



Neutral Citation Number: [2022] EWHC 506 (Admin)

Case Nos: CO/744/2021 and CO/291/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MANCHESTER DISTRICT REGISTRY

As at Manchester Civil Justice Centre

1 Bridge Street West

Manchester

M60 9DJ

Date: 09/03/2022

Before :

MR JUSTICE JULIAN KNOWLES

Between :

GREATER MANCHESTER BUSES

SOUTH LIMITED

- and -

(1) GREATER MANCHESTER COMBINED AUTHORITY

(2) THE MAYOR OF GREATER MANCHESTER

-and-

(1) GREATER MANCHESTER BUS OPERATORS ASSOCIATION

LIMITED

(T/A ONEBUS)

(2) ROTALA PLC

ROOTALA PLC

-and-

(1) GREATER MANCHESTER COMBINED AUTHORITY

(2) THE MAYOR OF GREATER MANCHESTER

-and-

(1) STAGECOACH GROUP PLC

Cl

Defe

Interested P

Cl

Defe

Interested P

**(2) GREATER MANCHESTER BUS OPERATORS ASSOCIATION
LIMITED
(T/A ONEBUS)**

Marie Demetriou QC and Malcolm Birdling (instructed by **Herbert Smith Freehills LLP**)

for **Greater Manchester Buses South Limited**

Andrew Singer QC and Mark Laprell (instructed by **Backhouse Jones Solicitors**)

for **Rotala plc**

John Howell QC and Amy Rogers (instructed by **GMCA Solicitor**)

for the **Defendants**

Greater Manchester Bus Operators Association Limited (t/a OneBus)

did not appear and was not represented

Hearing dates: **26 - 28 May 2021**

Judgment Approved by the court

for handing down

(subject to editorial corrections)

**If this Judgment has been emailed to you it is to be treated as 'read-only'.
You should send any suggested amendments as a separate Word document.**

Mr Justice Julian Knowles:

Introduction

1.

These two applications for permission to seek judicial review challenge the decision of the Mayor of Greater Manchester to reform bus services in the region. They are brought by two bus operating companies: Greater Manchester Buses South Limited (Stagecoach Manchester/Stagecoach) and Rotala plc (Rotala). Specifically, the companies challenge the Mayor's decision on 25 March 2021 to make the Greater Manchester Franchising Scheme for Buses 2021 (the Franchising Scheme). I will refer to this as 'the Decision'. If implemented, the Franchising Scheme will radically alter how bus services in Greater Manchester are delivered.

2.

I held a remote 'rolled-up' permission hearing by Microsoft Teams between 26 and 28 May 2021. The material before the Court runs to thousands of pages, a lot of it being dense and technical material, such as economic modelling and forecasting. As I will explain, the decision-making process began in 2017 and was seriously impacted by the COVID pandemic in 2020/21. It is the potential effects of the pandemic on the transport market in Greater Manchester which lies at the heart of the Claimants' cases.

3.

I grant permission to both Claimants. Their claims raise arguable grounds, and the subject matter is of considerable importance to the region and its people.

The parties

4.

Stagecoach Manchester is a major commercial bus operator whose business is largely focused on South Manchester. It is the largest bus operator in Greater Manchester, with almost 100 million passenger journeys in 2019/20. Stagecoach Manchester is a wholly owned subsidiary of Stagecoach Bus Holdings Limited and is ultimately owned by Stagecoach Group plc.

5.

Rotala also operates bus and coach services in the North-West, and is the second largest bus operator in the Greater Manchester area.

6.

The Interested Party, OneBus, is a partnership of commercial bus operators in Greater Manchester which was formed in 2018 to enable bus companies to speak with one voice and drive a shared commitment to improve public transport across the Greater Manchester region. Whilst it was served as an Interested Party, it did not take part in the hearing.

7.

The First Defendant, the Greater Manchester Combined Authority (the GMCA), is the mayoral combined authority in Greater Manchester. It is made up of the Mayor, who is the Second Defendant to these claims, and an elected member from each of the ten constituent Metropolitan Borough Councils in Greater Manchester (Bolton, Bury, Manchester, Oldham, Rochdale, Salford, Stockport, Tameside, Trafford, and Wigan).

8.

The GMCA was created by the Greater Manchester Combined Authority Order 2011 (SI 2011/908) (the GMCA Order), which was made under the Local Transport Act 2008 and the Local Democracy, Economic Development and Construction Act 2009. The GMCA has the functions set out in the GMCA Order (and other legislation), including in relation to transport, economic redevelopment, and regeneration.

9.

Transport for Greater Manchester (TfGM) is an executive body of the GMCA responsible for running Greater Manchester's transport services. TfGM has its own functions as the transport executive for the GMCA's area under Part II of the Transport Act 1968 (TA 1968). It also acts as the GMCA's executive body for the purposes of Part 5 of the Local Transport Act 2008 and Part 6 of the Local Democracy, Economic Development and Construction Act 2009. It has powers to assist the GMCA in the discharge of that authority's functions: see s 9 of the TA 1968 and Article 9 of the GMCA Order.

10.

In summary, as Mr Howell QC explained, TfGM effectively acted as an officer of the GMCA in conducting work relating to the Proposed Franchising Scheme. Its work was then presented to the GMCA, which voted on whatever recommendations had been made in relation to the work in question.

Glossary

11.

This judgment uses the following terms and abbreviations:

The Assessment The GMCA Report, 'Bus Franchising in Greater Manchester Assessment September 2019', ie, the statutory assessment under s 123B of the TA 2000 prepared by TfGM on behalf of the GMCA

Assurance Review The non-statutory review of the COVID Impact Report carried out by Grant Thornton and presented to the GMCA in November 2019

BCR Benefit Cost Ratio (in simple terms, a BCR is the ratio of the benefits of a project or proposal, expressed in monetary terms, relative to its costs, also expressed in monetary terms)

BSA 2017 Bus Services Act 2017

COVID/COVID-19 The disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), named as COVID-19 by the World Health Organisation in February 2020

COVID Impact Report The TfGM report to the GMCA, 'COVID-19 Impact on Bus Franchising Report' (19 November 2020)

The Decision The Mayor's Decision of 25 March 2021 to make the Scheme, attached to his Decision Notice as Appendix 1

DfT Department for Transport

DGR The Defendants' Detailed Grounds of Resistance

First Consultation Report The TfGM report to the GMCA, 'Bus Franchising in Greater Manchester June 2020 Consultation Report' (26 June 2020)

Franchising Guidance The Bus Services Act 2017 Franchising Scheme Guidance, issued by the Secretary of State for Transport under s 123B(5) and other provisions of the TA 2000

Franchising Scheme The Greater Manchester Franchising Scheme for Buses 2021, made by the Mayor of Greater Manchester on 25 March 2021

GMCA Greater Manchester Combined Authority

GMCA Order Greater Manchester Combined Authority Order 2011 (SI 2011/908)

GMCA Functions

Order 2019 Greater Manchester Combined Authority (Functions and Amendment) Order 2019 (SI 2019/793)

Grant Thornton Grant Thornton UK LLP. Retained by the GMCA to carry out work relating to the franchising decision-making process.

The March 2021 Report The report presented to the GMCA by its Chief Executive on 23 March 2021 in accordance with s 123G of the TA 2000, 'Bus Reform: Consultation and the GMCA Response'

National Bus Strategy The DfT paper 'Bus Back Better - National Bus Strategy for England' (March 2021)

NPV Net Present Value (in simple terms, the NPV is a figure which provides a method for evaluating and comparing capital projects by reference to cash flows spread over time. The higher the NPV, the more profitable the project and the more attractive it is)

PSV Public service vehicle

The Scheme The Bus Franchising Scheme contained in Appendix 1 to the Decision Notice signed by the Mayor of Greater Manchester on 25 March 2021, 'Bus Reform - Bus Franchising Scheme - Consideration of GMCA Response to Consultation'

Second Consultation

Report The TfGM report to the GMCA, 'Bus Franchising in Greater Manchester Second Consultation Report' (12 March 2021)

TA 1968 Transport Act 1968

TA 2000 Transport Act 2000

TfGM Transport for Greater Manchester

Provision of bus services and franchising: the statutory scheme

12.

Since 1986, bus services outside of Greater London, including in Greater Manchester, have been deregulated. This means that bus services are provided by commercial operators who, in competition with one another, decide their own routes, timetables, fares, ticket types and customer service provision and, accordingly, retain control over their revenue and profits.

13.

Certain local types of local authority, known as franchising authorities, were given powers to make bus franchising schemes under Part II of the TA 2000 as amended by the BSA 2017. In simple terms, under a franchising scheme, bus operators provide services under contract to the local transport authority (a term defined in s 108(4)). As a mayoral combined authority, the GMCA is a franchising authority under the TA 2000: s 123A(4)(a).

14.

Under the TA 2000, some decisions relating to franchising are for the GMCA to take. But others, including the decision whether or not to make a franchising scheme, are ones for the Mayor personally to take on behalf of the combined authority: s123G(1)(b) and s123G(4), TA 2000; Article 4 of, and Sch 1, [3(i)], to the GMCA Functions Order 2019.

15.

A franchising scheme is defined in s 123A(3) of the TA 2000 as one:

a.

under which the franchising authority (or authorities) identifies the local services (as defined in s 2 of the TA 1985, by virtue of s 162(3), TA 2000) that it considers appropriate to be provided in an area under local service contracts. These are contracts that comply with TA 2000, s 123K(1)-(2), under which (i) the authority grants to another person the exclusive right to operate the local services to which the contract relates; and (ii) the person undertakes to provide the local services on such terms as may be specified: s123A(5)-(10). A franchising authority or authorities may only enter into a local service contract with a person who is the holder of either a PSV operator's licence, or a community bus permit: TA 2000, s123K(2);

b.

by virtue of which those services may only be so provided in accordance with such contracts (subject to TA 2000, s123O); or by virtue of which service permits for other local services which have a stopping place in that area granted by the authority (subject to s123H(5)); and

c.

under which it identifies additional facilities that it considers appropriate to provide in that area (s123A(3)).

16.

In Greater Manchester, franchising would involve a move away from the current deregulated model to one in which TfGM, on behalf of the GMCA, would set routes, timetables and fares for a number of different franchises. Bus operators would then bid on a competitive basis for fixed term contracts to operate services under those franchises. In very general terms, bus companies view franchising as less financially advantageous.

17.

As Ms Demetriou QC made clear, the choice is not a binary one between franchising on the one hand, and the current deregulated bus market on the other. Another option is for there to be partnerships between local authorities and bus companies. There are different forms of possible partnerships but, in simple terms, as Ms Demetriou explained it, the premise is that bus companies cooperate together in partnership to produce a cohesive service, rather than one operator being appointed to run a particular franchise.

18.

The Claimants' position is not that the Defendants could not in principle choose franchising over a partnership model. Their complaint is that the way in which the GMCA came to recommend to the Mayor that he make the Proposed Franchising Scheme was unlawful and irrational, and hence that his Decision was unlawful.

19.

The TA 2000 provides that a franchising scheme may not be made unless the franchising authority has complied with the requirements in ss 123B to 123G of the Act: see s123A(2). The principal provisions for the purposes of these claims are ss 123B and 123D-H.

20.

To begin with, under s 123B, a franchising authority that proposes to make a franchising scheme must prepare an assessment of the proposed scheme. Section 123B(2) and (3) provide that:

“(2) The assessment must –

(a) describe the effects that the proposed scheme is likely to produce, and

(b) compare making the proposed scheme to one or more other courses of action.

(3) The assessment must also include consideration of –

(a) whether the proposed scheme would contribute to the implementation of –

(i) the authority's or authorities' policies under section 108(1)(a), and

(ii) other policies affecting local services that the authority or authorities have adopted and published,

(b) whether the proposed scheme would contribute to the implementation by neighbouring relevant local authorities of –

(i)

those authorities' policies under section 108(1)(a), and

(ii)

other policies affecting local services that those authorities have adopted and published,

(c) how the authority or authorities would make and operate the proposed scheme,

(d) whether the authority or authorities would be able to afford to make and operate the scheme,

(e) whether the proposed scheme would represent value for money, and

(f) the extent to which the authority or authorities are likely to be able to secure that local services are operated under local service contracts.”

21.

Ms Demetriou emphasised sub-paragraphs (d) and (e) in particular, and said they showed that there had to be a business case in support of franchising.

22.

In preparing such an assessment, the franchising authority must have regard to, but is not obliged to follow, the guidance issued by the Secretary of State under s 123B(5): see s123B(6), namely the Franchising Guidance. This notes at [1.39]-[1.40]:

“[1.39] The authority or authorities should conduct a detailed assessment of each of the shortlisted options to determine the benefits, impacts and costs, and further determine the extent to which each option would meet the objectives.

[1.40]. Section 123B of the Act sets out the factors which an authority or authorities must consider as part of its assessment of its proposed franchising scheme. The factors that the Act requires authorities to consider reflect, broadly, the Treasury five case business case model. The sections below set out guidance, presented under headings that correspond to the five case model, to help authorities meet their statutory obligations and develop a robust assessment.”

23.

The five cases are the strategic, economic, financial, commercial and management cases. Each case is designed to assess the following points:

a.

strategic case: whether, and the extent to which, the proposed franchising scheme would contribute to the implementation of their local transport plan policies and any other of their published and adopted policies that affect local bus services, for example an environmental policy;

b.

economic case: whether the proposed scheme would represent value for money;

c.

financial case: whether the authority would be able to afford to make and operate the proposed franchising scheme:

d.

commercial case: the extent to which the authority is likely to be able to secure that local services are operated under local service contracts;

e.

management case: how the authority would make and operate the proposed franchising scheme.

24.

The Franchising Guidance explains how the franchising authority should approach the five-case business model. It says at [1.24] that the analysis in the assessment should, as far as possible, be carried out in line with guidance provided by central Government, specifically in the Green and Aqua Books (these are publications issued by the Government addressing best practice for various assessment methodologies).

25.

I was taken through the Franchising Guidance in some detail. A particular point which was emphasised in relation to the economic case (at [1.44] et seq of the Guidance) is the requirement that franchising authorities test proposed options against the counterfactual of a 'do nothing' option. In fact, that is something of a misnomer, because what is required is for the authority to test options against a baseline position but also to take into account changes which might happen in the ordinary course of the current position:

"1.44 Section 123B requires authorities to consider, as part of their assessment, whether the proposed scheme would represent value for money.

1.45 The authority or authorities should consider the economic case in terms of impacts on wider society, both from the proposed franchising scheme and from the other options being considered. Authorities should assess the economic, social and environmental costs and benefits, rather than solely focussing on the transport impacts of the different options.

1.46 The options should be considered against a counterfactual - a realistic 'do nothing' scenario. The counterfactual should take account of any business as usual improvements or plans that the authority would put in place regardless of the proposed scheme, such as continuing to subsidise certain services. The counterfactual should also include any improvements or changes that operators in the area have planned, using appropriate forecasts where feasible - such as to fares or changes to services that are likely to increase or decrease passenger journeys. The possibility of market entry or exit should also be considered.

...

1.54 All significant assumptions used in the economic and financial cases should be documented as the assessment is developed - identifying the evidence on which they're based where possible.

1.55 Given the above, the authority or authorities should think carefully about the most suitable appraisal period for assessing the impacts of the options, and should explain its decision in the assessment documentation. The authority or authorities should also consider how best they can demonstrate the ongoing sustainability of the different options, bearing in mind the long-term implications of a decision to change the model of bus service delivery in an area. The assessment should indicate clearly whether there is anticipated to be any substantive change in outcomes in the years immediately following the end of the chosen appraisal period."

26.

The appraisal period is, in effect, the 'life span' of the option under consideration. In relation to the Defendants' choice of appraisal period of 30 years for the Proposed Franchising Scheme, and decision to maintain this period after the pandemic (criticised by the Claimants and addressed later), one point made by Ms Demetriou is that there are substantial upfront costs in relation to franchising, and therefore a shorter appraisal period has the potential to significantly alter the cost-benefit analysis of that option.

27.

If, after preparing an assessment under s123B, the authority wishes to proceed with the proposed scheme, it must obtain a report from an independent auditor on that assessment under s 123D. Section 123D(2) provides that:

"The auditor's report must state whether, in the opinion of the auditor -

(a) the information relied on by the authority or authorities in considering the matters referred to in section 123B(3)(d) or (e) is of sufficient quality,

(b) the analysis of that information in the assessment is of sufficient quality, and

(c) the authority or authorities had due regard to guidance issued under section 123B in preparing the assessment."

28.

The Franchising Guidance also addresses the role of the auditor in carrying out its audit of a franchising authority's assessment of a franchising scheme under the TA 2000.

29.

Paragraphs [1.77]-[1.87] of the Guidance (which the auditor must also have regard to, by virtue of s 123D(5) and(6)) provide that:

a.

the audit report must state whether, in the auditor's opinion (i) the information relied on by the authority in the assessment in relation to affordability and value for money is of sufficient quality (s123D(2)(a)); (ii) the analysis of the information in the assessment in relation to affordability and value for money is of sufficient quality (s123D(2)(b)); and (iii) the authority has had due regard to the Guidance in preparing the assessment (s123D(2)(c)).

b.

the auditor must consider the following criteria when assessing whether the information and analysis is of sufficient quality: (i) whether the information used comes from recognised sources; (ii) whether the information used is comprehensive or selectively supports the arguments in favour, or against, any particular option; (iii) whether the information used is relevant and up-to-date; (iv) whether the assumptions recorded as part of the assessment are supported by recognised sources; and (v) the mathematical and modelling accuracy of the analytical methods used to calculate the impacts of the options (Franchising Guidance, [1.85]).

30.

In addition, [1.74] of the Franchise Guidance provides that a franchising authority will need to gather robust information and data to inform the preparation of the above assessments.

31.

As Stagecoach put it in its Skeleton Argument at [3], these requirements are designed to ensure that a decision to introduce a bus franchising scheme is robust, firmly based on detailed evidence and can be demonstrated to provide value for money.

32.

If, after obtaining an auditor's report under s 123D, the franchising authority wishes to proceed with the proposed franchising scheme, it must consult on the proposed scheme in accordance with ss 123E and 123F.

33.

Section 123E(4) contains a list of persons and organisations which the authority must consult, eg, persons operating local services in the area to which the proposed scheme relates (s 123E(4)(a)), and persons representing their employees (s 123E(4)(c)).

34.

Section 123F(1) specifies the matters that a consultation document under s 123E(2)(a) relating to a proposed franchising scheme must include, such as: a description of the area to which the proposed scheme relates; a description of the local services that are proposed to be provided under local service contracts; and the date on which the scheme is proposed to be made.

35.

The franchising authority has a statutory duty to respond to the consultation. Section 123G(1) provides that:

“(1) A franchising authority or authorities that conduct a consultation under section 123E must publish a report setting out –

(a) the authority's or authorities' response to the consultation;

(b) the authority's or authorities' decision on whether to make a franchising scheme covering the whole or any part of their area or combined area.”

36.

Section 123H(1) provides:

“If the authority ... publishing a report under section 123G have decided to make a franchising scheme covering the whole or any part of their area or combined area, they must make the scheme, and publish it, at the same time as the report under section 123G.”

Chronology

37.

A Chronology is annexed to this judgment.

Factual background

38.

The factual background on which Stagecoach relies is set out in the first and second witness statements of Neil Micklethwaite, the Business Development Director of Stagecoach Group plc. Among his other roles, he was responsible for developing Stagecoach's response to GMCA's consultations on the Proposed Franchising Scheme.

39.

Rotala's evidence is contained in the witness statements of Simon Dunn, a director, and Elizabeth Pritchard of Backhouse Jones, its solicitors.

40.

On 30 June 2017, GMCA decided to use the powers given to it under the TA 2000 to prepare an assessment of a Proposed Franchising Scheme, and also agreed to delegate authority to the Chief Executive of TfGM (who is also the Chief Executive of the GMCA) to prepare the assessment on its behalf.

41.

Work was then carried out on the Assessment over the next two years. For the most part, this work was carried out by TfGM. Ernst & Young also contributed.

42.

On 28 June 2019, TfGM confirmed that it had completed the Assessment, entitled 'Bus Franchising in Greater Manchester Assessment' (the Assessment). This set out a strategic, economic, commercial, financial and management case, as well as a review and conclusion, in respect of the Proposed Franchising Scheme, and compared it with other alternative options, including the matters prescribed in s123B. It was accompanied by an Economic Case Supporting Paper. As I remarked during the hearing, the Assessment is extremely detailed. It runs to some 524 pages (excluding appendices and the like). It was presented to the GMCA in June 2019 and it recommended that the Proposed Franchising Scheme be adopted.

43.

That month the GMCA decided to instruct Grant Thornton as independent auditor to provide the statutory audit required by s 123D of the TA 2000.

44.

On 27 September 2019, TfGM confirmed that Grant Thornton had audited the Assessment and had reported on 26 September 2019.

45.

Grant Thornton provided two documents in particular: 'Independent Reasonable Assurance Report on Transport for Greater Manchester's (TfGM) assessment of a proposed franchising scheme' and 'Observations on Transport for Greater Manchester's (TfGM) assessment of a proposed franchising scheme'. Both documents were fairly short, of just a few pages. The first of these concluded:

"In our opinion, in all material respects:

the information relied on by TfGM in considering the matters referred to in section 123B(3)(d) of the Act (the affordability of the scheme) or section 123B(3)(e) of the Act (the value for money of the proposed scheme) is of sufficient quality

the analysis of that information in the Assessment is of sufficient quality

TfGM had due regard to the Guidance issued under section 123B of the Act in preparing the Assessment."

46.

In broad terms, the second document set out observations by the auditor on the Assessment where it felt that improvements could be made, but which were not sufficient to cause it not to certify the Assessment as complying with the TA 2000.

47.

Grant Thornton's documents were prepared according to an 'Implementation Plan' which it drew up in August 2019. This set out an organised and comprehensive approach to how it was going to review the Assessment.

48.

TfGM provided a response to some of Grant Thornton's observations in the second document.

49.

At a meeting on 7 October 2019, the GMCA agreed to proceed to a public consultation in accordance with the TA 2000. The consultation window for the First Consultation (in the event, as I shall explain, there were two consultations) ran from 14 October 2019 to 8 January 2020. There were over 8000 responses to the consultation: First Consultation Report, [2.1.5].

50.

In the early months of 2020, the world was hit by the COVID pandemic. In the UK the first lockdown effectively began around 16 March 2020, when the then Secretary of State for Health told the House of Commons that the Government was 'advising people against all unnecessary social contact with others and all unnecessary travel. We need people to start working from home if they possibly can.' (Hansard, 16 March 2020, col 697). A week later the Prime Minister made a televised broadcast telling people that they 'must stay at home'. Emergency primary and secondary legislation was enacted by Parliament to give effect to the lockdown and the associated restrictions on travel.

51.

In June 2020, TfGM published the First Consultation Report. This noted at [2.1.6] that the pandemic had resulted in:

"... widespread and significant disruption to the bus market in Greater Manchester and had the consequent effect of diverting GMCA's ... attention to matters more directly associated with managing that crisis."

52.

On 26 June 2020 a report entitled 'Bus Reform: Consultation Update' (to which the First Consultation Report was appended) was presented to the GMCA by its Chief Executive. Paragraph 2.2 reported:

"2.2 Since the lockdown started there has been a major reduction of bus passenger travel in Greater Manchester. Patronage across commercial services initially reduced by around 90% with corresponding reductions in revenue. It is expected that while patronage may start to increase in the short term, for example because of the opening of non-essential retail shops as of 15 June, patronage will continue to be impacted by the decrease in travel and the continuation of social distancing measures."

53.

Section 3 of this Report said:

"3. IMPACT OF COVID-19 OUTBREAK ON DECISION MAKING PROCESS

3.1 As noted above, the potential implications of COVID-19 on the local bus market were not taken into account in formulating the proposed bus franchising scheme, its assessment, the consultation or TfGM's report on the consultation responses.

3.2 Those potential implications are relevant to any decision on bus franchising because of the relevance of the changes to the bus market, in terms of changes to, and uncertainty about, patronage levels, attitude to travel, potential changes in the operation of bus services and the need for, and capacity to meet, any social distancing requirements.

3.3 Before any final decision on franchising may reasonably be taken, consideration needs to be given to the impacts COVID-19 may have on the bus market in Greater Manchester and the options considered in the assessment, how that impacts on the assessment, audit and consultation already undertaken and the potential need to reconsider some of that work before any final decision on a franchising scheme is made. The outcome of that work will determine if there is a need to repeat some or all of the process set out in the Act.

3.4 That being said, TfGM has finished reviewing the responses received to the consultation that has been conducted on the basis of the pre-COVID-19 position and has finalised its report on the same. The report is attached at Appendix 2 along with the proposed scheme (Appendix 5) and the reports prepared by Ipsos MORI (Appendices 3 and 4). In relation to the proposed scheme, members will note that the TfGM report proposed a series of modifications to the same, following the outcome of the consultation. These recommended modifications concerned removing dates in the proposed franchising scheme, (including the date upon which any proposed franchising scheme would be introduced) and the timing of any subsequent consultation about how well the scheme was working. In addition to this it was proposed that the services listed in Annex 1 of the proposed scheme would be updated to reflect service changes made by operators (which were made pre COVID-19) and that a new article 4.3 would also be included in the proposed scheme to specify the dates on which services may first start to operate. It is important to note that the proposed scheme and these modifications reflect the recommendations and outcome of the consultation and also the market in a pre-COVID 19 context. The proposed scheme may therefore be subject to further amendment as a result of the further report on the potential impact and effects of COVID-19 on the bus market by TfGM.

3.5 In the circumstances, members are requested to simply note the contents of the report, scheme and supporting documents at the current time. Final proofreading is taking place on the TfGM report and the final version will be circulated to Members in advance of this meeting along with a summary of any changes. The purpose of their publication at this stage is to draw the original consultation exercise to a conclusion as well as enabling members, stakeholders and the public to consider the results of the consultation in which they may have participated, albeit within a context that pre-dated the COVID-19 outbreak.

3.6 A further report will be submitted to members in due course which will consider the potential impact and effects of events of COVID-19 on the bus market and make recommendations about appropriate next steps in the circumstances.”

54.

This report therefore proposed (inter alia) that the GMCA note that a further report would be submitted to members in due course which would consider the potential impact and effects of COVID-19 on the bus market and make recommendations about appropriate next steps. A resolution to that effect was duly passed by the GMCA.

55.

In other words, following the consultation, the GMCA did not take a decision either in favour of, or against, recommending the Proposed Franchising Scheme to the Mayor. Instead, it resolved to obtain a further report on the question in light of the pandemic.

56.

In her submissions Ms Demetriou accepted that, but for the pandemic, it is unlikely her client's challenge to the Decision (at least) would have been brought. But she said that it was harder to imagine an event which could have more affected the transport market than COVID. Mr Micklethwaite expanded on these concerns in his evidence.

57.

Pursuant to this resolution, the GMCA asked TfGM to prepare a report to consider how the pandemic had affected the analysis and the key conclusions in the Assessment, as well as its recommendation that franchising was the best option for reforming the bus market in Greater Manchester.

58.

The report prepared by TfGM pursuant to this request, 'COVID-19 Impact on Bus Franchising Report' (the COVID Impact Report) was presented to the GMCA in November 2020. This stated at [1.1.4] that:

"The purpose of this report is to consider the potential impact and effects of COVID-19 on the bus market in Greater Manchester, the options considered in the Assessment and how COVID-19 may impact on the recommendation made in the Consultation Report that the Proposed Franchising Scheme would be the best option for reforming the bus market in Greater Manchester."

59.

The COVID Impact Report set out four different potential scenarios for travel in Greater Manchester in the light of the pandemic, expressed in terms of the pre-COVID levels of typical weekly numbers of bus trips, in the period to 2026. The Report said at [1.4.1.] that the purpose of the scenarios was to enable:

"1.4.1 ... the key conclusions of the Assessment to be tested by reference to such potential outcomes to see whether the uncertainty associated with COVID-19 may make a material difference to those conclusions."

60.

The scenarios were illustrated in Figure 1 of the COVID Impact Report at [1.4.2]. This showed an x-axis (ie, horizontal), with the right-hand end labelled 'Extent of changes in social and environmental attitudes'. There was also a y-axis (ie, vertical) labelled, 'Stronger COVID/ economic recovery' at the top. The four scenarios were then set out in the four quadrants formed by the axes, with Scenario 1 in the top left quadrant; Scenario 2 at top right; Scenario 3 at bottom left; and Scenario 4 at bottom right.

61.

The four scenarios and their labels/captions were as follows:

a.

Scenario 1 'Back towards normality':

"• Travel demand returns as government restrictions are lifted, but subsidy insufficient for full recovery on PT.

• Car travel increases slowly to reach new highs after five years, with growth focused on off-peak.

• Some reduced travel to work offset by increased leisure travel - mostly by car.

- Cycling surge during crisis proves mostly temporary.
- Pre-COVID transport policy challenges remain relevant: no change in government transport capex plans.”

b.

Scenario 2 ‘New travel demand’:

- “• Reduced overall travel volumes despite recovery.
- Increase in use of technology (esp. remote working) means some demand permanently lost.
- COVID-induced changes in social attitudes - especially in relation to clean air - cause pressure to reallocate highway space away from cars: eg some growth in cycling.
- PT demand exceeds pre-crisis after five years stimulated by regulatory / spending measures at central/local level.
- Shift in government transport capex to active travel and PT, especially bus.”

c.

Scenario 3 ‘Car travel dominant’:

- “• Continued slump in PT travel due to weak economy
- Government subsidy phased-out before restrictions lifted/reluctance to use PT remain causing patronage decline.
- Private car travel increases as a proportion of total travel, and exceeds pre-COVID levels after five years - less congestion in immediate post-crisis period/low fuel prices; no ‘green’ measures taken.
- Carbon crisis overtaken by economic crisis.
- Traffic congestion worse after five years.
- Fiscal stimulus - if affordable - focused on road-building.”

d.

Scenario 4 ‘Poorer and more local’:

- “• Continued slump in PT travel from more home-working, weak economy, and COVID-induced preference for active travel.
- Car-use remains reduced by weak economy and changes in lifestyle.
- COVID-induced changes in social attitudes - especially in relation to clean air - cause pressure to reallocate highway space away from cars: rapid growth in cycling.
- Fiscal stimulus - if affordable - focused on active travel and shoring-up bus.”

62.

The Report then considered how COVID-19 and each of the scenarios might affect the conclusions reached on the strategic, economic, commercial, financial and management cases in the Assessment regarding the Proposed Franchising Scheme. It concluded that ([9.11.4]-[9.11.8]):

“9.11.4 The case for change set out in the Assessment remains and the Franchising Scheme still offers a greater chance of achieving GMCA’s objectives for the bus network than the potential partnership option in Greater Manchester under the different Scenarios that could occur. The Proposed Franchising Scheme remains the only option that will enable Greater Manchester to get the full benefit of an integrated transport system. The Proposed Franchising Scheme also still offers more scope for introducing Phase 2 measures that would improve the service, and to do so with greater value for money than the partnership option.

9.11.5 The analysis in this report confirms that, on balance, the value for money of the Proposed Franchising Scheme is likely to be robust to the uncertainty created by COVID-19 in all reasonably likely Scenarios. The Proposed Franchising Scheme also remains preferable to the Partnership option as, on balance, the overall net benefits are likely to remain higher and more deliverable, particularly given the considerable uncertainty surrounding what, if any, partnership options are on offer.

9.11.6 As with Partnership, the commercial arrangements for implementing franchising are still thought to be appropriate but may show some changes, and the management of implementation for both options would be possible under the different Scenarios.

9.11.7 The specific risks identified in the risk register and quantified in the economic analysis have not changed a great deal. However, the overall shift in GMCA taking revenue risk in a situation where revenues could fail to recover to previous levels is significant. If revenues do not recover fully, as is the case in three of the four Scenarios, GMCA would be in the position of making difficult decisions to reduce services or offer more public support. In the most pessimistic Scenario, where patronage falls dramatically, it may be difficult to build it up again, and this could affect the affordability of the Proposed Franchising Scheme; GMCA would need to find further funding to support the same level of service. The Proposed Franchising Scheme has the level of flexibility required to adapt to changes in demand and reductions in patronage and mileage – and so maintain its affordability despite the challenges that the recovery from COVID-19 may bring.

9.11.8 Although certainty on the level of the value for money of the Proposed Franchising Scheme in the economic analysis is now lower, and under a Scenario that sees a dramatic fall in patronage the affordability of the Proposed Franchising Scheme would be under threat, there is nonetheless a strong case to implement the Proposed Franchising Scheme. The lack of any certain partnership option that could be relied upon to bring benefit to Greater Manchester means that this option would potentially offer very little more than the Do Minimum. If there is long-term damage to the bus network that affects the ability of people in Greater Manchester to travel, GMCA will need to consider how to intervene. Intervention would be more straightforward and better value for money if the Proposed Franchising Scheme had been implemented. Without intervention, the long-term recovery of Greater Manchester could be under threat, and the ability to make a greater impact on issues of congestion and air quality that affect the economy and people in Greater Manchester. Given the strength of the Strategic Case and the importance of the bus service to Greater Manchester, the recommendation is to implement the Proposed Franchising Scheme.”

63.

The GMCA asked Grant Thornton to prepare a review of the COVID Impact Report (the Assurance Review). This was sent to TfGM on 19 November 2020. As stated on the first page, its purpose was to provide the GMCA with independent assurance on the approach taken by TfGM in preparing the COVID Impact Report.

64.

In summary, Grant Thornton concluded that:

“• the approach taken in the COVID Impact Report in considering the affordability and value for money of the Proposed Franchising Scheme in light of the potential impact of COVID-19 is appropriate; and

• the information and analysis of that information as contained in the COVID Impact Report on the affordability and value for money of the Proposed Franchising Scheme is of sufficient quality for the purposes of the report recognising the uncertainty and difficulty in forecasting in the current environment and therefore the use of scenarios represents a sensible approach.”

65.

The Assurance Review did not purport to be a statutory audit pursuant to s 123D of the TA 2000. Grant Thornton stated:

“For the avoidance of doubt, our Report does not constitute a statutory audit under the Local Audit and Accountability Act 2014 nor is it either:

- an evaluation of the COVID Impact Report conducted in accordance with auditing standards issued by the Financial Reporting Council;
- an audit per the requirements of section 123D of the [TA 2000]; or
- based on any other formal guidance.”

66.

A key issue in the Claimants’ challenge is the legal question whether it was necessary for the COVID Impact Report to be audited per the provisions of the TA 2000, as the Assessment was.

67.

The COVID Impact Report and the Assurance Review were presented to the GMCA on 27 November 2020 as appendices to a report from the Chief Executive, ‘COVID-19 Impact on Bus Franchising Report and Consultation’. This stated:

“2.2 The purpose of the [COVID Impact] Report is to consider the potential impact and effects of COVID-19 on the bus market in Greater Manchester, the options considered in the Assessment and its conclusions and how COVID-19 may impact on the recommendations made in the Consultation Report that the Proposed Franchising Scheme would be the best option for reforming the bus market in Greater Manchester.

...

6.1 The [COVID Impact] Report is not a new assessment of the Proposed Franchising Scheme. Instead, it considers the extent to which the Assessment of the Proposed Franchising Scheme remains valid in the light of COVID-19 and the uncertainties associated with it. These are matters which those who were consulted previously had no opportunity to express a view on and on which it is recommended that they should now be given such opportunity.

6.2 Should the GMCA wish to proceed with the Proposed Franchising Scheme, therefore, it is recommended that the GMCA undertake a further consultation exercise. The purpose of the consultation would be to allow consultees to provide their views on the Assessment in the light of the [COVID Impact] Report across the five cases set out in the Assessment and on the Proposed Franchising Scheme itself in the light of it.

...

8.1 Members are asked to note that a further report will be made to the GMCA on the outcome of the consultation.

8.2 Following consideration of that report, in accordance with Section 123G of the Act the GMCA must publish a report setting out:

1. Its response to consultation on the Assessment; and
2. The Mayor's decision on whether or not to make the Proposed Franchising Scheme."

68.

The GMCA was asked to approve the publication of both appendices and to proceed with the Proposed Franchising Scheme by undertaking a second public consultation (the Second Consultation). This recommendation was approved, and a second consultation document was published, 'Doing buses differently - Have your say on the impact of COVID-19 on our proposals for the future of your buses'. This consultation document stated at p9 that:

"... the purpose of this consultation is to allow you to provide your views on the Assessment in the light of the Report across the five cases in the Assessment, on the Proposed Franchising Scheme, and on whether or not the Mayor should make such a scheme."

69.

The document summarised the contents of the COVID Impact Report and provided details of documents that were available containing further information. It also set out the reasons why the GMCA was asking for views given the uncertainties associated with COVID-19, and it addressed the question whether or not to proceed with the Proposed Franchising Scheme 'now', or whether it should be delayed (at [2.1.46]-[2.1.51]).

70.

It specifically asked consultees to respond to the question:

"Q10: Taking everything into account, do you have any comments on the conclusion that this is the right time to make a decision about whether or not to proceed with the Proposed Franchising Scheme?"

71.

The Second Consultation ran from 2 December 2020 to 29 January 2021 (Stagecoach was given a short extension to submit its response).

72.

On 21 January 2021 Rotala filed its Claim Form and Grounds of Challenge.

73.

On 15 February 2021, Stagecoach provided its response to the GMCA. This constituted a response paper and accompanying documents, namely: a business response to the 12 questions posed in the second consultation document; a separate legal paper prepared by Stagecoach's solicitors; an economic paper prepared by NERA Economic Consulting, advisers to Stagecoach; and other material.

74.

The flavour of Stagecoach's response is given by the following paragraphs of its response paper:

“1.1 As we have explained above, the impact of the pandemic has been fundamental and there is significant ongoing uncertainty arising from it. Even if a scenario-based approach might be appropriate in these circumstances, the approach that the GMCA has followed and the analysis it has conducted is unsound.

1.2 The approach that has been applied by TfGM in practice is both seriously flawed, and inconsistent with the rigour that is required under the Transport Act 2000 (the “TA 2000”). It is also contrary to the interests of the people of Greater Manchester who reasonably expect their taxes to be spent wisely and their transport system to be managed in a way that ensures it is fit for purpose.”

75.

On 16 February 2021, the Defendants filed their Summary Grounds of Resistance in response to Rotala’s claim.

76.

On 26 February 2021 Stagecoach filed its claim.

77.

On 15 March 2021 the Department for Transport published its National Bus Strategy for England, ‘Bus Back Better’ (the National Bus Strategy). Mr Micklethwaite said in his second witness statement that this favoured enhanced partnerships (established under the Bus Services Act 2017, and the key alternative considered in the Assessment). In simple terms, an enhanced partnership is an agreement between a local transport authority and local bus operators to work together to improve local bus services. They generally give bus operators a greater role in determining how such services are delivered than franchising does.

78.

Also on 15 March 2021, the Defendants filed their Summary Grounds of Defence in response to Stagecoach’s claim.

79.

Following the end of the Second Consultation, TfGM produced its Second Consultation Report. This was presented to the GMCA at a meeting on 23 March 2021 with other material, including GMCA’s response to ‘Bus Back Better’. The Second Consultation Report indicated that there had been over 4000 responses to the Second Consultation: [1.1.12].

80.

In accordance with the requirements of s 123G of the TA 2000, the GMCA had to prepare and publish a report setting out its response to the consultation it had conducted, and making recommendations. The Report from the GMCA/TfGM Chief Executive, ‘Bus Reform: Consultation and the GMCA Response’ (the March 2021 Report), was also presented to the GMCA on 23 March 2021. This Report considered both consultation, and the responses to them, and made recommendations for the consideration of the GMCA’s members.

81.

Paragraph 6.53 of this Report noted that Stagecoach continued to oppose franchising and that it had argued there were flaws with the process undertaken by GMCA in considering the impact of COVID-19. Stagecoach considered that it would be a mistake for the GMCA to press ahead with its Proposed Franchising Scheme at that time. The report also noted Stagecoach’s argument that:

“- GMCA’s original assessment cannot be relied on given the impact of the pandemic.

- GMCA has not done the detailed work necessary to form an informed view as to the performance of possible options for the bus market in the “new normal” post-pandemic but has attempted to “short cut” the process by doing only a light touch analysis which was not carried out according to the statutory requirements and guidance nor properly audited in accordance with those requirements.”

82.

So far as Rotala’s position was concerned, the Report noted at [6.53] that:

“Rotala continued to be strongly opposed to the introduction of the Proposed Franchising Scheme at this time. It considers that proceeding with franchising is unlawful and irrational. It considers in any event that now is the wrong time to make a decision on whether to proceed given the current situation and the long-term impact that it will have on the bus market.”

83.

On the legality of the proposed scheme, the Report said in Section 18:

“18.1 As set out in Appendix 1 a number of consultees, and in particular bus operators have raised issues in their responses to the consultation about the lawfulness and rationality of making a decision to implement the Proposed Franchising Scheme at this time and on the basis of the information available. They have in particular challenged the approach of the COVID-19 Impact Report, both that the GMCA should have begun the process again with a new Assessment and that the Scenario methodology as applied is insufficient for the task; questioned the quality and quantity of the information provided; disagreed with the length and timing of the consultation; and proposed that the level of uncertainty arising from the pandemic means that any decision should be delayed.

18.2 A summary of the incumbent operators’ responses is set out above and a more detailed response to the specific legal issues raised is dealt with in TfGM’s Second Consultation Report’ (Appendix 1).

18.3 In making any recommendation to the Mayor that he should make a franchising scheme Members need to be satisfied that the process followed is lawful, that the consultation process was fair and enabled respondents to consider all relevant issues and provide an intelligent response; that there is sufficient information to enable the authority and the Mayor to make such a decision; that they have balanced the issues set out in section 16.6.59 of Appendix 1; that they have had due regard to the matters set out in section 149 of the Equality Act 2010 (the Public Sector Equality Duty) with which they will be familiar and that it is reasonable to make a decision now. Members will note that each of these issues is addressed in Appendix 1.

18.4 In brief, in terms of the process followed officers are satisfied that the requirements of the legislation have been met in the preparation of the Assessment, the independent audit of that assessment, the first consultation on the Assessment and the second consultation on the conclusions of the Assessment in the light of COVID-19. The consultation process was carried out over a period of 20 weeks in total. The Assessment and all supporting papers were available and where additional information was requested it was provided where reasonably required. Full details are set out in section 16 of Appendix 1.

18.5 With regard to the timing of the decision members need to consider the points made by consultees about the reasonableness of making a decision having long term consequences both for the bus market, bus operators, the GMCA and the public as well as more immediate financial risks in a time of such uncertainty and prior to the publication of additional guidance from the DfT on how to plan in uncertain times and without waiting until an alternative partnership offer can be developed for

comparison. Bus operators in particular have commented that the decision should not be taken now as the data is out of date, it is not possible to know the impact of the pandemic on the bus market and they are unable to commit to a long term partnership arrangement at present. Members need to weigh these representations against the alternative view that now is the right time to make a decision as the proposed scheme will best meet the GMCA objectives, a decision will create certainty and support recovery while flexibility in its implementation will help mitigate risks.”

84.

Overall, the March 2021 Report concluded at [19.1] and [19.2]:

“19.1 In conclusion it is considered that when compared to the alternatives the Proposed Franchising Scheme is preferable; that it would contribute to the implementation of GMCA’s local transport plan policies made under the Act and other policies affecting local services that GMCA has adopted and published; that the GMCA can make and operate the scheme; that the proposed scheme represents value for money; and that the GMCA is likely to be able to secure that local services are operated under local service contracts.

19.2 Although it may have some detrimental effect on services entering Greater Manchester which GMCA would seek to mitigate as far as possible and is likely to interfere with enjoyment of their ‘possessions’ by bus operators it is nonetheless considered that on balance it is in the public interest to make the Proposed Franchising Scheme and that it should be progressed subject to a number of minor proposed amendments set out below.”

85.

At its meeting the GMCA voted to recommend to the Mayor that he make the Franchising Scheme set out in an appendix to the Report.

86.

The Mayor accepted this recommendation and made the Franchising Scheme on 25 March 2021. His reasons in his Decision Notice were as follows:

“I have read the report “Bus Reform: Consultation and the GMCA Response” and the report on the National Bus Strategy which were presented to the GMCA meeting on March 23rd 2021. I also listened to the discussion at that meeting at which the other members of the authority, with one dissent, recommended that I should make the proposed franchising scheme.

I have followed the progress of the proposed franchising scheme, which was the subject of an assessment prepared by TfGM in June 2019 and which has been the subject of two consultations, one starting later that year and one more recently in the light of COVID-19. The potential impacts and effects of COVID-19 introduce significant uncertainty about the future for bus services in Greater Manchester and one issue is whether or not I should make any decision now about whether the scheme should be made. I have considered the assessment, the COVID-19 Impact Report and the Appendices to “Bus Reform: Consultation and the GMCA Response” with that in mind. I note that the overwhelming response of the consultation was that the Scheme should now be made.

I am satisfied that the GMCA would be able to operate the scheme and that it would be likely to be able to secure that local bus services are operated under franchise contracts. Notwithstanding the uncertainty produced by COVID-19, I am satisfied that the GMCA would be able to afford to make and operate the scheme, in particular in the transitional period, given the potential mitigations available.

The scheme, if made, may well have some adverse impact on services running into Greater Manchester from outside, although the GMCA would do whatever it can to minimise any such impact. But making the scheme would contribute significantly to the implementation of the local transport plan for Greater Manchester, the Greater Manchester Transport Strategy 2040 and the Five Year Transport Delivery Plan, as well as the Greater Manchester Strategy and I am satisfied that it should provide value for money. I am satisfied that it will enable GMCA to meet the strategic objectives of the Vision for Bus more effectively including wider integration across the whole of the public transport network and moving towards simplified and integrated fares.

There is a pressing need to improve bus services in Greater Manchester in any event and to help recovery from COVID-19. Doing nothing is not a sensible option. There are arguments for delaying a decision in the hope of being in a position, for example, of less uncertainty and where operators may produce a new, improved partnership offer. I have considered what partnerships might provide. But I am satisfied that the proposed franchising scheme will enable a better bus service for passengers to be provided with more likely net benefits; that it will enable more steps to be taken to improve bus services and also to do so with better value for money, and that the scheme will contribute significantly more to achieving the results that the GMCA policies for Greater Manchester aim for. Having considered the arguments put forward and what it is said may be gained by not taking a decision now including receipt of further advice from the Government, I do not consider that further delay is justified in the circumstances. Making the scheme now will also provide a framework within which the GMCA, TfGM and operators can plan for the future.

Making the scheme will change the market for bus operators. They will have the opportunity to bid for franchise contracts. But it is likely that some may suffer a loss of goodwill and, if unsuccessful in bidding for franchise contracts, the depots and buses they have may also be of less value to them (although the GMCA plans to offer to buy the strategic depots at market value and to acquire suitable existing vehicles from operators at their residual value). I am well aware that the legislation does not entitle any operator to receive any compensation if it does suffer any loss. But I am satisfied, however, that there is a very strong public interest in making the scheme which fully justifies the potential adverse impacts on operators and that it should not impose an individual and disproportionate burden on any of them. Although there is inevitably significant uncertainty about the future, making the scheme now will help to achieve a far better bus service in Greater Manchester, something which will assist the City region to recover from COVID-19 in the years to come and to achieve a better, greener future for all of its residents and workers; and that there would be particularly positive impacts for certain groups as identified in the reports referred to."

87.

On 24 March 2021 His Honour Judge Davies (as he then was) sitting as a High Court judge refused Rotala's application for interim relief and gave directions for the service of Amended Grounds of Claim and Detailed Grounds of Resistance, and for the filing of evidence, and he also ordered this rolled-up hearing.

88.

On 30 March 2021 the GMCA published its report in accordance with s 123G(1) of the TA 2000, and the Mayor made and published the Greater Manchester Franchising Scheme for Buses 2021.

89.

The Scheme was due to come into force in different areas of Greater Manchester between 2023 and 2025, however following the May 2021 local elections the Mayor announced that he was going to engage in talks with the Government about bringing forward the implementation of the Scheme.

The parties' cases in outline

90.

Although Stagecoach and Rotala put their cases in different ways, there was a significant degree of overlap. In essence, they both challenge as unlawful the process by which the GMCA came to recommend to the Mayor that he make the Proposed Franchising Scheme, and hence that his decision of 25 March 2021 in accordance with that recommendation was also unlawful. They each adopted points in the other Claimant's case so far as relevant to their own case.

91.

Their submissions impugning the Mayor's Decision to make the Franchising Scheme fall broadly into two groups: (a) arguments that the decision was unlawful, in other words, the way it was taken did not comply with the mandatory requirements of the TA 2000; and (b) arguments that the GMCA's recommendation to make the Scheme, and the Mayor's decision, were irrational because of alleged flaws in methodology by TfGM and the GMCA, in particular, how the process was conducted from the point of the COVID Impact Report onwards, as well as in other ways.

92.

Both of the Claimants accepted that some of their arguments on unlawfulness blended into their arguments into irrationality and that there was not always a hard-edged distinction between the two heads of challenge. For example, they argued that the way some issues had been approached were both irrational, and also rendered the decision-making process incompatible with the mandatory statutory scheme. I think that acceptance was right.

93.

They seek by way of relief orders quashing the GMCA's recommendation to the Mayor, and his subsequent decision to make the Franchising Scheme.

94.

The Defendants resist the claims. They argue, in summary, that the decision-making process was lawful. The statutory requirements were fulfilled. The conclusions which they reached on complicated matters of socio-economic and transport policy during the decision-making process were ones which were reasonably open to them, and especially so in light of the unprecedented uncertainties for the bus transport market caused by the pandemic.

Stagecoach

95.

As formulated in its Amended Grounds of Challenge and Skeleton Argument, and as presented by Ms Demetriou orally, Stagecoach's case can be summarised as follows:

a.

The TA 2000 requires that a decision to approve a franchising scheme be based on a robust evidence base, and that compliance with this requirement must be supported by an independent audit to the standard prescribed by the TA 2000 before being put to public consultation for informed comment from stakeholders (including affected local authorities, operators, residents and commuters). It is

clear from the scheme of the TA 2000 that this is not intended to be a formalistic, box-ticking, exercise.

b.

Stagecoach does not argue that the pandemic meant that the GMCA could not proceed with the Proposed Franchising Scheme. Rather, its case is that, if the GMCA considered it appropriate to proceed with the scheme amidst the uncertainty created by the pandemic, the TA 2000 required it to produce an assessment and audit that were based on up-to-date data and forecasts which met the prescribed standards set out in the Act, and to consult on those reports. The GMCA acted unlawfully by failing to do so, and the steps which the GMCA did take did not provide a lawful basis for making a final decision. In particular, Stagecoach asserts that:

(1)

Rather than updating the Assessment in light of the changed developments, TfGM prepared an ad hoc report to 'consider the potential impact and effects of COVID-19 on the bus market and the Assessment and ... make recommendations about appropriate next steps' (Defendants' DGR, [3]). The product of this exercise was the COVID Impact Report. It is common ground that the COVID Impact Report was not a statutory assessment pursuant to the TA 2000; the Defendants case is that it did not have to as it 'was not an updated assessment' (DGR, [47]). (In fact, Mr Howell said this was not common ground: see Defendants' Skeleton Argument at [68]: 'Stagecoach's assertions (in Sskel [5(2)] that "it is common ground that the Covid Impact Report did not meet the standards prescribed by the TA 2000", and (in Sskel [33]) that the Defendants have admitted that, are not correct.)

(2)

It is also common ground that the COVID Impact Report was not the subject of an independent audit to the standard prescribed by the TA 2000. Again, the Defendants' case is that it did not have to be, because it could continue to rely on the statutory Grant Thornton report it had obtained pre-pandemic in respect of the Original Assessment This rests on the 'formalistic' assertion that, once ticked, the audit requirement box 'is ticked for all time', no matter what the change of circumstances unless the local authority as 'a matter of judgement' considers that this should be revisited. Stagecoach argues that this approach was flawed.

(3)

Instead, Grant Thornton received limited instructions from TfGM to 'review' the COVID Impact Report, but was explicitly told not to 'audit the COVID Impact Report on the same terms as its original audit or the Assessment'. The outcome was a five-page letter from Grant Thornton dated 19 November 2020 (the Assurance Review), which stated on the first page that '[f]or the avoidance of doubt, this Report has not been prepared in accordance with section 123D of the Act', a point which is repeated on the following page, along with an explanation that it was also not 'an evaluation of the COVID Impact Report conducted in accordance with auditing standards issued by the Financial Reporting Council' or "based on any other formal guidance'. The Assurance Review also explains that the auditors had not undertaken any review or audit of the models relied upon in the COVID Impact Report, as '[t]he purpose of our review was not to undertake an audit of any financial or other supporting models since the audit of the Assessment'.

(4)

The COVID Impact Report concluded that the Proposed Franchising Scheme ought to proceed, and the GMCA decided on 27 November 2020 to proceed with the Second Consultation on this basis. After

the conclusion of the Second Consultation, the GMCA recommended on 23 March 2021 that the Proposed Franchising Scheme be approved. The Mayor did so on 25 March 2021.

96.

Stagecoach says that the consequence is that the Defendants failed to carry out an updated assessment to the prescribed standard (including failing to obtain an independent auditor's report on that updated assessment) before consulting on (and ultimately approving) the proposal to proceed with the Proposed Franchising Scheme.

97.

Stagecoach therefore crystallises its case into the following three grounds of challenge:

a.

Ground 1: The Defendants committed an error of law by proceeding with (and ultimately approving) the Proposed Franchising Scheme in circumstances where they failed to comply with the statutory requirements of the TA 2000.

b.

Ground 2: Alternatively, the Defendants acted irrationally in proceeding with (and ultimately approving) the Proposed Franchising Scheme on the basis of the COVID Impact Report and Grant Thornton's Assurance Review. In conducting an analysis of its irrationality challenge, Stagecoach argues that the Franchising Scheme will interfere with its rights under Article 1 of Protocol 1 to the European Convention on Human Rights and the Court should therefore apply a heightened standard of scrutiny: Skeleton Argument, [68].

c.

Ground 3: The Second Consultation was not conducted lawfully as neither Stagecoach, nor any other consultee, was provided with sufficient information so as to permit them to consider and respond intelligently to the questions raised by that consultation.

98.

Orally, Ms Demetrious encapsulated Stagecoach's case as follows. She said the failure to audit the COVID Impact Report as she contended it should have was 'front and centre' of Stagecoach's case and that the effect of the error could be framed in three ways:

"So we say, first of all, it amounts to an illegality, so a failure to comply with the Act, because essentially the position that the defendants adopted circumvents the requirements of the Act. So that's the first way in which we put our case.

Secondly, it was an irrational decision, because in the circumstances, in the circumstances where there had been this dramatic turn of events, it was irrational of the GMCA to carry out its further work -- its further COVID work to a standard that fell below the statutory standard.

And we say, thirdly, there was a flaw -- it led to a flaw in the consultation, because the lack of rigour in the COVID report meant that consultees, including my client, were unable meaningfully to comment on the proposal."

99.

One of the exhibits to Mr Micklethwaite's second witness statement is a letter dated 7 May 2021 from Daniel Hanson of NERA Economic Consulting, who assisted Stagecoach with its representations during the Second Consultation. The letter contained Mr Hanson's opinion about why the Second

Consultation Report did not resolve points which NERA had made during the consultation. There was also a further letter and enclosures dated 25 May 2021 served shortly before the hearing.

100.

The Defendants objected to this material being relied upon by way of expert evidence, and said that in any event it did not take Stagecoach's case any further. At the hearing, Ms Demetriou said that she was not relying upon the letters as expert evidence but was making the points contained within them by way of submission, which she was entitled to do. She said they were there and could be used by the Court to aid its understanding of technical issues and evidence. This approach was further explained in a post-hearing written submission from Stagecoach, to which the Defendants replied. I have approached this material on the basis explained by Ms Demetriou.

Rotala

101.

The general background to Stagecoach's submissions, set out above, also forms the background to Rotala's submissions and I do not need to repeat it.

102.

Rotala's case as formulated in its Amended Grounds of Challenge and Skeleton Argument, and as presented orally by Mr Singer QC, is:

a.

Ground 1: the GMCA's decision to continue the existing bus reform consultation process on or after 27 November 2020 was unlawful. It is clear from Section 123A of the TA 2000 that the stages in ss 123B-G must be followed if a franchising scheme is to be made/not made. These requirements are linear, in the sense that they are a process that must be carried out in the order they appear in the statutory scheme. It is Rotala's primary position that the June 2020 reports were, or ought to have been, 's 123G reports' marking the end of the statutory process, so that the decision to hold the Second Consultation in November 2020 was unlawful. Neither the GMCA nor the Mayor has identified any section of the TA 2000, nor any authority, which permitted a second consultation in the circumstances which arose in this case.

b.

Ground 2: the decision to undertake the Second Consultation during the COVID-19 pandemic was irrational or manifestly unreasonable. In June 2020 GMCA decided to pause the statutory process, as confirmed by its solicitors in August 2020. For the reasons given in relation to Ground 1, Rotala submits that the only lawful decision open to the GMCA to take in late November 2020 was for it to recommence the statutory process. In the alternative, and by this ground, Rotala's position is that the decision on 27th November 2020 to recommence/reconsult was irrational. The COVID crisis had not abated as at late November 2020, so its potential impact on the Greater Manchester bus market could not be said to be clearer or settled between June and November 2020.

c.

Ground 3: the decisions to recommend the making of a franchising scheme and the making of the same were unlawful/irrational. Rotala's response to the COVID-19 Impact Report in the Second Consultation (and the supporting reports prepared by their expert accountants BDO and economic consultants Oxera) identified a number of issues with the analysis in that Report. In summary, their effect was to inform GMCA/TfGM that the scenarios were not based on accurate, up-to-date data; that the calculations had not been worked through in such a way as to take account of all matters relevant

to the scenarios; that the methodology used by TfGM was defective in a number of ways, and that the Grant Thornton non-statutory assurance report, in reality, provided no assurance, and that the use of the terms 'appropriate' and 'of sufficient quality' was of little value without those terms being defined and without Grant Thornton having been given any criteria to which to work. Having been put on notice of all those shortcomings, it was not lawful or rational for GMCA to recommend to the Mayor that he go ahead with the franchising scheme, nor for the Mayor to do so, without either: (i) all these shortcomings being addressed and the COVID-19 Impact Report being re-considered and audited in such a way as to comply with s 123D of the TA 2000; or (ii) waiting until the COVID-19 pandemic had ended; or (c) being satisfied that each of those criticisms was invalid. Neither GMCA, nor the Mayor, could be rationally satisfied that the criticisms made were invalid. The only further document which the GMCA and the Mayor received thereafter in relation to the impact of COVID-19 and the matters raised by Rotala in the consultation, was the Second Consultation Report in March 2021, which was not capable of answering the points made by Rotala during the consultation.

103.

Mr Singer helpfully orally encapsulated his case as follows:

"... we firstly say that the decision on 27 November to carry out a second consultation was unlawful and/or irrational. That the linear and mandatory statutory scheme had reached the stage where the consultation had been conducted, and so, the lawful options were to make -- in November, were to make a decision to franchise or not, or to decide to restart the process. And the defendants took a different, and we say, therefore, unlawful decision.

And in the alternative, we say no rational authority would have decided to reconsult in the middle of the ongoing pandemic, where the situation remained effectively as unclear as it was in June when they paused the process. And that further that the decision to reconsult was made on the basis of a statutory non-compliant assurance report from Grant Thornton, which lacked any actual basis for assurance, and that is unlawful or irrational. But in addition, that the decision to restart effectively disabled the authority from considering other courses of action as required by section 123B of the Act, and as they have done in the assessment.

Then in the further alternative, the decisions taken in March were unlawful or irrational because the timing of those decisions, in the middle of the ongoing pandemic, was not sensible, because no rational authority would conclude that the information before them, notably the second Grant Thornton report and the scenario approach as used, was sufficiently robust to allow a decision to be taken in March on the basis that the statutory tests were made out as to affordability and value for money."

104.

There was, at one stage, an application by Rotala to rely on expert evidence in the form of two reports, one from Steven Law of accountants BDO and one from Andrew Meaney of Oxera Consulting (Rotala's economic consultants), but in the event Mr Singer did not pursue the application. He was content to make his case on the basis of the material that was submitted by Rotala and its consultants during the consultation process (and especially the Second Consultation), which he considered were sufficient to make his client's case.

The Claimants' grounds of challenge distilled

105.

The Claimants' grounds of challenge as set out in their Amended Grounds and Skeleton Arguments have a degree of overlap, but can be broken down as follows. I have taken this analysis (with some small amendments) from the Defendants' Skeleton Argument, which I consider fairly breaks down the Claimants' areas of challenge, and I propose to deal with these points in order in the 'Discussion' section of this judgment.

106.

In the following, 'S' and numbers in square brackets refers to Stagecoach's Amended Grounds of Challenge, and 'R' refers to Rotala's Amended Grounds of Challenge. I also refer to their Skeleton Arguments where necessary.

(i) The Claimants' submissions on unlawfulness

107.

The Claimants' submissions on unlawfulness are:

a.

the TfGM First Consultation Report 'was a report in accordance with s 123G(1)(a)' and thus marked the end of the statutory process (R, [31]);

b.

once a consultation period under s 123E had ended, no further consultation was possible and therefore the franchising authority GMCA had to publish its report under s 123G(1)(a) without further consultation (R, [33]);

c.

consultees were not provided with sufficient information to permit them to respond intelligently to the scenarios that had been used 'for the purposes of modelling the impact of COVID-19' and 'the mechanism by which these 'scenarios' had been translated into projections of the expected impact' (S, [56]);

d.

the Defendants failed to comply with the statutory requirements of the TA 2000 and the Franchising Guidance (S, Ground 1);

e.

the Grant Thornton Assurance Review did not meet the requirements for an audit under s 123D (S [27], [31], [32] and [40]) and the Defendants could not be satisfied that they had received an auditor's report that complied with s 123D given the COVID Impact Report (R, [51]);

(ii) The Claimants' submissions on irrationality

108.

The Claimants' submissions on irrationality are:

a.

the effects of COVID-19 on the objectives of the bus network were not properly considered (S, [37]);

b.

it was irrational for the GMCA to 'update' the Assessment using an analysis which fell short of the standards of that Assessment (which were required by statute) (S, [49]);

c.

it was irrational to rely on the COVID Impact Report as part of the decision along with the Second Consultation Report to recommend the Franchising Scheme to the Mayor (S, [50] and S, Ground 1);

d.

an irrational model was used (S, [51]);

e.

the Second Consultation during the COVID-19 pandemic was irrational/manifestly unreasonable (R, Ground 2);

f.

TfGM's response in the Second Consultation Report to comments in a report by Oxera was inadequate or failed to take them properly into account (R, [60]-[65]);

g.

the Defendants were not entitled to place any weight on Grant Thornton's Assurance Review and accordingly could not satisfy themselves that the statutory criteria set out in s 123B were met or properly assessed in the Original Assessment when read in conjunction with the COVID Impact Report (R, [51]-[54]);

h.

the timing of the decision was flawed in that (i) the timing of the decision making was not sensible given the uncertainties (R, [65]-[66]); (ii) the Defendants have disabled themselves from considering the matters in s 123B(2)(b) of the TA 2000; (iii) the Defendants failed to take into account Rotala's answers to Q2 and Q10 in the Second Consultation (R, [67]-[68]);

i.

it was irrational not to delay the decision for further discussions with operators in light of the National Bus Strategy (S, [52]).

(iii) The Defendants' response

109.

In response, Mr Howell submitted in summary that:

a.

There was no unlawfulness in the way the Decision was taken. The statutory process in the TA 2000 was followed. A statutory assessment was obtained which was audited in accordance with the statutory provisions. A lawful consultation (the First Consultation) was then carried out, and responded to, as required by the TA 2000. The GMCA was not required, in June 2020, to report or take a decision under s 123G, and it did not do so. The GMCA acted lawfully (and rationally) in obtaining the COVID Impact Report and then carrying out a Second Consultation. It was not required to start the statutory process again from the beginning. The COVID Impact Report was a non-statutory report and did not need to comply with the TA 2000, nor did the Assurance Review have to comply with s 123D (as it avowedly did not).

b.

The Defendants did not act irrationally during any stage of the decision-making process. The methodology it adopted and the conclusions it reached were ones which were reasonably open to it. The criticisms made by the Claimants are largely repeats of argument they made during the consultations which were properly considered and responded to by TfGM and accepted by the GMCA.

No proper basis has been advanced for the contention that any of the conclusions reached by TfGM and the GMCA were ones which were not reasonably open to them. The GMCA and the Mayor were reasonably entitled to recommend, and then make, the Franchising Scheme rather than delay it, despite the uncertainties caused by the pandemic. The robustness of the recommendations which had been reached following the (pre-pandemic) Assessment in 2019 had been appropriately tested in the COVID Impact Report; Grant Thornton had approved it; and there had then been a full Second Consultation. Consultees had been given full information as part of that consultation and had been able to make informed representations about (inter alia) whether a franchising scheme was the right option and whether the decision ought to be delayed in light of uncertainties for the bus market caused by the pandemic. Criticisms made by (in particular) the Claimants and their economic consultants had been fully considered by the GMCA and reasonable conclusions reached in relation to them.

Discussion

110.

The parties' lengthy written pleadings and oral submissions over three days contained a great many points on a very complex area. Long goblets of the evidence were read out to me and minutely picked over. At one point we found ourselves discussing the cleanliness of Manchester's buses. I do not say that by way of criticism, but merely to illustrate the level of detail which was gone into.

111.

In the discussion which follows I propose to deal with that which I think is necessary to fairly address the parties' cases. The fact that a particular point or document is not addressed does not mean that it has been overlooked. I have had the advantage of full transcripts of the hearing, and I have consulted them in the course of writing this judgment.

Introduction: standard of review

112.

Stagecoach in particular submitted that in considering the Claimants' arguments on irrationality, I should apply a standard of 'heightened scrutiny' (Skeleton Argument, [68]). It cited Lord Sumption's judgment in *Bank Mellat v HM Treasury* [2014] AC 700, [20], where he said a court considering the question of proportionality in relation to a Convention right should conduct:

"... an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community"

113.

Stagecoach argued that heightened scrutiny is required because the Defendants' decision to introduce the Franchising Scheme will interfere with the Claimants' right under Article 1 Protocol 1 of the European Convention on Human Rights (A1P1) to peaceful enjoyment of their possessions. In particular, the Franchising Scheme would deprive operators, other than the franchisee, of the goodwill they have generated in their businesses in Greater Manchester and would also interfere with their physical assets, such as depots and fleets: cf *R (United Trade Action Group Limited and others) v Transport for London* [2021] EWHC 72 (Admin), at [202] - [205]. Goodwill is a 'possession' within the meaning of A1P1: *Breyer (and others) v Department for Energy and Climate Change* [2015] EWCA Civ

[408](#); Van Marle and others v The Netherlands (1986) 8 EHRR 483. Stagecoach said it understood this last point to be common ground, as TfGM acknowledged in the First Consultation Report at [13.6.61], where it said that the Proposed Franchising Scheme would, ‘effectively deprive any operator of any goodwill it has built up in respect of such services in Greater Manchester if it is unable to provide them under its brand.’

114.

In response, the Defendants argued (Skeleton Argument, [77]-[79]) that there was no claim that the Franchising Scheme involves any breach of either Claimant’s rights under A1P1 and that, accordingly, the relevant question is not one about its proportionality. It is whether the decision, or some part of the reasoning in support of it, was not something any reasonable decision-maker could have adopted in the circumstances.

115.

The Defendants said that the level of scrutiny to be applied to a decision depends on the nature of the interference and the subject matter impugned. Here:

a.

The Franchising Scheme is a regulatory intervention which does not affect the ownership or control of the Claimants’ physical assets. They remain free to use their depots and fleet; they may compete for, and be awarded, a local service contract or contracts when the Scheme comes into operation in which they may be used (although their use for their current business will then be curtailed); they may sell their strategic depots at market price to the franchising authority and receive an agreed upon price for their suitable existing fleet (which would be put into a residual value mechanism controlled by the authority); or they may put their depots and fleet to other uses or otherwise dispose of them. There is no evidence of the amount of any goodwill that either Claimant might or will lose.

b.

The Franchising Scheme is a regulatory change affecting the bus market in Greater Manchester. This is the type of general measure in the public interest in respect of which a State has a wide margin of appreciation. The decision to make the Franchising Scheme involved a multi-faceted evaluative judgment about the future regulation of the bus market in Greater Manchester, and required assessments of social, environmental, economic, organisational and financial matters, in circumstances of greater uncertainty than normal (because of the pandemic). Both the Decision, and the reasons for it, involve matters in relation to which the Court has no particular institutional competence, and they do not involve questions in respect of which there is normally only one ‘right’ answer. Even had the legal question been one of proportionality in respect of such a regulatory measure, the Court should accord a wide margin of appreciation both with regard to the existence of a problem of public concern warranting measures of control and as to the choice of the detailed rules for the implementation of such measures’ and will respect the legislator’s judgment on what is in the general interest unless it is ‘manifestly without reasonable foundation’: Mellacher v Austria (1990) 12 EHRR 391, [45].

116.

In those circumstances, the Defendants say there is no requirement for ‘heightened scrutiny’ of the Decision or the decision-making process which led to it. On the contrary, they say that they should be afforded a wide margin of appreciation in relation to the conclusions that were reached.

117.

I broadly agree with the Defendants’ approach, for the following reasons.

118.

Bank Mellat authoritatively sets out the test for proportionality. The issue of how that test is to be applied in different contexts, and in particular how it relates to the Strasbourg concept of an impugned measure being ‘manifestly without reasonable foundation’, is a difficult question about which much has been written in recent years. If I may be allowed to say (diffidently), I referred to some of the case law and the contrasting approaches in *R (Harvey) v London Borough of Haringey* [2019] ICR 1059, [110]-[125]. More recently, Lord Reed discussed this topic with far greater authority and clarity in *R (SC) v Works and Pensions Secretary* [2021] 3 WLR 428, [143]-[162].

119.

To begin with a preliminary point, the concept of a margin of appreciation arises because of the need for an international court, charged with the task of determining whether a domestic measure has infringed an individual's Convention rights in a particular case, to have appropriate respect for the choice which a democratic State has made with respect to the measure in question, having regard to its own national conditions, and which it, rather than the European Court of Human Rights, is best placed to assess. Where the context is social or economic policy then States have a wide margin of appreciation: see eg, *Stec v United Kingdom* (2006) 43 EHRR 47, [52].

120.

That said, at the national level, there is a broadly analogous principle that in some circumstances it is appropriate for the courts to recognise that there are areas of judgement within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention: *R v Director of Public Prosecutions ex parte Kebilene* [2000] 2 AC 326, 381. In the domestic context, the term ‘margin of discretion’ rather than ‘margin of appreciation’ is to be preferred. In *In Re Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016, [44], Lord Mance said the latter term does not apply at the national level. Lord Reed made a similar point in *SC*, [143]. Nevertheless, he went on to point out, as I have said, that domestic courts have generally endeavoured to apply an analogous approach to that of the European court.

121.

In *Bank Mellat* Lord Sumption was not referring to the intensity of review when he referred to ‘an exacting analysis of the factual case advanced’, as the Claimants suggested. He was expounding a general test for determining whether an impugned measure disproportionately interferes with a Convention right. That is a test which always requires a close scrutiny of the facts, and that is what Lord Sumption was referring to. The mere fact that a Convention right may be engaged by a decision or legislative measure does not mean that ‘heightened scrutiny’ (in the sense of affording reduced, or little, weight or deference to the decision maker’s judgment) has to be applied. The level of the intensity of review in applying the proportionality test will vary according to the subject matter, as the discussion in *SC* shows. In that case, Lord Reed said at [161]:

“The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues.”

122.

I am prepared to assume that the Claimants’ A1P1 rights are potentially engaged by the Decision. That said, it is right to note that their arguments about loss of goodwill are largely speculative. I agree with the Defendants’ characterisation of the Decision as involving a ‘broad multi-factorial, policy-

laden, evaluative judgment about the future regulation of the bus market' in Greater Manchester (Skeleton Argument, [78(2)]). As the discussion in this judgment shows, the decision whether to recommend and then make the Franchising Scheme was a complex socio-economic question in relation to which many different views were expressed. That decision therefore falls within one of those areas in relation to which the Court should give substantial weight - in other words, afford a wide margin of discretion - on democratic grounds, and the grounds of institutional competence - to the judgements of the democratically accountable bodies responsible for the Decision (whilst obviously retaining the ultimate responsibility for deciding whether that judgment was lawful).

123.

Hence, no heightened standard of scrutiny is required. I note that Lang J in *United Trade Action Group Limited* - where A1P1 was explicitly engaged - did not apply a standard of heightened scrutiny. I also note that apart from their general submission on this point, the Claimants cast their detailed arguments in terms of conventional *Wednesbury* irrationality and did not emphasise any particular issue where they said a special heightened standard of review was called for, and nor did they advance their arguments by reference to the Convention or proportionality.

Submissions on unlawfulness

(i) the TfGM First Consultation Report 'was a report in accordance with s 123G(1)(a)' and thus marked the end of the statutory process (R, [31])

124.

I begin with a preliminary submission by Rotala (at least in writing; it was not really pursued orally by Mr Singer) that the GMCA and TfGM are in reality one and the same. In its Skeleton Argument it refers in a number of places to reports by 'GMCA/TfGM' and it argues (eg at [21]) that 'any suggestion that the two bodies are separate in a real sense is wholly misconceived'. I do not agree. Ms Demetriou also did not join with Rotala on this point.

125.

Whilst the Chief Executive of GMCA was (and, as far as I know, still is) also the Chief Executive of TfGM, and as Ms Pritchard said in her witness statement there are other shared staff, the two are legally distinct entities, with different functions. It is important to recognise this distinction so that the relevant decision-making roles are properly understood.

126.

TfGM was established by Article 9 of the GMCA Order:

"9. (1) In this article 'the Executive' means the Greater Manchester Passenger Transport Executive established by the South East Lancashire and North East Cheshire Passenger Transport Area (Designation) Order 1969.

(2) The Executive is to be an executive body of the GMCA for the purposes of Part 5 of the Local Transport Act 2008 and Part 6 of the 2009 Act and is to be known as 'Transport for Greater Manchester'.

(3) In the application of section 101 of the Local Government Act 1972 (arrangements for the discharge of functions) to the GMCA the Executive is to be treated as if it were an officer of the GMCA.

(4) Where arrangements are in force for the discharge of functions of a constituent council by the GMCA by virtue of -

(a) section 101(1)(b) of the Local Government Act 1972; or

(b) section 19 of the Local Government Act 2000 and regulation 7 of the Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2000,

the Executive is to be treated as if it were an officer of the GMCA for the purposes of section 101 of the Act of 1972 and for the purposes of those Regulations.

(5) The Executive has power to discharge any function which is the subject of arrangements entered into with it by virtue of paragraph (3) or (4).”

127.

The GMCA is the franchising authority for the purposes of the TA 2000. It had the duty to assess and audit the Proposed Franchising Scheme under ss 123B-D. The requirements of Part II of the TA 2000 in connection with franchising obviously required a large quantity of specialist technical work, and GMCA delegated certain functions to TfGM, which then carried out that work under the direction of GMCA.

128.

However, that does not and did not make TfGM and the GMCA the same entity. As I explained earlier, the work carried out by TfGM was presented to the GMCA (generally as appendices to reports prepared by its Chief Executive), along with recommendations. The matter was then voted upon by the members of the GMCA as the democratically elected body.

129.

In the same way, it is important to distinguish the Mayor from the GMCA. Whilst he is a member of the GMCA, he is a legally distinct entity and, by s 123G(4), he was responsible personally for taking the ultimate decision whether to make the Franchising Scheme which the GMCA had recommended.

130.

I turn now to the status of the First Consultation Report and the other reports from June 2020.

131.

In its Amended Statement of Facts and Grounds, Rotala focussed on the First Consultation Report, which it said ‘clearly’ marked the end of the statutory process and thus that it was a report in accordance with s 123G(1)(a) of the Act [at 31]. It relied on a statement to that effect in [3.5] of ‘Bus Reform: Consultation Update’, to which the First Consultation Report was annexed (emphasis added):

“3.5 In the circumstances, members are requested to simply note the contents of the report, scheme and supporting documents at the current time. Final proofreading is taking place on the TfGM report and the final version will be circulated to Members in advance of this meeting along with a summary of any changes. The purpose of their publication at this stage is to draw the original consultation exercise to a conclusion as well as enabling members, stakeholders and the public to consider the results of the consultation in which they may have participated, albeit within a context that pre-dated the COVID-19 outbreak.”

132.

In its Skeleton Argument at [24] Rotala also suggested that the other reports produced in June 2020, namely ‘Bus Reform: Consultation Update’ and the report of the Scrutiny Committee (that is, Greater

Manchester Housing Planning and Environment Overview and Scrutiny) entitled 'GM Bus Reform Consultation' of 11 June 2020 also fell under this heading. Its primary position was that:

"24. ... the June reports [NB: plural] were or ought to have been section 123G reports marking the end of the statutory process so the decision to hold the second consultation in November 2020 was unlawful."

133.

Rotala argued that the statutory process under the TA 2000 is clear and linear, and that it had to be complied with in accordance with the process set out in the Act and in order. The consequence, said Rotala, is that the statutory process came to an end (or should have come to an end) in June 2020, and thus that all further steps taken by the Defendants thereafter were unlawful. But, equally, Rotala said that if these were not such reports then the GMCA failed to comply with the statutory scheme because they should have been, so that, again, all further steps thereafter were unlawful.

134.

I reject the submission that the First Consultation Report and/or the other reports from June 2020 were, as a matter of fact, reports in accordance with s 123G(1)(a). Mr Howell rightly said this was a question of fact. I also reject the allied submission that, as a matter of law, they needed to be. It follows that I also reject the submission that any further consultation was prohibited in the absence of the whole process starting again, with a fresh assessment carried out in accordance with s 123B and audited under s 123D.

135.

Section 123G(1) requires a report published in accordance with it to contain both the franchising authority's response to the consultation, and (in the case of a mayoral combined authority like the GMCA) the Mayor's decision on behalf of the combined authority under s 123G(4) on whether to make a franchising scheme.

136.

None of the June 2020 reports purported to do either of these things. Indeed, as the Defendants point out, they could not have done so because in June 2020 the Mayor had not taken any decision on franchising. Also, the First Consultation Report itself made clear that, as at that time, the GMCA did not know what its response to that Consultation would be in terms of recommending, or not, a move to franchising, because of the impact of COVID. This Report said at [2.1.6] - [2.1.7]:

"2.1.6 While TfGM were in the process of reviewing the consultation responses and preparing this report under the direction of GMCA, there was a global outbreak of COVID-19 which rapidly developed into a national state of crisis in the UK and elsewhere. Among other actions taken, the UK Government published its plan to 'contain, delay, and mitigate any outbreak, and use research to inform policy development' on 3 March 2020, which resulted in there being widespread and significant disruption to the bus market in Greater Manchester, and had the consequential effect of diverting GMCA's and TfGM's attention to matters more directly associated with managing that crisis. Additional legal measures implemented by the UK Government in its response to the COVID-19 pandemic, such as the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, had further direct implications for GMCA, caused further disruptions for GMCA, TfGM and all bus operators and stakeholders in Greater Manchester and across the country.

2.1.7 It is important to note that this report does not attempt to consider the impacts of the global COVID-19 pandemic or any of the implications that might be of consequence to the Proposed

Franchising Scheme resulting from it. Further analysis by GMCA and TfGM will be required within the parameters and scope of a review that will be determined by GMCA. Instead, this report focuses on the outcome of the consultation only.”

137.

That the First Consultation Report was not of itself GMCA's response to the consultation pursuant to s 123G(1)(a) is clear from the following paragraphs (emphasis added):

“2.1.10 This report is likely to form part of GMCA's response to consultation, which will also include consideration of whether:

- GMCA considers it desirable that the Proposed Franchising Scheme should be made, with or without modifications; and
- If the Proposed Franchising Scheme should be made with modifications, what those modifications should be and whether any further consultation on them is required.

2.1.11 This report also explains how those modifications would be proposed to account for the responses to the consultation and are not intended to modify the Proposed Franchising Scheme to account for any changes to the bus market in Greater Manchester following the COVID-19 outbreak. Any such modifications would require further consideration within the parameters and scope of the review that will be determined by GMCA.”

138.

Further, the report of 27 November 2020, ‘COVID-19 Impact on Bus Franchising Report and Consultation’, proposed the GMCA carry out a further consultation and said at [81]-[8.2]:

“8.1 Members are asked to note that a further report will be made to the GMCA on the outcome of the consultation.

8.2 Following consideration of that report, in accordance with Section 123G of the Act the GMCA must publish a report setting out:

1. Its response to consultation on the Assessment; and
2. The Mayor's decision on whether or not to make the Proposed Franchising Scheme.”

139.

So far as [3.5] of ‘Bus Reform: Consultation Update’ is concerned, a preliminary point is to emphasise (as I did during the hearing) that it referred to drawing the ‘original consultation’ to a conclusion (my emphasis) – not, it is to be noted - drawing the consultation process as a whole to a conclusion. Paragraph [3.5] therefore clearly left open the possibility that there would be a further round of consultation in the future.

140.

It is important to read [3.5] in context and note what that Update did not say. As the Defendants point out, it did not propose or recommend that the First Consultation Report be adopted as (or as part of) the GMCA's response to the consultation that had been conducted (whether for the purpose of s123G(1)(a) or otherwise); nor did it suggest that the consultation would not be re-opened, or that no further consultation would be undertaken, as part of the next steps that might be appropriate having considered the potential impact and effects of COVID-19 on the bus market. On the contrary, [3.6]

made clear that a further report would be submitted to members of the GMCA in due course which would 'make recommendations about appropriate next steps in the circumstances'.

(ii) the argument that it was unlawful to consult further once a consultation period under s 123E had ended, and the franchising authority had then to publish its report under s 123G(1)(a) without further consultation (R, [33])

141.

Rotala's next contention in [33] of its Amended Grounds and in its Skeleton Argument at [25] et seq, is that, once the First Consultation under s123E had ended, no further consultation was permissible, and the franchising authority was then required to publish its report under s 123G(1)(a) without further consultation. Thus, if the First Consultation Report or other reports from June 2020 were not reports under s 123G(1)(a) (which I have held they were not), Rotala argues there was no power to hold a further consultation, and so what flowed from that including the Mayor's decision was unlawful.

142.

The way it is put in [26] of Rotala's Skeleton Argument is this:

"More importantly, perhaps, whether the report was a Section 123G report is not dispositive of this ground of challenge because having followed the statutory process up to June 2020, GMCA was obliged to publish a section 123G report and on its own case did not do so but instead decided in November 2020 to hold a second consultation without any legal justification for that decision."

143.

I reject the contention that having carried out the First Consultation and obtained the First Consultation Report, the GMCA was therefore debarred from carrying out a further consultation exercise. There is nothing in the wording of Part II of the TA 2000, nor in authority, logic or principle, which leads to such a conclusion. I agree with Mr Howell that there is nothing in the Act which suggests that a consultation may not be reopened nor is there any reason why Parliament can or should be taken to have intended to prohibit any further consultation.

144.

I begin with the general observation that this submission is unusual. Normally, consultations are challenged on the grounds that they were not wide enough or detailed enough. Challenges to decisions on the basis they were preceded by too much consultation are not common.

145.

In R (Moseley) v Haringey LBC [\[2014\] 1 WLR 3947](#), [23]-[24], Lord Wilson said (internal citations omitted):

"23. A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly ... But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.

24. Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation ... First, the requirement 'is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested' ... Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise feel' ... Such are two valuable practical consequences

of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society ...”

146.

It seems to me that Rotala’s argument must fail for a number of reasons. Firstly, there is the context. As Lord Steyn said in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 548, ‘In law context is everything’. The context here, as I remarked during the hearing, is the fundamental reform of bus services in one of the most populous regions of the country. This has the potential to affect many hundreds of thousands, if not millions, of people in the years to come. It will have a significant social and economic impact. The issues involved are complex and multi-faceted. All of this strongly suggests that a broad and deep measure of consultation was required in as flexible a way as possible. The number of stakeholders who were consulted by TfGM and Ipsos MORI pursuant to GMCA’s direction under s 123E(4) bears this out, as does: (a) the number of responses received to the two Consultations (over 8000 and 4000, respectively); and (b) the length of the two Consultation Reports (a combined total of well over 1000 pages).

147.

Second, there is nothing in s 123E to suggest that the required consultation has to be a one-time event. The Act does not provide that a consultation under s123E may not be reopened once an initial consultation period has ended. Given the complexity of the subject-matter this is unsurprising. It is to be readily apprehended that such a consultation could produce something which required a second round of consultation. It seems to me that clear words would be required before the conclusion could properly be reached that Parliament intended that franchising authorities had to ignore post-consultation events, and that any further consultation was prohibited.

148.

Rotala’s argument in [30] of its Skeleton Argument that a contrary intention appears in the TA 2000 because ‘it sets out all stages including a statutory consultation stage and the next stage to be followed in clear terms’ begs the question whether that consultation can take place in stages. Absent clear statutory language to the contrary, there is nothing wrong in there being phased consultation: see *R (Parents for Legal Action Ltd) v Northumberland County Council* [2006] EWHC 1081 (Admin), [34]. Mr Howell made this precise submission during the hearing, and I agree with it.

149.

Mr Howell made an allied submission which I also agree with. He postulated that a consultation produced the result that the franchising authority wanted to change the proposed scheme in a minor way, eg, altering a few routes in a way which affected only a small number of people. Mr Howell said that if the Claimants were right, the whole statutory process, beginning with an assessment, would have to start again, which would be an absurd and disproportionate result.

150.

Third, fairness may require a consultation to be re-opened in some circumstances, and in particular where something has arisen which consultees have not had the opportunity to comment upon: *R (Robin Murray & Co) v Lord Chancellor* [2011] EWHC 1528 (Admin), [47]. In this case the pandemic took hold after the First Consultation had closed in January 2020. I consider that there would have been a strong case of unlawfulness if the GMCA had not held a second consultation before deciding to recommend franchising, so profound were the pandemic’s effects on the transport market. This conclusion is supported by *Marriott v Secretary of State for the Environment, Transport and the Regions*, Unreported, 10 October 2000, [87]-[88], on which Mr Howell particularly relied. There,

Sullivan J held (in the context of a detailed statutory planning scheme) that a consultation may be reopened where fairness requires it, and also as a consequence of s 12 of the Interpretation Act 1978.

151.

Fourth, s 123E(1) imposes a duty to consult. Section 12(1) of the Interpretation Act 1978 provides that where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as the occasion requires. In my judgment, no such intention appears in s 123E, and I reject the Claimants' submissions to the contrary.

152.

Fifth, the Franchising Guidance provides at [1.95] under the heading 'Response to Consultation' (emphasis added):

"Following the consultation process, an authority or authorities must prepare and publish a report setting out their response to the consultation together with their decision as to whether or not to proceed with the proposed franchising scheme. An authority or authorities should address issues raised by respondents to the consultation as part of their response, including setting out any changes to the franchising proposal that they intend to make as a result. Depending on the significance of any changes, an authority or authorities may choose to consult again."

153.

Whilst the Franchising Guidance is not an aid to statutory interpretation, this paragraph does envisage that a franchising authority might wish to consult again following its response to an original consultation. I reject Rotala's submission (Skeleton Argument, [30]) that this paragraph is referring to 'a further consultation after the section 123G report has been produced'. That is because s 123H(1) requires that such a report must be published at the same time as any scheme is made, and it would make no sense to consult thereafter because the decision would already have been made. I do accept that this paragraph on its face contemplates further consultation in relation to changes to the proposed consultation (as Mr Howell acknowledged), but it does nonetheless more support the Defendants' position than the Claimants' position. I think Mr Howell was right to submit that the authority either has the power to consult again, or it does not.

154.

Sixth, and lastly, Mr Howell submitted that even if a statutory consultation conducted under s123E of the TA 2000 Act cannot be reopened after the consultation period initially set has ended (whether under that section or an implied common law power), there was no legal reason why a franchising authority may not consult further on a voluntary basis to help it to determine, for example, what its response to the representations made in the initial consultation period about the proposed scheme and its assessment should be in the light of subsequent events, or what recommendation it may wish to make about whether any (and, if so, what) franchising scheme should be made. He said that if s123E provided no such power of itself, it unarguably did so in conjunction with s102B of the Local Transport Act 2008 read with Articles 6 and 7 of the GMCA Order. Section 102B provides, in general terms, that an integrated transport authority (ITA) may do anything the ITA considers appropriate for the purposes of carrying-out its functions. By virtue of Articles 6 and 7 the GMCA had the functions of the Greater Manchester ITA transferred to it. Mr Howell said the effect of these provisions was that the GMCA had a general power to consult whenever it considered it needed to. I agree.

(iii) whether consultees were not provided with sufficient information to permit them to respond intelligently to the scenarios that had been used 'for the purpose of modelling the impact of

COVID-19' and 'the mechanism by which these 'scenarios' had been translated into projections of the expected impact' (S, [56]).

155.

This is Stagecoach's third Ground of Challenge (Amended Grounds, [55] et seq; Skeleton Argument, [75] et seq). In particular, Stagecoach argues that the Defendants failed to provide sufficient information to permit it to carry out a meaningful analysis of (a) the scenarios which the GMCA had decided to use for the purposes of modelling the impact of COVID-19 in the COVID Impact Report; and (b) the mechanism by which those scenarios had been translated into projections of the expected impact. It is said that this rendered the Second Consultation unlawful (and hence also the Mayor's ultimate decision) because it failed to satisfy one of the requirements for a lawful consultation, ie, that there be 'sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response': *R v Brent London Borough Council ex parte Gunning* (1985) 84 LGR 168.

156.

It seems to me that this submission must fail. That is because, in summary, the GMCA provided a large quantity of material and responded to requests from Stagecoach during the consultation for further information. Stagecoach was granted an extension of time in which to respond, and it provided lengthy and detailed responses. Had Stagecoach required further information on specific issues during the consultation process then I have no doubt the GMCA would have provided it. I have read Stagecoach's response to the Second Consultation, and it was able to make its case fully. I agree with this oral submission from Mr Howell:

"Consultees were able to comment, as they did, on whether the use of scenarios was appropriate; whether patronage figures in each of the scenarios should be modelled from a set of inputs, notwithstanding the reasons given why they had not been; if they had not been modelled, how any such patronage figures should have derived, or what other figures should have been used; whether other scenarios should be considered; whether judgment on the potential outcomes would be highly unlikely to fall outside the range of projected outcomes was correct, and whether there were any plausible outcome that was worse or better than those projected in the scenarios should be considered; and the claimants and others were able to, and did, respond intelligently to all those issues."

157.

Firstly, I note that the GMCA made considerable material available for the purpose of the Second Consultation. Under the heading, 'Where do I get more information?', p5 of the Second Consultation Document listed the following as being available to consultees:

"• The Proposed Franchising Scheme ...

- The COVID-19 Impact on Bus Franchising Report
- GMCA report on the COVID-19 Impact on Bus Franchising Report and Consultation (27 November 2020)
- The consultation documentation and questions from GMCA's consultation on a proposed bus franchising scheme which ran from October 2019 to January 2020 and supporting papers, including:
- Assessment and supporting papers

- Draft Proposed Franchising Scheme
- Draft Equality Impact Assessment on the Proposed Franchising Scheme
- Auditor's report • Auditor's observations
- TfGM's response to Auditor's observations
- Consultation Document
- The reports on the outcomes of the previous consultation
- Ipsos MORI consultation summary report
- Ipsos MORI qualitative research summary report
- TfGM Consultation Report (June 2020)
- GMCA report (26 June 2020)
- Stakeholder responses”

158.

Next, in his first witness statement at [36]-[39], Mr Micklethwaite described the dialogue which took place between Stagecoach and the GMCA during the Second Consultation. Stagecoach asked at several points to be supplied with further information, and the GMCA complied with those requests. Mr Micklethwaite makes no complaint about non-responsiveness from the GMCA. Stagecoach also sought an extension of time to respond to the consultation which, after some negotiation, the GMCA agreed to.

159.

In the event, Stagecoach provided a detailed response to the consultation. It supplied: a business response paper to the 12 questions posed in the Second Consultation Document; a separate legal paper prepared by Stagecoach’s solicitors; and an economic paper prepared by NERA Economic Consulting, among other documents.

160.

Stagecoach nonetheless contends, as I have said, that consultees were not provided with sufficient information to permit them to respond intelligently to the scenarios that had been used ‘for the purpose of modelling the impact of COVID-19’ and ‘the mechanism by which these scenarios had been translated into projections of the expected impact (Amended Grounds, [56]).

161.

I do not regard these specific criticisms as having substance. As I will explain in a moment, the COVID Impact Report explained the GMCA's approach to both of these matters. Whilst Stagecoach might take issue with the GMCA's methodology (and NERA on its behalf certainly did so at Section 4.1 of its paper (‘Scenarios have not been developed robustly and clearly ... Forecasts have been generated subjectively ... forecasts are effectively just assumptions’)), Stagecoach was able to respond fully and intelligently to the COVID Impact Report in order to make its case. The real issue, which I address later, is whether TfGM’s conclusions were reasonably open to it.

162.

The primary object of the scenarios used in the COVID Impact Report, and the projections of bus use in each, was to enable the key conclusions of the Assessment to be tested by reference to potential outcomes to see whether the uncertainty associated with the pandemic might make a material difference to those conclusions. I set out [1.4.1]-[1.4.2] of the COVID Impact Report earlier, where this approach was explained.

163.

The potential impacts on the bus market in each scenario were then described in [1.4.3]-[1.4.20], with the projections for each of them compared to the 'Do Minimum' option in the Assessment illustrated in Chart 6, to which I referred earlier. Paragraph [1.4.21] explained that the numbers in Chart 6 were not modelled from a set of quantified inputs, but were devised to fit the Scenarios and to help to understand what a range of outcomes could look like. They were expressed as a percentage of pre-COVID-19 demand that would be reached at 18 months and 78 months from March 2020.

164.

It is therefore clear that the patronage percentages in Chart 6 were based on TfGM's expert judgment, rather than on the basis of some quantified inputs and modelling, or some other mechanism, because TfGM considered that it was not reasonably practicable to have done so given the uncertainties caused by the pandemic. Further explanation for this choice of methodology was given at [3.2.3]-[3.2.8] ('Why the existing Analytical Framework has not been used') and in [3.3.1], [3.3.8] and [3.3.10].

165.

Both Claimants were supplied with the TfGM paper 'COVID recovery scenario planning in Greater Manchester' from June 2020. This set out the four scenarios, and explained the thinking behind them:

"We have attempted to represent the range of possible scenarios through a 2 x 2 grid, with the vertical axis representing the strength of economic recovery, and the horizontal axis representing the extent of change in social and environmental attitudes as a result of the crisis. (The changes in public attitudes are assumed to influence government policy). The scenarios are mainly relevant for planning over a time horizon of three months to seven years. The four scenarios are:

- Scenario 1: Back towards normality - stronger economic recovery, little change in public attitudes
- Scenario 2: New travel demand - stronger economic recovery, big changes in public attitudes
- Scenario 3: Car travel dominant - weaker economic recovery, little change in public attitudes
- Scenario 4: Poorer and more local - weaker economic recovery, big changes in public attitudes."

166.

However, the COVID Impact Report made clear in due course that after the scenarios had been formulated, assumptions that had been made in each about how circumstances might initially evolve had in some cases been shown not to be the case:

"1.4.22 Since the Scenarios were formulated, assumptions about how circumstances might initially evolve in each scenario have in some cases, unsurprisingly, been shown not to be the case. The initial stages of the COVID-19 pandemic and the economic and social changes that have started to play out have also provided some information on which to base a judgement about the likelihood of the different scenarios materialising. For example:

- Restrictions have been lifted when the advice suggested they should be, and restrictions on public transport have been appropriate and not reduced capacity so that the service was unviable. However, a new national lockdown is in place and some restrictions are likely to continue thereafter.
- There have not been dramatic macro-economic changes – sterling remains relatively stable, global trade has been maintained, and both inflation and borrowing rates remain low. The Bank of England has followed an expansionist monetary policy (eg, early November announcement of a £150bn monetary stimulus).
- A return to workplaces was encouraged by the Government in the summer, although the recent lockdown means that those who are able to work from home are encouraged to do so.
- There has not been a large-scale change in the attitudes to environmental measures or sustainable transport. Whilst there was an increase in cycling, the return of car travel has meant that this is not necessarily going to be sustained.
- There does not seem to have been a widespread continued aversion to public transport following the easing of restrictions, particularly bus.
- Subsidy to public transport has been maintained during the crisis from both central and local government. There is no sign that this will be prematurely removed.”

167.

In [1.4.25], [1.4.27]-[1.4.28] TfGM said:

“1.4.25 As noted above, there have been developments since these projections were developed and some of the original assumptions upon which each of the Scenarios might develop have, unsurprisingly, not proved correct and some in future will, also unsurprisingly, prove not to be the case. The projections in the Scenarios are nonetheless useful for the purpose of testing the impact of COVID-19 on the appraisal of options in the Assessment. They represent the range of future outcomes that could still come from the interaction of the long-term drivers – the strength of the economic recovery and the attitudes to public transport among decision-makers and the public. It is still possible (though less likely) that there will be a trajectory derived from Scenario 2, as Greater Manchester looks to ‘build it back better’; a down side scenario, Scenario 3, with a more dramatic loss of patronage reflecting a weaker economy and less support for public transport (though again less likely); a scenario, Scenario 1, where a recovering economy leads ‘back toward normality’ but patronage still falls short of where it would have been; and a ‘poorer and more local’ future, Scenario 4, where the economy does not recover strongly but there are more local and public transport journeys. As the key drivers of the four Scenarios take effect over the medium and longer term, these different futures will all remain possible for a while, though their relative likelihood will change.

...

1.4.27 The economy has so far shown the ability to bounce back from the first downturn, but there are headwinds in terms of the potential for further lockdowns and restrictions. There is also continued uncertainty about the nature of the arrangements with the EU following the end of the transition period. It is still therefore possible that a future that looks more like Scenario 4 than Scenario 1 will occur, with a poorer Greater Manchester emerging and a greater impact on bus patronage than in Scenario 1.

1.4.28 Not all of these potential Scenarios, therefore, are equally likely, but it is helpful for decisionmakers to be aware of a broad range of possible outcomes as to what the market may look like in the future. By covering such a wide range of outcomes that could occur, it is considered that the actual outcome would be extremely unlikely to fall outside of this range. Decision-makers need to be aware that they could be working in the context of an outcome that looks like one of these Scenarios or one that lies between them. None of these Scenarios is likely to be exactly what happens to travel and the bus network, but they each help to illustrate the range of potential outcomes that exist. Whilst the future is unlikely to look exactly like any one of the Scenarios, this is a way of making tangible an analysis from a position of uncertainty and also of making better judgements about what type of future is more likely to occur.”

168.

It seems to me, as the Defendants contend, that all consultees (including the Claimants) were able to comment fully and intelligently on whether the use of scenarios was appropriate; whether the patronage figures in each of the scenarios should have been modelled from a set of inputs, notwithstanding the reasons why they had not been; if not, how any such patronage figures should have been derived or what other figures should have been used; whether other scenarios should have been considered; whether the judgment that the potential outcomes would be highly unlikely to fall outside the range of projected outcomes was correct; and whether there was any other plausible outcome that was worse or better than those projected in the scenarios.

169.

I can illustrate this conclusion by reference to the robust criticism which NERA were able to level at TfGM’s methodology. In their paper, NERA argued that they had identified ‘a number of potentially important flaws’ in TfGM’s work, namely:

“■ Scenarios have not been developed robustly and clearly. This means it is not possible to form a view on whether the scenarios are coherent descriptions of potential futures, whether they appropriately capture the potential uncertainty in the market, and how likely they (or any other potential scenarios that could have been created) are.

■ Forecasts have been generated subjectively. There is no clear and evidence-based description of how the scenarios have been converted into forecasts, which means that the forecasts are effectively just assumptions.

■ Benefits that were estimated in the original analysis have been scaled in a highly simplistic way that will almost certainly be incorrect and fail to take account of impacts that are likely to be important to the assessment. For example, the approach will not take account of any potential future shifts in demand between times of day or between different route corridors.

■ The analysis includes a number of notable omissions and inconsistencies. For example, no consideration is given to whether a shorter appraisal period is appropriate, despite the high level of demand uncertainty in the market and how explicit consideration of the appraisal period is required under the Act. A shorter appraisal period would significantly reduce the Benefit to Cost Ratio (BCR) of franchising and increase the BCR advantage of a partnership option. It is also difficult to see how Scenario 3 in TfGM’s analysis can credibly be described as an “outlier” or “extremely unlikely”, given how COVID-19 and the demand for public transport have evolved since the COVID Impacts Report was written.

All of these points suggest that the key finding that ‘on balance, the value for money of the Proposed Franchising Scheme is likely to be robust to the uncertainty created by COVID-19 in all reasonably likely Scenarios’ is unlikely to be correct. In our view, given these flaws in the approach that has been applied and how it would have been feasible to carry out the analysis better (eg by waiting to see how the uncertainty in the market plays out, getting clear alignment with forthcoming DfT guidance on how to analyse uncertainty, and/or by carrying out the analysis more robustly), TfGM’s approach and analysis does not demonstrate the rigour that would be expected in an OBC and that is required for a properly informed decision to be taken, and is therefore inconsistent with the requirements of the Act.”

170.

It is not for me to assess the merits of the competing arguments. That was a point which Ms Demetriou expressly accepted (‘... and we’re not asking you, nor could we ask you, to find that either the GMCA was right or we were right ...’). What this response does show, however, is that the Claimants were able to, and did, respond in an informed way to the issues. It was then for the relevant decision makers to assess those responses and to accept or reject them or decide otherwise how to proceed.

(iv) The Defendants failed to comply with the statutory requirements of the TA 2000 and the Franchising Guidance (S Ground 1)

171.

In its first ground of challenge, Stagecoach maintains that the GMCA unlawfully failed to follow the statutory process in the TA 2000 and thus that the Decision was unlawful.

172.

In its Amended Grounds at [27] it puts the argument as follows (citations omitted):

“27. The Claimant’s first ground of review is that it was unlawful for the Defendants to proceed to make a decision on the Proposed Franchising Scheme before they had complied with the mandatory requirements of the TA 2000 and the [Franchising] Guidance, and that the Mayor’s decision of 25 March 2021 is in consequence unlawful. This is because the Mayor made his decision on the Proposed Franchising Scheme on the basis of the COVID Impact Report which did not comply with the requirements for an assessment under s 123B and the Assurance Review which did not comply with the requirements for an audit under s 123D of the TA 2000. The deficiencies in the COVID Impact Report were not, and could not be, cured by the Second Consultation.”

173.

The nub of Stagecoach’s argument is that the effect of the pandemic was so severe that the Assessment, Grant Thornton’s statutory audit, and the First Consultation responses, could no longer be relied upon in any way, and so the statutory process had to start all over again with a fresh statutory assessment, etc. Further, and in any event, it argues that the TA 2000 requires any decision to make a franchising scheme to be made on the basis of an analysis that meets the standards set by the Act and the Franchising Guidance. Hence, it submits that any further information, data or analysis not canvassed in the original Assessment (in this case, in particular, the COVID Impact Report and Grant Thornton’s Assurance Review), if they were to be lawfully taken into account, had to be of the statutorily prescribed standard, and that because, in particular, the Assurance Review was avowedly not so, the Decision was unlawful (Amended Grounds, [29]-[31] and [36]-[39]).

174.

I do not consider that the GMCA breached any of the mandatory statutory requirements of the TA 2000. It prepared an Assessment as required by s 123B and in doing so took into account, as it was required to do, the Franchising Guidance; it obtained Grant Thornton's statutory audit (as required by s 123D); and it then carried out the First Consultation as required by s 123E. In short, it did what it was required to do by the TA 2000, which prescribes a minimum floor but not a ceiling.

175.

The first part of my analysis is that whilst the TA 2000 sets out the steps that must be taken and prescribes, for example, what the assessment must contain (s 123B(2) and (3)), and what the auditor's report must contain (123D(2)), I do not read the TA 2000 as imposing any restriction on the information which may be taken into account besides those statutorily required documents, in the decision making process. I think that must be so. Consider the statutory requirement for consultation. Although the TA 2000 prescribes what a consultation document must contain (s 123F), and who must be consulted (s 123E(4)), it does not say anything about what consultees' responses' must contain. Consultees are therefore entitled to put forward any arguments or information they wish, and the Act does not limit them or require their responses to be in a particular form or to meet a particular standard. I will return to this point in a moment. It is left to the decision maker to decide what to make of consultees' responses, what weight to attach to them, and how it will respond to them. In fact, as I read its position, Stagecoach accepts this (Amended Grounds, [34], '... the Claimant's case is not ... that it is in all circumstances unlawful for a decision maker to take into account material which falls outside the four corners of the Original Assessment').

176.

As I have said, it is part of Stagecoach's argument under this head that the GMCA recognised that the pandemic meant that the Assessment (and what had flowed from it) could no longer be relied on. It argues, in particular, that by commissioning the COVID Impact Report, the GMCA was acknowledging that it did not have sufficient information, and that further evidence and analysis would be required in order to make a recommendation as to the implementation of the Proposed Franchising Scheme.

177.

I think this reads too much into what the GMCA did when it commissioned the COVID Impact Report. Earlier, I quoted paragraphs from the June 2020 report, 'Bus Reform: Consultation Update'. Paragraph 3.3 made clear that before any final decision on franchising could be undertaken, consideration needed to be given to the impact the pandemic might have on the bus market in Greater Manchester and the options that had been considered in the Assessment. Thus, one of the primary purposes of carrying out further work was not because the Assessment was somehow being abandoned, but to test the analysis in the Assessment in light of the pandemic to see if the recommendations made on the back of it following the First Consultation should stand. This was also made clear in [1.1.4]-[1.1.5] of the COVID Impact Report:

"1.1.4 The purpose of this report is to consider the potential impact and effects of COVID-19 on the bus market in Greater Manchester, the options considered in the Assessment and how COVID-19 may impact on the recommendation made in the Consultation Report that the Proposed Franchising Scheme would be the best option for reforming the bus market in Greater Manchester.

1.1.5 This report sets out:

- The effects that COVID-19 has had on the bus market in Greater Manchester;

- Potential future Scenarios for travel in Greater Manchester and the effects on bus (“the Scenarios”) as detailed below at Section 1.4 (Possible future transport scenarios) below;
- How COVID-19 and the potential future Scenarios may affect the case for change set out in the Strategic Case in the Assessment, and the conclusion that the Proposed Franchising Scheme was the best option to achieve GMCA’s objectives;
- How COVID-19 and potential future Scenarios may affect the conclusion set out in the Economic Case in the Assessment that the Proposed Franchising Scheme was good value for money;
- How COVID-19 and potential future Scenarios may affect the considerations set out in the Commercial Case in the Assessment on the commercial strategy for implementing the Proposed Franchising Scheme, and the conclusion that it could be successfully procured;
- How COVID-19 and potential future Scenarios may affect the conclusion set out in the Financial Case in the Assessment that the Proposed Franchising Scheme was affordable;
- How COVID-19 and potential future Scenarios may affect the considerations set out in the Management Case in the Assessment, the implementation of the Proposed Franchising Scheme and the conclusion that this could be managed successfully;
- How COVID-19 and the potential future Scenarios may affect the Proposed Franchising Scheme and the conclusion that no modifications to the Proposed Franchising Scheme are required at this stage beyond those already contemplated;
- How COVID-19 may affect the partnership options considered in the Assessment and those put forward by operators during the consultation; and
- A conclusion on the effect of COVID-19 on the previous recommendation in the Consultation Report that the Proposed Franchising Scheme should be implemented”

178.

I next consider the important - and in many ways, the central - question whether the GMCA was obliged as a matter of law to prepare a new statutory assessment under s 123B and obtain a new statutory audit opinion under s 123D because the impact of the pandemic had been to undermine the Assessment and First Consultation to such an extent that a new statutory process was required. This is the submission which Stagecoach makes in its Amended Grounds at [34]:

“34. ... The Claimant’s case is that the impact of the COVID pandemic was so severe that the very validity of the Original Assessment was called into question and, in those circumstances, the Defendants were obliged to carry out a new Assessment in accordance with the provisions of the Act.”

179.

In considering this submission, the starting point is to recognise that beginning again was certainly one option which was open to the GMCA. Indeed, this option was expressly recognised in ‘Bus Reform: Consultation Update’ at [3.3] (emphasis added):

“3.3 Before any final decision on franchising may reasonably be taken, consideration needs to be given to the impacts COVID-19 may have on the bus market in Greater Manchester and the options considered in the assessment, how that impacts on the assessment, audit and consultation already undertaken and the potential need to reconsider some of that work before any final decision on a

franchising scheme is made. The outcome of that work will determine if there is a need to repeat some or all of the process set out in the Act.”

180.

However, before exercising that option, given the complexity of the issues, it was lawfully open to the GMCA to test the impact of the pandemic on the Assessment’s conclusions, which it did by commissioning the COVID Impact Report. What it did then was a matter for its judgment. It chose to proceed to a Second Consultation. The potential effects of the pandemic were then considered in the Second Consultation Report (see, in particular, Section 17) and in the March 2021 Report (see, in particular, Section 15). Later, I will consider Rotala’s submission that it was irrational for the GMCA to have moved to a Second Consultation.

181.

Stagecoach argues in its Skeleton Argument at [33]-[34] and [37]-[38] that there could only be one answer as to whether the key conclusions in the Assessment could be relied on by the Defendants. It notes Grant Thornton’s opinion in its Assurance Review that ‘in choosing to proceed now the risk has increased that the outturn position may be materially different from the central case previously set out in the Assessment’ and argues ([37]-[38]):

“37. ... the conclusion that the Original Assessment required updating and re-auditing in accordance with the requirements of the TA 2000 is inescapable. However, neither the COVID Impact Report nor the Assurance Review comply with the requirements of the Act and the Defendants do not contend to the contrary.

38. In those circumstances, the Defendants were obliged to do two things. The first was to carry out an updated Assessment in accordance with the provisions of the Act. The second was to put this before their auditors and secure their confirmation that this was validly prepared. The course that the Defendants adopted is unlawful because they have purported to validate the Original Assessment by means of a process that falls well short of the statutory requirements which were applicable to that Original Assessment and continued to pertain.”

182.

I do not accept that such a conclusion was ‘inescapable’, as Stagecoach contends. Grant Thornton only said that the outturn position may be materially different – not that it would definitely be so. The existence of such a risk did not necessarily mean that the key conclusions in the Assessment could no longer be relied on. The GMCA was therefore not bound, in my judgment, to conclude that it had to start the whole process again. It was entitled test the position through the Second Consultation and, in particular, by asking the Claimants and other key stakeholders for their views. As the Second Consultation document said in the ‘Overview’ section:

“This consultation document explains why GMCA considers that bus franchising remains the right way to reform the bus market, having considered the possible effects of COVID-19. The purpose of this consultation is to allow you to provide your views on the Assessment in the light of the Report across the five cases in the Assessment, on the Proposed Franchising Scheme, and on whether or not the Mayor should make such a scheme.”

183.

Finally, the COVID Impact Report itself had not concluded that the key conclusions in the Assessment could no longer be relied on:

“9.11 The effect of the COVID-19 pandemic on the patronage and revenue of bus services in Greater Manchester has been severe. They are currently running at about half the capacity that they were previously. Whilst services are likely to continue to recover as the economy recovers, and restrictions reduce, the timing and extent of this continue to be in doubt.

...

9.11.4 The case for change set out in the Assessment remains and the Franchising Scheme still offers a greater chance of achieving GMCA's objectives for the bus network than the potential partnership option in Greater Manchester under the different Scenarios that could occur. The Proposed Franchising Scheme remains the only option that will enable Greater Manchester to get the full benefit of an integrated transport system. The Proposed Franchising Scheme also still offers more scope for introducing Phase 2 measures that would improve the service, and to do so with greater value for money than the partnership option.

9.11.5 The analysis in this report confirms that, on balance, the value for money of the Proposed Franchising Scheme is likely to be robust to the uncertainty created by COVID-19 in all reasonably likely Scenarios. The Proposed Franchising Scheme also remains preferable to the Partnership option as, on balance, the overall net benefits are likely to remain higher and more deliverable, particularly given the considerable uncertainty surrounding what, if any, partnership options are on offer.”

184.

A further argument advanced by Stagecoach is that it was unlawful to take a decision based upon information, data and analysis which it submits did not meet the standards set out in the TA 2000 and the Franchising Guidance. It contends that the COVID Impact Report did not analyse ‘by reference to the criteria defined by statute and to the standard prescribed by statute’ whether, in the light of the pandemic, the strategic, economic, commercial, management and financial cases support the introduction of the Proposed Franchising Scheme (Amended Grounds, [29] and [37]). It argues in particular at [29(c)] that:

“The Act therefore requires that any decision to introduce franchising will be based on an assessment, audit and consultation carried out in accordance with the standards set by the TA 2000 and the Guidance. In circumstances where, due to a material supervening event, a decision will be made by reference to further information, data and analysis not canvassed in the Original Assessment, it would defeat the policy and objectives of the Act for the Defendants to be permitted to carry out that further analysis to a less rigorous standard.”

185.

In considering these submissions, it is necessary to consider what the TA 2000 and the Franchising Guidance do, and do not, prescribe.

186.

Beginning with the Act, s 123B(2) and (3) specify broad based topics which the statutory assessment must address. These include: the effects that the proposed scheme would be likely to produce, a comparison between making the proposed scheme and one or more other courses of action) how the authority or authorities would make and operate the proposed scheme; and value for money. Hence, whilst the Act prescribes the content of an assessment it does not prescribe any particular quality assurance standard, or other standard, that it must meet.

187.

So far as the Franchising Guidance is concerned, the Secretary of State must issue such guidance by virtue of s 123B(5):

“The Secretary of State must issue guidance concerning the preparation of an assessment under this section, and that guidance may, in particular, include guidance about methods to be used when assessing a proposed scheme.”

188.

By s 123B(6), the franchising authority must ‘have regard to’ such guidance when preparing its assessment. However, it is not obliged to follow it, and may depart from it if it considers that it is right to do so. Thus, I agree with the Defendants that even when the statutory guidance specifies how the analysis should be conducted, it does not set a standard from which it would necessarily be unlawful to depart when preparing an assessment. That said, the Franchising Guidance does provide at [1.22] that an assessment must contain sufficient detail for an informed decision to be made. The risk a franchising authority runs if it strays too far from the Guidance is that its assessment would not be passed by the auditor when it came to report pursuant to s 123D. Section 123D(2)(c) provides that one of the things the auditor must report upon is whether in its opinion the franchising authority has had due regard to the statutory guidance.

189.

But, in a sense, all of this is beside the point. I am here dealing with Stagecoach’s submission that the statutory approach in the TA 2000 relating to assessments and auditors applied to work commissioned by GMCA outside of the statutory scheme. But there is no statutory requirement that any further analysis that a franchising authority may undertake after a statutory assessment has been prepared and audited, including, for example, any further analysis prepared after any consultation, must be, or be the equivalent of, a new statutory assessment under s 123B of the Act, or be audited under s 123D, or comply with the statutory guidance relating to statutory assessments. The Franchising Guidance merely provides at [1.95] that in responding to a consultation the franchising authority ‘should address the issues raised by respondents as part of their response’.

190.

Nor can such an obligation be implied into the statutory scheme. Once it is accepted (as, I have said, Stagecoach does accept) that the GMCA was entitled to take non-statutory material into account, then it seems to me that the submission is defeated. I come back to the point I have already made about the statutory consultation. No-one has suggested that consultees’ responses have to be prepared to the same sort of statutory ‘standard’ as the assessment and the audit, nor could that sensibly be suggested. And equally, no-one suggests that it would be unlawful for the GMCA to place weight, even very considerable weight, upon those responses in its response to the consultation and its overall recommendation to the Mayor. I agree with the way Mr Howell put it orally for the Defendants on this point:

“There is no statutory requirement, however restricting what further analysis a franchising authority may take into account after it has prepared an assessment, and it matters not whether that further analysis is contained in a consultation response which the authority decides to adopt, or whether it’s produced by the authority in reaction to a consultation sponsor or in reaction to any other event. Nor is there any statutory guidance applicable to any such analysis.”

191.

If that is the case, therefore, it must be a matter for the GMCA’s judgment (challengeable only on a rationality basis) as to what weight it places on work it has commissioned outside of the statutory

scheme in the overall exercise of its function of deciding whether or not to recommend a franchising scheme. That is so whether the further work is prompted by some sort of supervening event occurring after the statutory assessment and consultation was completed (as in this case), or because responses to the consultation revealed particular areas where further work was required, or for any other reason.

192.

Plainly, the pandemic required very considerable further work in order to test the Assessment's conclusions in light of its impact on work and travel. But the pandemic's unprecedented effects did not impose a different obligation on the GMCA of the hard-edged variety contended for by Stagecoach. It was still required to make an exercise of judgment about: what further work was required; and how to proceed in light of that further work, whether (for example) by moving to consultation (as it chose to); or by re-starting the statutory process again (which it did not); or by abandoning the idea of franchising altogether (again, which it did not).

193.

It follows that the COVID Impact Report did not need to contain the matters specified in s 123B, or be prepared in light of the Franchising Guidance, or be audited in line with s 123D and I reject Stagecoach's submissions to the contrary. But as a matter of fact, the Report did analyse in broad terms each of the five cases in the Guidance (see Sections 2 - 6), and referred to at least some the matters referred to in s123B(2) and (3) (eg by comparing franchising with other options). Also, in its Assurance Review, Grant Thornton reported on those instances where, in preparing the COVID Impact Report, TFGM departed from the Franchising Guidance, and it commented on whether any such departures are appropriate or not given the circumstances.

(a)

the Grant Thornton Assurance Review did not meet the requirements for an audit under s 123D (S [27], [31], [32] and [40]) and the Defendants could not be satisfied that they had received an auditor's report that complied with s 123D given the COVID Impact Report (R, 51)

1.

Both Claimants criticise the Grant Thornton Assurance Review as failing to comply with s 123D. Rotala contends that the Defendants could not be satisfied that they had received an auditor's report that complied with s123D of the Act given the COVID Impact Report (Rotala, [51]). Stagecoach contends that the Assurance Review did not meet the requirements for an audit under section 123D (Stagecoach, [27], [31], [32] and [40]).

2.

In light of what I have already said, it is plain that this submission must fail. The GMCA received a statutory audit of the Assessment in September 2019, and it thereby fulfilled its statutory obligation. Although this audit was criticised during the consultation process (see eg, Second Consultation Report, Section 9), no-one contended that it did not comply with s 123D.

3.

I agree with what Mr Howell said orally on this issue:

"The Act does not itself prescribe any standard to which any further analysis after the assessment has been completed in order to -- must conform. The Act does not prescribe any such standard. The statutory guidance does not address what standard any further analysis should meet. And even if it had, it would not be mandatory to follow it."

4.

Having complied with the statutory requirements, there was no requirement for the further work to test the Assessment in light of the pandemic to comply with the TA 2000. The COVID Impact Report was not, and did not purport to be, a statutory assessment under s 123B. Therefore, there was no requirement for it to be audited under s 123D.

5.

Rotala argues in [56] of its Skeleton Argument that the statutory purpose of s 123E would be defeated if the conclusions on which a decision could be based have not been the subject of that statutory audit:

“56. ... The logical result of the Defendants’ position is, therefore that bus franchising will, especially in relation to its economic and financial cases, have a range of predicted outcomes, which have not been subject to audit. That is not the intention of the Act. Put another way, the statutory intention is that any franchising scheme will have had its outcomes audited. On the Defendants’ case, in the event of a supervening issue affecting those outcomes, the scheme can be put into effect without that having happened. So, looking at the totality and the overall effect, if the Defendants are correct, the statutory purpose is defeated by a supervening event which post-dates the original assessment and the rate payers of Greater Manchester take an unaudited risk in the new circumstances.”

6.

I do not accept this argument. As I have already said, the statutory process requires a consultation exercise, to which the franchising authority must respond. The TA 2000 therefore envisages a decision being taken in part on information that has not been subject to any sort of auditing process.

Submissions on irrationality

7.

I now get into the highly detailed parts of the Claimants’ challenges. The core of them, as Ms Demetriou put it pithily, is that the TfGM and the Defendants ‘did not do a good enough job’ in how they responded to the pandemic, and in particular how its effects were analysed in the Covid Impact Report and in response to the Second Consultation.

8.

Ms Demetriou’s and Mr Singer’s position was that it was all the points taken together which made the Decision irrational, rather than just one aspect. Mr Howell emphasised that the focus of this challenge was on the rationality of the ultimate Decision in March 2021 and not on, for example, the decision to carry out the Second Consultation.

9.

In analysing the Claimants’ cases, I remind myself: (a) that I am not concerned with the merits or otherwise of franchising: the task for me is whether the decisions in question are flawed in public law terms. The Claimants accept this. As Ms Demetriou again put it, ‘we’re not the experts’; and (b) for the reasons I have given, I have to afford a wide margin of discretion to the judgements made by the decision makers in the course of making those decisions.

(i) the effects of COVID-19 on the objectives of the bus network were not properly considered (S, 37)

10.

Stagecoach argues in its Amended Grounds at [37] that:

‘... by using the Assessment as the starting point for the updated analysis, [the COVID Impact] Report does not properly consider or accurately capture the full effect of COVID-19 on the case for the Proposed Franchising Scheme’.

11.

It submits that the COVID Impact Report attempted to shortcut the statutory requirements for an assessment by conducting a ‘light touch’ ad hoc analysis. It says that [1.34]-[1.35] of the Franchising Guidance requires franchising authorities to set out their objectives for local bus services and other relevant policies. Pursuant to s 123B(3) the statutory assessment must consider the extent to which each of the options will help achieve these policy objectives. However, Stagecoach argues that instead of setting new objectives in accordance with the situation caused by the pandemic, the COVID Impact Report merely considered whether the objectives set out in the Original Assessment remained valid.

12.

I do not accept this criticism. The GMCA’s principal objectives were set out in Section 7 of the Assessment, which referred to the objectives under the headings: network (eg, reliability and punctuality); fares; customer experience; and value for money. These were formulated to contribute to the implementation of, the ‘Vision for Bus’ contained in the Local Transport Plan, the Greater Manchester Transport Strategy 2040, and what was then its draft Delivery Plan, as the Assessment explained at [2.1.2] and [7.1.2 - 7.1.4]. The ‘Vision for Bus’ was retained in the 2040 Strategy when that plan was reviewed and then re-adopted in January 2021 as part of the Local Transport Plan (when the Delivery Plan was also adopted as part of that plan): see Bus Reform: Consultation and the GMCA Response, at [2.8-2.17]. Whether a franchising scheme would contribute to the implementation of the Local Transport Plan is a matter to which the statutory assessment must give consideration: see s123B(3)(a).

13.

Whether these objectives needed to change in light of the pandemic was a matter for the GMCA’s judgment. It was expressly considered in detail and was addressed by consultees as part of the Second Consultation. I do not see any basis on which its conclusions can be held to be irrational.

14.

Section 2.3 of the COVID Impact Report was headed ‘GMCA’s Objectives for the Bus Network’ and specifically considered those objectives in light of the pandemic. Paragraphs 2.3.1 and 2.3.2 stated:

“2.3.1 Given the need for reform remains, changing circumstances may change the conclusions reached in the Assessment and TfGM’s Consultation Report on the nature of the appropriate objectives for the bus network. Whilst there are increased threats to the service, it is not necessarily the case that objectives should change. This section considers the continuing validity of the original objectives in light of the impact of COVID-19.

2.3.2 The original set of objectives built upon the overall GMCA objectives for Greater Manchester and the importance of travel for people in Greater Manchester being able to realise those ambitions, as well as the issues faced by the bus service set out above. GMCA’s ambition to ‘Build Back Better’ is relevant because it shows a continuation of GMCA’s concerns with the economy, social equality and the environment. There is a particular emphasis on the environment and the need to Build Back Greener.”

15.

Each of the objectives was then considered in light of the pandemic. As an example, in relation to the 'Network' objective, the Report said this:

"2.3.3 Under network, the Assessment set out objectives on increasing the reach and accessibility of the network and improving the integration and efficiency of the network. There were also objectives on improving the quality of service provided – such as the reliability and punctuality of services – and the environmental performance in terms of the reduction of harmful emissions and CO2 from the bus fleet in Greater Manchester.

2.3.4 As noted above, the effects of the COVID-19 pandemic are likely to make the achievement of these objectives more difficult but also more important. The reach and accessibility could be further reduced because of COVID-19, and the investment necessary to improve environmental performance could be harder to achieve. Efficiency could be improved by the pandemic, but only because of a reduction in services, and there will be a tipping point where the network becomes too small, and efficiency then begins to decline. Under none of the Scenarios would the objectives for the bus network themselves be different. Whilst the focus on action by GMCA may switch to preserving a bus network from enhancing it and ensuring it is able to achieve the goals to achieve the vision as set out in Greater Manchester's Transport Strategy 2040, the objectives of reach, accessibility and efficiency remain the same.

2.3.5 There is still a need to improve the network across Greater Manchester in line with the objectives laid out in the Assessment, and the emphasis on Build Back Greener gives more importance to the environmental performance of the bus fleet."

16.

The Second Consultation Report also considered the impact of the pandemic on the Assessment objectives and whether they remained valid. It addressed responses to the Second Consultation dealing with the identified challenges for the bus market and the GMCA's objectives. Paragraph [4.15.6] stated:

"4.15.6 Objectives in the light of the challenges of COVID-19. Whilst some operators suggested the challenges facing the market were now different, and therefore the objectives should shift, these new challenges do not mean the previously identified challenges are no longer relevant, and nor do they invalidate the objectives identified by GMCA. Whilst the context is different and potentially more challenging, the objectives of improving the network, simplifying fares, and improving customer service and achieving VfM remain the right ones. A revised version of the Transport Strategy 2040 was recently adopted by GMCA in the light of COVID-19 (January 2021) that contained the same high-level objectives (the Vision for Bus) for the bus market as in the original (published in 2017)."

17.

Again, overall, I do not consider that there is any basis for impugning the rationality of these conclusions

(ii) it was irrational for the GMCA to 'update' the Assessment using an analysis which fell short of the standards of that Assessment (which were required by statute) (S, 49)

18.

Paragraph 49 of Stagecoach's Amended Grounds argues:

"49. ... the profound social and economic changes caused by the COVID pandemic drastically altered the transport landscape. That this will have long-term impacts is undeniable, even if the nature of

those impacts are at present uncertain. This inevitably renders the assumptions, data and analysis in the Original Assessment unreliable and inapt as the basis for either a consultation, or a decision, in relation to the Proposed Franchising Scheme. As noted at §30 above, the Defendants recognised that the Original Assessment required updating due to these widespread and potentially permanent changes. In circumstances where detailed analysis was required to evaluate the impacts of COVID on the different options, which was more complex to model than the analysis in the Original Assessment, it was irrational for the GMCA to prepare this 'update' using analysis which fell short of the standards of the Original Assessment."

19.

This argument was repeated in [70] of its Skeleton Argument.

20.

Paragraph 30 of its Amended Grounds asserted, '... the GMCA has recognised that the Original Assessment [Tab 5] and Auditor's Report could no longer provide the basis for taking a decision in respect of the Proposed Franchising Scheme.'

21.

I do not accept this argument, which I consider to be unsound in its premise. It is not accurate to say that the GMCA recognised that the Assessment needed 'updating' in light of the pandemic, or that it updated it.

22.

I set out the relevant parts of the June 2020 reports earlier. They clearly set out GMCA's position. That was that what was required was not some sort of 'update' of the Assessment, but further work to assess whether and, if so, to what extent, the pandemic had impacted on the Assessment and the recommendations that had been made in light of it. Paragraph [1.1.4] of the COVID Impact Report stated:

"1.1.4 The purpose of this report is to consider the potential impact and effects of COVID-19 on the bus market in Greater Manchester, the options considered in the Assessment and how COVID-19 may impact on the recommendation made in the Consultation Report that the Proposed Franchising Scheme would be the best option for reforming the bus market in Greater Manchester."

23.

Paragraph 16.4.51 and 16.4.53 of the Second Consultation Report explained (emphasis added):

"16.4.51 The GMCA has not prepared a new or updated assessment of the Proposed Franchising Scheme. The COVID-19 Impact Report did not update the Assessment or the analysis of affordability or value for money in it. Stagecoach are aware that there were a number of models used in preparing the Assessment and were informed that 'the inputs, model structure and logic of each of these models have not been updated since the Assessment and nor has there been any systematic refresh of the model inputs.' The COVID-19 Impact Report did not 'update' the Assessment's analysis of affordability and value for money. As Stagecoach themselves note, 'the conclusions of the Original Assessment are used as the starting point for' the COVID-19 Report.

...

16.4.53 The COVID-19 Impact Report indisputably contains further analysis that is not contained in the Assessment to ascertain whether or not the conclusions in it may be affected by the uncertainty associated with the potential effects of COVID-19 on the bus market. But there is no statutory

requirement that any further analysis that a franchising authority may undertake after an assessment has been prepared and audited, including, for example, any further analysis prepared after any consultation, must involve the preparation of a new assessment under section 123B of the Act, comply with the statutory guidance in respect of how such an assessment should be prepared, and be followed by a new audit under section 123D of the Act. OneBus and Stagecoach never suggested when proposing partnerships in the first consultation, for example, that, if the GMCA carried out any further analysis to consider the merits of those proposals and how they compared with the Proposed Franchising Scheme that any such further analysis would have such consequences”

24.

The exercise in which TfGM and the GMCA were engaged was shot through with the need to exercise judgment on complex economic and policy questions, a process which had been made all the more difficult by a public health emergency which was unprecedented in modern times. Whether it was appropriate in the circumstances not to construct a further model to determine the outcome in each scenario in the manner in which the reference case for the Assessment had been modelled was, in my view, one of those matters of judgment, as was whether the COVID Impact Report had suitably addressed the sensitivity of the conclusions in the Assessment in light of the pandemic. The Second Consultation Report stated:

“16.4.61 It is not the case that there is any requirement in the Act that any further analysis that is carried out by a franchising authority after any consultation has to comply with any statutory guidance relating to the preparation of the assessment even if relevant. COVID is in any case an event having potential consequences of a character not directly addressed in the statutory guidance. How appropriately to assess the uncertainty about the potential impacts of COVID-19 on the conclusions of the economic case in an assessment about value for money involves judgement. Whether the scenarios provide an appropriate basis for providing a “range of results around the options to account for uncertainty” is addressed in the section on the use of scenarios at section 3 of this report. Whether the ‘what if?’ tests in the Economic Case provide for appropriate range of potential outcomes in the circumstances to test the robustness of the conclusions on value for money in the Assessment is addressed at section 5.10 of this report.”

25.

Section 5.10 of the Second Consultation Report, headed ‘The use of the ‘What if?’ analysis’, summarised the themes in the criticisms made of that approach in consultees’ responses, namely: the Assessment does not represent a credible starting point for the analysis; ‘What if?’ analysis is not consistent with guidance (namely, one paragraph in a section on Scenario Analysis in the Treasury’s Guide to Developing the Project Business Case (see [5.10.11])); the basis for the ‘What if?’ analysis and the general approach to its treatment of benefits; comments on the conclusions drawn from the ‘What if?’ analysis in the COVID Impact Report; other impacts included in the Assessment. Section 5.10 was a lengthy section which considered and responded to these criticisms in very considerable detail. I do not accept it discloses any irrationality of approach. The COVID Impact Report used a different method of analysis from the Assessment, as the Defendants recognise in their Skeleton Argument at [95], but that did not make TfGM’s approach irrational.

(iii) it was irrational to rely on the COVID Impact Report as part of the decision along with the Second Consultation Report to recommend the Scheme to the Mayor (S, [50]) (and Stagecoach’s other grounds relating to the scenarios and economic case)

26.

Stagecoach argues that the analysis in the COVID Impact Report contains 'numerous deficiencies', as developed in its Amended Grounds at [38]. It further argues at [50] that these deficiencies mean the COVID Impact Report could not provide an adequate basis for either an informed consultation, or a decision as to whether to implement the Proposed Franchising Scheme, and thus that it was irrational for the Defendants to rely upon it as a basis for either consultation or decision making. These errors could not be cured by the Second Consultation, and the Second Consultation Report in any event failed to disclose a sufficient evidential basis for making such an important decision.

27.

The starting point when considering these arguments is to recognise, as the Defendants point out, that the material available to them (and TfGM) went beyond these two reports, but also included the Assessment and the GMCA report, 'Bus Reform: Bus Back Better', which responded to the DfT's National Bus Strategy, 'Bus Back Better'. In addition, there were the very many responses to the Second Consultation including those from the Claimants and their economic consultants. The Defendants therefore had a wide range of evidence to analyse.

28.

Whether the COVID Impact Report was sufficiently robust to be relied upon was specifically considered in the Second Consultation Report. One of the central arguments advanced by the Claimants and other consultees was that it was not. Some of these criticisms were set out in the Second Consultation Report at [17.2.22] under the heading 'Responses to challenges to any decision being taken now on the Proposed Franchising Scheme':

"17.2.22 There are a number of common themes in the representations as to why a decision should not now be made to make a franchising scheme. In summary these are that:

- There has been no meaningful re-analysis of the challenges facing the bus market and of GMCA's objectives and whether they remain valid and appropriate for the post pandemic world.
- The information on which such a decision can or ought reasonably to be made is not available: the data in the Assessment is out of date; there is too much uncertainty about the future; the Scenarios and their uses in the COVID-19 Impact Report are flawed; any analysis should be based on the guidance on scenarios that the DfT produces; the analyses of VfM and affordability are flawed; and it would be wrong to assume the financial risks involved now given the extent of the uncertainty and the financial pressures on public funds.
- There is no pressing need to take an irreversible decision now and it would be better not to do so: there are no pressing reasons why a decision has to be taken now; the priority should be to help the bus market to recover, something best achieved with a 'recovery partnership' and something which the decision now to make such a structural change would hinder; delaying any decision to make a franchising scheme would also enable that decision to be based on better information, providing a clearer view of the financial risks and VfM of such a scheme and enabling a full and fair comparison to be made between franchising and a longer term partnership; it would also lower the risks to public funds and would enable a more viable bus network to enter the franchising process."

29.

At [17.2.41]-[17.2.44] this section of the Report concluded:

"17.2.41 The COVID-19 Impact Report concluded that the case for change remained valid under different scenarios, as did the conclusion that the Proposed Franchising Scheme performed better in

terms of achieving GMCA's objectives under the different potential outcomes. The same is true of the conclusions on VfM and on affordability as set out below. Those remain the conclusions having considered the responses to the second consultation.

17.2.42 The analysis in the Strategic Case of the COVID-19 Impact Report is not, as Stagecoach suggest, superficial. No substantive arguments have been adduced to suggest that the objectives are wrong or that the conclusions are unreliable. The strategic analysis looked at each objective and how the different scenarios might affect previous conclusions that were reached in the Assessment. The economic and financial analysis also looked at the wide range of outcomes and concluded that the original conclusions on VfM and affordability would remain valid in all but the most extreme of circumstances.

17.2.43 It is also important to recognise, when considering uncertainty, the type of scheme that is envisaged and how adaptable it may be when being implemented. Most transport schemes are pieces of fixed infrastructure, such as a new road or rail improvements, that will increase transport capacity in a specific and fixed way. The forecasts of use of such assets, therefore, are very important. In one of the examples quoted by NERA, the Lower Thames Crossing is needed because there is congestion at current crossings and traffic is anticipated to increase. If this does not happen, then the value in both strategic and Economic terms of the intervention is called into question. The Proposed Franchising Scheme is not like this. Whilst it has transition costs associated with it, the key uncertainty is not about those costs, but the scale of the franchised services that will be run and the revenues associated with them over coming years. This uncertainty will affect the bus service in Greater Manchester whether or not the Scheme is implemented (and GMCA will be exposed to difficult financial decisions in terms of the transport system in any event if some downside scenarios, such as Scenario 3, were to materialise). The Proposed Franchising Scheme is itself flexible, and enables a set of decisions about how the service is run to be taken by the GMCA, with the objective obtaining the best service for Greater Manchester within the resources available. Each of these decisions can be taken responding to specific circumstances at the time and for different areas. Taking those decisions with a view to integrating and simplifying fares, creating a single more efficient network and improving customer service will, the Assessment argues, lead to better outcomes over the coming years than the current market structure. It could be argued that uncertainty about the future of the bus service makes the Proposed Franchising Scheme more necessary as it gives GMCA more levers to deal with potential uncertainty over coming years. The COVID-19 pandemic is an example where GMCA has had to intervene, and risk in the market has necessarily rested with the public sector rather than private sector operators, when unexpected events happen.

17.2.44 It is considered that GMCA has sufficient information to enable it to take a rational decision to be taken on whether it is in the public interest to implement the Proposed Franchising Scheme."

30.

The 'numerous deficiencies' alleged by Stagecoach in [38] of its Grounds relate principally to the four scenarios; the What If? Tests used; the appraisal period in the economic case; and possible partnerships considered.

31.

The first criticism was whether the scenarios were outdated ([38(a)(i)]). As the Defendants point out, this was not in the end pursued in Stagecoach's Skeleton Argument. Criticisms that the scenarios are outdated because they were developed at an early stage of the pandemic, and that what had already occurred was not what had been anticipated were, in any event, referred to in [3.5.2] and [3.5.3] of

the Second Consultation Report. The Report addressed them at [3.5.7] and [3.5.8] (eg, ‘Such developments, even if they were unanticipated, do not invalidate the Scenarios, nor do they suggest a different patronage for the main period for which the Proposed Franchising Scheme and other interventions are appraised’). This conclusion was reasonable.

32.

The next criticism in Stagecoach’s Grounds at [38(a)(ii)] is that the COVID Impact Report did not provide ‘a meaningful description of the scenarios, indicate the evidence the scenarios are based on or describe how the scenarios were developed’ and that ‘there is an insufficient evidential basis for the demand projections used’. Reference is made to the Franchising Guidance, [1.54]: ‘all significant assumptions used in the economic and financial cases should be documented as the assessment is developed – identifying the evidence on which they are based if possible.’

33.

I do not accept that there is real substance in these criticisms. Firstly, [1.54] refers to the preparation of a statutory assessment, as is clear from [1.44]: ‘Section 123B requires authorities to consider, as part of their assessment, whether the proposed scheme would represent value for money.’ It does not apply to further analysis outside of the statutory scheme, such as the COVID Impact Report.

34.

But in any event, the COVID Impact Report did explain the assumptions about bus patronage used in the scenarios, in Chart 6 (referred to earlier) and paragraph [1.4.24]. As [1.4.21] made clear, the numbers were not modelled from a set of quantified inputs but were devised to fit the scenarios and to help to understand what a range of outcomes could look like. There was an explanation about why this approach was adopted. The Claimants criticise this methodology, but it is incorrect to say the basis of the scenarios was not explained. Further, the scenarios were tested for internal consistency.

Paragraph 3.3.3 of the Second Consultation Report explained:

“Once the Scenarios had been developed, internal assurance was undertaken to ensure that the projections were internally consistent ... the Scenarios did not throw up any anomalous results that would lead TfGM to question their internal consistency or credibility.”

35.

Stagecoach further argues in its Amended Grounds – and I think this is the heart of the criticism on this aspect of the case – that, without ‘a clear or evidence-based description of how the four ... scenarios were converted into forecasts ... the forecasts are ‘essentially just subjective assumptions’ ([38(b)(i)]). Paragraph 41(1) and [47(1)] of its Skeleton Argument argues:

“41(1) The planning scenarios, the validity of which is central to all of the analysis which follows, are not clearly developed or explained. The COVID Impact Report does not provide a meaningful description of the scenarios, indicate the evidence on which the scenarios are based, or describe how the scenarios were developed. It is therefore impossible to know whether the scenarios are coherent, plausible or sufficiently likely descriptions of potential future states of the world, whether they provide a sufficiently wide span of potential futures that capture the underlying uncertainty caused by COVID, and whether there are other impacts of COVID that are relevant and should have been included in developing the scenarios. If the scenarios do not represent realistic or accurate possibilities, the conclusions in the COVID Impact Report based on these scenarios will be unsound.

...

47(1) Scenarios and projections: The vast bulk of the analysis across the lengthy Second Consultation Report is based on four scenarios ... The importance of the scenarios is clear from the Defendants' DGRs at §56: 'The object of the scenarios and the projections of bus patronage in each was to enable the key conclusions of the Assessment to be tested by reference to potential outcomes to see whether the uncertainty associated with COVID-19 may make a material difference to those conclusions'. The consequence is that the robustness of these scenarios (and their relative likelihood) is critical: all of the analysis which follows depends on it. However, the approach which has been taken indicates that they have not been developed in a robust or defensible way, with the consequence that the lengthy analysis contained in the Second Consultation Report could fairly be described as a castle that is built on sand."

36.

Paragraph 44 of Stagecoach's Amended Grounds contain a number of detailed criticisms of the scenarios, eg, that home working might depress the demand for bus transport more than had been allowed for in the scenarios; and that the expected growth in the use of autonomous vehicles over the next 30 years had not been taken into account.

37.

It seems to me that the answer to these criticisms (and the others made by Stagecoach) is to be found in various places, including the Defendants' Skeleton Argument at [95] and in Section 3 of the Second Consultation Report. For example, [3.3.1]-[3.3.2] stated:

"3.3.1 TfGM decided to use scenarios to help address the uncertainty associated with COVID-19 looking forward to 2026, as explained in the COVID-19 Impact Report. Scenarios are intended to represent 'corner points' of the domain of plausible outcomes and help to illustrate what may occur and why. Scenario planning entails identifying variables (sometimes called 'uncertain factors') that are expected to drive change in the future. The scenarios created in June 2020 reflected an iterative discourse between transport professionals, including those involved in planning and modelling, to reach a set of scenario narratives. In Greater Manchester, variables have been collected together to form two axes of a 2 x 2 grid of scenarios (Chart 1 below). The axes into which variables have been collected are:

- The strength of recovery from the COVID-19 pandemic. Economic strength/weakness is assumed to constrain central Government policy; and
- The extent of change in public attitudes following the COVID-19 pandemic, with public attitudes assumed to influence central Government policy

...

3.3.2 Before the work was started, advice was sought from Dr Katy Roelich of Leeds University on the derivation of scenarios and how this might be approached."

38.

The Report went on to explain at [3.4.10]-[3.4.13], [3.4.19]:

"3.4.10 A number of operators have included responses that set out what they consider to be the lack of transparency about the Scenarios and their development.

3.4.11 A description the key drivers of likely public transport use, and how they might be reflected in each of the four scenarios, was provided at sections 1.4.2 to 1.4.20 of the COVID-19 Impact Report.

3.4.12 Their initial development was described in 1.4.21. A lack of transparency cannot be inferred from the fact that there are no quantified assumptions set out, as it was clearly stated that the patronage figures 'were not modelled from a set of quantified inputs but were devised to fit the scenario and to help understand what a range of outcomes could look like.' It was thus clear that they were the product of judgment. There is no direct link between the spreadsheet that Stagecoach were provided with during the consultation and the Scenarios as set out. The spreadsheet was part of an exercise to look at an approach in which inputs to the modelling system were quantified, and projections taken from that the system and used for the Scenarios. But it was considered that this modelling approach would still involve judgments being made about a range of inputs, and would not yield a more transparent or robust set of scenarios: TfGM chose to use scenarios that were not constructed in this way.

3.4.13 Stagecoach complain that 'the forecasts are effectively just assumptions', as 'there is no clear and robust link based on analysis and evidence between the Scenarios and the forecasts used in the Assessment.' The projections were not forecasts. Moreover, as the COVID-19 Impact Report stated in 1.4.25, there had been developments since the projections were developed; some of the original assumptions upon which each of the Scenarios might develop had unsurprisingly not proved correct and some would, also unsurprisingly, prove not to be the case. The projections were useful for the purpose of testing the impact of COVID-19 on the appraisal of the options in the Assessment. It was thought that they represented the range of future outcomes that could still materialise. Whether that is the case is ultimately what matters.

...

3.4.19 The existence of different approaches in different circumstances in no way invalidates TfGM's approach to scenario planning. Grant Thornton (GT) were aware of the decision taken not to quantify inputs and model scenarios, and did not raise this as an issue in their review of the work done. The critical aspect is the range of scenarios used and whether this is adequate or is unreasonably narrow, and whether they are biased or partial to a specific option. The lack of a methodology, such as that proposed by Oxera or used in other cases, has no impact on whether the Scenarios can be considered to cover an appropriately broad range of potential outcomes. The range of scenarios is wide, and while the methodology has been criticised by some respondents, they do not suggest that the outcome would in fact be outside the range of the Scenarios set out by TfGM."

39.

The fundamental point underlying Stagecoach's complaint on this aspect of the case is that possible outcomes such as those shown in Chart 6 could only be determined by a process of modelling from a set of quantified inputs, and that the use of judgement was wrong and impermissibly subjective. This was a point Ms Demetriou emphasised in her oral submissions and it was, at least initially, something which concerned me. In what had been a very significantly data-driven exercise, this approach did appear incongruous. If the GMCA had simply ignored this argument then it would, I think, have been open to criticism. On further reflection, however, I am satisfied that the GMCA's approach was one which was reasonably open it. That is for the following reasons.

40.

TfGM made the judgement that modelling was neither preferable nor desirable: see, eg, the COVID Impact Report at [3.2.5] - [3.2.8], [3.3.1], [3.3.8] and [3.3.10]. Mr Howell made the point in submissions, I think reasonably, that 'one person's subjective assumption is another person's judgment ...' Mr Howell acknowledged that whether modelling would have been a better approach is

something which one could 'have an argument about', but said the approach taken was not one which no reasonable authority could have adopted. I agree.

41.

The arguments in favour of the use of such modelling which had been made by consultees during the Second Consultation were set out in the Second Consultation Report at [3.4.3]-[3.4.5]. The response to these points, explaining why such an approach was not practicable in the circumstances, nor desirable (in summary terms, because it might create a false impression of the robustness of the analysis), were explained at [3.4.7]-[3.4.8] and [3.4.14]-[3.4.15], [5.10.15] and [5.10.27] of that Report. This last paragraph said:

"5.10.27 While a modelling approach to such tests would provide a higher level of consistency and might be easier to audit, the uncertainty over model inputs and uncertainty regarding the stability of the relationships underlying the models used in the Assessment, mean that such testing would lead to applying the model outside the bounds within which it was calibrated and would be likely to give decision-makers a false appreciation of the robustness of the analysis."

42.

Thus, TfGM considered the detailed critiques of its methodology that had been advanced by the Claimants and other consultees, but decided for the reasons it gave that its methodology was sound. It expressly recognised there was uncertainty. In my judgment these were conclusions which were reasonably open to it. It is one of those difficult and technical areas where I should, in accordance with the reasons I gave earlier, defer to the expertise of those involved.

43.

I turn to the criticisms of the 'What If?' tests. The COVID Impact Report, as part of its consideration of the Economic Case in Section 3.4, used a 'What If?' method of analysis to explore the impact that the four scenarios might have on the economic metrics NPV and BCR, in relation to the Proposed Franchising Scheme and the Operator Proposed Partnership, taking the results from the Assessment as the starting point.

44.

Under the heading 'Use of COVID-19 Scenarios to consider COVID-19 Impacts', [3.2.8]-[3.2.9] of the Report explained:

"3.2.8 Given that COVID-19 introduces uncertainty, rather than just risk, standard risk management techniques which develop high and low projections around a central case using the existing analytical framework are unlikely to cover the broad range of possible alternative futures that need to be considered. Demonstrating resilience of an intervention to uncertainty in economic terms, therefore, is about demonstrating that assumptions are still robust, within a reasonably likely set of potential futures, and that the intervention can still be delivered, even though some adaptation may be required to its implementation

3.2.9 Scenario planning offers a tool to explore the range of possible alternative futures and hence to test the robustness of the assumptions underpinning a proposal. Therefore, the analysis presented in this chapter has used the Scenarios as set out Section 1.4 (Possible future transport scenarios) to:

- Explore what the implications of the Scenarios could be for the value for money appraisal;
- Apply a 'What If?' factoring approach to the previous appraisal to present the impact the Scenarios may have on the economic metrics, focusing on the potential downsides for value for money;

- Use the above analysis to consider qualitatively the robustness of the Economic Case presented in the Assessment and under what, if any, circumstances the Proposed Franchising Scheme may not offer value for money and how likely this may be;
- Consider how TfGM could review the commercial levers to adapt the implementation of the Proposed Franchising Scheme to deal with any downside issues if they arose; and
- Reach an overall conclusion of robustness of the Economic case as presented in the Assessment.”

45.

Paragraph 3.4.3 of that Report further explained:

“The analysis presented here does not rebuild the full economic appraisal, and the results are intended only to highlight the uncertainties that exist and to assist in making inferences about the robustness of the existing Assessment. These inferences would also inform any adaptation of how the Proposed Franchising Scheme would be implemented given any significant change in circumstances. The potential for such adaptations is discussed in the Commercial and Management Case sections of this report.”

46.

The four steps in the ‘What If?’ analysis were explained in [3.4.4]:

“3.4.4 The ‘What If?’ tests presented here reflect a simple factoring of the appraisal results from the Assessment and, in turn, look at:

- Rebasing the appraisal to reflect changes to the size of the bus travel demand by:
 - o Step 1 - the impact of changes to aggregate benefits due to overall changes in trip-making under the Scenarios
 - o Step 2 - the impacts of changes to the implementation costs to scale the options to the revised bus market size
- And then looking at some potential downside tests that consider what level of benefit reduction would be required to mean that the Proposed Franchising Scheme was not value for money by
 - o Step 3 - changes to the benefits of individual impacts:
 - Step 3A: Impacts if the bus market size reduced
 - Step 3B: Further analysis of the branding benefit.”

47.

Stagecoach contends at [38(b)(ii)] and [45(b)] of its Amended Grounds that the scaling of benefits in Step 1 of the What If? approach was not justified; that it failed to consider factors that affect the benefits of an option (such as service quality benefits, network benefits, interoperability benefits); that it implicitly assumed that induced demand is uniformly distributed across all trips; and that it contravened [1.53] of the Franchising Guidance. Ms Demetriou amplified these in her submissions. For example, she said:

“So they've taken the quantified benefits from the original assessment, not changed the constituent elements of those benefits or the value to be attributed to them, but simply scaled down in proportion to the changes in demand that you see in the projections. That's what they've done.

And so the question we ask, the question we -- the point we made -- or my clients made in the consultation is that, well, that's overly simplistic. And you can see why, my Lord, with respect, just as a matter of logic it's overly simplistic, because you saw in the previous report that different values are ascribed to, for example, travel time by different sub-segments of the market ..."

48.

One of the basic criticisms made of the approach adopted in the Covid Impact Report was that it was 'simplistic'.

49.

This point about the scaling of benefits refers to NERA's criticism (in section [4.4] of its Report) that Step 1 in the What If? Test was overly simplistic and ignored, for example, spatial and temporal demand factors. NERA argued under the heading 'Benefits have been scaled simplistically' that:

"4.4 Third, the analysis 'scales' the likely benefits of franchising and partnerships in line with these forecast changes in demand. In other words, if TfGM forecast (or, more accurately, assume) that demand will be 50 per cent of what their previous analysis suggested, they then also assume that the benefits of franchising and of a partnership option will also be 50 per cent of what their previous analysis suggested.

This approach is unsupported by clear rationale, analysis or evidence and there is little reason to believe that benefits can be simply scaled in this way - at all or in the same way for the proposed franchising system as for a partnership option.

To see why this is important, it is worth noting that in the original analysis benefits were estimated with detailed consideration of spatial and temporal demand factors. For example, service provision was assessed in different corridors and at different times of day, with user and non-user benefits being generated (through reductions in Generalised Journey Cost, GJC) in accordance with how proposed network changes improved or rationalised service provision in those corridors or at those times.

However, all of this could easily change as the economic and social impacts of COVID-19 and technology shift the demand for transport, which would have a corresponding impact on the accumulation of benefits meaning that an aggregate scaling approach is overly simplistic. Consider an example where all the previous GJC benefits were concentrated in the evening period, but evening demand was totally diminished in a given scenario (e.g. due to changes in discretionary spending patterns, or constraints on hospitality sectors). On aggregate, roughly 20% of total demand might disappear but 100% of previously estimated benefits would actually be affected, as benefits are not uniformly distributed.

The scenarios and the benefit scaling give no consideration to this type of effect and therefore the link between scenario outputs and benefit reduction is likely to be spurious."

50.

Paragraph 60 of Stagecoach's Skeleton Argument argues that:

"60. This approach is unsupported by any clear rationale, analysis or evidence and there is little reason to believe that benefits can be simply scaled in this way - at all or in the same way for the proposed franchising system as for a partnership option."

51.

I consider the answer to this criticism is that Steps 1 to 2 were intentionally simplified, and the GMCA designed them with its 'eyes open' to what it was doing. Paragraph 3.4.5 of the COVID Impact Report explained that:

"3.4.5 Steps 1 to 2 are simplified attempts to rebase the appraisals of the Proposed Franchising Scheme and the partnership options from the Assessment to allow for the first-order demand effects of each Scenario. This has been undertaken as it is considered reasonable to assume that overall benefits of the options will be based on market size. This rebasing then creates a new position to test impacts on specific benefits that are less clear and which could increase or decrease benefits."

52.

Further, as pointed out in [5.10.42] of the Second Consultation Report, the majority of benefits in the Assessment (fares, interoperability and service quality) apply across all geographies and time periods and are therefore not directly affected by spatial or temporal factors.

53.

In my judgment, therefore, it would not be right to view Step 1 in isolation. The step-wise What If? approach has to be viewed as a whole. As the Defendants explained in [88] of their Skeleton Argument, Step 3 involved consideration of what the effect on those benefits which were not dependent on overall bus patronage would be required in order to show that the Proposed Franchising Scheme would not offer value for money (recognising that in fact the benefits in such cases could in fact increase with a reduced market). The analysis was purposefully simplified to aid interpretation: see [3.4.3] - [3.4.6]; [3.4.18] - [3.4.23] of the COVID Impact Report; and [5.10.7] - [5.10.8] and [5.10.42] of the Second Consultation Report. Paragraph [5.10.46] of this Report concluded:

"TfGM conclude, therefore, that the criticisms of Steps 1 and 2 have been made without fully appreciating that these are preliminary steps that need to be understood alongside Step 3, and when done so, the assumptions can be considered reasonably chosen."

54.

This conclusion lay within the range of reasonable conclusions open to TfGM.

55.

In [45(b)(i)] of its Amended Grounds, Stagecoach argues that in the Second Consultation Report, the approach TfGM adopted in relation to the scaling of the benefits and costs relative to the anticipated change in bus patronage at [5.10.41] - [5.10.46] of the Second Consultation Report (which it says results in the logic that a reduction in total trips by x% would also lead to a reduction in net benefits due to franchising of x%, because the franchising benefits per trip remain constant before and after the reduction in demand) was flawed and 'simplistic and incorrect'. It then goes on to make a number of specific criticisms in [45(b)(ii)] including because, for example, it is unlikely that service quality benefits per trip are likely to remain the same after the pandemic, as they are likely to be altered by the way bus users think about quality: [45(b)(ii)(1)].

56.

It is unnecessary to lengthen this judgment by dealing in detail with each of the points made, which descend into granular matters of detail, such as cleanliness. I remind myself I am not concerned with a merits review of the analysis carried out by TfGM and the GMCA in the various reports. The fundamental question is whether their conclusions were reasonable. It suffices to say that for the reasons set out in the Defendants' Skeleton Argument at [110] et seq, the conclusions which they and

TfGM reached on these issues were reasonably open to them. The short point is that, in this highly complex area (as with, I would imagine, a lot of modelling or forecasting), more than one method of analysis is possible. But as I have made clear, the What If? Tests which were adopted were expressly stated to be simplified to enable a judgment to be made about the robustness of the key conclusions in the economic case. The fact that a more complex method analysis might have been possible does not mean that the analysis in fact conducted could not rationally support the conclusions which were reached.

57.

Stagecoach also contends that the What If? Tests somehow contravene [1.53] of the Franchising Guidance relating to the preparation of a statutory assessment ([38(b)(ii)]). I dealt with this point earlier. The COVID Impact Report was not such an assessment.

58.

Stagecoach next contends (at [38(c)] and [45(c)] of its Amended Grounds and [41(3)], [47(3)] and [62]-[65] of its Skeleton Argument that no consideration was given to the most suitable appraisal period in the COVID Impact Report; that this was contrary to the statutory guidance relating to the preparation of an assessment under s 123B; and that a period of 15 (rather than 30 years) may have been more suitable and, if so, the benefit cost ratio of the proposed franchising scheme is likely to be overstated and that, in the Second Consultation Report, there was no explanation why it remained possible to make meaningful assessments over a 30 year period given the added uncertainty of the pandemic. On this point Ms Demetriou said:

“Now, the point that we made -- or my clients made in the consultation is, well, where you have uncertainty then that logically calls for a shorter period because the regulatory landscape may change. So you can't assume this is all going to be in place for the next 30 years. And, my Lord, the short point is that simply was not considered in the Covid Impact Report.”

59.

It seems to me that the length of the appraisal period was, par excellence, a matter of judgment on which views could reasonably differ. The approach in the Assessment was set out at [14.3.6]:

“14.3.6 While a 60-year appraisal timeframe is common when developing the business case for major transport interventions that can be expected to be durable over time such as Bus Franchising, it would not be normal practice to apply such a long appraisal period for a bus industry Partnership scheme, where there is no evidence or precedent of schemes lasting over 10 years. To ensure fair appraisal treatment of all options, a 30-year appraisal period has been selected, but a sensitivity test has been undertaken to assess the impact of moving to a 60 year appraisal period. This appraisal assumption will disadvantage the Franchising Scheme option when comparing economic performance between the franchising option and the partnership options, because it does not show in monetised terms the difference in the likely duration of the interventions.”

60.

The Assessment also said that franchising schemes had been shown to deliver durable benefits in excess of that period; and that, by contrast, there was no industry precedent for a durable partnership that had lasted more than 10 years and delivered significant passenger benefits over that time: [13.1.5] and [13.3.10].

61.

It seems to me that the key point is that whether a 30-year period had been used or, say, a 15-year period, did not, in the end, especially matter to the analysis. The scenarios used in the COVID Impact Report to test the robustness of the Assessment looked forward to 2026, when it might be assumed that any longer-term effects of the pandemic would have run their course. Paragraph [3.5.9] of the Second Consultation Report stated:

“3.5.9 Go North West state that the Scenarios are too short-term and that 2026 is too early to end the Scenarios. This timeframe was chosen as one over which the effects of the COVID-19 pandemic could be thought to play out, and the key shorter- and longer-term effects of the pandemic would by that point be part of a new status quo. The COVID-19 pandemic will affect long-term trends and attitudes as well as having shorter term effects – but given the level of uncertainty, and the use of a range of scenarios (rather than a central focus approach), it is appropriate to represent its effects as occurring over a discrete period of time.”

62.

As I have said, the selection of 2026 was a matter of judgement which cannot easily be impugned given the unprecedented nature of the pandemic. The assumption in the COVID Impact Report was that, from 2026 to the end of the appraisal period, the trend in bus travel demand was assumed in each scenario to follow the trend in the Assessment. This was considered very conservative for Scenario 2, conservative for Scenarios 1 and 4 and not unreasonable for Scenario 3: see [3.4.7(ii)] and [3.4.8]. It was therefore irrelevant to this approach whether a 15-year or 30-year appraisal period was chosen.

63.

In her oral submissions Ms Demetriou, I think, accepted that there could be a range of reasonable views on this issue. The nub of her complaint was that the issue was not considered. I do not think this is right. TfGM did engage with NERA’s criticisms of the appraisal period in the Second Consultation Report. It was pointed out that: franchising is a regulatory change to the bus market that is intended to be long term with no fixed end date. Guidance would indicate a 60-year period would be appropriate in such a case: [5.2.31]; uncertainty (which is always part of investment appraisal) is dealt with by the application of discounting and, most importantly, via sensitivity/scenario testing (rather than reducing the appraisal period): [5.2.33]; the choice of a 30 year period was conservative in any event, given (a) it was already reduced from the 60-year norm, which would have favoured the Proposed Franchising Scheme even more; (b) the combination of the use of the discount rate applied to future benefits when the majority of the investment costs of franchising are front-loaded and (c) the need to take into account the residual value of the depots (which would offset some of the costs of the Franchising Scheme) when considering its BCR if the appraisal period was shorter; [5.2.33] – [5.2.36].

64.

It is clear, therefore, that the question of the appraisal period was one of the matters raised by consultees during the Second Consultation, and the responses then evaluated by TfGM which, for the reasons it gave, determined that the 30-year period in the COVID Impact Report was a valid period. There was no ‘failure’ to grapple with the issue, as Stagecoach alleges. I have therefore concluded was not irrational to choose a 30-year appraisal period in the Covid Impact Report.

65.

Stagecoach next contends in [38(d)] of its Amended Grounds and [47(4)] of its Skeleton Argument that, contrary to [1.36]-[1.40] of the Franchising Guidance, the COVID Impact Report did not conduct a detailed assessment of the likely partnership options which might have promised better value for

money than franchising; and that, in any event, the performance of partnership options under the different scenarios should have been considered.

66.

The Defendants respond with a point I have already made elsewhere, namely, that these paragraphs refer to the process of preparing a statutory assessment under s 123B, which the COVID Impact Report was not. But they also say, in any event, that that Report did consider partnership proposals. At [2.4.24]-[2.4.26] the COVID Impact Report said:

“2.4.24 The original Assessment looked at two partnership options – one based on the proposals put forward by operators (the ‘Operators Proposed Partnership’) and one where a potential more ambitious partnership was set out (the ‘Ambitious Partnership’). In the response to the consultation, the various new partnership proposals, whilst representing an improvement on the Operator Proposed Partnership, were not judged to be superior to the Ambitious Partnership. TfGM have considered what impact COVID-19 may have on the partnership offers above, and these responses received from operators have been a helpful addition to this analysis. As outlined throughout this report, TfGM recognises that there are significant challenges in the Greater Manchester bus market due to COVID-19, and that these challenges will inevitably have an effect on what operators are able to commit to in their partnership proposals. The responses received from OneBus, Rotala, Stagecoach and First indicate that any revenue-related commitments made in the partnership proposals cannot now be relied upon in light of COVID-19.

2.4.25 In their recent correspondence, operators did not specifically refer to their commitment to a potential for a freeze in the price of a multi-operator ticket. Given the likely cost of this commitment, it is reasonable to assume that this (along with other commitments involving spending, such as accelerated fleet renewal) might be at greater risk than some of the other commitments. The nature of commitments to asset renewal under Partnership Plus, relating to both their commitment to provide thirty extra vehicles during the period of the partnership and also to transition their fleet to greener vehicles, were not binding on operators and so were not considered to be of great benefit to Greater Manchester. It is likely that one result of the COVID-19 pandemic has been to delay investment plans, and this may affect operators’ ability to invest in new vehicles. This is supported by the various public statements on suspending or deferring capital investment in the short and medium term that operators have made in light of the COVID-19 situation.

2.4.26 In conclusion, based on the responses received, it is highly unlikely that operators would still be able to commit to all of the commitments outlined in their partnership proposals received in response to the consultation. This means that for the partnership that can be currently envisaged, it would be likely to achieve less than the ambitious partnership set out in the Assessment, and maybe less than the Operator Proposed Partnership, which included a freeze in the all-operator ticket price. It may be that, at some point in the future, operators might be able to coalesce around a partnership offer with some substantial commitments that could be assessed. It is not clear when that might be and, as the effects of COVID-19 on operators may last longer than the pandemic itself or social distancing restrictions, it may be some time. It would not be appropriate to wait for a renewed partnership proposal as they may never come together to make such a proposal.”

67.

The Report considered, therefore, what realistic partnership options there were and considered how franchising would compare with the operator proposed partnership, even though operators were then unwilling to commit to it.

68.

Stagecoach further contend (a) that a 'recovery partnership', should have been considered and (b) that a more rigorous analysis might have revealed that the likely partnership options promised better value for money than franchising having regard to the National Bus Strategy which it it said heavily favoured enhanced partnerships (Amended Grounds, [38(d)] and Skeleton Argument, [27] and [47(4)]).

69.

In fact, 'recovery partnerships' were considered in section 13 of the Second Consultation Report, which is entitled 'Recovery partnerships'.

70.

Overall, I am satisfied partnerships as an option were fully considered during the decision making process, and were considered in particular in a report prepared in response to the Government's National Bus Strategy 'Bus Back Better', namely 'Bus Reform: Bus Back Better' (23 March 2021). That report considered whether delay would be justified in the light of the National Bus Strategy in order to ascertain whether operators would commit to an enhanced partnership (which they had previously refused to do) and, if so, on what terms, concluding that it would not be justified in the circumstances: [5.2]-[5.12]. That was a rational conclusion.

(iv) an irrational model was used (S,[51]) and (viii) it was irrational not to delay the Decision for further discussions with operators in light of the National Bus Strategy (S, [52])

71.

Stagecoach contends that it was irrational to adopt 'an insufficiently rigorous approach, resulting in the production of a model which could not form the basis for rational decision making on a project of this magnitude' particularly when it was anticipated that the DfT would produce guidance about addressing the uncertainty produced by the pandemic (Amended Grounds, [51]). It also contends that the decision should have been delayed in light of the publication of the National Bus Strategy (Ibid, [52]).

72.

This is essentially a repetition of arguments which I have already rejected. It was not irrational to use the scenarios to consider the potential effects of the pandemic and whether they may affect materially the key conclusions in the Assessment. The Defendants also considered whether any decision should be delayed for a number of reasons including the production of further guidance from the DfT (see further below) and the National Bus Strategy. They were entitled to reach the conclusions which they did.

(v) the submission that further consultation during the COVID-19 crisis was irrational or manifestly unreasonable (Rotala Ground 2)

73.

Rotala's primary position, as set out above, is that the only lawful course open to GMCA in November 2020 was to recommence the statutory process from scratch, with a new statutory assessment and a new statutory audit. In the alternative, in its second ground of challenge, Rotala's position is that the decision on 27 November 2020 to recommence the consultation process was irrational. Mr Singer said:

“We also say that the decision to reconsult was irrational because not only was there the same uncertainty that there had been in June, but there was actually more uncertainty.”

74.

Rotala advances essentially three reasons in support of this submission: (a) the GMCA paused the franchising process in June 2020 because it realised that reaching a final decision then was impossible because of the effects of the pandemic, and that the situation had not changed in November 2020 because the pandemic had not ended and was of indeterminate length and further effect; and that it was irrational to seek consultees’ view in those circumstances (see Amended Grounds of Challenge, [38], [40] and [41]); (b) Question 10 in the GMCA’s Second Consultation document (which I set out earlier) indicated that the decision to consult further was taken without deciding if the time to launch the process was appropriate (Ibid, [40] and [41]); and (c) the GMCA was not able to comply with the statutory requirement to consider one or more courses of action other than franchising, as Rotala could not confirm that a partnership option was available, and it was ‘self-evidently irrational’ to ask whether or not a franchising scheme was likely to perform better than a partnership in achieving the GMCA’s objectives (Ibid, [39]).

75.

I do not accept these submissions. It was not irrational for GMCA to decide in November 2020 to conduct a Second Consultation exercise. My reasons for so concluding are as follows.

76.

Firstly, I reject the premise of the initial part of Rotala’s submission that there had been no relevant change in circumstance between June and November 2020, and that the Defendants have not identified any good reason for deciding to carry out the Second Consultation.

77.

The starting point is that in June 2020 the impact of the pandemic was noted in the report, ‘Bus Reform: Consultation Update’, and the need for a further report was identified. I set out the relevant portions of this report earlier. It is clear that the reason why the GMCA took no decision in June 2020 following the First Consultation was because of the pandemic. It recognised that it would need to consider the potential implications of the pandemic - which then had only existed for about three months - for the bus market, and that further work would be necessary in order to do so. Contrary to Rotala’s argument in [38] of its Amended Grounds, the GMCA did not decide to ‘pause’ the franchising process until the pandemic had ended, nor did it decide that, until that time, any final decision on the franchising scheme would be ‘impossible’.

78.

The COVID Impact Report was presented to the GMCA in November 2020. It was nearly 150 pages long and was extremely detailed. Among other things, as I have said it set out four different potential scenarios for travel in Greater Manchester in light of the pandemic, expressed in terms of the pre-pandemic levels of typical weekly numbers of bus trips, in the period to 2026. Paragraphs 1.4.1-1.4.2 explained:

“1.4.1 The transport market in Greater Manchester is in a state of disruption from COVID-19. To enable consideration of the potential impact and effects of COVID-19, it is necessary to take account of the fact that the current situation carries a great deal of uncertainty that was not foreseen in the Assessment. There is a range of potential outcomes for the transport system in Greater Manchester as a result of COVID-19 both in terms of how patronage evolves and what problems and issues are caused. To help make informed decisions across different aspects of travel (not just bus reform), TfGM

have taken a scenario-based approach, looking forward to 2026 (when it might be assumed that any longer-term effects of COVID-19 would have run their course), considering potential future outcomes with different characteristics. The use of such scenarios enables the key conclusions of the Assessment to be tested by reference to such potential outcomes to see whether the uncertainty associated with COVID-19 may make a material difference to those conclusions.

1.4.2 The scenarios chosen are intended to reflect the key drivers of likely public transport use, including bus patronage, over this period: the progress of the pandemic, social distancing and other rules in place, its economic effects, and any knock-on effects on the attitudes to environmental measures and sustainable transport among the public and in government. Whilst there are many factors, to give a useful range of outcomes, the scenarios were considered as the product of two important trends: (i) the pace and nature of the economic recovery, and the associated employment and travel that would occur; and (ii) the social attitudes to public transport and employment (for instance, where people choose or are able to work). This provides four potential futures (otherwise referred to in this report as the 'Scenarios') which are characterised by different social and economic circumstances, and which are likely to have different outcomes in terms of bus patronage."

79.

The Report considered how COVID-19 and each of the scenarios might affect the conclusions reached in the strategic, economic, commercial, financial and management cases in the Assessment regarding the Proposed Franchising Scheme.

80.

The graph set out as Chart 6 at [1.4.24] showed the level of recovery to 31 October 2020 and set out the projections of the typical weekly number of bus trips for the four different scenarios, when they were developed in May and June 2020:

"Chart 6 below shows the level of recovery to 31 October 2020 and sets out the projections of the typical weekly number of bus trips for the four different Scenarios outlined above, when they were developed in May and June of 2020. It shows that initially, the bus market decreased to c. 25% of pre-COVID-19 levels under all scenarios, and then the varying degrees of recovery are shown across the Scenarios. Scenario 3 assumes a significant permanent decline in the bus market by 2026, whilst Scenario 1 and Scenario 4 show some recovery towards pre-COVID-19 levels of between 70%-80%, whereas Scenario 2 shows the market recovering and exceeding pre-COVID-19 levels (to c. 110%)."

81.

Paragraph 1.2.25 stated:

"As noted above, there have been developments since these projections were developed and some of the original assumptions upon which each of the Scenarios might develop have, unsurprisingly, not proved correct and some in future will, also unsurprisingly, prove not to be the case. The projections in the Scenarios are nonetheless useful for the purpose of testing the impact of COVID-19 on the appraisal of options in the Assessment. They represent the range of future outcomes that could still come from the interaction of the long-term drivers - the strength of the economic recovery and the attitudes to public transport among decision-makers and the public. It is still possible (though less likely) that there will be a trajectory derived from Scenario 2, as Greater Manchester looks to 'build it back better'; a down side scenario, Scenario 3, with a more dramatic loss of patronage reflecting a weaker economy and less support for public transport (though again less likely); a scenario, Scenario 1, where a recovering economy leads 'back toward normality' but patronage still falls short of where it would have been; and a 'poorer and more local' future, Scenario 4, where the economy does not

recover strongly but there are more local and public transport journeys. As the key drivers of the four Scenarios take effect over the medium and longer term, these different futures will all remain possible for a while, though their relative likelihood will change.”

82.

In its ‘Overall Conclusion’ at [9.11.4]-[9.11.5], the COVID Impact Report stated:

“9.11.4 The case for change set out in the Assessment remains and the Franchising Scheme still offers a greater chance of achieving GMCA’s objectives for the bus network than the potential partnership option in Greater Manchester under the different Scenarios that could occur. The Proposed Franchising Scheme remains the only option that will enable Greater Manchester to get the full benefit of an integrated transport system. The Proposed Franchising Scheme also still offers more scope for introducing Phase 2 measures that would improve the service, and to do so with greater value for money than the partnership option.

9.11.5 The analysis in this report confirms that, on balance, the value for money of the Proposed Franchising Scheme is likely to be robust to the uncertainty created by COVID-19 in all reasonably likely Scenarios. The Proposed Franchising Scheme also remains preferable to the Partnership option as, on balance, the overall net benefits are likely to remain higher and more deliverable, particularly given the considerable uncertainty surrounding what, if any, partnership options are on offer.”

83.

In Section 5 of his report ‘COVID-19 Impact on Bus Franchising Report and Consultation’, the GMCA and TfGM’s Chief Executive specifically considered the option of deferring the decision on whether to proceed with franchising. He said at [5.3]:

“Thus, while there are some apparent reasons to delay a decision on whether to proceed with the Proposed Franchising Scheme, and while there will be more information available about the likely effects of COVID-19 given such a delay, it is not clear that the GMCA will be in a significantly better position to understand the longer-term effects of the COVID-19 crisis on the bus market in the Spring of 2021 or even later in that year.”

84.

He then set out at [5.4] the reasons why it was important to take any decision about franchising sooner rather than later. He concluded at [5.5]:

“5.5 These reasons for proceeding now mean that, while there is always a case to defer making decisions until there is more information, it is considered that the question, whether and how to intervene in the bus market, should be looked at now. The findings of the Report in terms of whether and to what extent the previous conclusions reached in the Assessment remain valid, notwithstanding the impact of COVID-19, mean that it would be appropriate to take a decision to proceed with the Proposed Franchising Scheme. Failing to do so would hamper the delivery of the Transport Strategy 2040 and the ability to build back better.”

85.

The Chief Executive therefore proposed a further consultation. He said at [6.1]-[6.3]:

“6.1 The [COVID Impact] Report is not a new assessment of the Proposed Franchising Scheme. Instead, it considers the extent to which the Assessment of the Proposed Franchising Scheme remains valid in the light of COVID-19 and the uncertainties associated with it. These are matters which those

who were consulted previously had no opportunity to express a view on and on which it is recommended that they should now be given such opportunity.

6.2 Should the GMCA wish to proceed with the Proposed Franchising Scheme, therefore, it is recommended that the GMCA undertake a further consultation exercise. The purpose of the consultation would be to allow consultees to provide their views on the Assessment in the light of the Report across the five cases set out in the Assessment and on the Proposed Franchising Scheme itself in the light of it. It would be made clear that those who may wish to respond need not repeat any earlier representations that they may have made in the earlier consultation, although they would be free to do so or to indicate where they may wish to modify or supplement them in the light of COVID-19.

6.3 It is recognised that any consultation conducted in a time of COVID-19-related restrictions will be different to previous consultations and the GMCA will have to do everything it reasonably can to ensure that the consultation is fair. Due regard has also been had, under section 149 of the Equality Act 2010, to the relevant considerations in conducting a consultation at the current time given the potential difficulties those with protected characteristics may have in engaging with it, as detailed below.”

86.

It is clear, therefore, that between June and November 2020 the GMCA was supplied with a substantial report which considered the potential effects of the pandemic in Greater Manchester and how it might affect the key conclusions in the Assessment. The decision whether or not to defer a decision was carefully considered, with the arguments for and against deferral fully set out. The GMCA decided that it had enough information to proceed with the Second Consultation.

87.

In its Skeleton Argument at [35] Rotala argues that the impact of the pandemic could not be said to have been clearer in November 2020 than in June 2020; that the COVID Impact Report ‘did not supply any new data on the impact of COVID’; and that the relevant data in the Assessment was from 2017. It is asserted that the Report ‘did not have any data other than that which was used in the June 2019 Assessment.’

88.

I do not accept these points. On any view, the COVID Impact Report contained substantial new analysis of the potential impacts of the pandemic on the key conclusions in the Assessment. Section 1.2 and 1.3 included data up to November 2020 about transport use and reported on what had happened to the bus market in Greater Manchester, as well as on many other matters. The purpose of the consultation was to allow consultees to provide their views on the Assessment in the light of that data and the conclusions in the COVID Impact Report more generally.

89.

In my judgment it was not irrational for the GMCA to conclude in November 2020 that it had enough information about future bus travel trends in the COVID Impact Report to move to a further consultation. This was a matter for GMCA's judgement weighing a number of factors on a matter of policy with which the Court should not lightly interfere. It is not right that ‘nothing had changed’, as Rotala argues.

90.

I turn to Rotala's second criticism, namely that Question 10 in the Second Consultation (which asked consultees whether they had any comments to make on whether then was the right time to decide whether to proceed with the Proposed Franchising Scheme), shows the decision to hold a consultation was irrational because, '... it cannot be part of that process to decide if it is the right time to do so.' (Amended Grounds of Challenge, [40]).

91.

This is a bad point. GMCA was not asking consultees whether it was the right time to hold a consultation. It was asking whether or not then was the right time to make a franchising scheme. As I have said, that was a matter which had been considered and a provisional conclusion reached by the GMCA. It was perfectly proper for it then to seek consultees' views on the issue. Asking the question was a recognition by the GMCA that views could differ, which it ought to take into account before reaching a final conclusion. That is the whole point of holding a consultation.

92.

Rotala's final criticism under this head is that the GMCA was not able to comply with the statutory requirement to consider one or more courses of action other than franchising, as Rotala could not confirm that a partnership option was available, and it was 'self-evidently irrational' to ask whether or not a franchising scheme was likely to perform better than a partnership in achieving the GMCA's objectives.

93.

I also reject this criticism. The statutory requirement to compare making the Proposed Franchising Scheme with one or more alternative courses of action is one that relates to the assessment prepared under s 123B. Section 123B(2)(b) provides that 'the assessment must ... (b) compare making the proposed scheme to one or more other courses of action.'

94.

The Assessment published in September 2019 met that statutory requirement. It compared the proposed franchising scheme with other courses of action including 'do minimum', and different forms of partnership. Section 59 of the Assessment was headed 'The Options Considered', and many other sections of the Assessment considered the different options in detail.

95.

But the matter did not end there. The Second Consultation addressed the potential effects of the pandemic on the 'do minimum' option and various forms of partnership, in a number of different potential scenarios. It sought consultees' views not only on the conclusion that the Proposed Franchising Scheme was likely to perform better than the partnership option in achieving the GMCA's objectives, notwithstanding the pandemic, but also on whether they supported or opposed the introduction of the proposed franchising scheme. Question 2 was:

"2. Do you have any comments on the conclusion that the Proposed Franchising Scheme is likely to perform better than the partnership option in achieving GMCA's objectives, notwithstanding COVID-19?"

96.

Question 7 was:

“7. Do you have any comments on the conclusions of the COVID-19 Impact on Bus Franchising Report about how COVID-19 is likely to affect the impacts of the Proposed Franchising Scheme, partnership and Do Minimum options on (a) passengers, (b) operators, (c) GMCA and (d) wider society ?”

97.

I therefore do not regard it as an accurate criticism that no other course of action was compared with franchising in the Second Consultation. Rotala’s assertion in [37] of its Skeleton Argument that ‘GMCA is not now acting rationally/lawfully in only considering one of the notional courses of action in its second consultation’ was factually wrong. Consultees were readily able to comment upon other options, including doing the minimum and leaving the bus market essentially unreformed (which the Franchising Guidance makes clear is a possible course of action which needs to be considered against proposals for reform: [1.46]).

98.

Consultees had a full opportunity to set out their case why they considered that a partnership might be a better option. As the Defendants point out, if Rotala thought that it could not at the time give an answer, or considered that a more helpful response to these questions would be forthcoming from it or other consultees at a later stage, and hence that it would be better to postpone taking a decision until that time, then it and other consultees were free to make that case in response to Question 10.

(vii) TfGM’s response in the Second Consultation Report to Oxera’s report was inadequate or failed to take Oxera’s points properly into account (R, [60]-[65]); and other criticisms (Rotala Skeleton, [40]-[51])

99.

In its Amended Grounds at [60]-[65], Rotala advanced arguments concerning how TfGM had responded to matters raised by Oxera during the Second Consultation including about the scenario-based analysis, the economic case for franchising and the timing of the process. It argued, for example, that the evidence presented did not justify the Defendants’ conclusion that proceeding with franchising would deliver benefits in excess of costs, that it represents the best value for money compared with alternative forms of intervention or a ‘do nothing’ scenario, or that it will have the expected impacts on GMCA’s budget. It also argued that to introduce franchising at this time was not the right model to help bus patronage to recover from the pandemic and that this had not been properly taken into account.

100.

The Defendants deny that, in considering the representations made by by or on behalf of Rotala, TfGM failed to have any regard to any material comment contained in the Oxera report. Moreover, they submit whether TfGM gave sufficient weight or consideration to Oxera’s comments, or did not have proper regard to them, does not raise a question of law that might invalidate the Decision: see eg ELS Wholesale (Wolverhampton) Ltd v Secretary of State for the Environment (1988) 56 P & CR 69 per May LJ at p72-73, 81.

101.

Further, they submit that matters were properly considered. For example, the speed at which the network can adapt to change with franchising was considered in [6.9.212]-[6.9.213] and elsewhere in the Commercial Case in the Second Consultation Report; how the immediate recovery of the bus market should be facilitated was considered in [13.2.4]-[13.2.7] and [17.2.49]-[17.2.50] of that Report and further, in the light of the National Bus Strategy, in section 4 of the NBS Report. Also, the second

bullet point in [17.2.45] of the Second Consultation Report considered the framework for the longer term recovery of the bus market in Greater Manchester.

102.

It seems to me, as the Defendants point out in their Skeleton Argument at [127] et seq, that this part of Rotala's Amended Grounds fails to identify any specific material comment in the Oxera report that was not addressed in the Second Consultation Report or, more significantly perhaps, any specific conclusion reached in that Consultation Report which was alleged to be irrational and the reasons for any such contention. That is sufficient to dispose of these grounds of criticism. But I also agree with the other points made by the Defendant in their response. There is nothing in these grounds of criticism by Rotala.

103.

In their Skeleton Argument at [126] et seq the Defendants address some additional points which Rotala made in its Skeleton Argument at [40]-[51]. Having carefully considered these, I remain unpersuaded there is any substance to them.

104.

Rotala's first point (at [44]) was that, 'The scenarios [were] designed on the basis of the first lockdown and its relaxation and took no account of the second/third lockdown or its duration'. Similar issues were considered at [3.5.7] and [3.5.8] of the Second Consultation Report:

"3.5.7 In contrast to the claim made by Go North West, the Scenarios do not place a high dependency on their starting position. They are explicitly formulated by reference to a range of factors that are longer term than initial variance in the response to the pandemic. Section 1.4.25 of the COVID-19 Impact Report sets this out, as well as stating that some assumptions will necessarily prove to be incorrect, which is self-evident in any event, given there are four contrasting scenarios.

3.5.8 Go North West also refer to a number of specific, unanticipated developments that have occurred since the Scenarios were developed - such as the national lockdowns - and Stagecoach also refer to recent developments in new variants of COVID-19 and their potential impact on the effectiveness of vaccination. Such developments, even if they were unanticipated, do not invalidate the Scenarios, nor do they suggest a different patronage for the main period for which the Proposed Franchising Scheme and other interventions are appraised. Recent developments (including the timetable for the lifting of the restrictions of the second lockdown) do not, in fact, invalidate the original projections for 18 months into the COVID-19 pandemic, i.e. September of this year, (70%, 80%, 40% and 60% of pre-COVID patronage for the four scenarios respectively). These outcomes are still possible under different circumstances over the next six months or so. Even less would recent events invalidate what any of the Scenarios project beyond this year; depending on the progress of the different drivers of the Scenarios Neither Stagecoach, NERA, or Oxera suggest any different range of longer-term outcomes that should be tested based on these recent developments, or any other consideration."

105.

I do not consider there is any basis on which these conclusions can be said to be irrational or unreasonable.

106.

Rotala next contends (at [45]) that the scenarios unjustifiably assume that any longer-term effects of the pandemic will have run their course by 2026. I dealt with the same point in a different context

earlier. The selection of 2026 was an exercise of judgment which cannot easily be impugned, and was reasonable. The issue was addressed in the Second Consultation Report at [3.5.8] to [3.5.11]. Thus, the Report said at [3.5.9]-[3.5.10]:

“3.5.9 Go North West state that the Scenarios are too short-term and that 2026 is too early to end the Scenarios. This timeframe was chosen as one over which the effects of the COVID19 pandemic could be thought to play out, and the key shorter- and longer-term effects of the pandemic would by that point be part of a new status quo. The COVID-19 pandemic will affect long-term trends and attitudes as well as having shorter term effects – but given the level of uncertainty, and the use of a range of scenarios (rather than a central focus approach) it is appropriate to represent its effects as occurring over a discrete period of time.

3.5.10 The trend of a fall in patronage each year of 1.2% assumed in the Economic Case moving forward from 2026 is also conservative in that it represents a continued decline even after the negative shock in three of the four scenarios. Assuming a longer term trend for the effects of COVID-19 (for instance to 2031 as TfL do) is unlikely to lead to a different outcome in terms of the economic analysis – particularly as the effects of COVID-19 will become less marked in the years following 2026.”

107.

Rotala next argues (at [46]) that the combination of factors in the scenarios were ‘randomly selected’ and do not ‘contain any quantification of the extent of the demand changes’. I do not accept these criticisms. The scenarios were based on an exercise of judgment and not on ‘randomness’. The factors in Figure 1 in the COVID Impact Report (with the scenarios set out in the axes’ four quadrants, as I explained earlier) reflect the factors in [1.4.2] of the Report, which I set out earlier. There was also a quantification of the changes in the demand in terms of bus patronage in each scenario (eg, in Scenario 3, car travel dominant).

108.

In [47] of its Skeleton Argument Rotala argues that the Second Consultation Report confirms that it is not possible for operators to gauge partnership schemes when the COVID-19 outcome is unknown. It is said that the Report is ‘riddled’ with references to the impossibility of predicting the bus market during the COVID-19 pandemic, especially in relation to the Economic case, and it cites [3.2], especially at [3.2.5]-[3.2.7], [3.2.8], [3.2.12], and also [3.3.10] and [9.1.3]. I am satisfied that this uncertainty was properly addressed in the way in which the analysis in the COVID Impact Report was carried out. The approach was not irrational.

109.

Rotala then makes a series of comments on the Financial Case at [49]-[50]. It is contended, for example, ‘the affordability of the proposed franchising scheme is, in reality, an unknown quantity for GMCA’ and the conclusions reached by TfGM were irrational. For the reasons set out in the Defendants’ Skeleton Argument at [126(6)], and the following reasons, I am satisfied there is nothing in these points and that the conclusions reached by TfGM were reasonably open to it. As would be expected, the affordability of a Franchising Scheme was carefully considered in the COVID Impact Report and in the Second Consultation Report, in light of responses on that issue

110.

Paragraphs [5.1.5]-[5.1.6] of the COVID Impact Report said:

“5.1.5 The outcome of GMCA’s previous consultation, and TfGM’s consideration of the issues raised during this process, was reported to the 26 June 2020 meeting of GMCA. At that time, it was considered in light of consultation feedback that the Proposed Franchising Scheme was affordable and the balance of risks remained appropriate. It was noted that a further report would be submitted to members in due course that would consider the potential impact and effects of COVID-19 on the bus market and make recommendations about appropriate next steps.

5.1.6 The effects of COVID-19 in this report are considered with reference to the uncertainties that currently exist, and a range of potential outcomes identified in the Scenarios. The effects upon the options contained in the Assessment are considered with reference to:

- The previously forecast net transition costs of the Proposed Franchising Scheme
- The ongoing balance of financial risks and lines of defence in the event GMCA assumed revenue risk under the Proposed Franchising Scheme and potential additional mitigations in the event a downside scenario materialised
- The value and availability of the funding sources set out in GMCA’s preferred funding approach for consultation: these effects could relate to both the Proposed Franchising Scheme and the partnership options
- The commitments by operators, costs and risk of the previously forecast Operator Proposed Partnership

5.1.7 The effects discussed are necessarily possible, rather than forecast, implications of COVID-19 given the uncertainties that currently exist. These effects are a high-level description, informed by impact analysis where possible and relevant, and do not constitute a specific reforecast of the income, cost and risks of the Proposed Franchising Scheme. Instead, the effects upon income, costs and risks are considered against a range of possible scenarios.

5.1.8 Similarly, these possible effects do not consider any different options relating to the scope, or commercial principles and risk allocation of franchising compared with the principles set out in the Assessment.”

111.

Section 5.5 set out TfGM’s conclusions. Paragraph [5.5.5] acknowledged the possibility of a funding gap due to the pandemic, especially if bus use did not recover well (as in Scenario 3):

“5.5.5 It remains possible that, under a more significant downside scenario (such as Scenario 3) these resources would still leave a residual funding gap, during and post transition, and in the event that the Mayor subsequently implemented the Proposed Franchising Scheme and such a scenario materialised, GMCA would need to accept this residual risk and, in the absence of sufficient levels of government funding, underwrite this risk through incremental local funding.”

112.

However, the Report went on to conclude:

“5.5.6 After transition, the proposed precept included as part of GMCA’s funding strategy would provide a further ongoing source of revenue funding and greater confidence in prevailing trends along with the ability to fully adapt the network and associated operating costs, if required, would provide further confidence that the Proposed Franchising Scheme would be affordable over the appraisal period under the Scenarios.

5.5.7 It is important to note that although the Proposed Franchising Scheme exposes GMCA to an increased level of risk if patronage does not return to pre-COVID-19 levels, as set out in the Strategic Case in Section 2.4.4 (Options for intervention - Do Minimum), under the Do Minimum, GMCA would continue to support the bus network through subsidised services that are run on a tender basis, as is done at present. Under all the Scenarios, but particularly Scenario 3, the problems caused to the overall transport system by the decline in bus would mean that GMCA would need to determine how to respond to this pressure. If GMCA were to make more funding available to support services, this would still be a reactive process that adapted itself around decisions made by private sector operators.”

113.

The Second Consultation Report considered and responded to operators’ concerns about the impact of the pandemic in particular in Section 7. In summary, TfGM acknowledged: the uncertainty caused by the pandemic; that the pandemic had given rise to affordability concerns, including in particular from operators; that there was the risk of a funding gap which the GMCA would have to meet; that all bus reform options (including doing the minimum) were impacted by pandemic uncertainty; that under franchising, the financial risk would impact more directly on the GMCA rather than operators, and that mitigation options had been approved; but that it was satisfied that franchising was affordable. In my judgment, its conclusion cannot be described as irrational:

“7.6.23 In response to the second consultation, a number of affordability concerns in relation to the Proposed Franchising Scheme were raised. An incumbent operator considered that, despite the mitigations proposed, there was a financial ‘gap’ during the transition period and that ongoing affordability risk had not been adequately addressed. TfGM did not identify any funding gap as a result of these comments and noted in response how ongoing affordability risks had been addressed. It is also important to note that the COVID-19 Impact Report acknowledged that, whilst the mitigations identified could provide significant additional resources and resilience to offset a loss of farebox income, there was still a residual risk (for example, if the most adverse Scenario transpired) which GMCA would need to accept and underwrite with incremental local funding.

...

7.6.26 Further concerns raised, particularly by incumbent operators, related to increased uncertainty and viability of the Proposed Franchising Scheme; a lack of detail on the impacts of the proposed mitigations; whether the proposed sources of funding were available and secured; and that there was a lack of consideration of alternative uses of this funding in the context of the financial pressures experienced as a result of COVID-19.

7.6.27 It was acknowledged in the COVID-19 Impact Report that there was and is significantly greater uncertainty as a result of COVID-19, which would likely impact all bus reform options, as well as the Do Minimum: this is the reason a scenario-based analysis was undertaken and that, as revenue risks would accrue to GMCA, rather than operators, more directly under the Proposed Franchising Scheme, mitigation options have been considered and previously approved by GMCA

...

7.6.30 Having considered the responses to the first and second consultations, TfGM considers that it remains the case that in light of COVID-19, there is now significantly greater uncertainty over future bus patronage and related factors. Whilst this uncertainty is not specific to the Proposed Franchising Scheme, and GMCA would still face risks under a Do Minimum or partnership, it would assume

financial risks more directly under the Proposed Franchising Scheme. For this reason, it is important that GMCA notes this uncertainty and accepts the potential requirement to implement proposed mitigation options of the form and scale identified in the COVID-19 Impact Report. If this were the case, TfGM considers this would provide an acceptable balance of risks to achieve GMCA's objectives for bus services and that GMCA could afford to make and operate the Proposed Franchising Scheme."

(vii) the Defendants were not entitled to place any weight on Grant Thornton's Assurance Review and accordingly could not satisfy themselves that the statutory criteria set out in s 123B were met or properly assessed in the Assessment when read in conjunction with the COVID Impact Report (R, [51]-[54], and Skeleton Argument, [53] et seq)

114.

At [53] et seq of its Skeleton Argument, Rotala contends that in light of the criticisms made in its response to the Second Consultation and those of its consultants BDO and Oxera, including, in summary, that the scenarios in the COVID Impact Report were not based on accurate, up to date data; that the calculations had not been worked through in such a way as to take account of all matters relevant to the scenarios; that the methodology used by TfGM was defective in a number of ways outlined; and that the Grant Thornton Assurance Review report, in reality, provided no assurance and was flawed, it was not rational for GMCA to recommend to the Mayor that he go ahead with the Franchising Scheme, nor for the Mayor to do so without either all those shortcomings being addressed and the COVID Impact Report being re-considered and audited in such a way as to comply with s 123D of the TA 2000; or waiting until the pandemic had ended; or being satisfied that each of those criticisms was invalid. These submissions are then expanded upon in subsequent paragraphs. Grant Thornton's work comes in for particular criticism.

115.

Dealing first with the criticisms of the Assurance Review, for the reasons I have already set out this was not, nor did it need to be as a matter of law, a statutory audit under s 123D. There had already been a statutory Assessment which had been audited as required by statute, and as I have said the question whether the whole statutory process had to start again in light of the pandemic, or whether (as the GMCA decided to do) further non-statutory work should be commissioned in order to test the conclusions reached in the Assessment in light of the uncertainties caused by pandemic, was a matter for the GMCA's judgment. It was not irrational for the GMCA to take the second course.

116.

Rotala's submissions under this head seem to me, in substance, merely to be a repeat of the submissions they (and Stagecoach) made to TfGM during the Second Consultation. Section 9.3 of the Second Consultation Report (headed, 'Flaws in the assurance work done on the COVID-19 Impact Report') met those criticisms head-on. For example, [9.3.3] noted that both Claimants had raised challenges to the work Grant Thornton had performed, which were then outlined in more detail, and TfGM's responses to these challenges were then set out.

117.

That discussion and analysis was set out over ten pages of the Second Consultation Report as a number of 'Challenges', from p430-p439. For example, Challenge 2 was, 'Whether an assurance framework should have been used to perform the work':

"9.3.18 GT's work on the COVID-19 Impact Report was requested by TfGM in order to provide an independent report on the approach taken by TfGM in preparing the Report and quality of the information and analysis in it. GT were asked to express a professional opinion on those matters. GT

were deemed qualified to express such an opinion based on their professional expertise and their experience of both the transport industry and the Bus Reform programme itself, given their previous involvement in the audit of the Assessment.

9.3.19 BDO's Report considers whether or not there was any other relevant frameworks that could have assisted GT with its review of the COVID-19 Impact Report. BDO state that "In the absence of the instruction to carry out an audit on the same terms [as the Assessment], this guidance could not be referenced in relation to GT's work on the COVID Impact Report. No other guidance is referred to. In fact, GT specifically say that the GT November 2020 Report is not based on any formal guidance...". BDO therefore query whether, in the absence of following any formal guidance or assurance frameworks, "It is implicit, therefore, that they [GT] cannot provide any assurance over the financial models referred to in the COVID Impact Report." BDO go on to state that "where there is no formal guidance to follow for the work to be carried out, had BDO been instructed, we would most likely consider it appropriate to undertake a non-assurance or Agreed-Upon-Procedures engagement".

9.3.20 HSF [ie, Stagecoach's solicitors] make similar comments in their Report, stating that "It does not appear to have been conducted in accordance with the International Standard on Assurance Engagements (ISAE) 3000". They go on to say that in their opinion "it is unclear why Grant Thornton did not seek to conduct its work in compliance with this standard for assurance engagements (or indeed any other)."

9.3.21 As noted above, GT did not imply that they had complied with any assurance or other frameworks, rather they explicitly stated that they did not comply with any such framework in their Letter: "For the avoidance of doubt, our Report does not constitute a statutory audit under the Local Audit and Accountability Act 2014 nor is it either: - an evaluation of the COVID Impact Report conducted in accordance with auditing standards issued by the Financial Reporting Council; - an audit per the requirements of section 123D of the Act; or - based on any other formal guidance."

9.3.22 TfGM considers that GT's Letter is clear about the nature of their work and that GT have not sought to mislead the reader of their Letter over the scope and level of assurance they are providing. The conclusions represent its professional view.

9.3.23 As outlined above, GT were not required to follow any statutory guidance when reviewing the COVID-19 Impact Report. Whilst BDO state that in their opinion GT should have undertaken the report based on a "non-assurance or Agreed-Upon-Procedures engagement" and whilst HSF said that it was unclear why GT did not use the ISAE 3000 guidance, that does not mean that GT were not entitled to express its own professional view on the matters it did."

118.

In relation to all the challenges, at [9.4.1] TfGM concluded:

"9.4.1 In conclusion TfGM do not agree that the respondees have shown either that GT failed to consider anything material or that its opinion was not one that they were reasonably entitled to reach when carrying out their audit of the Assessment. Further, with regard to the criticisms of the approach to the assurance review of the COVID-19 Impact Report made in response during the second consultation period, it is not accepted that a further audit report was required under s123D of the Act, but rather that reliance can be placed on the COVID-19 Impact Report and GT's assurance of it."

119.

I have considered the Claimants' criticisms of this part of the Second Consultation Report. They are addressed separately in detail in Annex 2 to the Defendants' Skeleton Argument. It seems to me that they are really just arguments about the merits, about which views could differ, and do not begin to provide an argument that it was irrational for TfGM to rely upon the Assurance Review.

120.

I do not propose to lengthen this already lengthy judgment by setting out each of the Claimant's criticisms and the Defendants' response to them. A single example will suffice. Paragraph [54(c)] of Rotala's Amended Grounds argues:

"54. The Claimant's case is that the second consultation report's responses referred to above are patently inadequate and/or have failed to take BDO's material comments into account properly or at all.

...

c. Without meaningful guidance to Grant Thornton as to what they were to be satisfied about and, in particular, the meaning of 'appropriate' and how it was measured, Grant Thornton could not give assurance as instructed."

121.

Similar points are made in [58] of Rotala's Skeleton Argument.

122.

In Annex 2, the Defendants respond:

"18. Rotala alleges that, without meaningful guidance to Grant Thornton as to what they were to be satisfied about and, in particular as the meaning of "appropriate" and how it was to be measured, Grant Thornton could not give the assurance as instructed: see paragraph [54c].

19. The complaint appears to be that Grant Thornton could not express any view about (a) whether the approach taken in the COVID Impact Report (when considering the affordability and value for money of the proposed franchising scheme in the light of the potential impact of COVID-19) was 'appropriate', and (b) whether the information and its analysis on its affordability and value for money was "of sufficient quality for the purposes of the report", without definitions or other guidance as to the meaning of what would be "appropriate" or "of sufficient quality" for that purpose.

20. Such a complaint is untenable and Rskel [58(c)] does not make less so. Those are matters of professional judgment on which Grant Thornton could not unreasonably (and did in fact) express an opinion without having to be instructed on how it should form that opinion: see further §9.3.26 of the March Consultation Report [A2/24/1200]. Grant Thornton having expressed such opinion, it was not irrational for that opinion to be taken into account."

123.

I agree.

124.

It is convenient here to deal also with Rotala's submissions at [59]-[61] of its Skeleton Argument, which are to the effect that Oxera's criticisms were not dealt with properly or at all in the Second Consultation Report. The specific criticisms related to the use of the scenarios in the COVID Impact Report: it was said to be irrational to use the four scenarios when the DfT was still developing and had not yet promulgated the result of a promised document on the use of scenarios to take account of

uncertain times; the projection of demand from the scenarios was overly vague; the relative likelihood of Scenario 3 (the most pessimistic scenario) happening was irrationally discounted; and the 'What If?' methodology was simplistic and led to errors.

125.

The Defendants set out the relevant references in the Second Consultation Report where TfGM responded to Oxera's points at [130] et seq of their Skeleton Argument. I am satisfied that all of Oxera's criticisms were properly considered and addressed in the Second Consultation Report. What weight was to be attached to them was for TfGM to determine. The fact that more weight might have been attached so some or all of them does not undermine TfGM's overall conclusions. Nor does the fact that Rotala disagrees with the TfGM's conclusions.

126.

Again, a single example will suffice to demonstrate that there is no substance to Rotala's criticisms. In relation to modelling, and the failure to wait for the DfT's guidance, this issue was addressed in [3.6] and [17.2.31] of the Second Consultation Report. Rotala and Oxera's argument was summarised in [3.6.2] and in [17.2.18]. At [3.6.1]-[3.6.2] TfGM said:

"3.6.1 A number of representations were to the effect that no decision should be made until the DfT has provided its guidance on using scenarios, due to be published in February 2021 (but not yet forthcoming as of 12th March 2021), and until the impacts of COVID-19 in the longer-term are known or knowable.

3.6.2 Rotala and Oxera suggest it is irrational for the Scenarios to have been developed before consideration of the guidance which the DfT is developing. GMCA should have waited to ensure that the Scenarios used are in line with the guidance. It would be prudent to wait until the guidance is published, which may support a more robust assessment. The COVID19 Impact Report suggests that approach adopted will align with this yet unpublished DfT guidance, but, in the absence of any evidence of any discussion with, or information provided by, the DfT, 'the accuracy of GMCA's approach by reference to the DfT guidance' cannot be tested (Rotala response sections 12 and 23; Oxera p8)."

127.

TfGM's response is at [17.2.55]-[17.2.59]:

"17.2.55 A number of the consultees mentioned that the Department for Transport are currently reviewing their guidance in the area of allowing for Risk and Uncertainty in business case development (the 'Uncertainty Toolkit') and so questioned whether TfGM should wait for this guidance before considering the effects of COVID-19.

17.2.56 It is likely that when the guidance appears, it will represent an evolution of both sensitivity testing and the use of scenarios. The evolution of scenarios could well explore structural trends of national importance, as set out by DfT in Jul-21 in their 'route map', when it stated their intention to create scenarios looking at specific national trends, with forecasts being developed after February 2021.

17.2.57 Any new DfT scenarios may still pivot round a central national projection. They may be more akin to sensitivity tests of particular drivers of uncertainty (such as technology changes e.g. high electric vehicle take up, or behavioural factors e.g. changing trip rates), rather than narratives that explore the interaction of these drivers into coherent and plausible scenarios. If so, they would not

create the diverse range of plausible futures that TfGM considers that scenario planning for franchising requires for assessing the potential impacts of the uncertainty introduced by COVID-19 on the conclusions within the Assessment in a way that is relevant, informative and transparent to local decision-makers. If so, TfGM consider that while such scenarios would be helpful, they are not likely to be as appropriate for the consideration of the impact of COVID-19 on the robustness of the conclusions in the Assessment regarding the VfM of the Proposed Scheme. But what the final form of any guidance may be will not be known until it is published. It is recognised that TfGM's approach may well not align with it.

17.2.58 The question is whether the advantages gained (in terms of information by awaiting the guidance and then using it to assess whether or not the conclusions in the Assessment remain valid given the uncertainty COVID-19 creates) outweigh the disadvantages of delay. It is considered that to delay further would not necessarily provide materially better information enabling a substantially better decision about whether franchising is in the public interest to be made, given the wide range of outcomes against which the conclusions of the Assessment can be tested using the Scenarios. But further delay would postpone the structural reform of the bus market in accordance with the GMCA's strategic policies which is required to best meet the challenges it faces in any event and it would reduce the GMCA's ability to plan for the long term future of the bus market, and the fullest recovery from the COVID-19 pandemic.

17.2.59 On balance it considered that the disadvantages of delay outweigh its possible advantages in terms of gaining further information, whether by use of the DfT guidance once published or from an offer of a new, longer-term partnership.

(viii) the timing of the decision was flawed in that (a) the timing of the decision making was not sensible given the uncertainties (R, [65] and [66]); (b) the Defendants disabled themselves from considering the matters in s 123B(2)(b) of the TA 2000; (c) the Defendants failed to take into account Rotala's answers to Q2 and Q10 in the Second Consultation (R, [67] and [68])

128.

The question of whether to take a decision 'now', or to delay it, was an issue which the GMCA and the Mayor were alive to. I have already touched upon this issue earlier. The arguments for and against were considered in Section 5 of the November 2020 report 'Bus Reform' (which recommended there be a Second Consultation). They recognised there were arguments for and against, and so that question was one of those which consultees were invited to address. The consultation document said at p22:

"However, the impact and effect of COVID-19 remains uncertain and is likely to remain so for some time. GMCA will therefore need to consider whether it is the right time to decide whether to proceed with the Proposed Franchising Scheme."

129.

The arguments for and against deferring were then set out. The question of delay was also addressed later at [2.146]-[2.151]. Question 10 was:

"10: Taking everything into account, do you have any comments on the conclusion that this is the right time to make a decision about whether or not to proceed with the Proposed Franchising Scheme?"

130.

It was plainly a reasonable decision to proceed to recommend, and then make, the Franchising Scheme in March 2021 despite the pandemic. As the Mayor noted in his Decision Notice in section 2, the ‘the overwhelming response of the consultation was that the Scheme should now be made’. Given there were over 4000 responses to the consultation, that fact alone shows the decision to proceed was not irrational. But in any event, the question of delay was carefully considered in various places in the Second Consultation Report (see eg sections [3.6], [16.5/2] and [17.2]), and also in section 5 of the GMCA’s response to the National Bus Strategy, and in section 15 of the GMCA’s response to the Second Consultation, ‘Bus Reform: Consultation and the GMCA Response’.

131.

The Claimants seek to rely on matters that might argue for the decision being postponed, without regard to the matters supporting making the decision when it was, when the issue is one of balance.

132.

Rotala next contends that the Defendants disabled themselves from considering the matters set out in s123B(2)(b) of the TA 2000 (the statutory assessment must describe the effects that the proposed scheme is likely to produce, and compare making the proposed scheme to one or more other courses of action). I do not accept that. The Assessment published in September 2019 met that statutory requirement. It compared the proposed franchising scheme with alternative courses of action: two possible partnership options (an operator proposed partnership and a more ‘ambitious partnership’ based on an enhanced partnership that operators were not prepared to agree), as well as the ‘do minimum’ option. The contents pages of the Assessment are replete with references to these alternatives, and how they were analysed. The further work done in the COVID Impact Report did not invalidate that comparative process. That Report itself also considered the alternatives: see eg at [2.4.2], [4.2], [4.3], [5.6], [6.2], [6.3].

133.

Rotala further contends [67] and [68] that the Defendants failed to take into account the Claimant’s answer to Q2 and Q10 in the Second Consultation I set out Question 10 earlier. Question 2 was: ‘

“Do you have any comments on the conclusion that the Proposed Franchising Scheme is likely to perform better than the partnership option in achieving GMCA’s objectives, notwithstanding COVID-19?”

134.

Rotala’s answer to Question 2 was principally that it would be irrational to make a decision without any knowledge of the partnership proposal that will be possible once the pandemic is over and the long-term effects of the pandemic are known. Its answer to Question 10 was that it would be irrational to decide to proceed with the Franchising Scheme until the long-term impact of the pandemic was known.

135.

Again, I do not accept that Rotala’s contention is correct. Its arguments for deferring a decision, including its contention that the GMCA should wait until the long-term effects of the pandemic on the bus market are established, were summarised in [17.2.18] of the Second Consultation Report and were addressed later in that section, as I have already explained. The argument about waiting until the longer term-effects of the pandemic were known and a new partnership might be available, were addressed at [17.2.52], [17.2.53], [17.2.54], [17.2.58] and [17.2.59] of the Report. At [17.2.52]-[17.2.53] TfGM concluded:

“17.2.52 A number of operators have suggested delaying any decision to make a franchising scheme would also enable that decision to be based on better information, providing a clearer view of the financial risks and VfM of such a scheme and enabling a full and fair comparison to be made between franchising and a longer-term partnership.

17.2.53 Delaying a decision may enable a new partnership proposal to be put forward later. However, this does not mean that a decision on the Proposed Franchising Scheme should wait until operators have formulated a new partnership as an alternative. Whilst it is appropriate for TfGM to explore viable alternatives to the Proposed Franchising Scheme, but, if these do not exist, there is no obligation to wait an indefinite amount of time for operators (some of whom oppose the scheme) to agree a new proposal. It might be different if there were good reason to believe that a delay would yield a partnership that would outperform the Proposed Franchising Scheme and better achieve TfGM’s objectives, but this is not the case ...”

(ix) it was irrational not to delay the decision for further discussions with operators in light of the National Bus Strategy (S, 52)

136.

Lastly, I deal with Stagecoach’s contention that the GMCA should have delayed the decision to allow discussions with operators to take place in light of the publication of the DfT’s National Bus Strategy, ‘Bus Back Better’.

137.

As I have already said, the GMCA’s response to the National Bus Strategy considered question of delaying a decision in light of it in order to ascertain, in particular, whether operators would commit to an enhanced partnership (which they had previously refused to do) and, if so, on what terms. At [5.10] the response noted that the NBS did not create any new legal options that GMCA needed to consider, as the options presented were those already provided for in the existing legislation. For the reasons the GMCA gave in section 5, in particular at [5.2]-[5.12] and [5.17]-[5.19], it concluded that, on balance, further delay was not justified in the circumstances. That was a decision which was reasonably open to it.

Conclusion

138.

I am not persuaded the impugned decisions were either unlawful or irrational. It follows that these applications for judicial review are dismissed.

ANNEX

CHRONOLOGY

27/6/17 Bus Services Act 2017 comes into force amending the TA 2000

30/6/17 The GMCA publishes a report entitled ‘Bus Services Act 2000’ and decides to prepare an Assessment of a proposed bus Franchising Scheme in Greater Manchester under s 123B of the TA 2000

September 2019 The Assessment is published. It recommends the adoption of a Franchising Scheme

26/9/19 Grant Thornton provides statutory audit of the Assessment under s 123E

7/10/19 GMCA resolves to hold the First Consultation

14/10/19-

8/1/20 First Consultation period. 8,516 consultation responses are received

March 2020 UK goes into lockdown due to the COVID pandemic. Ability to travel is severely curtailed

26/6/20 'Bus Reform: Consultation Update' presented to the GMCA

TfGM's First Consultation Report presented to the GMCA

The GMCA notes that before any decision on whether or not to introduce the Proposed Franchising Scheme can be made, consideration will need to be given to the impact of COVID-19, and notes that a further report would be submitted to members in due which would consider the potential impact and effects of the pandemic on the bus market and make recommendations about appropriate next steps

27/11/20 TfGM's COVID Impact Report presented to the GMCA

Grant Thornton's non-statutory Assurance Review of the COVID Impact Report presented to the GMCA

The GMCA resolves to hold a Second Consultation. Its principal purpose is to allow consultees to provide their views on the Assessment in light of the findings of the COVID Impact Report and to provide their views on whether or not the Proposed Franchising Scheme should be introduced

21/1/21 Rotala files its Claim Form and Grounds of Challenge

2/12/20-29/1/21 Second Consultation period (Stagecoach is granted a short extension). 4,017 consultation responses are received

15/2/21 Stagecoach replies to Second Consultation

16/2/21 The Defendants file their Summary Grounds of Defence in response to Rotala's claim

26/2/21 Stagecoach files its claim

15/3/21 DfT publishes its National Bus Strategy for England, 'Bus Back Better'

15/3/21 The Defendants file their Summary Grounds of Defence in response to Stagecoach's claim

23/3/21 TfGM produces its Second Consultation Report

23/3/21 GMCA responds to 'Bus Back Better' in its report, 'Bus Reform - Bus Back Better'

23/3/21 Pursuant to s 123G of the TA 2000, the report 'Bus Reform: Consultation and the GMCA Response' is presented to the GMCA

The GMCA resolves to recommend to the Mayor that he make the Franchising Scheme

24/3/21 His Honour Judge Davies sitting as a High Court judge refuses Rotala's application for interim relief and gives directions for the service of Amended Grounds of Claim and Detailed Grounds of Resistance, and for the filing of evidence, and he also orders a 'rolled-up' hearing

25/3/21 The Mayor makes the Franchising Scheme

30/3/21 'Bus Reform: Consultation and the GMCA Response' published

26-28/5/21 Rolled-up judicial review hearing