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## Combined Authorities

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### *Introduction*

1. This paper will address three topics:
  - i) The background to combined authorities;
  - ii) The (new) statutory scheme;
  - iii) Derbyshire County Council's forthcoming judicial review challenge to a combined authority's consultation in relation to a potential enlargement of the combined authority's area.

### **Background**

#### What is a combined authority?

2. A "combined authority" is a type of local government institution introduced in England outside Greater London by Part 6 of the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act"). Combined authorities may be set up by two or more local authorities. They take on statutory functions transferred to them by an Order made by the Secretary of State. The core purpose of a combined authority is to deliver better outcomes for local communities as a result of closer joint working and collaboration at a local level. Combined authorities are intended to "support improved strategic decision-making on economic issues and better co-ordination and delivery of economic development interventions by local authorities".<sup>1</sup> They take account of the fact that functional economic market areas, illustrated by travel to work areas, are often much larger than the area of individual local authorities.

#### The Local Democracy, Economic Development and Construction Act 2009

3. The 2009 Act enabled the Secretary of State to make an order establishing a combined authority for an area which met certain specified conditions. Before making such an order the Secretary of State had to be satisfied that its creation would improve the efficiency and effectiveness of transport and economic development in the area. The order was subject to approval by Parliament under the affirmative procedure. Under the 2009 Act the purpose was to enable there to be an authority that can exercise the functions of both Integrated Transport Authority under the Local Transport Act 2008 and those of economic prosperity boards.<sup>2</sup>

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<sup>1</sup> CLG, Economic prosperity boards and combined authorities: Consultation on draft statutory guidance (Feb 2010), p10.

<sup>2</sup> Economic Prosperity Boards are also set up by order made pursuant to Part 6 of the 2009 Act. Such Boards have been a lot less popular than combined authorities. There is a Board in Cheshire and Warrington and a shadow board operating in Warwickshire.

## The Cities and Local Government Devolution Act 2016

4. Part 6 of the 2009 Act has been significantly amended by the Cities and Local Government Devolution Act 2016 (“the 2016 Act”). The 2016 Act enabled secondary legislation, inter alia, to:
  - i) Enable any public authority function relating to an area to be conferred on a combined authority;
  - ii) Confer any local government function on a combined authority (previously they had been limited to economic development, regeneration and transport);
  - iii) Provided for an elected mayor for a combined authority’s area who would exercise specified functions individually and chair the authority; and
  - iv) Provide for the possibility for the mayor additionally to undertake the functions of a Police and Crime Commissioner for the combined authority area (in place of the Police and Crime Commissioner).
5. As a result of the amendments effected by the 2016 Act combined authorities have assumed greater significance as a vehicle for the devolution of powers and budgets to encourage economic growth in accordance with “devolution deals” entered with central government.<sup>3</sup> Combined authorities provide a way of meeting the governance requirements national government has set for the devolution of powers and resources to a local level through negotiated devolution agreements. However, there is no requirement that there be a devolution agreement between central and local government before a combined authority is proposed. A group of councils can propose a combined authority without any reference to devolution.
6. There are now two types of combined authority: those with a directly elected mayor for the area covered by the combined area and those which do not have a mayor.

### Existing combined authorities

7. Five combined authorities were established under the 2009 Act:
  - i) Greater Manchester;

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<sup>3</sup> As of March 2016 eleven areas had agreed a devolution deal. Some areas, eg Cornwall, were not combined authorities.

- ii) Liverpool City Region;
  - iii) North East (Newcastle and surrounding area);
  - iv) Sheffield City Region;
  - v) West Yorkshire
8. Each of these authorities, with the exception of West Yorkshire, subsequently agreed to establish a directly-elected mayor under its devolution deal. Orders making provision for an elected mayor have been made in relation to the Liverpool, Sheffield and Greater Manchester combined authorities. However, last week, a majority of the constituent councils that made up the North East Combined Authority voted against the devolution deal because of concerns about funding in light of the Brexit vote. It thus seems likely that the North East Combined Authority will, at least at present, not have an elected mayor.
9. The Tees Valley and West Midlands Combined Authorities were established earlier this year after the 2016 Act came into force. Both of these combined authorities will have an elected mayor. There are also a number of proposed combined authorities.

## ***The Statutory scheme as amended by the 2016 Act***

### Establishment of a combined authority

10. Section 103 of the 2009 Act provides that the Secretary of State may by order establish a combined authority as a body corporate. The two conditions precedent to the establishment of such an authority which remain in section 103 following the amendments made by the 2016 Act are as follows:
- “(2) Condition A is that the area consists of the whole of two or more local government areas in England.
- ...  
(5) Condition D is that no part of the area forms part of-
- (a) the area of another combined authority;
  - (b) the area of an EPB [Economic Prosperity Board], or
  - (c) an integrated transport area”
11. Section 12 of the 2016 Act removed the geographical restrictions in relation to the establishment of combined authorities by removing the requirements (ie Conditions B and C) that prevent combined authority areas from being non-contiguous or doughnut shaped.
12. By virtue of section 110(1) of the 2009 Act an order under section 103 may only be made if three conditions are satisfied. One is that the Secretary of State considers that to do so is likely to improve the exercise of statutory functions in the relevant areas. The second one is that the constituent councils consent to the orders being made. “Constituent Council” means, by virtue of section 110(3), a county council any part of

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whose area is within the proposed combined authority area, or a district council whose area is within the proposed combined authority area. Thus a county council will, if it wishes, be able to veto the formation of a combined authority that includes some of its area (cf the position in relation to the amendment of combined authorities' boundaries discussed below).

13. The third condition is that the Secretary of State must have carried out a public consultation, unless the exception in section 110(2) applies. The exception arises if a scheme has been prepared and published under section 109,<sup>4</sup> the constituent councils "carried out a public consultation in connection with the proposal contained in the scheme" and the Secretary of State considers that no further consultation is necessary. The requirements of consultation in this context are considered in more detail in the final section of the paper discussing Derbyshire County Council's judicial review claim.

## Functions

14. Under the 2009 Act as originally enacted, a combined authority could only undertake functions relating to economic development, regeneration, transport.
15. The 2016 Act removes the limitations on what functions could be transferred to combined authorities by permitting the Secretary of State to transfer local authority functions or the functions of public bodies to combined authorities. The combined authority's functions will be determined by order for which sections 104 (transport), 105 (local authority functions) and 105A (other public authority functions) provide.
16. The general power of competence under section 1 of the Localism Act 2011 may be transferred by order to a combined authority, see section 113D of the 2009 Act.

## Mayoral combined authorities

17. Under section 107A of the 2009 Act, an order may provide for the combined authority to have an elected mayor. The elected mayor will be a member of, and chair, the combined authority. Section 107B(1) provides that the Secretary of State can make an order for there to be an elected mayor following a proposal being made by each county and district council within the area of a proposed or existing combined authority and by an existing combined authority (the appropriate authorities). In the absence of such a proposal, an order can be made if the appropriate authorities consent or, in the case of an existing combined authority, there are one or more non-consenting constituent councils but the combined authority and at least two constituent councils consent, see section 107B(1)-(3). Where there are non-consenting councils, the Secretary of State must make an order under section 106 removing the area of any non-consenting council from the area of the combined authority.
18. The mayor is required to appoint one of the members of the combined authority to be their deputy, see section 107C. A deputy mayor must act in place of the mayor if the mayor is unable to act or the office of mayor is vacant.

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<sup>4</sup> There is no requirement for authorities to undertake a review of the exercise of statutory functions in relation to an area followed by a publication of a scheme under section 109.

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19. Section 107D(1) provides that the Secretary of State may make an order that provides for certain functions of the combined authority to be exercisable only by the mayor. The order may include provision for the exercise of such functions by the mayor to be made subject to certain conditions. Such an order can only be made with the consent of all the appropriate authorities (ie the county councils, district councils whose area is within the area of the combined authority, and in the case of an order in relation to an existing combined authority, the combined authority itself), see section 107D(9).
20. Section 109F provides that the Secretary of State may make an order providing for the mayor for the area of a combined authority to also exercise functions of a Police and Crime Commissioner in relation to that area. As with an order providing for certain functions to be exercisable only by a mayor, such an order can only be made with the consent of all the appropriate authorities. Such an order has been made in relation to the Greater Manchester combined authority.

## Changes to the boundaries of existing combined authorities

21. An order under section 106 may add or remove a local government area to or from the existing combined authority area. Under section 106(3A) the required consent for adding a local government area is that of the combined authority itself, its mayor if there is one and the “relevant council” in relation to the area to be added. If the area being added is the area of a county council (ie the whole area), then the county is the relevant council and has to consent. However, if the area being added is the area of a district within a county council area, then the relevant council is either the district or the county council. It is sufficient if either of those councils consents to the addition, see s 106(3B)(c) and s 106(3C)(a). However, if it is proposed that a local government area be removed from an existing area of a combined authority, both of those councils must consent, see section 106(3C)(b).

## Financial matters

22. Combined authorities (with or without mayors) may raise a levy on their constituent councils. This constitutes a shift of funding between tiers rather than a means to introduce “new money” into the system.
23. Section 5 of the 2016 Act amends sections 39 and 40 Local Government Finance Act 1992 to include a mayoral combined authority as a major precepting authority, and enables a precept to be set in relation to funding of the mayoral functions.

## Governance arrangements

24. Section 104 of the 2009 Act provides that the Secretary of State may make such orders in respect of the constitution and governance arrangements as he could make in relation to an Integrated Transport Authority under the provisions of the Local Transport Act 2008. The constitutional arrangements of combined authorities are set out in Schedules to the various orders setting up the combined authorities. The majority of members of the combined authority must be appointed by constituent councils. Each council must appoint at least one of its elected members as a member of the combined authority.

## Overview and scrutiny committees and audit committees

25. Section 8 of the 2016 Act introduces a new Schedule 5A to the 2009 Act. The Schedule requires all combined authorities to establish one or more overview and scrutiny committee(s) and an audit committee with the functions and powers specified. It also enables the Secretary of State to make provision by order as to the membership of the overview and scrutiny committee.

### ***The Derbyshire County Council's judicial review challenge***

26. Derbyshire County Council have issued a judicial review challenging a consultation exercise carried out by Barnsley, Doncaster, Rotherham and Sheffield Combined Authority. The combined authority's consultation concerned a proposed geographical extension to encompass two new members: Chesterfield Borough Council which is situated within Derbyshire and Bassetlaw District Council which is situated with Nottinghamshire and the conversion of the combined authority into a mayoral combined authority. The intention is to have the first mayor elected in May 2017.
27. Chesterfield Borough Council wishes that the combined authority include its area (which is in Derbyshire) but Derbyshire County Council does not wish to have any of its area being part of the Sheffield Combined Authority. Derbyshire contends, inter alia, that if the area of Chesterfield BC becomes part of Sheffield Combined Authority, Derbyshire County Council will necessarily become part of that Combined Authority and will be prevented from becoming a constituent council in another combined authority.
28. Derbyshire contends that the combined authority's consultation is unlawful because it fails to comply with the provisions of the 2009 Act. Further, it contends that the consultation fails to comply with the requirements of the fair consultation as laid down in *R v Brent LBC ex p Gunning* (1985) 84 LGR 168 and approved by the Supreme Court in *R (Moseley) v London Borough of Haringey* [2014] 1 WLR 3947.
29. The so called *Gunning* criteria for fair consultation are that:
- i) Consultation must be at a time when proposals are still at a formative stage;
  - ii) The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response;
  - iii) Adequate time must be given for consideration and response;
  - iv) The product of the consultation must be conscientiously taken into account in finalising any proposals.
30. In the present case, the combined authority have carried out the first three steps but it will be Secretary of State who takes the fourth step.
31. Derbyshire also rely on Lord Wilson's statement in *Moseley* that fairness will typically require reference to be made to alternatives to the proposal on which consultation is commenced.

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32. A further issue that will be considered by the High Court when it hears the application at the rolled up hearing is the timing of the challenge. In *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472. Arden LJ, in this case, suggested that often will be appropriate to wait until a consultation is concluded before challenging it by way of judicial review although there will be cases where it is appropriate such as where there is “some irretrievable flaw in the consultation process”. Derbyshire contend that there is such a flaw in the present case.
33. Derbyshire allege that the combined authority’s consultation was irretrievably flawed because:
- i) It was inconsistent with the terms of section 113 of the 2009 Act because it:
    - a. failed to consult the “public” as it excluded residents of Derbyshire outside of the district of Chesterfield from its consultation;
    - b. Failed to consult on the specific proposals set out in the Scheme but instead asked only a series of generalised questions about devolution.
  - ii) The consultation was misleading and insufficiently detailed to allow a proper response because, inter alia;
    - a. There was no reference to alternative options;
    - b. The consultation failed to mention that Derbyshire does not consent to being “a member of the...Combined Authority”;
    - c. The consultation omitted all reference to the fact that Derbyshire will automatically become members of the combined authority and that the counties may potentially be required to relinquish certain responsibilities to the elected mayor and/or the combined authority.
34. Derbyshire’s challenge is likely to be heard by the end of the year.

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