



Dated 15 November 2017

London Councils

Pooling Business Rates in London

Advice on the legal framework and governance options

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Circulation Draft dated 15 November 2017

1 **Executive Summary**

- 1.1 This note outlines the potential governance options for the proposed London Business Rates 100% retention pilot pool for 2018/19.
- 1.2 Most of the functions associated with the pool will be administrative and would be performed by a lead authority and accountable body.
- 1.3 It is proposed that a portion of some of the net gain from the pooling arrangement would be retained as a strategic investment pot (**SIP**) which could be used to fund projects that will deliver economic growth.
- 1.4 This note suggests alternative governance options for oversight of project funding approvals from the SIP.
- 1.5 The three most pragmatic forms of governance for the business rates pooling arrangement appear to be:
- 1.5.1 a joint committee (**Option 1**); or
 - 1.5.2 a quasi-contractual approach involving a lead authority in consultation with participating authorities (**Option 2**); or
 - 1.5.3 a lead authority with a decision-making meeting of duly authorised officers (**Option 3**).
- 1.6 Of these three options, it would appear that Option 2 would be the most appropriate as it affords more flexibility and would appear to have the most support based on discussions held to date via London Councils.
- 1.7 Option 2 would be documented in a non-legally binding Memorandum of Understanding. It would involve the individual local authorities delegating authority to the City of London Corporation (COLC), as the Lead Authority, to take decisions on the allocation of the SIP, in consultation with the other 33 participating authorities. As some London Boroughs and COLC do not currently operate executive arrangements, those authorities cannot lawfully delegate decisions to single elected members. Therefore a meeting comprising elected members would need to be consultative in nature to enable all participating authorities to participate in the same way.
- 1.8 The Lead Authority would consult all individual participating London authorities including the GLA (the **Participating Authorities**) before making any decisions to allocate funds from the SIP to projects. The Lead Authority would only decide to approve projects for SIP funding where both the GLA and two thirds or more of the other Participating Authorities had, assuming no sub-region unanimously disagreed, already voted in favour of a project.
- 1.9 Currently, the only governance model which could incorporate this level of approval and enable all Participating Authorities' elected members to participate in the same way, whilst accommodating Participating Authorities' diverse constitutional structures, would constitute a consultative meeting of Participating Authorities (Option 2).
- 1.10 Other options for a governance model for the Pool have been considered but none would appear to be suitable or offer the flexibility or potential appeal of Option 2. Under current legislation, a joint committee structure could not accommodate voting other than by simple majority. A decision-making forum of Participating Authorities' officers would disenfranchise elected members from due consideration and involvement in the decisions of the pool regarding the allocation of the SIP to individual projects. An Economic Prosperity Board (EPB) model would not appear to be viable at this stage as it would require an order from the Secretary of State and its area would overlap with the existing

West London EPB. Nor would an incorporated structure as it has no precedent and may take too long to agree within the limited timescale.

- 1.11 While the initial pooling agreement will be for 2018/19 only, there is a possibility that the pilot will be extended by government and the pool may therefore continue for a further year in 2019/20. The Pool's operation, including this governance model, will be evaluated by London Councils, the GLA and government and could allow for potential adjustments to the governance model if agreed as expedient, were pooling to continue beyond the first two years.
- 1.12 We recommend that each authority's decision to participate in the Pool should confirm the allocation of business rates between the collecting authorities, the GLA and the SIP and form part of the terms of reference for the Pool.

2 Background

2.1 We have been instructed by London Councils to provide legal advice in connection with a proposal to establish a business rates pooling arrangement involving the COLC, all of the London Boroughs¹ and the Greater London Authority (**GLA**).

2.2 This advice note considers:

2.2.1 The powers of the London Boroughs to participate in a business rate pooling arrangement with each other and the GLA and any limitations or restrictions which need to be addressed;

2.2.2 The principal options for the form of governance arrangement for the pooling arrangements including the mechanism for allocating funds comprising the SIP.

2.3 The preferred model for the pilot pool would include the following features:

2.3.1 No participating authority would suffer financial detriment as a result of its involvement in the pooling arrangement;

2.3.2 The pooling arrangement should include three categories of distribution as follows:

(a) a percentage of the fund for distribution by the GLA/Mayor;

(b) a percentage of the fund which will be returned to each London Borough; and

(c) a percentage of the fund which will be included in the SIP to be allocated to projects by the Lead Authority taking into account the responses of the Participating Authorities.

2.3.3 The governance of the SIP should permit the Lead Authority to make decisions on the use of resources within the SIP where both the GLA and at least two thirds of the London Boroughs are in favour (subject to no participating authorities in one sub-region² unanimously disagreeing with the decision).

3 Powers to establish a Business Rate Pooling Arrangement

3.1 The Secretary of State has the power to designate two or more "relevant authorities" as a pool of authorities for the purposes of the provisions of Schedule 7B of the Local Government Finance Act 1988³.

3.2 Paragraph 45 (Interpretation) of Schedule 7B defines a "relevant authority" as:

3.2.1 a billing authority in England, or

3.2.2 a major precepting authority in England.

3.3 The list of billing authorities at Schedule 5, Part 1 of the Non-domestic Rating (Rates Retention) Regulations 2013/452 includes the GLA and the London Boroughs as billing

¹ Henceforth, for the purposes of this advice note, any reference to "London Boroughs" should be deemed to include COLC acting in its capacity as a local authority.

² London Councils' link to the map of sub regions: <http://www.londoncouncils.gov.uk/download/file/21341>. The Lead Authority can make decisions where consultation indicates the GLA and London Boroughs are in favour, and London Borough support is defined as two-thirds majority subject to sub-regional veto – as defined in the London Councils; prospectus.

³ As amended by the Local Government Finance Act 2012.

authorities and the GLA is also a precepting authority pursuant to section 39 (1) of the Local Government Finance Act 1992.

3.4 Schedule 7B, Part 9 imposes a number of requirements with regard to the designation of a pool including:

3.4.1 The authorities covered by the designation must be notified by the Secretary of State as per Part 9, paragraph 34 (7);

3.4.2 Timing requirements regarding notification before making the local government finance report under paragraph 12 (2);

3.4.3 A condition requiring the authorities to which the pooling designation relates to appoint a lead authority to exercise the functions specified in the condition⁴;

3.4.4 Such other condition(s) as the Secretary of State thinks fit⁵;

3.4.5 Any regulations with regard to levy payments and safety net payments on account may treat the pool as a "relevant authority" for the purposes of the regulations; and

3.4.6 Furthermore, where a pool of authorities is required to make a payment to the Secretary of State, each authority in the pool is jointly and severally liable to make that payment⁶ and where the Secretary of State is required to make a payment to pool authorities, the payment must be made to the lead authority appointed in accordance with conditions under paragraph 35 (1)⁷.

3.5 As far as we have been able to ascertain, there is nothing in legislation (except insofar as may be included within a condition by the Secretary of State pursuant to the relevant Designation Order) which would require a pooling arrangement to assume a particular legal structure or corporate form.

3.6 In light of our understanding of discussions which have taken place to date, there are in our view theoretically five principal options which might be available to the GLA and the London Boroughs for the administration of the proposed pooling of business rates in London. These are as follows:

3.6.1 A joint committee (**Option 1**)⁸; or

3.6.2 A lead authority consulting the participating authorities in advance and, within their authority's own constitutional arrangements, decide their authority's view on proposals for the allocation of funds to individual projects from the SIP (**Option 2**);

3.6.3 A lead authority with a meeting of duly authorised officers with delegated authority from their Participating Authorities to make decisions at meetings on allocations of SIP funds (**Option 3**);

3.6.4 The Participating Authorities each becoming members of a separate corporate vehicle, (such as a limited company) for the purpose of operating the pooling arrangement (**Option 4**); and

⁴ Paragraph 35(1)(A)

⁵ Paragraph 35(2).

⁶ Paragraph 38(2) the potential risk associated with this issue can be mitigated contractually – see later at page 12

⁷ Paragraph 38(3)

⁸ Pursuant to the Local Government Act 1972, section 101 (5) (**Joint Committee Option**) and in respect of the GLA pursuant to section 39 of the Greater London Authority Act 1999.

3.6.5 The establishment of an Economic Prosperity Board (**EPB**) (**Option 5**).

3.7 Given the constraints of the timetable for implementation of the London pooling proposal, we do not propose to explore at present Options 4 or 5 for the following pragmatic reasons.

3.8 We would suggest a corporate vehicle (**Option 4**) would not be appropriate in these circumstances given this form has no precedent within other authorities' pooling arrangements; and that it would be ambitious to expect resolution by all the stakeholders of the requisite fundamental issues and documentation (for example, a shareholders or members agreement) to form a company within the timescale is for what is intended to be a two year pilot arrangement. The legal powers to found such a proposal would also require more detailed consideration.

3.9 An EPB (**Option 5**) we suggest would similarly not be feasible in the short term both because it would require an order from the Secretary of State and it would overlap with the current West London EPB area.

4 **"Proper Purpose"**

4.1 Given that local authorities and any pooling arrangement designated by the Secretary of State are generally⁹ "creatures of statute", as a matter of public law, the relevant authorities must exercise the powers available to them for a "proper purpose" when deciding which form of governance the pooling arrangement should take. For example, the authorities should not seek to adopt a particular form of governance as an artificial device with the main purpose of circumventing legislation that might otherwise be applicable in order to avoid controls¹⁰.

4.2 However, the authorities are entitled to identify and follow a legitimate route to a legitimate end by reference to the relative operational and financial advantages and disadvantages which will follow from the potential different options available to them.

4.3 By way of example, a decision to choose the lead authority and consultative members model (Option 2) rather than a joint committee (Option 1) because Option 2 would afford more opportunities for consultation with and consideration by the Participating Authorities would be an exercise of powers for a "proper" purpose. Whereas a decision to choose Option 2 with the sole motive of circumventing the statutory controls on voting applicable to Option 1 (referred to in paragraph 5.11 below) might arguably be regarded as an exercise of the relevant power for an "improper" purpose.

4.4 A potential improper purpose argument is an intrinsic risk of any innovative arrangement involving local government and the likelihood of challenge will diminish with the passage of time. In this context, it should be borne in mind that this arrangement will apply to a one or two year pilot and will be evaluated by London Councils and the government before any extension of pooling arrangements in London.

"Wednesbury Reasonableness"

4.5 The Participating Authorities will need to take into account the usual "Wednesbury" principles in making the decision as to which option to adopt. This will involve the authorities paying due regard to any relevant considerations (such as efficiency) and disregarding irrelevant considerations (such as purely political motives to secure re-election).

⁹ Although the COLC is not strictly a creature of statute, COLC must exercise the local authority powers and functions conferred upon it having regard to the same considerations.

¹⁰ *Credit Suisse v Allerdale BC* [1996] 4 All E.R. 129

4.6 The Participating Authorities should also act in a fairly business-like manner with reasonable care, skill and caution, and with a "due and alert regard" to the interests of their ratepayers¹¹. It is our current understanding that the choice of governance structure the pooling arrangement alone will not directly affect ratepayers in London.

¹¹ *Bromley LBC v Greater London Council* [1983] 1 A.C. 768; *Roberts v Hopwood* [1925] A.C. 578; *Prescott v Birmingham Corporation* [1955] Ch. 210

5 The Most Viable Governance Options

5.1 Joint Committee (Option 1)

Powers

5.2 The London Boroughs will be familiar with their powers to establish a joint committee which also underpin the London Councils Leaders' Committee Governing Agreement 2001 (as amended).

5.3 In summary, the legislative basis is contained in sections 101 and 102 of the Local Government Act 1972 (**LGA 1972**), restated here for convenience:

5.4 *"101 (1) Subject to any express provision contained in this Act or any Act passed after this Act, a local authority may arrange for the discharge of any of their functions:*

(a) by a committee, a sub-committee or an officer of the authority; or

(b) by any other local authority."

102 (1) For the purpose of discharging any functions in pursuance of arrangements made under section 101 above:

(b) two or more local authorities may appoint a joint committee of those authorities."

5.5 Executive functions are not to be delegated under section 101 of the LGA 1972 but can be delegated under similar provisions to those set out above pursuant to sections 9E and 9EA (formerly section 19) of the LGA 2000 and the Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2012.

5.6 For the purposes of sections 101 and 102 of the LGA 1972, each London Borough and the GLA are "relevant local authorities".

5.7 The GLA is not a participating member of the London Councils Leaders' Committee and accordingly, if a joint committee were the preferred governance model for the business rate pooling arrangement, it would be necessary to establish a further joint committee involving all of the London Boroughs and the GLA.

Governance issues concerning joint committees

5.8 A joint committee has no separate legal identity and no corporate status and so cannot own property and where it purports to employ staff or enter into contracts in effect such arrangements are enforceable against each of the individual authorities. Therefore any agreement will need to address such issues with one authority acting as a "lead" (which is also a requirement under paragraph 35(1) of Schedule 7B of the Local Government Finance Act 1988). In relation to the business rates pooling arrangement, the authorities have identified the City of London Corporation as the proposed lead authority.

5.9 There is a degree of flexibility in relation to the terms of any delegation and authorities may specify the manner in which the delegated functions may be exercised (e.g. by reference to geography, service, or financial parameters).

- 5.10 Authorities can agree joint arrangements where certain closely specified types of decisions taken by a joint committee might be able to be the subject of a review by any of the Participating Authorities, following certain procedural steps (perhaps including a "cooling off" period before any decisions of the joint committee could be acted upon). These issues, together with the constitutional set up of the joint committee (e.g. numbers of members each authority may appoint; their terms of office; designation and role of COLC as lead authority; allocation of running costs and so on would need to be addressed in a formal agreement between all authorities involved).
- 5.11 Voting rights for joint committees are prescribed by paragraphs 39 to 44 of Schedule 12 (Meetings and Proceedings of Local Authorities) of the LGA 1972. Paragraph 39 requires that "*all questions coming or arising before a local authority shall be decided by a majority of the members of the authority present and voting thereon at a meeting of the authority*". It is possible that this legislation could be amended and this issue has been raised with government but currently, given the timescales it is unlikely that any such legislative amendments would be made in time for the pilot to start next financial year.
- 5.12 As a formal committee of the Participating Authorities, a joint committee would of course be subject to the political balance requirements¹² in the Local Government and Housing Act 1989 (LGHA) Schedule 1 and the Local Government (Committees and Political Groups) Regulations 1990. Although we are given to understand, this is unlikely to be an issue in this case as each of the Participating Authorities' leaders would be involved in such an arrangement.

Advantages/What would be possible

Option 1, a joint committee, could offer the following principal advantages:

- 5.13 it is a model that has been used many times across the country for other functions and the Leeds City Region Business Rates Pool operates through a joint committee;
- 5.14 it is legally one of the more straightforward entities to set up, and has clear statutory authority;
- 5.15 it maintains direct democratic oversight of the functions in question;
- 5.16 it is possible to delegate statutory functions to it directly;
- 5.17 it would be possible to frame the terms of the delegations to incorporate a framework for decision making on the allocation of funds; and

Disadvantages/What would not be possible

However, there are a number of potential disadvantages associated with this model:

¹² Section 15(5) LGHA states that the seats on any body which fall to be filled by appointments made by any relevant authority or committee of a relevant authority must have regard to the following principles of political balance: (a) that not all of the seats on the body may be allocated to the same political group; (b) that the majority of the seats on the body is allocated to a particular political group if the number of persons belonging to that group is a majority of the authority's membership; (c) subject to (a) and (b), the number of seats on the ordinary committees of a relevant authority which are allocated to each political group bears the same proportion to the total of all the seats on the ordinary committees of that authority as is borne by the number of members of that group to the membership of the authority; and (d) subject to (a) and (c) the number of the seats on the body which are allocated to each political group bears the same proportion to the number of all the seats on that body as is borne by the number of members of that group to the membership of the authority.

- 5.18 from an operational viewpoint, the establishment of a new joint committee will require and engage the associated administrative machinery including compliance with formal requirements of advance publication of agenda papers, voting and publicity. On the one hand, this could be perceived as an advantage in terms of added visibility, transparency and accountability. On the other hand, this could be perceived as involving perhaps slightly more administrative resources. This is a matter for consideration and discussion by the authorities;
- 5.19 a joint committee has no separate legal personality and would need to operate through a lead authority;
- 5.20 the statutory restrictions on voting arrangements mean that the preferred governance arrangements addressing the principles for governance prepared by the London Finance Commission and reflected in the draft prospectus for the pilot pool considered by Leaders Committee and the Mayor (see footnote 13 for summary¹³) could not be applied;
- 5.21 each participating authority will need to ensure that it has obtained the required authorisations under its constitution to enter into the arrangements;
- 5.22 there are also specific provisions in section 13 LGHA with regard to the status of a person who is not an elected member of any of the authorities but is appointed a member of the joint committee. The disadvantage of a joint committee in this case is that a person who is appointed as a member of the joint committee but who is not an elected member of one of the Participating Authorities would not have a vote¹⁴.

6 **Lead Authority and Consultation of Elected Member Representatives** (Option 2)

Powers

- 6.1 Local authorities have a power to delegate decisions to other authorities as referred to in paragraphs 5.4 and 5.5 above.
- 6.2 A pooling arrangement can be operated by agreement between the relevant authorities, whether as a non-legally binding memorandum of understanding (**MOU**); a more detailed formal legally binding contract or possibly, a hybrid arrangement where some provisions are expressed to be legally/contractually binding and others are included as expressions of general intent as to the protocols to be followed. Given the constrained timescale we consider an MOU is the most realistic option for documenting the governance arrangements and it also has precedent in other pools.
- 6.3 Local authorities have the power to enter into a Memorandum of Understanding to record the governing arrangements between them including under section 111 of the Local Government Act (**LGA**) 1972: "*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 any thing (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*

¹³ In summary: each element of London government should have a stake; no exclusion from the benefits of London's success or be disempowered from addressing local needs; no overriding of the Mayor's interests by the London local authorities, and vice versa; decision-making arrangements must provide for the prevention or breaking of any deadlock; the system must enforce binding decisions which reflect a clear consensus; the system must be simple and clear in the processes and parties' responsibilities; stability by retaining existing responsibilities where possible; there should be scope to respond to other relevant reforms; decision-making should reflect the roles of the authorities (the London Boroughs) and the GLA/Mayor; and the political arrangements should be supported by a formal officer group to provide standing technical advice and support.

¹⁴ Section 13(1) LGHA 1989

discharge of any of their functions". If a contractually binding Inter Authority Agreement were deployed then the relevant powers include section 1(1) of the Local Government (Contracts) Act 1997 "for the provision or making available of services for the purposes of, or in connection with the discharge of the functions of the local authority". In this context the relevant "functions" are those of a billing authority or a major precepting authority.

- 6.4 In relation to the London Business Rates Pooling arrangement, the Participating Authorities would have implicit powers to enter into arrangements with each other for the purposes of fulfilling the requirements of Schedule 7B for obtaining an order of the Secretary of State authorising the establishment of a business rate pool.

Governance issues

- 6.5 By and large, the governance and distribution arrangements would be set out within the terms of the MOU.
- 6.6 This could either involve a lead authority arrangement with authorities resolving to delegate certain clearly defined administrative functions to a single lead authority with a meeting of elected members who are consulted regarding allocations for the SIP (**Option 2**) or it could involve a lead authority supported by a decision-making forum of authority officer representatives who have delegated authority to make decisions (**Option 3**). The potential mechanics and responsibilities of the lead authority are explained in more detail below.

Lead Authority

- 6.7 The Participating Authorities could delegate most administrative functions to COLC as the lead authority who would then be responsible for administering the pool and could provide a secretariat with the GLA and London Councils for assessing and preparing reports to the Participating Authorities' applications for the SIP against pre-agreed criteria. We understand that it is currently proposed that the GLA may provide the transactional support role.

MOU

- 6.8 For this arrangement, the Lead Authority's role would (in addition to its normal responsibilities) cover:
- 6.8.1 Maintenance and support of the Pool's governance arrangements and the methodology for the allocation of resources;
- 6.8.2 Assessment and preparation of reports on applications for the SIP in accordance with the agreed criteria.
- 6.9 The MOU could be expressed not to be legally binding and would not (in the absence of consideration or being expressed as a deed) be a contract. In due course for example if the pilot were deemed to be successful and were continued then, the arrangement in the MOU could be re-expressed as a legally binding Inter Authority Agreement and hence potentially enforceable as a contract between the authorities in part or as a whole.
- 6.10 As the arrangement under Option 2 or Option 3 would be an unincorporated association, the representatives will be able to operate bespoke voting arrangements (subject to the proviso above regarding a "proper purpose") according to the provisions of the MOU or Inter Authority Agreement.

Option 2 – Consultative Elected Member Representatives

- 6.11 With regard to the approval of allocations of the SIP for individual projects, the Lead Authority would take decisions following consultation with Participating Authorities. This could involve the Lead Authority preparing reports with proposed recommendations as to SIP allocations and circulating the report to the Participating Authorities for prior consultation and a decision as to which way the relevant authority will vote. The consultative representatives could then meet but decisions would not be made at that meeting.
- 6.12 If the representatives are to comprise elected members of the authorities, then care will need to be taken by each individual participating authority to ensure their appointments fit with their particular authority's constitution/governance model and scheme of delegation. Authorities which have a Mayor and Cabinet Executive or Leader and Cabinet Executive would be able to appoint the Senior Executive Member (Mayor or Leader) or another executive member as their appointed representative.
- 6.13 The elected members from authorities with non-executive arrangements (committees) would need to have the decision as to how to respond made in a duly constituted committee or subcommittee meeting of their authority.
- 6.14 In making decisions regarding allocations of the SIP it will be important that all Participating Authorities take lawful and valid decisions. Given the diversity of constitutional arrangements in London local government, (e.g. elected Mayors and Executives; Leader and Executives; and Committee forms of governance) the only way that all Participating Authorities can be engaged through their elected members on a two thirds response basis would be for each participating authority to take an individual view on the recommendations in a report prepared by the Lead Authority and then communicate their decision to the Lead Authority. This would need to ensure reports were circulated by the Lead Authority at least one month in advance of a meeting of the representatives to allow the individual authorities time to consider and make their decision within their own governance timetables (including scrutiny and call-in). The Lead Authority would then aggregate the individual Participating Authorities' responses and make the decisions regarding the allocation of the SIP to individual projects on the basis of the consultation principles and agreed thresholds. The decision-making process would be scheduled to take place bi-annually to allow the Lead Authority to report the outcome to the Congress of Leaders and the Mayor of London

Option 3 - Officer representatives

- 6.15 Alternatively, an officer representative arrangement could involve each Participating Authority delegating authority to its own authorised officer representative and the representatives which can respond to SIP allocation decisions. The representative(s) could all be officers¹⁵ (duly authorised and delegated with the authority to exercise the relevant functions by their authority), depending on what the individual authority's particular constitutional/governance arrangements¹⁶ and scheme of delegation allow, with

¹⁵ There is a general power to local authorities to discharge their functions through officers under section 101(1) Local Government Act 1972. Local authorities can delegate to officers as long as decisions are not effectively being made by a member(s) through an officer (*R v Port Talbot BC* [1988] 2 All E.R. 207; *Fraser v SoS for the Environment and the Kensington and Chelsea RLBC* (1987) 56 P. & C.R. 386). However, if a power is delegated to an officer acting in consultation with an executive member(s) then a decision without consulting the member(s) would be ultra vires.

¹⁶ If the relevant authorities have executive arrangements and to the extent executive functions as set out in the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (as amended) are involved, then this would need to comply with the Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2012) where authorities have a committee system or prescribed arrangements.

those officer delegates then being duly empowered to make decisions at the duly constituted representatives meeting.

- 6.16 The extent of the terms governing the lead authority and consultative members' arrangement could similarly be comprised in a MOU or a more detailed Inter Authority Agreement.

Advantages of Options 2 and 3

- 6.17 Options 2 and 3 have the advantage of familiarity to DCLG and the Secretary of State: All of the established business pool agreements we have reviewed have been based on MOUs signed by the relevant s151 Officers of the authorities involved whether or not there is a combined authority or joint committee as well.
- 6.18 Simplicity – in the context of achieving agreement between the Participating Authorities within the time constraints, it may be easier for the Participating Authorities to reach agreement on a shorter MOU than on a more detailed contract, joint committee or corporate shareholding arrangements.
- 6.19 Voting rights – the statutory requirements regarding voting which apply to joint committees do not apply to the arrangements described in Option 2 or 3. Whilst most of the current MOUs for operational business pooling arrangements do provide for decisions by a simple majority, a number require unanimity (which indicates that the Secretary of State is prepared to agree bespoke voting rights where agreed by the Participating Authorities).
- 6.20 A contractual arrangement in the form of Option 2 or Option 3 could accommodate the features summarised at paragraph 2.3 of the Background section above.
- 6.21 Flexibility – the terms of the MOU can specify whether particular provisions are intended to be legally binding between the parties, allowing the Participating Authorities to clarify their legal rights and obligations to one another.
- 6.22 It should be borne in mind that either Option 2 or 3 could later transition to a joint committee arrangement if the factors mitigating against the latter option (e.g. restrictions on voting rights) were to be resolved by legislation or otherwise.

Disadvantages associated with Options 2 and 3

- 6.23 Whilst existing MOUs indicate that the Secretary of State is willing to approve bespoke voting arrangements, none include the degree of detail required by the Participating Authorities in this project.

7 Distribution arrangements – key issues

Authorities' decisions to enter into arrangements/terms of reference

- 7.1 Whichever governance form the Participating Authorities adopt to govern the pooling arrangement it will be necessary for each of them to approve those arrangements formally.
- 7.2 Confidence that the conditions which the authority leaders set out in their "in principle" agreement to participate is likely to be underpinned if each authority's formal decision to participate includes a condition which confirms the allocation of business rates between the collecting authorities, the GLA and the SIP. Further, this condition could with other terms be mandated as terms of reference for both the pooling arrangement and decisions to allocate funding to SIP initiatives.
- 7.3 The terms of reference/conditions which are likely to underpin confidence in the proposals appear to us to include:

- 7.3.1 That no authority should be financially worse off compared to their position if they had not participated in the pooling arrangement - we see this as being of particular importance in order to reassure s151 Officers that the authorities could not be in breach of their common law fiduciary duty to their ratepayers given the potential joint and several liability provision under Schedule 7B, Part 9, paragraph 35(1);
- 7.3.2 The allocation to each authority and the share allocated to the SIP;
- 7.3.3 The factors which are to be applied in the allocation of funds from the SIP to individual projects - including:
- (a) a requirement to make SIP allocations (within each financial year) with a requirement to seek to do this to meet specified targets;
 - (b) specified broad economic/growth criteria which must be satisfied to enable an initiative to qualify for funding – we appreciate this will have to be approved by DCLG – existing criteria used by central government business growth funds might be applicable or capable of adaptation;
 - (c) that the pooling arrangement is time limited unless all of the authorities and government approve an extension;
 - (d) a mechanism to deal with and distribute either income above that projected or income less than projected;
 - (e) a liability distribution provision to deal with claw-back on an equitable basis in the event income is subsequently reduced (through rating appeals) after the pool is dissolved; and
 - (f) a sub-regional right to veto a project for funding.
- 7.3.4 The report underlying the decision of each authority is likely to consist of a part common to all of them but should also include a part which addresses any particular implications for that individual authority.
- 7.3.5 Our expectation is that the 'governance arrangement' will in each year approve projected business rate income and subsequently review/reconcile the actual income. With notional allocations being made and a subsequent review to ensure notional allocations had been paid/committed with a process to deal/reallocate any underspent amounts.
- 7.3.6 If the Participating Authorities decide to appoint one of their members as the lead authority, the MOU or Inter Authority Agreement will need to recognise this. The lead authority will need protection that the consequences of certain actions taken in its name are shared (e.g. through indemnities and financial compensation mechanisms) and conversely, the other authorities will need to be protected from the unauthorised actions of the lead authority, the issue of joint and several liability and will want reassurance that should any payments be made by the Secretary of State to the lead authority under Schedule 7B paragraph 38(3) that these are equitably redistributed.

8 Conclusion

- 8.1 We would recommend either Option 2 or 3 involving a designated lead authority delegated with the role of undertaking the bulk of administrative decisions and supported by a meeting of representatives.

- 8.2 If Option 2 were adopted then it should be borne in mind that the elected member representatives could not validly take decisions at the bi-annual meetings, hence they would be consulted in advance.
- 8.3 If Option 3 were pursued then the officer representatives could be delegated with authority to make decisions on behalf of their authorities.
- 8.4 Meetings could be convened biannually during the financial year. The pilot arrangement would be documented in a MOU and then in due course in an Inter Authority Agreement if felt advantageous to do so.

Trowers & Hamlins LLP
Ref: HZR
15 November 2017