides the ability to optimise the waste collection service for the long term. Effort could be concentrated for maximum effect e.g. in enforcement. Equally local problem areas such as high-rise building can</p>

<sup>2</sup> Estimate based on redundancy costs of ~£300-500k plus a similar cost in legal and support services

	be treated more effectively across the region. It also provides sufficient scale to pilot or role out new opportunities into the future.
Opportunities for trading	Creating a single WCA will enable regional commercial waste services, providing new revenue opportunities.
Optimal use of public infrastructure	Having a single arrangement with commercial waste collection opportunities will increase the potential to optimise the use of public disposal facilities with public waste for public benefit.
Responsiveness	Strong management will be required to manage the larger organisation, however once the arrangements are in place the new WCA will be able to address more effectively dynamic issues associated with waste collection.

## 4.2 Single WCA body hosted within the Combined Authority

### 4.2.1 Description

The establishment of the Combined Authority (CA) for the Liverpool City Region provides an opportunity for an alternative host for a new single collection body. A new single WCA body could be hosted within the Combined Authority. The Combined Authority would be responsible for the management of all the waste collection assets, the management staff and the employment of the staff associated with the management of the service. The Combined Authority would also act as the legal entity for the service and any contracts let. This probably is the option most likely to deliver the savings and opportunities identified in section 4 'Single Waste Collection Authority'.

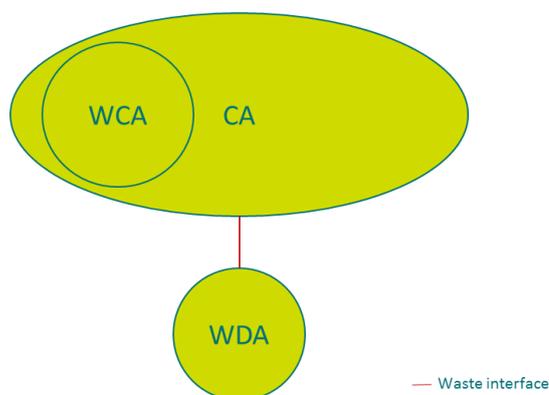


Figure 5

This arrangement is illustrated above and would facilitate the savings listed at the start of section 4 'Single Waste Collection Authority'

### 4.2.2 Governance and control

The governance of the joint waste collection function merged with the Combined Authority would be addressed as part of the Combined Authority's overarching governance, while delivering accountability to local residents. A strategic member and operational officer committees focusing on waste collection matters should support this. The CA's governance systems, which will be a form of committee representation, will need to address this. A further committee alternative would be for a CA member committee to provide the strategic direction with operational matters being handled by the chief executive, senior director and the officer team.

Once established as a CA with waste collection responsibilities by order of the Secretary of State, the function of waste collection can only be removed from the CA by further order of the Secretary of State. Decisions taken within the CA may need to reflect the best interests of the CA.

#### 4.2.3 Staffing and assets

Staff would need to transfer to the CA and this could be via secondment or preferably full transfer.

The size of the new joint waste collection service may necessitate its own back office functions e.g., legal, finance etc. This could be achieved through additional direct employment, seconding in staff or procuring the relevant services via a service contract with one of the constituent councils.

Control and ownership of the main assets in terms of depots, vehicles, bins and similar equipment should be transferred. This will enable rationalisation and standardisation of service provision. However, savings will not just be realised through cost cutting. It is equally important during the rationalisation process to consolidate or extend expertise in areas that will drive long term value such as effective procurement, effective contract management, re positioned collection systems that respond to changes in operational technology and regulation etc. or adjusted following improvements IT to provide better interfaces with the public.

Whilst this review has looked at the operational benefits from rationalising WCA assets, depots that RCVs work from, there may be substantive benefits from the amalgamation of the fleet management services regionally e.g. by amalgamating with Mersey Travel, already part of Liverpool City Region CA. Whilst there will be some bespoke requirements for public transport vehicles and refuse vehicles, respectively, there are also a lot of commonalities in terms of HGV operations. While out of scope for this particular piece of work it may be worthy of consideration in the future.

#### 4.2.4 Legal and financial

Currently, waste collection is not part of the CA functions. For this option to work the CA's functions would need to be extended to include waste collection. Each of the Councils in the Liverpool City Region would agree to, and persuade the Secretary of State to agree to, the transfer their collection function/powers in to the CA. Please see the legal Annex A attached for more detail on this.

Once the legal arrangements are set up for the CA to be responsible for a single waste collection function, the CA would be able to hold contracts, employ staff and carry out the services in house or contract out the operation of the service. Please see the legal Annex A attached.

A new waste collection levy would be needed for the WCA to recover its costs for the new universal service from the councils within the CA. It may be flexed to meet particular demographic or public needs but once identified will be universally applied.

The new universal service, once implemented, would avoid the tension and disagreements that would otherwise exist between partnering authorities should they all provide different collection regimes. This will require significant input to develop a universal service standard. While the overall savings realisable will be significant, some councils may find the need to invest in the short term to establish a new service at the agreed standard for the entirety of the CA. In the medium term, there should be an attractive payback on this investment.

The financial impacts from establishing the single collection body within the CA are effectively the same as if it was established within a lead Council approach as discussed in section 4.1.4. The funding would be set via a levy arrangement. In summary, we anticipate reduction in waste fleet crew management staff of 10-12 staff providing an estimated £300k -£500k saving per year. In addition, concentrating the back-office functions such as finance, legal and HR etc. could lead to a combined savings of £100k-200k/year.

#### 4.2.5 Service, performance and flexibility

The service issues described for the 'Single WCA body hosted within a lead Council' approach, see section 4.1.5, are the same for the 'Single WCA body hosted within the Combined Authority'. The key difference being that the functions and powers of each WCA have been transferred into a new entity in this organisational form. This removes all historic operational interfaces and provides a

strong platform for unifying the service and realising savings. There would be a collective budget, a unified vision for the service and a single interface with the WDA. The key advantages of this approach are it

- removes the focus on local issues and enable the new single WCA to focus on larger economic issues associated with waste collection
- it creates a much larger waste collection area, which is regionally significant, that will engender greater market competition. National contractors business profile will be altered locally and nationally if they are successful in winning such a contract
- the single interface with the WDA would simplify the current arrangements and will enable the fairer distribution of waste collection savings across the region. This will avoid the current perverse situation where a well performing council investing in waste collection only receives a small proportion of the savings realised in waste disposal because of the current levy arrangements
- the ability to change working practices such as “task and finish” to more productive modern arrangements
- as a single entity, the new larger WCA will be able to fully target economic and commercial opportunities within the region which are not possible as stand alone councils. An example would be to concentrate commercial waste services in Liverpool city centre to establish a strong commercial presence by focusing the combined resources here. Subsequently the service could be expanded to other parts of the CA region.

The scope of the new WCA arrangements would need careful consideration prior to any application to extend the current CA order with the Secretary of State. For example given the economic development role envisaged for the CA there may be some cross fertilisation in respect to opportunities for spin off activities dealing with the collected waste either through new recycling processes or industrial processes that use the generated recyclates.

4.2.6 Sustainability against core criteria

The key advantage of a single WCA body hosted within the Combined Authority is the removal of organisational and budget barriers which have diminished economic possibilities

In terms of meeting the key criteria for success for a new structure this approaches achieve the following:

<p>Stable environment, common approach, fewer interfaces</p>	<p>Provides a stable platform for the delivery of substantial benefits in waste collection and the development of wider economic possibilities. A common collection system is possible in terms of operational methods and policies. It further provides opportunities to focus staff resources in new value added areas to provide a platform for savings into the future.</p> <p>It enables savings across geographic boundaries and improves WCA unification. The single WCA removes the previous geographic and budget issues. One key interface remains with the WDA and care will needed to optimise costs for the disposal and collection systems.</p>
<p>Efficiency</p>	<p>Provides the ability to optimise the waste collection service for the long term. It would create a nationally significant market area that will improve competition for waste collection services. Equally local problem areas such as high-rise building can be treated more effectively across the region. It also provides sufficient scale to pilot or role out new opportunities into the future.</p>
<p>Opportunities for trading</p>	<p>Creating a single WCA will enable regional commercial waste services, providing new revenue opportunities</p>

Optimal use of public infrastructure	Having a single arrangement with commercial waste collection opportunities will increase the potential to optimise the use of public disposal facilities with public waste for public benefit
Responsiveness	Strong management will be required to manage the larger organisation, however once the arrangements are in place the new WCA will be able to address more effectively dynamic issues associated with waste collection.

### 4.3 Single WCA body formed as a standalone organisation

#### 4.3.1 Description

The formation of a single WCA company or similar legal entity provides the opportunity to develop a universal approach, reduce interfaces, while simplifying transactional mechanisms between the parties. It further allows for the development of commercial opportunities and the consolidation/development of expertise to create a platform for savings into the future.

Councils have powers to create companies under their ownership. Various options are assessed in the legal Section 8 Appendix 1. They may include:-

- Company limited by shares
- Private company limited by guarantee
- Community Interest Company
- Co-operative and community benefit society (formerly industrial and provident society)
- Limited Liability Partnership

The councils that form the Liverpool City Region Combined Authority have the power to establish a company in joint ownership to undertake the obligations and duties of the WCA's under specific delegations. The most simple and practical legal structure for setting up the joint waste body as a standalone legal entity, separate from any of the councils, would be a company limited by shares. Please see the legal Annex A attached.

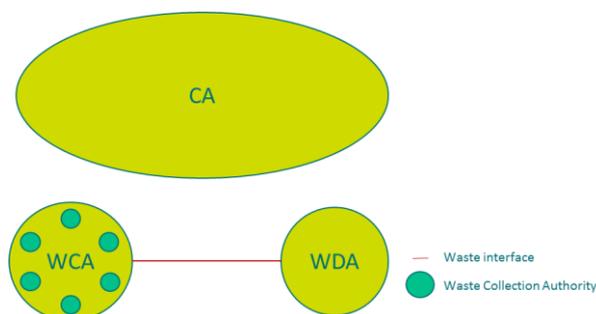


Figure 6

The body will be able to take on all the services that any contractor could provide. The full extent of these would be set out in the company's Memorandum and Articles. The company structure will allow the company to trade and secure activities outside of the strict waste collection remit. See further details in the attached legal Annex A. These added activities may include the processing of recyclable materials or offering similar services to local authorities outside of the LCR.

#### 4.3.2 Governance and control

The company will have a board that represents the owners. In many respects this board is the equivalent of the member committee of the other structural forms discussed above. The board could have representatives from each council and this board will decide the strategic direction of the

company and oversee the work of the chief executive of the single WCA. Such arrangements can simplify the number of interfaces and encourage integration. However, as the above diagram illustrates there can still be strong representation from the existing councils. This creates potential tensions in deciding the overall direction of the single WCA. Equally this organisational form once created must comply with company law and its functions set out in its articles of association together with formal accounting standards. These may sometimes mean taking decisions in the best interests of the company notwithstanding more local political issues.

#### 4.3.3 Staffing and assets

The company will be able to employ staff and own assets. Staff for the new company will be transferred from existing Councils responsible for the waste collection function. To gain best benefit from the joint WCA as a standalone organisation it must be allowed to manage staff numbers and deploy staff in alternative roles in accordance with its legal obligations. Please see the legal section 9.3. Redeployment would be particularly relevant if the body were to expand its activities either through commercial waste collections, offering services to other authorities or operating in related areas such as green space maintenance, street cleaning etc.

Operational flexibility would be improved through this organisational form. As the function of waste collection will be transferred to the company, it is most likely that all existing staff would be transferred. Similarly, the other assets such as vehicles and bins etc. would be transferred to the new company.

It has been assumed that the services can be provided under a lease of property and other assets from the current councils to avoid capital value issues. However, the length of any lease needs to be sufficient to allow the company to provide the service with some security and must be capable of extension.

#### 4.3.4 Legal and financial

Further detail on company structures is set out in the attached legal Annex A. The key features and considerations when forming a company are

- Limitation of liability,
  - Thereby restricting the risk exposure of the company, albeit this will probably be limited to some extent by the security required by contractors. The liabilities of the WCA company may be limited but the liabilities of the individual owners of the WCA company may remain but could be capped under contractual provisions
- Ability to trade
  - This is important if the body is to provide commercial services to other local authorities or commercial customers, especially given the benefits provided through the RRC contract for filling unused plant capacity
- Vires and procurement concerns
  - Procurement issues may flow from authorities contracting to provide services to each other if a “public to public” exception cannot be established. Please see attached for a legal Section 9.2 discussing the relevant procurement law issues.
- Company can hold property and employ staff

The simplest and most likely form to be used for the joint WCA would be a company limited by shares. The distribution of shares and voting rights will be an important consideration. Given the overarching need to create a common standard and universal service, this will drive the need for equally share ownership and voting rights so that one party cannot dominate the direction of the company. However if the interests of the owners do not align and benefits cannot be distributed equitably, the Memorandum and Articles and other company governance documents will need to provide for disputes including potential deadlock situations to be resolved.

The ability to trade in commercial waste or on wider issues is a key benefit of this option.

The wider savings potential relates particularly to the operational savings come from the integration of the collection infrastructure, round optimisation etc. The savings discussed here relate to the

management saving which have been estimated at £400k-£700k pa with set up costs of £500-£1m (see section 4.2.4 for the assumptions underpinning these figures).

Please see attached for a legal Annex A exploring the ability of the joint WCA to collect commercial waste. This is an important area as the ability to exploit the spare capacity in the RRC contract with commercial waste collected by the joint WCA company is commercially valuable.

If the joint WCA company were able to expand its functions in terms of commercial waste collections to fully exploit the spare capacity within the RRC, this may create an opportunity to save up to £2m/year in the disposal contract. While possible under this arrangement it is more likely under the joint waste management body arrangement in section 5.2.

Another related issue to who should collect the commercial waste is the recent legal case which suggests that commercial waste collection by local authorities is exempt from VAT, albeit that a further legal challenge could still be brought and this could change. (See the legal Section 9.3) A Teckal company operating as an arm's length organisation may not be able to take advantage of this reducing the competitiveness of this element of the services offered under the Teckal arrangement over other commercial collectors. To keep this VAT advantage councils may consider keeping the commercial waste collection function.

#### 4.3.5 Service, performance and flexibility

The service issues described for the 'Single WCA body hosted within a lead Council' approach, see section 4.1.5, are the same for the 'Single WCA body formed as a standalone organisation'. The key difference is that duties of each WCA are delegated into a new entity (most probably a company limited by shares) whilst legal responsibility for the waste collection function remains with the councils. Equally fragmentation can arise if councils request variations to the services that would make it bespoke to their area. However, councils would have to pay for bespoke services as these will not be a central part of the waste collection services that this company will be formed to offer.

Organisationally the joint WCA company does allow for a good transition from the current arrangements as each council can join the common service at the time that is suitable to exit their existing arrangement leading to phased and managed ramp up of the service. A staged merging of services would dilute the savings in the short term and require re-optimisation as councils joined. Thus, the financial benefits may not accrue to the single WCA company as quickly as other approaches.

The system is very flexible in that it can provide the full range of services and expand these as required by the board. Once established with an ownership constructed from the councils of the Liverpool City Region CA can provide services for all of them and assuming the councils remain in control, Teckal company status does avoid the need for councils to formally procure the services.

If good progress is made on service standardisation and rationalisation the savings discussed elsewhere in this report can be realised.

As with the other approaches of a joint collection body the performance reporting will be in aggregate and the individual Councils will no longer report individual recycling and waste management statistics.

#### 4.3.6 Sustainability against core criteria

The key advantage of a single WCA body formed as a standalone organisation is the ability to trade and secure activities outside of the strict waste collection remit. These added activities may include the processing of recyclable materials or offering similar services to local authorities outside of the LCR.

A key lesson from other joint waste bodies such as Dorset have shown that whilst savings are possible they can be overtaken by poor management and rushing the process can make delivering the savings much more difficult. In addition this flexibility to join the joint service is mirrored in a potential to withdraw and destroy the savings of all parties. Whilst withdrawal is unlikely due to the costs savings being lost, the potential to leave still reduces the overall stability of the process.

In terms of meeting the key criteria for success for a new structure this approaches achieve the following:

<p>Stable environment, common approach, fewer interfaces</p>	<p>Provides an improved and simplified platform for the delivery of substantial benefits in waste collection and the development of wider economic possibilities. A common collection system is possible in terms of operational methods and policies assuming the alignment of owner objectives. It further provides opportunities to focus staff resources in new value added areas to provide a platform for savings into the future.</p> <p>It enables savings across geographic boundaries and improves WCA unification. This form of a single WCA company may not remove the previous geographic and budget issues. One key interface remains with the WDA and care will needed to optimise costs for the disposal and collection systems.</p>
<p>Efficiency</p>	<p>Provides the ability to optimise the waste collection service for the long term. It would create a nationally significant market area that will improve competition for waste collection services. Equally local problem areas such as high-rise building can be treated more effectively across the region. It also provides sufficient scale to pilot or role out new opportunities into the future.</p>
<p>Opportunities for trading</p>	<p>Creating a single WCA will enable regional commercial waste services, providing new revenue opportunities</p>
<p>Optimal use of public infrastructure</p>	<p>Having a single arrangement with commercial waste collection opportunities will increase the potential optimise the use of public disposal facilities with public waste for public benefit</p>
<p>Responsiveness</p>	<p>Strong management will be required to manage the larger organisation, however once the arrangements are in place the new WCA company will be able to address more effectively dynamic issues associate with waste collection.</p>

## 5 A joint waste management body

To capture opportunities in addition to those illustrated in section 'Specific activities co-ordinated via voluntary arrangements', 'Share procurement and contracting' and 'Single Waste Collection Authority' sections, organisational forms are needed that reduce the interface between waste collection and waste disposal. The types of benefits that are enabled by joint waste management body are

- the ability to see waste collection and disposal as one integrated system that can be optimised without distorting organisational or transactional constraints e.g. different priorities
- through one budget, savings costs from increased recycling performance can be fairly offset against savings in disposal costs or offsetting against new revenue opportunities, removing historic perverse incentives
- levy arrangements can be simplified so that the total costs can be distributed simply and fairly. Historically maintaining an appropriate mechanism has been impossible with frequent inefficiencies and disagreements
- Having a single organisation will remove the interface arrangements that hinder the rapid and timely adjustments that will be necessary to deliver the optimum solution over the long term.

Under a joint waste body arrangement there are two approaches that can be taken

- A joint waste management body as a standalone organisation - to integrate all the WCA function within the existing structure of the WDA and receiving direction from the CA, or
- Host a new joint waste management body within the combined authority - to combine the collection and disposal functions to a single body, maintaining this as a separate management area.

### 5.1 A joint waste management body as a standalone organisation

#### 5.1.1 Description

MRWA is the WDA that was set up by statute to provide the disposal functions for the Merseyside Councils. This option would see the waste collection functions from each Council being transferred to WDA so that the whole waste management function would be managed as a single system within the single body.

It has long been recognised by private sector contractor that a strong regional presence creates a very strong competitive position, commercial advantage and profitability. Council waste disposal functions have been consolidated into a single Waste Disposal Authority but waste collection remains fragmented and delivered by six local bodies. Merging the waste collection functions to enable greater scale and a more effective and attractive counter party to the private sector makes sense if contracts are to be outsourced. Equally if contracts are in house consolidating functions to gain economies of scale and leveraging best practice and expertise will provide economic gain. The next step is to remove the counter intuitive barrier between WDA and a joint WCA. Initiatives in collections can impact on costs in disposal and vice versa. Manging these in isolation on at a time can create tensions and drive up total costs unnecessarily.

The nature of strategic direction and management control together with political guidance coming from the Liverpool City Region Combined Authority.

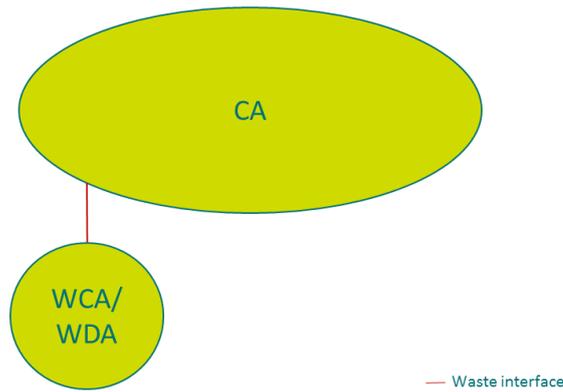


Figure 7

This arrangement is illustrated above and would facilitate the savings listed at the start of section 5 'A joint waste management body' of this report

### 5.1.2 Governance and control

The existing governance structures of WDA are discussed in the attached legal Annex A. It comprises a steering committee of elected members to instruct and guide the chief executive of WDA. This might be a suitable structure for the new joint WDA/WCA arrangement in terms of accountability to the public. However, the addition of an officer led committee below this may assist with the collection elements. Waste collection tends to involve many more local operational issues which may bog down the primary member led committee and divert them from the strategic direction of the organisation. Utilising the existing structure would facilitate a quicker set up of a new organisation from a governance perspective.

### 5.1.3 Staffing and assets

WDA current has an existing staff structure and asset base and so expanding this with staff and assets transferred to it for the collection service is within the scope of the Authority. The Authority has access to all the required back office support services. However, the back-office function may need to be expanded, particularly HR to deal with the issues associated with operational crews. This could be delivered via direct appointments, transfers from one of the councils, secondments or service level agreements.

There may need to be a structural change in the organisation. Currently WDA operates a commissioning model where the clear majority of functions are sub-contracted and only a few aspects such as closed landfill monitoring etc. are performed in house. If the waste collection services are to be outsourced the current organisational philosophy could be maintained, however if the waste collection services are to be delivered via the DSO approach then WDA would need to change in character. Both approaches are possible however absorbing the waste collection DSO functions may take longer than an outsources approach.

### 5.1.4 Legal and Financial

The legislation that establishes the WDA places some constraints on the potential any joint body. Please see the legal Annex A attached. Its role is limited to waste disposal and recycling activities but does not extend to collection other than at the HWRCs. Given the statutory nature of WDAs, in order for the collection function to be formally delegated to the WDA, a change to the Environmental Protection Act 1990 may be needed. This will have particular challenges as it has impacts beyond Liverpool City Region Combined Authority and may be difficult to achieve.

It is not clear if the ability of the councils to collect and charge for commercial waste collection could be transferred. Again, please see the legal Annex A attached. However, it may be possible for councils to separately, jointly collect commercial waste for disposal at the WDA. The ability to collect commercial waste is an important function if the region is to fully optimise the value from the disposal

and recycling contracts. Currently the contract structure provides a pricing arrangement that provides a limited benefit from moving waste between disposal to recycling.

Another issue that could potentially influence the structure is the need to charge VAT on commercial collection. Please see the legal Annex A attached.

Overall the cost savings would be like the other single collection body approaches, albeit there may be some further savings from a reduced back office function and the removal of duplication. The wider savings potential relates particularly to the operational savings come from the integration of the collection infrastructure, round optimisation etc. The savings discussed here relate to the management saving which have been estimated at £400k-£700k pa with set up costs of £500-£1m (see section 4.2.4 for the assumptions underpinning these figures). However, the key benefit is that the financial savings would be more likely to be maintained in the long term as the lack of an organisational boundary will permit the continual monitoring and updating of the service, optimisation of the overall cost etc.

Another benefit is that the funding flow would be simplified, as the funding would be directed through a single levy process. The Levy would be less contentious as all households would be receiving the equivalent service and thus the demands to adjust payment based on the performance at recycling or waste minimisation would be diminished.

5.1.5 Service, performance and flexibility

The service standards would be agreed by the steering committee and applied universally. The key benefits of this arrangement come from removing the numerous interfaces between the WDA and the six WCAs. These are forming barriers to harmonisation, optimisation and create duplication. Creating a single body to manage the interconnected waste collection and waste disposal functions to deal with all the economic waste activity associated with waste will provide the potential to improve services levels, performance and future flexibility. However lateral expansion into green space management, wider fleet management may be constrained by the statutory definition of the joint waste management body, particularly the WDA.

5.1.6 Sustainability against core criteria

The key feature of a single joint waste management body is the potential to facilitate waste system savings. For a single joint waste management body further future savings could be achieved by continually optimising the service. From a cost management perspective there would be additional savings compared to the single waste collection body approach, which could be significant and are quantified elsewhere.

There are potentially barriers to the implementation and particularly potential limitations regarding commercial waste collection, which will require detailed legal assessment.

In terms of meeting the key criteria for success for a new structure this approaches achieve the following:

<p>Stable environment, common approach, fewer interfaces</p>	<p>Provides a stable platform for the delivery of substantial benefits in waste collection and the development of wider economic possibilities. A common collection system can certainly be delivered with operational methods and policies aligning with owner objectives. It further provides opportunities to focus staff resources in new value added areas to provide a platform for savings into the future.</p> <p>If a full transfer of WCA powers to the WDA is permitted, this would enable savings across geographic boundaries and unites the WCA's. This joint waste management body could remove previous geographic and budgetary issues. The key interface with the WDA has been removed which will enable the optimisation of costs for the disposal and collection systems.</p>
<p>Efficiency</p>	<p>Provides the ability to optimise the waste collection service for the long term. It would create a nationally significant market area that will improve</p>

	competition for waste collection services. Equally local problem areas such as high-rise building can be treated more effectively across the region. It also provides sufficient scale to pilot or role out new opportunities into the future.
Opportunities for trading	Creating a joint management body may enable regional commercial waste services, providing new revenue opportunities. The legal powers permitting this need to be identified.
Optimal use of public infrastructure	Having a single arrangement with commercial waste collection opportunities will increase the potential to optimise the use of public disposal facilities with public waste for public benefit not just between recycling and disposal but new ways to effectively use the HMRCs etc.
Responsiveness	Strong management will be required to manage the larger integrated organisation, however once the arrangements are in place the new joint waste management body will be able to address more effectively dynamic issues associated with waste collection and disposal. It will be more capable of lobbying for changes e.g. in enforcement law and potential infrastructure investments that may encourage the development of food waste/AD solutions for encourage the development of solutions that further the circular economy objectives.

## 5.2 A joint waste management body within the combined authority

### 5.2.1 Description

The establishment of the Combined Authority (CA) for the Liverpool City Region provides an opportunity to host a new joint waste management body. A new single WCA joint waste management body covering both waste collection and disposal could be hosted within the Combined Authority. The Combined Authority would be responsible for the management of all the waste collection and waste disposal assets, the management staff and the employment of the staff associated with the management of the service. The Combined Authority would also act as the legal entity for the service and any contracts let. This is the option most likely to deliver the largest savings and opportunities throughout the entire report.

We understand that the CA is considering a proposal to locate the WDA within the CA as a distinct entity, although it is not known how far these proposals have developed or the legal basis. If the concept of bringing together the collection functions is accepted, then there is logic to extending this to include the waste collection services from the constituent councils.

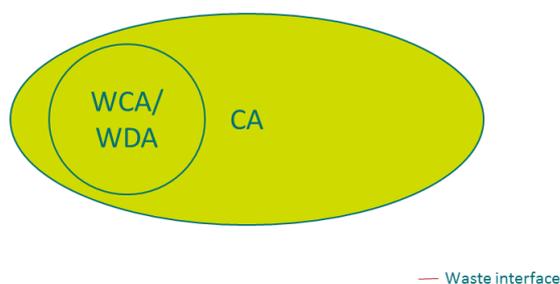


Figure 8

This arrangement is illustrated above and would facilitate the savings listed at the start of section 3 'Single Waste Collection Authority'

### 5.2.2 Governance and control

The functions of the existing WDA's and WCA's would be transferred into the Liverpool City Region Combined Authority under this organisational option by order of the Secretary of State. A newly formed joint waste management body could reposition, rationalise and optimise the current arrangements to deliver a more cost effective, efficient and responsive service.

The governance and control of the joint waste body could be arranged in the same way as discussed above in section 5.1.2 Governance and control. This could however be simplified further since the main CA board could provide the necessary strategic oversight and electoral accountability. Any decision would need to be balanced against the size of the CA's portfolio. It will be important particularly in any transition phase that there is a harmonised view on the overall direction of the newly formed joint waste management body.

### 5.2.3 Staffing and assets

All the staff and all the assets e.g. depots, vehicles, bins, contracts etc. would be transferred into the CA. An assessment of liabilities under TUPE and under existing contracts will need to be made. This will enable rationalisation, standardisation and optimisation of service provision. However, savings will not just be realised through cost cutting. It is equally important during the rationalisation process to consolidate or extend expertise in areas that will drive long term value such as effective procurement, effective contract management, re positioned collection systems that respond to changes in operational technology and regulation etc. or adjusted following improvements IT to provide better interfaces with the public.

The size of the new joint waste management body may necessitate its own back office functions e.g., legal, finance etc. This could be achieved through additional direct employment, seconding in staff or procuring the relevant services via a service contract with one of the constituent councils. Developing back office functions with specific domain experience will nurture skills and knowledge that should improve the delivery of savings.

### 5.2.4 Legal and financial

Currently, waste collection and disposal is not part of the CA functions. For this option to be considered, the Secretary of State would need to be persuaded to insert waste functions into the order creating the new arrangements. Each of the Councils in the Liverpool City Region and the WDA would then be required by law to transfer their collection and disposal functions/powers in to the CA.

Similar issues will apply to the transferring of the waste collection and disposal functions as applied with the section 4.2.4 of functions being transferred to the CA. Many of these issues have already been addressed in the overarching CA governance agreements and similar governance agreements could potentially be used here.

Once the legal arrangements are set up for a joint waste management body, the CA would be able to hold contracts, employ staff and carry out the services in house or contract out the operation of the service. We would expect that the joint waste management body would be able to collect trade waste and would also be maintaining the current advantageous position on VAT since the functions have been transferred.

A new joint waste management levy would be needed for the new body to recover its costs for the new universal service from the councils within the CA. It may be flexed to meet particular demographic or public needs but once identified will be universally applied.

The new universal service, would avoid the tension and disagreements that would otherwise exist between the individual partnering authorities and with the WDA. Significant early input will be needed to develop a universal service standard. While the overall savings realisable will be significant, some

councils may find the need to invest in the short term to bring their service to the universal standard. In the medium term, there should be an attractive payback on this investment.

The financial gains several parts

- small costs saved from legal costs and procurement costs for commodity items such as bins and vehicles. Legal costs savings being £10-50k per procurement and procurement costs being 10% of the procurement budget
- concentrating the back-office functions such as finance, legal and HR etc. could lead to a combined savings of £100k-200k/year.
- anticipated reductions in waste fleet crew management staff of 10-12 staff providing an estimated £300k -£500k saving per year.
- expanding its functions in terms of commercial waste collections to fully exploit the spare capacity within the RRC, this may create an opportunity to save up to £2m/year in the disposal contract.

There will however be transitional costs in creating the new organisational form and in moving toward a universal service.

#### 5.2.5 Service, performance and flexibility

The underlying precept of a common specification is that all residents receive the same service. This is generally true but the service may vary with the type of property or demographic. For example whilst most low-rise properties will receive one agreed service, flats and other properties with difficult collections will receive a different service with potentially communal bins or sacks for example. Charging may vary for different demographics as another example. However, once the overarching specification is established it would be universally applied across the CA.

The service is not just the type of bins, when bins are collected and the range of recyclates accepted, it involves policies of side waste, lid closure, assisted collections, charging, enforcement, etc. All of these areas must be harmonised in a single waste collection authority.

Merging services provides the opportunity to

- concentrate attention on areas for service improvement e.g. side waste in urbanised areas
- fund new collection systems to deal with issues associated with high-rise properties
- target communications at particular demographics across the region more cost effectively than when each council tries to do this on their own
- fund trials of new systems or collection methods from the savings release, so enabling further improvements in the future
- invest in new in cab and operative communication systems that improve service monitoring and provide better real time evidence to accurately and quickly manage public observations

The key advantages of this approach are

- it removes the focus on local issues and enable the new joint waste management body to focus on larger economic issues associated with waste collection
- it creates a much larger waste collection area, which is regionally significant, that will engender greater market competition. National contractors business profile will be altered locally and nationally if they are successful in winning such a contract

- the removal of any organisational form interface with the WDA will simplify the current arrangements and will enable the fairer distribution of waste collection savings across the region. This will avoid the current perverse where a well performing council investing in waste collection only receives a small proportion of the savings realised in waste disposal because of the current levy arrangements
- the ability to change working practices such as “task and finish” to more productive modern arrangements
- as a single entity the new larger joint waste management body will be able to fully target economic and commercial opportunities within the region which are not possible as stand along councils. An example it could concentrate commercial waste services in Liverpool city centre to establish a strong commercial presence by focusing the combined resources here. Subsequently the service could be expanded to other parts of the CA region.

The use of legislative powers and the scope of the new joint waste management body arrangements would need careful consideration prior to any approach seeking to extend the current scope of CA order to be made by the Secretary of State. As this transfer of functions will be authorised by the Secretary of State, any proposal to reorganise or relocate such functions in the future will be subject to approval by the Secretary of State. Please see the legal Annex A attached for further details.

However, given the economic development role envisaged for the CA there may be some cross fertilisation in respect to opportunities for spin off activities dealing with the collected waste either through new recycling processes or industrial processes that use the generated recyclates. The range of services covered could also be flexible as there are a range of activities that have common aspects such as street cleaning, graffiti clean-up, green space management that could be integrated into the new arrangements.

#### 5.2.6 Sustainability against core criteria

The key benefit of operating as a joint waste management body is that future savings would be maintained from continually optimising the service. The principle benefit of delivering the service as a joint waste body is that the optimisation of the service can be maintained in the long term and can be undertaken across the whole waste system (collection and disposal). Positioning the joint waste management body within the CA will enable linkage to expanding opportunities across the region e.g. energy from future food waste collection. The CA structure already exists and extending the remit to include waste may be the simpler and quicker way forward. It potential also keep the commercial waste expansion opportunities and the VAT advantage. This is clearly the option provides the highest saving and future flexibility.

In terms of meeting the key criteria for success for a new structure this approaches achieve the following:

Stable environment, common approach, fewer interfaces	<p>Provides a stable platform for the delivery of substantial benefits in waste collection and the development of wider economic possibilities. A common collection system is possible in terms of operational methods and policies. It further provides opportunities to focus staff resources in new value added areas to provide a platform for savings into the future.</p> <p>It enables savings across geographic boundaries and improves WCA unification. The single WCA removes the previous geographic and budget issues. One key interface remains with the WDA and care will needed to optimise costs for the disposal and collection systems.</p> <p>This option creates the most stable platform with the fewer interfaces</p>
Efficiency	<p>Provides the ability to optimise the waste collection service for the long term. It would create a nationally significant market area that will improve competition for waste collection services. Equally local problem areas such as high-rise building can be treated more effectively across the region. It also provides sufficient scale to pilot or role out new opportunities into the future. The organisational arrangement enable joint working</p>

	<p>across other areas such a fleet management and green space management.</p> <p>This option creates the most stable platform with fewer interfaces. It does, however, require a further order by the Secretary of State if there is a wish to relocate waste functions in the future.</p>
Opportunities for trading	<p>Creating a joint management body may enable regional commercial waste services, providing new revenue opportunities.</p> <p>This option creates the greatest opportunities for new revenue streams</p>
Optimal use of public infrastructure	<p>Having a single arrangement with commercial waste collection opportunities will increase the potential optimise the use of public disposal facilities with public waste for public benefit not just between recycling and disposal but new ways to effectively use the HMRCs etc.</p> <p>This option offers the best opportunities to optimise the public infrastructure.</p>
Responsiveness	<p>Strong management will be required to manage the larger integrated organisation, however once the arrangements are in place the new joint waste management body will be able to address more effectively dynamic issues associate with waste collection and disposal. It will be more capable of lobbying for changes e.g. in enforcement law and potential infrastructure investments that may encourage the development of food waste/AD solutions for encourage the development of solutions that further the circular economy objectives.</p> <p>The approach is responsive and should be able to optimise on factors that influence the waste collection and recycling and disposal , including the circular economy benefits that come from delivering recycling infrastructure locally.</p> <p>This option is most likely to be responsive to change</p>

## 6 Conclusions

Historically there has been relatively modest co-operation between the WCA's and between the WCA's and the WDA within the Liverpool City Region Combined Authority geographical area. Scepticism existing about the actual costs of the WDA and future benefits of the new waste disposal PPP contract exists. The collection systems of the various WCA's vary. The imperfections of levy arrangements inhibit optimal behaviours. These factors have led to a situation that makes the realisation of whole waste system savings challenging.

Having looked at the impact of new organisational forms we have concluded that the formation of a single joint waste management body within the combined authority has the greatest potential to facilitate the widest spectrum of savings of between £11m and £19m/year in the longer term. It also has the greatest potential to realise management costs savings as illustrated below.

Financial savings in the management costs relate to

- legal and administrative costs of £10-50k per procurement
- 10% of the procurement team budget relating to the procurement budgets of vehicle, bins etc.
- £100-200k/year in support services costs
- £300k-£500k/year created from savings in fleet management team costs

We feel that there is significant potential, which when combined with current financial pressures and the formation of the new CA creates an ideal opportunity to create long term savings within the region and to extend the performance of the whole waste system. Clearly more work will be needed to fully justify the way forward, to create a consensus, resolve the legal issues and management issues, and to manage the transitional arrangements. You may require a detailed business case prior to final recommendation. However, with strong leadership and a common vision great things can be achieved. We recommend that the WCA's and their councils, and WDA consider the formation of a single joint waste management body within the combined authority for the future management of a whole waste system within the city region.

## 7 Annex A – Review of waste collection and disposal arrangements – Joint working arrangements

### 7.1 Introduction

The Councils comprising the Liverpool City Region (the “Councils”), the Liverpool City Region Combined Authority (the “LCRCA”) and the Merseyside Waste Disposal Authority (the “MWDA”) are considering a range of options for joint working in relation to the future delivery of waste collection and disposal services.

These options include:-

- a) Voluntary arrangements to improve co-operation and service delivery between the Councils, the LCRCA and the MWDA on waste collection and disposal without changing current legal structures or current governance arrangements;
- b) The creation of a joint waste collection committee (“JWC”) with new governance arrangements but no new legal structure;
- c) The creation of a new legal entity to be a Waste Collection Authority (“WCA”) for the Councils and retaining separate structures for LCRCA and MWDA;
- d) Transferring responsibility for the function of waste collection from each of the Councils to the LCRCA and retaining the MWDA as a separate structure;
- e) Extending the role of the MWDA to include responsibility for the function of waste collection as well as disposal (a new “Merseyside Waste Authority” or “MWA”), transferring responsibility for the function of waste collection from each of the Councils to the MWA and keeping waste separate from the functions of the LCRCA;
- f) Transferring responsibility for the function of waste collection from each of the Councils to the LCRCA and transferring responsibility for the function of waste disposal from the MWDA to the LCRCA.

The illustrative diagrams at figures 1 to 8 of the main report show the various options as structure charts. Voluntary arrangements under options a) and b) may range from increased co-operation to improve the status quo to discharging waste collection services under a shared services arrangement. The key point about the approaches that might be adopted under options a) and b) is that they do not involve changes to existing, or the creation of new, legal structures.

This Annex A provides a short summary of the legal powers, duties, rights and responsibilities of each of the parties alongside each of these options. It is not intended to provide comprehensive legal advice and should not be relied upon as such. Instead it seeks to signpost the Councils, LCRCA and MWDA to a number of points for detailed legal consideration alongside an analysis of the merits and weaknesses of each of the options on the basis of cost, efficiency and performance. Each Council may have different policies and working practices on waste collection and the appetite to reach a consensus on these may involve local political considerations alongside those of improvements to service delivery and efficiency. This Annex A refers to some governance issues but does not address local political considerations.

### 7.2 Voluntary arrangements to improve co-operation and service delivery between the Councils, the LCRCA and the MWDA on waste collection and disposal without changing current legal structures or current governance arrangements.

#### Powers

Powers to adopt joint working arrangements to deliver waste collection services, without requiring a separate legal structure, are available to the Councils under:-

- Section 111 of the Local Government Act 1972 (the “72 Act”) - *“Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.”*
- Section 1 of the Localism Act 2011 (the “2011 Act”) – a general power of competence - *“A local authority has power to do anything that individuals generally may do.”* Section 1 also states *“[this Section] confers power (subject to sections 2 to 4) to do it in any way whatever, including .....*
  - b power to do it for a commercial purpose or otherwise for a charge, or without charge, and*
  - c power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.”*

Co-ordinating or other responsibilities are likely to be placed on one or more of the Councils involved and may involve the adoption of a lead authority role. A lead authority arrangement will be different from the other options set out in this Annex A and in the main report. Under a lead authority arrangement, one Council will take on greater responsibility than any of the other Councils. This may create a sense amongst the other Councils of having lost some of the direct control that they currently have. The creation of separate legal entities explored below in this Annex A would mean that no one Council has any greater responsibility than any of the others.

The individual Councils have powers to borrow or trade. (See Section 10.5)

### **Procurement Law Considerations**

Adopting voluntary working arrangements in common, insofar as they do not require the Councils to enter into a contract for the provision of waste collection services, will not be subject to the public procurement rules. This applies to any administrative, non-contractual, arrangement for co-operation on waste collection services and may include the delegation of the services to a lead authority.

### **7.3 Joint Waste Committee (“JWC”)/ other voluntary schemes of delegation/ an Inter-Authority Agreement.**

#### **Powers**

Under a JWC the Councils form a committee to manage and run the services. The JWC may manage the waste strategy with decisions being taken by the individual Councils or the Councils can delegate the decision making for the waste collection functions to the JWC. No formal, statutory process is required in order to establish the JWC and no new legal structure is created. Instead, the “constitution” of the JWC will be set out in an agreement between the relevant authorities. Typically, this will be a joint committee agreement (“JCA”) or similar document, setting out the governance arrangements under the JWC and the extent to which some decision making powers are delegated to the JWC, and also making clear which matters (strategic issues perhaps on significant financial matters) remain reserved to the individual Councils. The JCA may also set out the rights and obligations of the constituent Councils amongst themselves.

This may allow the Councils to maintain their present mix of in-house waste collection services alongside existing contracts which outsource the service. A pooling of resources (for example vehicles and manpower) is provided for including provision of waste collection services in common for the Councils and the Councils can provide services to each other under:

- Section 1 of the Local Authorities (Goods and Services) Act 1970 (the “1970 Act”) – *“a local authority and any public body within the meaning of this section may enter into an agreement for all or any of the following purposes, that is to say—*
  - (a) the supply by the authority to the body of any goods or materials;*
  - (b) the provision by the authority for the body of any administrative, professional or technical services;*
  - (c) the use by the body of any vehicle, plant or apparatus belonging to [property belonging to or facilities under the control of] the authority and, without prejudice to paragraph (b) above, the placing at the disposal of the body of the services of any person employed in connection with the vehicle or other property [property or facility] in question;*
  - (d) the carrying out by the authority of works of maintenance in connection with land or buildings for the maintenance of which the body is responsible;**and a local authority may purchase and store any goods or materials which in their opinion they may require for the purposes of paragraph (a) of this subsection.”*
- Section 113 of the 72 Act – seconding staff - *“a local authority may enter into an agreement with another local authority for the placing at the disposal of the latter for the purposes of their functions, on such terms as may be provided by the agreement, of the services of officers employed by the former, but shall not enter into any such agreement with respect to any officer without consulting him.”*

A JWC may also involve a lead authority arrangement.

In addition, any one of the Councils can delegate their waste collection functions to one of the other Councils. Under a delegation, one (or more) Council asks another Council to perform its waste collection function. While the delegation is in place, the “delegatee” Council runs the service as though it was its own and has control over its management. The “delegator” should not have any continuing, direct role in service delivery. However, the delegation can be removed by the delegator at any time, retaining ultimate control with the delegator Council. Although a delegation means giving up day to day control of the service on behalf of the delegator, such delegation will be underpinned by a written agreement setting out (as a minimum) the reasons why the authority will end the delegation, what would happen on termination and often will contain other provisions which give comfort to the delegator. The delegation may, as with a JWC, lead to a pooling of resources and is permissible under sections 111 and 101 of the 1972 Act, section 1 of the 2011 Act or section 1 of the 1970 Act if executive functions. The delegation arrangement will provide for the costs, incurred by the delegatee in fulfilling the delegated functions, to be met by the delegator.

The Councils could enter into a contractual collaboration in relation to provision of waste collection services between themselves, or they could procure a third party contractor to provide the waste collection services or some elements of the services. This is permissible under the powers in the 1970 Act but see the implications of this under the procurement law section below.

An Inter-Authority Arrangements (“IAA”s) may mirror many of the features of a JCA. Similarly to arrangements underpinning the formation of a JWC, this will not create a separate legal entity. It is therefore important that any such IAA must provide appropriate detail for the governance, decision-making and financial issues analogous to that being provided for through the JWC. Given this, and the fact that there is no new legal structure (for example, a company) to employ staff or enter contracts etc., detailed commercial terms are likely to be required which, in some cases, can prove contentious and time consuming to establish, especially when dealing with liabilities to any third-party contractor where issues involving joint and several liability may arise.

An IAA may also involve a lead authority arrangement.

A fundamental issue with the creation of either a JWC or a LAA is the amount of detailed documentation required to set out the parties’ respective control or delegation to others. It could be seen as requiring a disproportionate amount of documentation given that these solutions do not deliver a new legal structure (in comparison with, for example, establishing a company).

A JWC or IAA would have the same powers to borrow or trade as the constituent Councils. (See Section 10.5)

## **Procurement Law Considerations**

The constituent Councils should be careful where the JWC (perhaps via a lead authority), or a delegate Council proposes to discharge obligations on behalf of the Councils or another Council in common via a private sector contractor. Clearly, the application of the public procurement rules will need to be considered if the JWC and/ or a lead authority proposes entering into, or extending, a contract with the private sector. A contractual collaborative approach provides for a more “service like” arrangement and raises the prospect of this being a procurable contract. In addressing procurement law issues in relation to joint working without a legal company, your legal advisers may wish to review the Hamburg Waste judgment (the “Germany Case”) as referenced further below at Section 10.1 Procurement issues in relation to joint working arrangements within a separate legal entity.

### **7.4 The creation of a new legal entity to be a Waste Collection Authority (“WCA”) for the Councils and retaining separate structures for LCRCA and MWDA**

#### **Powers**

Using the general power of competence under Section 1 of the 2011 Act (see above), the Councils may wish to setting up a new and separate legal entity to manage their waste collection functions, possibly establishing a company as the WCA. Such a “company” may include any of the legal structures set out in Section 9 Appendix 1 – Quick guide to potential corporate vehicles. Whilst establishing a new company may appear at first sight to be complex, it need not be and there are potential benefits including:

- Making use of the power to trade under Section 95 of the Local Government Act 2003 and the Local Government (Best Value Authorities)(Power to Trade) (England) Order 2009 (SI 2009/ 2393) in order to generate income and reduce the net cost of the collection services.
- Limitation of liability. If the company contracts with third parties the liability of the constituent authorities will, in theory, be limited. In practice of course, third party contractors are likely to

require some form of guarantee or security from the company's owners (the Councils) unless they are content with the company's strength of covenant.

- A company can hold property, employ staff and enter into contracts.

The Councils will want to consider a number of legal issues associated with setting up a company, including:-

- Procurement law implications (see immediately below and Section 10.2)
- Employment law and the transfer of employees (see further below at Section 10.3)
- Tax considerations (see further below at Section 10.3)
- Powers to borrow and/or trade (see Sections 9, 10.3 and 10.5).

### **Procurement Law Considerations**

The constituent Councils will need to consider the extent to which the new legal entity may need to comply with the public procurement rules. If the new legal entity proposes entering into, or extending, a contract with the private sector, depending on the threshold value of the contract, full compliance with EU and UK public procurement legislation may be required. In addressing procurement law issues in relation to joint working through a separate legal entity, your legal advisers may wish to review the statutory requirements and case law, including the "Teckal" case, as referenced further below at Section 10.2. In addition, matters such as employment law considerations, pensions, tax and state aid issues may be relevant.

## **7.5 Transferring responsibility for the function of waste collection from each of the Councils to the LCRCA and retaining the MWDA as a separate structure**

### **Powers**

Local authority functions, including those for waste collection, can be transferred to the LCRCA by order of the Secretary of State. However, before such an order can be made the consent of the Councils, and the existing LCRCA is required and consultation must have been carried out. The relevant legislation is:-

- Section 113 of the Local Democracy, Economic Development and Construction Act 2009 as amended by the Cities and Local Government Devolution Act 2016 - *Requirements in connection with changes to existing combined arrangements*

*"(1) The Secretary of State may make an order under section 104, 105, 106 or 107 in relation to an existing combined authority only if -*

*(a) the Secretary of State considers that to do so is likely to improve the exercise of statutory functions in the area or areas to which the order relates, and*

*(b) any consultation required by subsection (2) has been carried out.*

*(1A) If a scheme has been prepared and published under section 112 the Secretary of State must have regard to that scheme in making the order."*

The LCRCA will have powers to borrow analogous to prudential borrowing and will derive powers to trade from the general power of competence under Section 1 of the 2011 Act. (see Section 10.5)

For the powers of the MWDA, please see Section 10.4.

### **Procurement Law Considerations**

The LCRCA will be a contracting authority under the public procurement rules and will need to comply with EU and UK public procurement legislation accordingly. A transfer of the waste collection function to the LCRCA by the Secretary of State will not raise issues of procurement law. As with a

transfer of functions to a company, matters such as employment law considerations, pensions, tax and state aid issues may be relevant.

## **7.6 Extending the role of the MWDA to include responsibility for the function of waste collection as well as disposal (a new “Merseyside Waste Authority” or “MWA”), transferring responsibility for the function of waste collection from each of the Councils to the MWA and keeping waste separate from the functions of the LCRCA**

### **Powers**

A significant legal problem with this suggested option is that the MWDA is not a relevant authority for the purposes of the 2011 Act and is restricted in its functions to matters relating to waste disposal and cannot assume powers and duties that go beyond its remit. It would appear as though MWDA could not extend its powers to include responsibility for the function of waste collection as well as disposal without legislative change to Environmental Protection Act 1990. (For the powers of the MWDA, please see Section 10.4)

### **Procurement Law Considerations**

The LCRCA (if it were able to take on the additional function of waste collection following legislative change) will continue to be a contracting authority under the public procurement rules and will need to comply with EU and UK public procurement legislation accordingly. A transfer of waste collection to the LCRCA under legislation will not raise issues of procurement law. As with a transfer of functions to a company, matters such as employment law considerations, pensions, tax and state aid issues may be relevant.

## **7.7 Transferring responsibility for the function of waste collection from each of the Councils to the LCRCA and transferring responsibility for the function of waste disposal from the MWDA to the LCRCA.**

### **Powers**

Above, local authority and other public authority functions, including those for waste collection and waste disposal, can be transferred to the LCRCA by order of the Secretary of State. However, before such an order can be made the consent of the Councils, and the existing LCRCA is required and consultation must have been carried out. The relevant legislation is:-

- Section 113 of the Local Democracy, Economic Development and Construction Act 2009 as amended by the Cities and Local Government Devolution Act 2016 - *Requirements in connection with changes to existing combined arrangements*

*“(1) The Secretary of State may make an order under section 104, 105, 106 or 107 in relation to an existing combined authority only if -*

*(a) the Secretary of State considers that to do so is likely to improve the exercise of statutory functions in the area or areas to which the order relates, and*

*(b) any consultation required by subsection (2) has been carried out.*

*(1A) If a scheme has been prepared and published under section 112 the Secretary of State must have regard to that scheme in making the order.”*

- Under paragraph 13 of the Waste Regulation and Disposal (Authorities) Order 1985, the Secretary of State can ask MWDA to submit a scheme for the winding up of the authority and the transfer of its functions, property, staff, rights and liabilities to its constituent councils. (See Section 10.3 below.)

The LCRCA will have powers to borrow analogous to prudential borrowing and will derive powers to trade from the general power of competence under Section 1 of the 2011 Act. (see Section 10.5)

### **Procurement Law Considerations**

The LCRCA with additional functions will continue to be a contracting authority under the public procurement rules and will need to comply with EU and UK public procurement legislation accordingly. A transfer of waste collection and waste disposal functions to the LCRCA by the Secretary of State will not raise issues of procurement law. As with a transfer of functions to a company, matters such as employment law considerations, pensions, tax and state aid issues may be relevant.

## 8 Appendix 1 – Quick guide to potential corporate vehicles

	Company Limited by shares	Private Company Limited by Guarantee	Community Interest Company (CIC)	Co-operative and community benefit society (formerly industrial and provident society) (CCBS)
<b>Legal identity separate from its members</b>	Yes	Yes	Yes	Yes
<b>Limited liability of members</b>	Yes – if wound up, limited to unpaid amount on the shares (including premium)	Yes – if wound up, limited to the (usually nominal) amount each member has agreed to contribute up to in their statement of guarantee	Yes – may either be limited by shares or guarantee	Yes – members' liability limited to the amount unpaid on shares.
<b>Governing documents</b>	Articles of association	Articles of association	Articles of association incorporating the specific requirements of the Community Interest Companies Regulations 2005 and related CIC legislation	Constitution or rules administered by members, generally on basis of one vote per member. Ability to merge into existing or new society (through resolution of members). Admission and withdrawal of members is set out in the society's rules. Model constitution approved by the Charity Commission does not provide for transfers of membership.
<b>Scope to obtain charitable status / tax benefits as a charity</b>	It is possible for a company limited by shares to be a charity, though very rare in practice; most are set up as companies limited by guarantee. Often however, trading subsidiaries of a charity are set up as companies limited by shares.	Yes if it has charitable objects for the Charity Commission will register it as a charity	No	Not required to register as a charity but if it meets charitable criteria it may benefit from "exempt charity" status and obtain tax benefits
<b>Regulation</b>	Companies Act 2006 and associated legislation	Companies Act 2006 and associated legislation Charity law and Charity Commission if also a charitable company	Companies Act 2006 and subordinated legislation made under that Act and related legislation, including the Companies (Audit, Investigations and Community Enterprise) Act 2004 and the Community Interest Company Regulations 2005 Regulated by the Regulator of Community Interest Companies.	Regulated by the Financial Conduct Authority FCA (and not by the Charity Commission even if its objects are charitable)
<b>Main potential sources of funding/income</b>	Generating surpluses from trading activities or sale of assets or other income. Members own shares which they either purchase or may be given (e.g., through an employee share scheme).	Fund raising/grants/donations Trading or other income-generating activities if permitted by its objects. Borrowing if income sufficient and constitution permits	Similar to company limited by guarantee or other private limited company, but scope for raising equity and debt capital is restricted by their community benefit objectives and limitations on dividends and interest payments	Equity investment, grants, fundraising, trade or other income-generating activities and borrowing dependent on constitution

<b>Can it distribute profits?</b>	Yes	In principle yes, but companies limited by guarantee often have a prohibition in distributing profits to members under the articles of association	CICs can generate a profit. Dividends may be paid depending on the corporate structure and constitution of the specific CIC. Such payments are subject to controls (and in some cases a dividend cap) set out in CIC legislation.	Generally it is a requirement of registration with the FCA that a CCBS should not distribute profits to members but retain them for the benefit of the community. Capital requirements apply.
<b>Asset lock</b>	No – but subject to maintenance of capital restrictions	No specific requirement but provisions with such an effect could be included in memorandum and/or articles of association	Articles must include an “asset lock” as set out in the CIC Regulations 2005. Assets can only be transferred at full market value (with limited exceptions). Surplus assets remaining on dissolution are protected for the community	Such provisions may be included in the CCBS’s constitution and will be if it has charitable status.
<b>Minimum number directors/members or equivalent</b>	At least 1 director (a natural person at least 16 years old) who may be the sole member. Members will decide the most important decisions regarding the company. Directors will carry out the day-to-day business	At least 1 director (a natural person at least 16 years old) who may also be the sole member.  If also a charity, the Charity Commission recommends a minimum of at least 3 directors (individuals).	As for company limited by guarantee, by shares or any other private company	Every CCBS must have a committee of management (sometimes called “directors”) and a secretary. Generally a minimum of three individuals plus a secretary
<b>Registration and costs</b>	Must register and file annual returns and accounts with Registrar of Companies, Companies House Standard incorporation certificate costs £15(electronic)/£40 plus additional costs in preparing constitution (from c£300). Annual return filing fee of £13 (electronic)/£40. Must keep a register of persons with significant control	Must register and file annual returns and accounts with Registrar of Companies, Companies House . Standard incorporation certificate costs £15(electronic)/£40 (paper) plus additional costs in preparing constitution (from c£300). Annual return filing fee of £13 (electronic)/£40.. Must keep a register of persons with significant control	Must satisfy “community interest test” to register as and continue to operate as a CIC. Must register (£35/£25(conversion)) and then file annual returns (£15) and annual accounts accompanied by a community interest report (£15) all with Registrar of Companies, Companies House. which has a section overseeing CICs. Registration with Registrar of Companies,  Must keep a register of persons with significant control	Registration with the FCA costs between £40 and £950 depending on the society’s level of deviation from the model rules. Annual fees depend on the value of assets. The annual return fee has been abolished (see FCA Policy Statement 10/7).
<b>Typical use</b>	Most common business structure and well recognised by banks and other commercial organisations as a trading vehicle “for profit”	Attractive structure for not for profit organisations that require limited liability and seek a degree of continuity to do such acts as own land or other assets, enter into contracts, employ staff, hold a bank account and/or borrow money	Intended for social enterprises that wish to use their assets, income and profits for the benefit of a community, with mandatory asset lock and controls on dividends to reassure potential participants, donors or investors	CCBSs are organisations with social objects to run a trade or business for the benefit of the community. They are used by organisations which conduct an industry, business or trade for the benefit of the community where a wide membership receives an equal say in the organisation and in the management without a realisable financial interest.

<p><b>Issues</b></p>	<p>Query use of vehicle for collaborative Teckal type venture or for social enterprise given it is set up to generate and distribute profits to investors. Permitted under trading powers and the Localism Act 2011</p>	<p>Permitted under local authority trading powers and the Localism Act 2011. Limited availability of working capital makes this structure less well suited to commercial ventures</p>	<p>Basically a limited liability company with an added "overlay". Doubtful whether additional costs and complexity justified by benefits over other forms. Permitted vehicle under trading powers but unlikely to be suited to public/public collaborative venture. Any direct private capital participation in the CIC would most likely preclude the "in house" procurement exemption</p>	<p>. There must be special reasons why they cannot register as a company. In practice they are used less frequently than companies though permitted to be used in exercising trading powers.</p> <p>Shares in CCBSs differ from the shares in companies as they:</p> <ul style="list-style-type: none"> <li>- remain at nominal value;</li> <li>- have limited or no rights to receive returns;</li> <li>- typically have 'one member one vote' regardless of the number of shares held;</li> <li>- shares can be cancelled without any provision for their value; and</li> <li>- shares can be withdrawn by members.</li> </ul> <p>Capital requirements apply. Even transferable shares are not envisaged to be freely transferable.</p>
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## 9 Appendix 2 – Procurement Law Case Notes

### 9.1 Procurement issues in relation to joint working without a legal company

#### **Hamburg Waste Judgement - (the “Germany Case”<sup>3</sup>)**

A joint administrative and co-operative working arrangement between public bodies has been held to sit outside the public procurement law rules in the Hamburg Waste judgment (the “Germany Case”). It requires the following to apply:

- there is real co-operation aimed at jointly achieving the public tasks of the cooperating contracting authorities with no private capital;
- the relationship is solely governed by considerations and requirements relating to the pursuit of objectives in the public interest; and
- any payments which are made between the contracting authorities are for actual reimbursement of costs only.

In the Germany Case, the public bodies involved were performing reciprocal tasks. An EU Working Paper<sup>4</sup> does say that the split of tasks between public bodies does not need to be equal, especially if one party has a particular specialism.

Under this first criterion there is also the requirement that there is no private sector capital meaning that this case could not be applied to a joint venture with a private waste collector.

Secondly, there has to be the pursuance of a public interest objective at the heart of the arrangements. As with the Germany Case, the collection and treatment of household waste is seen to be of great public interest and benefit.

Finally, the payments under such arrangements must only be financial reimbursements for actual costs. Therefore, the Councils would need to be very careful as to how they addressed financial payments between them in order to make sure that they can fully justify their costs for any charges they make to each other.

All of these requirements have been underlined in more recent case law and are also set out in Article 12 of the Directive 2014/24/EU on Public Procurement (Public Contracts Directive 2014). The Public Contracts Directive 2014 is implemented into UK law by the Public Contracts Regulations 2015 (SI 2015/102) (PCR 2015).

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<sup>3</sup> Commission of the European Communities v Germany (C-480/06) EU:C:2009:357 (09 June 2009)

<sup>4</sup> “Commission staff working paper concerning the application of EU public procurement law to relations between contracting authorities (‘public-public cooperation’)” Brussels 4.10.2011

## 9.2 Procurement issues in relation to joint working arrangements within a separate legal entity

If a separate company is set up to provide services back to the local authorities they will need to consider whether the Public Contract Regulations 2006 (the “Regulations”) apply. For waste services the value of the contract only needs to be above the relevant financial threshold (currently £173,956 for service contracts) for the Regulations to bite.

The Regulations apply whenever a contracting authority awards a contract to a party which is legally distinct from it. Accordingly, once a separate legal company is established that company (company, LLP etc.) should not, prima facie, be awarded a contract to provide services to the public authority establishing the company without that authority having conducted a procurement procedure in compliance with the Regulations.

If the local authorities wish to utilise a separate company the CJEU has set parameters within which contracting authorities can receive services from a separate company without needing to run a competitive tender before awarding the contract. This is by using the Teckal exemption which involves the contracting authorities setting up a joint vehicle of some sort over which they exercise control similar to that exercised over their own authority and which has no private company involvement in the funding or management.

### Teckal

The principal case which gave scope for this type of exemption was the case of *Teckal SRL v Commune DI Vialmo* (Case C-107/98) (‘Teckal’). The test set out in Teckal is that whenever a contracting authority awards a contract to a party which is legally distinct from it, the procurement rules apply, unless: the contracting authority exercises over the contractor a degree of control which is similar to that which it exercises over its own internal departments; and the contractor carries out the essential part of its activities with the controlling authority or authorities. The correct interpretation of both the requisite degree of control, and the essential part, has been the subject of a number of subsequent cases before the ECJ.

### Control

In the *Carbotermo* Case the court held that the degree of control necessary to satisfy the Teckal test is present only where the contracting authority has a decisive influence over both the strategic objectives and the significant decisions of the company. The court considered that a 100% interest or ownership of the company was indicative that the requisite degree of control may be present, but it was not the decisive consideration for the Court. Importantly the ECJ considered that without any reservation of control or specific voting powers for the contracting authority which could restrict the board’s freedom of action, the authority lacked sufficient control. The contracting authority in *Carbotermo* only had the normal powers of a shareholder, which was found to be an insufficient limit on the power and influence of the board of directors.

In another case, the *Coditel* case, the ECJ examined whether the control exercised over a municipal concessionaire by an authority was similar to that which it exercised over its own departments. It found that the concessionaire must be subject to a control which enables the public authority to influence its strategic objectives and decisions.

Therefore, subject to verification of the facts by the referring court, the ECJ concluded that the control exercised, through its statutory bodies, by the member public authorities over the concessionaire may be regarded as being similar to the control which they exercised over their own departments.

The ECJ also ruled that, when a public authority joins an inter-municipal society for the purposes of transferring to it the management of a public service, it is not necessary that the public authority exercises individual control. The control can be exercised jointly by all the local authorities, with decisions being taken by a majority. The control exercised need only be similar to that exercised by the public authority over its own departments. It need not be identical. While such control must be effective, it is not necessary that it is exercised individually.

The Coditel decision was followed by the Supreme Court in England and Wales in the LAML case. In that case the court overturned the decision of both inferior courts and said that the fact that the different local authorities may have independent relationships with the Teckal company for the provision of insurance that did not prevent them having the necessary control over the strategic objectives and significant decisions of the company collectively.

The decision in Carbotermo confirmed that it is not enough to have the entire membership of the company in the contracting authorities' hands. It is necessary to demonstrate a level of control over the management of the company. In order to achieve this it is suggested that a membership agreement would need to be drawn up (which will in turn also require amendments to the corporate vehicle's articles of association). These documents would need to establish that control will rest in the hands of the members and will include provisions which: reserve key decisions to the members rather than the board of directors (consideration needs to be given to what these might be but could include approval of annual budget, business plan and other financial related matters); and reserve the right to make appointments to the board and the right to remove directors so appointed.

A 2011 case from the ECJ Econord highlights the need for all shareholders (even if their shareholdings are not equal) to "contribute effectively" to the joint control of the company. This could be through playing a role (the court didn't stipulate exactly what) in the managing body of the company as well as (but definitely not instead of) being a shareholder.

In 2014 the ECJ ruled that the award of contract between separate publicly-owned entities would not fall within in-house exception on its facts but the ECJ was prepared to consider such an extension. (Technische Universität (Case C-15/13))

## **Activities**

In Carbotermo the amount of work carried out by the company in the authorities' area was only 28% of its overall turnover and accordingly this did not meet the second limb of the Teckal test. However, there was no definitive indication from the court as to what an essential part of the activities actually is.

The Parking Brixen case highlighted the importance of a Teckal compliant company not being "market orientated" in order to come within the exception to the procurement rules. In that case the company was looking to expand its operations in new geographical areas and into different lines of work. Therefore, the essential parts of the activities were not for the contracting authorities who were members of the company.

What we have seen recently in the Public Contracts Directive 2014, implemented into UK law by the Public Contracts Regulations 2015 (SI 2015/102) (PCR 2015), that a Teckal compliant company must undertake at least 80% of its activities for its member contracting authorities thus giving a much clearer indication of what "essential part" means. Therefore, there is the ability to provide up to 20% of the company's services to other bodies. It may be worth considering the impact of this if the local authorities wanted other contracting authorities to be able to take advantage of the services provided by the inward facing company.

Where there are members of the company who are not the contracting authority or authorities (whether it is either a private sector organisation or otherwise) the courts have viewed this as fatal in meeting all the elements of the Teckal exemption. Accordingly, to ensure that the company can be considered an "in house company" and therefore remain outside of procurement requirements, only those authorities who are procuring services from the function company can be members of the company at the time of the services are procured and delivered.

## **Non-Teckal companies**

If the services are only being delivered by the company to the one or more Councils that own it and there is no private involvement in the company, it may come within the Teckal exemption set out above which means that the Councils would not have to run a procurement exercise before entering into a contract with it. This has both positive and negative aspects as it avoids the need to conduct a

procurement exercise but limits the entities with which the company can trade. However, if the wish of the Councils is to supply services to other entities as well, then the company will only be able to provide the services to any local authority including those that are members of the company if it has been awarded a contract following a competitive exercise. Therefore, there is no guarantee that the company owned by the local authorities would be awarded the contract.

The procurement obligations of public bodies in relation to the establishment of public private partnerships were historically subject to some debate. However, on 18 February 2008, the European Commission published an interpretative communication on the application of the EU law relating to public procurement and concessions to Institutionalised Public Private Partnerships (IPPPs). The communication provides guidance on the application of existing Community law to the founding and operation of IPPPs.<sup>5</sup> Recent EU case law has supported the view that contracts may be directly awarded to a PPP by a public authority, presuming first that the private sector partner under the PPP has been procured in accordance with EU law.

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<sup>5</sup> [http://ec.europa.eu/internal\\_market/publicprocurement/docs/ppp/comm\\_2007\\_6661\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/ppp/comm_2007_6661_en.pdf)

### 9.3 Further considerations relating to joint working within a separate legal entity

#### Governance and Probity

The Councils are likely to require a shareholders' or members' agreement that sits behind the company's written constitution which governs the participating authorities' conduct in respect of the operation of the company. The benefit of such an agreement is that provisions can be included which are not open to public inspection (whereas the company's written constitution – the Articles of Association - would be a publicly available document from Companies House). In addition, there are some specific legislative requirements which ought to be considered.

#### The Local Government and Housing Act 1989

The legal entity is likely to be a company formed with a view to trading (that is, generating a profit, even if such profit is retained within the company for the purpose of re-investment in the collection services for example) would be a local authority controlled company for the purposes of Section 68<sup>6</sup>, Local Government and Housing Act 1989 (the "1989 Act") (a "Part V Company"). This is because, as a group, the constituent authorities will have:

- power to control a majority of the votes at a general meeting of the company; and
- power to appoint or remove a majority of the board of directors of the company.

This means that, pursuant to the 1989 Act, the company must:

- state on its company stationery that it is a company controlled within the meaning of the 1989 Act, identifying the relevant local authorities
- set its directors' remuneration at a level that did not exceed the maximum amount which would be payable by the relevant authority in respect of a comparable duty performed on behalf of that authority, less any amount actually paid by that authority in respect of that duty
- not appoint any person disqualified from being a councillor as a director
- not publish political materials
- provide information to the constituent authorities' auditors and the Audit Commission on request
- provide information to the local authorities' members on request in order to allow them to properly perform their duties
- have Audit Commission approval of its choice of auditor (if it needs to appoint auditors in accordance with the Companies Act 2006) before making any appointment (although obviously this will soon be irrelevant)
- make available for public inspection the minutes of its company meetings (as opposed to board meetings) for the previous four years
- provide information to the local authorities' members on request in order to allow them to properly perform their duties

#### Indemnities for members and officers

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<sup>6</sup> Note that this section may be subject to repeal at some point under Local Government and Public Involvement in Health Act 2007. However, currently it is in force.

The Local Authorities (Indemnities for Members and Officers) Order 2004 clarified and extended the powers of local authorities to give indemnities to members and officers in respect of liabilities incurred in the course of fulfilling their duties. This includes situations where members or officers are acting as directors of companies in connection with their role with the authority in question. These powers are similar to those which companies have under the Companies Act 2006 to enable them to arrange for indemnities in favour of directors and officers. However, there are limitations:

Indemnities do not extend to liabilities arising from any action, or failure to act which constitutes a criminal offence

- The indemnity will apply where the member or officer when taking the action which gave rise to the liability, acted honestly and in good faith. If the action was knowingly reckless then the indemnity will not apply
- Indemnities cannot be given to cover the cost of members or officers taking legal action for defamation. Indemnities can of course be given to individuals in order to defend any defamation proceedings taken against that individual in relation to their official functions
- If any money is paid under an indemnity allowing a member to answer allegations of a breach of the code of conduct, that sum is repayable if there is a finding against the councillor of a breach of the code of conduct and the councillor is suspended, partially suspended or disqualified as a result. Where there is a finding of a breach of the code of conduct but the penalty falls short of a suspension, partial suspension or disqualification the regulations provide that the relevant council's Standards Committee will decide whether the costs involved in providing the indemnity should be repayable by the councillor (this no longer applies in England)
- In relation to criminal proceedings indemnities can be given to a member or officer to defend criminal proceedings. That sum is repayable in the event of a conviction for that offence.

This would be relevant if the local authorities appoint members or officers to act as directors of the company.

## **Some common change management issues**

### **People**

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") provides protection to employees when the business or service in which they work is transferred from one employer to another. In broad terms, under TUPE transferring employees' existing terms and conditions of employment (except certain occupational pension arrangements) will transfer automatically to the new employer. It is likely that TUPE would apply to transfer of waste services to a company and that an assessment will need to be made as to which employees would transfer. The participating authorities would therefore need to ensure that they and the company complied with TUPE.

In addition to TUPE, there are a number of government publications concerning the transfer of staff from a public sector organisation to a service provider which the participating authorities would need to consider.

Clearly, the extent to which the local authorities will need to harmonise terms and conditions will depend on how far the terms and conditions are currently harmonised. Any harmonisation required could have a cost implication for the business plan.

The extent to which employees (or the employees have an expectation that) terms and conditions would be improved to match that of the private sector and deliver the key objectives of the local authorities will also need to be considered. Both in terms of funding any harmonisation of terms and conditions and complying TUPE and the above guidance on staff transfers in the public sector.

### **Pensions**

The local authorities should identify whether or not contributions are currently in deficit. This is because this report anticipates that local authorities would wish the company to enter into an

admission agreement to continue to offer membership of the LGPS to transferring staff. It is likely that where a shortfall is identified, the administering authority will want either:

- a guarantee from the local authorities to meet any liabilities of the company to the scheme in the event that the companies default on their obligations; or
- a bond in place to secure the company's obligations.

Clearly, either option could present a significant issue to local authorities where a shortfall is identified that will need to be considered when determining the best way to proceed. Consideration of the State Aid rules is also relevant when deciding how to address any shortfall.

### **Tax Matters**

The company would be a separate legal entity from the local authorities and therefore would not benefit from the exemptions granted to local authorities in section 519 of the Income and Corporation Taxes Act 1988. As an incorporated entity it would fall within the definition of 'company' in section S832 (1) of the Income and Corporation Taxes Act 1988 ICTA88 and, is therefore within the charge to corporation tax.

The local authorities should therefore obtain financial advice on what tax the company would need to pay and what impact this would have on its business plan. This advice will need to include the position in respect of VAT as well as corporation tax.

### **State Aid**

Where local authorities are investing in a company, it is important to ensure that the state aid rules are not being breached. These rules would apply to a Teckal company as well.

These are the relevant tests:

Is the measure granted by the state or through state resources? Yes.

Does it confer an advantage to an undertaking? A benefit to an undertaking which engages in economic activity, granted for free or on favourable (non-commercial) terms, could be State aid. This would include soft loans, financial or non-financial support and the provision of guarantees. The European Court has described "any activity consisting of the offering of goods or services on a given market is an economic activity".

Only those entities which engage in an economic activity are considered as undertakings. State aid rules (along with other competition law provisions) only apply to undertakings.

The status of the body concerned and the way in which it is financed are not determinant factors in concluding whether such entity carries on economic activities or not. Thus a public, voluntary or not for profit body may carry on both economic and non-economic activities - the economic activities being severable from the public authority activities. Similarly, a registered charity even while carrying on its activities on a non-profit making basis will still be carrying on an economic activity where it offers goods or services for sale.

Is it selective, favouring certain undertakings? Yes.

Does the measure distort or have the potential to distort competition? If it strengthens the position of the beneficiary relative to other competitors then this criterion is likely to be met. The potential to distort competition does not have to be substantial or significant, and this criterion may apply to small amounts of aid and firms with little market share. That would be a "yes". It is quite easy to fulfil this criterion.

Is the activity trade-able between member states? Again, it is quite easy to trigger this one. Property development, per se, has been held to be potentially trade-able, for example. Retail activities like single petrol stations aren't. Case law ranges from a museum in a rural part of Denmark being held not to affect trade between member states to a theme park in Benidorm being held to affect trade between member states.

What are the exemptions? Most of the exemptions are irrelevant – what is proposed is not aid for R and D, environmental protection, risk capital, a firm in difficulty, employment or training. Even if the corporate vehicles are SMEs, the exemptions are not obviously on point.

The most relevant exemption is more obviously relevant. This exemption has been developed by way of case law as to whether the provision of public funds by way of loan, capital injection or purchase of shares to an undertaking constitutes state aid is the "market economy investor" test. Essentially, it is necessary to examine whether the terms on which funds are provided go beyond

those that a private investor, operating under normal market economy conditions, and having regard to the information available and foreseeable developments at the time, would find acceptable when providing funds to a comparable private undertaking.

The application of the principle requires an examination of whether there will be an acceptable return on the provision of funds within a reasonable period of time. Helpfully, the test does not require comparison with a private investor placing capital with a short term view of profitability. It is possible to look at (as was said in *Alfa Romeo No.1* [1991]) “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 longer term”.

It would be important to understand the business plan going forward and the estimate for break-even. For example, if it was proposed to break-even after approximately 3 years and this is likely would a comparable private sector investor be prepared to invest in this scenario? If so, then there may well be an argument for saying that the project does not constitute state aid. It is worth referring to the RDA and Viridian venture capital schemes (for example) which technically fell foul of the state aid regime (but were cleared by the Commission), since it was clear from these schemes that private sector investors were investing on different terms from the state emanations.

As far as the company is concerned, if it is essentially carrying out the local authorities' statutory functions (to the extent that it is able to do so) then it is strongly arguable that investment in that company falls within the “services of general economic interest” exemption. In other words, the company is carrying out public services entrusted to it by the local authorities.

## 9.4 Specific Statutory Provisions governing Merseyside Waste Disposal Authority (MWDA)

<p><b>Establishment of JWDAs and levy powers</b></p> <p>Waste Regulation and Disposal (Authorities) Order 1985  <a href="http://www.legislation.gov.uk/ukxi/1985/1884/contents/made">http://www.legislation.gov.uk/ukxi/1985/1884/contents/made</a></p> <p>Local Government Act 1985 (s.10)  <a href="http://www.legislation.gov.uk/ukpga/1985/51/contents">http://www.legislation.gov.uk/ukpga/1985/51/contents</a></p> <p>Joint Waste Disposal Authorities (Levies) (England) Regulations 2006  <a href="http://www.legislation.gov.uk/ukxi/2006/248/contents/made">http://www.legislation.gov.uk/ukxi/2006/248/contents/made</a></p>	<p>The 1985 legislation established statutory JWDAs in specific areas including Merseyside, where MWDA was created by taking on the waste disposal functions of Merseyside County Council. JWDAs were to carry out their functions from 1<sup>st</sup> April 1986 and were to be funded through setting a levy on their constituent Councils.</p> <p>Under paragraph 13 of the Order, the Secretary of State can ask MWDA to submit a scheme for the winding up of the authority and the transfer of its functions, property, staff, rights and liabilities to its constituent councils.</p> <p>The 2006 regulation sets out when and how the levy should be apportioned and issued to constituent councils.</p>
<p><b>Functions of a Waste Disposal Authority:</b></p> <ul style="list-style-type: none"> <li>• <b>Disposal of Collected Waste</b></li> <li>•</li> <li>• <b>Provision of Sites (HWRCs) for Depositing Waste</b></li> </ul> <p>Environmental Protection Act 1990  <a href="http://www.legislation.gov.uk/ukpga/1990/43/contents">http://www.legislation.gov.uk/ukpga/1990/43/contents</a></p> <p>Clean Neighbourhoods and Environment Act 2005  <a href="http://www.legislation.gov.uk/ukpga/2005/16/contents">http://www.legislation.gov.uk/ukpga/2005/16/contents</a></p> <p>Local Government Act 1972  <a href="http://www.legislation.gov.uk/ukpga/1972/70/contents">http://www.legislation.gov.uk/ukpga/1972/70/contents</a></p>	<p>MWDA exercises its powers in accordance with the Environmental Act 1990 (EPA 90) and its 'incidental' powers aligned to those duties pursuant to section 111 of the Local Government Act 1972.</p> <p>S.30 (2)(d) of EPA 90 identifies MWDA as a WDA.</p> <p>S.51 of EPA 90 sets out the functions of WDAs. It is the duty of each WDA to arrange:</p> <ul style="list-style-type: none"> <li>• for the disposal of the controlled waste collected in its area by the WCAs</li> <li>• for places to be provided at which persons resident in its area may deposit their household waste and for the disposal of waste so deposited. These sites can also be used by other persons for deposit of non-household waste for which a charge can be made.</li> </ul> <p>The Clean Neighbourhoods and Environment Act 2005 (s.47) removed the requirement on WDAs to divest their operations to specially formed companies (LAWDCs) originally introduced by s.32 of EPA 90.</p>

## 9.5 Some Relevant Statutory Powers

### Power to borrow

The ability of each type of legal entity to borrow in accordance with its constitution will need to be considered. (See Section 9 Appendix 1 on company structures above which considers the ability to borrow as part of the table analysing options.)

### Prudential borrowing

Under Section 18 of the Local Government Act 2003, local authority controlled companies can be brought within the prudential borrowing regime. The constituent authorities may wish to include restrictions in the company's written constitution and any service agreement to ensure that the company is restricted from doing anything that could impact on the authorities' borrowing limits.

For as long as the company is classed as a Part V Company, the constituent authorities will have to take into account the profit and loss, and the value of assets of the company, when putting together their annual accounts.

### Power to charge

There is no specific power that allows local authorities to set up a corporate structure, but there are a number of powers that require local authorities to utilise a company or similar legal entity when acting under them. The new primary general power of competence ("GPOC") in section 1 of the Localism Act 2011 (the "2011 Act"), gives local authorities the ability to establish a separate entity.

The constituent authorities should establish the aim of the company. A company does not have to be set up so that its primary aim is to generate profit for shareholders; a company can have social objectives; charging sufficient amounts to cover the running costs of the organisation for providing those collection services, with any surplus either be recycled into the company or used for making suitable donations, for example. The relevant powers are available under GPOC

### Power to trade

Local authorities have a number of powers that allow them to trade at a profit but the majority of these are related to specific activities which are not relevant here. As well as section 1 of the 1970 Act the two broadest powers to trade are in section 95 of the 2003 Act and section 1(4) of the 2011 Act.

Section 95 of the 2003 Act allows a local authority to do, for a commercial purpose, anything which it is authorised to do for the purpose of carrying on any of its ordinary functions. This is known as a trading power and means that the local authority can include an element of profit in the charges for its services. The section 95 power permits the local authorities to trade in function related activities only (i.e. the local authority needs to have the power but not the obligation to engage in an activity before it can trade in it). So the power to trade does not confer a general power to trade but a power that is governed by criteria designed to protect the numerous interests and stakeholders. In this case, the provision of services such as procurement advice, contract management and the other areas that are set out in the 1970 Act would come within this power.

The power conferred by section 95 may only be exercised by the local authorities through a company within the meaning of Part 5 of the Local Government and Housing Act 1989 (a "Part V Company") and after a business case has been prepared and approved as required by Regulation 2 of the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009 (the "Trading Order").

More importantly now, under section 1(4) of the 2011 Act, GPOC extends to doing something "for a commercial purpose or otherwise for a charge...". Some leading practitioners have interpreted this as including a power to trade. The main difference between GPOC and section 95 is that under GPOC the trading activity doesn't need to be a function-related activity, instead it is anything that the local authorities can do under GPOC.

"Company" is defined in section 95 of the 2003 Act and section 4 of the 2011 Act as a company under section 1(1) of the Companies Act 2006 or a society registered or deemed to be registered under the Cooperative and Community Benefit Societies and Credit Unions Act 1965 (the "1965 Act") (an industrial and provident society) now a co-operative and community benefit society (CCBS).

There are no other specific limitations on trading using GPOC. For example, under section 95 of the 2003 Act there is a requirement to present a business case to the local authorities before trading through a company whereas the 2011 Act doesn't contain this requirement. However, the Secretary of State has the power to make secondary legislation and it is not to say that in the future such requirements won't be laid down.

With the implementation of GPOC local authorities have much extended powers under which commercial activities can be delivered. There are still limitations on how such activities can be carried out but central government is keen to encourage more enterprising approaches to local authorities' working arrangements.

Any local authority considering setting up a separate corporate structure to deliver services should consider carefully the risk of doing so. There are specific procurement issues related to the company providing services to entities other than the member authorities which are discussed below. The trading powers allow a local authority to act in a more commercial manner and have ownership in a company that can generate additional financial returns. However, the risks associated with such commercial relationships and the additional burdens that come with ownership (maybe only in part) of a fully trading company need to be considered carefully. If a separate entity was established purely to provide services back to the member authorities with no outward facing remit on a charging basis that simply covered its running costs then some of these risk would be alleviated and it may be possible use section 1 of the 2011 Act giving the local authorities more possibilities for corporate structure with fewer statutory demands.

### **Business case**

The Trading Order, requires authorities to create a business case when using that power which sets out the:

- objects of the business
- investment and other resources required to achieve those objectives
- risks the business might face and how significant these risks are
- the expected financial results of the business

Together with any other relevant outcomes that the business is expected to achieve. The business case must be approved by each of the local authorities. The Trading Order requires the business case to be a "comprehensive statement".

A detailed business plan (as opposed to a business case) for a trading company is desirable at a later stage, building upon the business case prepared for the purposes of the section 95 approval. If relying on GPOC there is no formal requirement for a business case but it would be prudent for the constituent authorities to have a business case and business plan in any event. This will be useful in informing members, at an early stage, of the input required, the viability of the trading company and the main risks, financial or otherwise. It will also assist in establishing the rationality of the decision, should there be a challenge on this basis.

A business plan should contain the following information, some of which will flow from the business case:

- reason for setting up the company
- what will it trade in
- what will it charge
- what are its overhead
- a fully worked up financial plan for the first five years
- staffing requirements

- what is the appetite in the market for another service provider
- what marketing will have to be undertaken
- what support services will be required and where can they be sourced from
- insurance
- transfer of information
- tax implications of different corporate structures
- anything else that the local authorities believe is relevant

A good business plan should be the foundations for the company. By spending time and effort and bringing the right people into the process the constituent authorities will be able to set up a company confident that it has the ability to meet its objectives and that it has the necessary support.

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