

## EDINBURGH TRAM NETWORK PROJECT ("ETN")

### REVISED GOVERNANCE STRUCTURE

#### ADVICE NOTE

#### A. Brief

We are instructed by **tie** Limited to advise in relation to the revisions to the ETN project Governance structure. These revisions are to be implemented through an Operating Agreement between City of Edinburgh Council ("CEC") and TEL and an MoU among **tie**, TEL and CEC. This advice is provided to **tie** Limited, TEL Limited and CEC pursuant to our mandate on the basis that the instructions we have received from **tie** represent the entirety of the matters we are asked to address and as if those instructions emanated direct from TEL Limited and from CEC. We have reviewed final drafts of the OA and MoU prepared by CEC Legal.

#### B. Scope

Our advice covers the following aspects of the ETN Governance structure in its new form:

Area 1: Impact on the existing Infraco Contract Suite and ETN delivery commitments;

Area 2: Interaction with the Edinburgh Tram Acts 2006 (Lines One and Two) ("the Tram Acts");

Area 3: The legislative and regulatory framework beyond Area 2; and

Area 4: Other legal or contractual issues.

This paper is presented as a reprise of DLA Piper advice provided on the selected Option D for Governance model. In some instances, our advice has covered the evolution of ETN Governance and procurement strategy over a prolonged period. Positions in this paper that rely upon previous analysis are highlighted as such but our earlier advice is not repeated in detail.

## C. Executive Summary

### Area 1

- 1.1 In conventional circumstances, a client-side adjustment of project Governance arrangements would be of little or no interest to the delivery partner. Because of the adversarial position adopted by Infraco, our advice is that Infraco may seek to obtain commercial advantage through commentary about or an interpretation of the Governance revisions which effectively downgrades **tie's** overall project management authority. We should be clear, however, that there is no contractual ability for Infraco to disrupt, control or prevent the introduction of the revised Governance arrangements themselves.
- 1.2 Though unpredictable, Infraco's attitude towards a tactic to extracting advantage from TEL's introduction as **tie's** owner and manager is most likely to become apparent (i) when formal assignation of the ETN Contract Suite to TEL takes place; (ii) possibly in the form of prejudicial comment on **tie's** project management competence during DRP proceedings; and (iii) any assignation of DPOFA. Were assignation to occur before TEL has become client under the Infraco Contract, it would need to be made clear to Infraco and Transdev who (as between **tie** and TEL) would be responsible for managing the Infraco - Transdev operational interface at ETN commissioning and system operating/maintaining phases. This may present an opportunity for Infraco to try to impose its views.

### Area 2

- 2.1 In order to ensure that TEL's function and activity as the ultimate manager of ETN delivery, operation and maintenance enjoys the advantages conferred by the Tram Acts, CEC require to notify Scottish Ministers of TEL's new level of engagement. This can be effected by simple letter pursuant to the relevant provisions of the Tram Acts (Sections 69(5) and 68(5) respectively) and is, arguably, a precondition to the assignation of the Infraco Contract to TEL. The exact content of this notification requires to be settled and is needed within 21 days of the signing of the TEL OA.

### Area 3

- 3.1 This topic embraces seven separate legal subjects:  
  
Procurement Law (UK law and EU Directives); State aid; TUPE; Transport Act 1985; Competition Law; and Health and Safety legislation and CDM Regulations.

### **Procurement Law**

- 3.2 The revised Governance arrangements do not alter the position that, within the ownership of Tel, **tie** remains the 'in-house provider' of project management services to CEC, thereby enjoying an exemption from EU procurement directives as regards its appointment under a contract for services. We consider that TEL also enjoys that status, subject to the comments we make below.

### **State aid**

- 3.3 There are no new state aid issues generated by the current revisions to ETN Governance and Phase 1. The structure proposed for any role LB has in the operation of the ETN will require examination for state aid issues.

### **TUPE**

- 3.4 The TUPE questions have been answered in separate advice earlier this year. That advice concerned the eventual termination of the DPOFA between **tie** and Transdev UK Limited ("Transdev"). No new issues arise from TEL's function, save that transfer (if any) of Transdev Edinburgh Tram Ltd employees would be to TEL (as opposed to **tie**), on the assumption that DPOFA had been already assigned to TEL.

### **Transport Act 1985**

- 3.5 The issues which arise under this statute are not affected by the introduction of TEL as the prospective owner of Lothian Buses ("LB"). These were analysed extensively in 2004 and are also the subject of an opinion obtained from Queen's Counsel (as well as numerous detailed advices from DLA Piper) which looked at the methodology to achieve the share transfer. Nothing in the revised ETN Governance arrangements hinders TEL owning LB, restricts the means of implementing share transfer or makes this more difficult than envisaged under the mechanism reviewed by Queen's Counsel. The recent regulatory authority interest in the Scottish public motor transport market makes it more likely that Edinburgh's integrated transportation plans may be scrutinised from a competition law standpoint, particularly the monopoly (as opposed to anti-competitive practices) aspect. The revised Governance arrangement is neutral in this context.

### **Competition Law**

3.6 TEL's authority to manage **tie** and the affirmation by MoU of how the Operating Agreements with CEC are to work do not affect the fundamental principle that CEC, **tie**, TEL and LB are a single economic entity, such that their arrangements to operate an integrated transport system cannot be successfully challenged as infringing the Competition Act 1998 Chapter 1 (anti competitive practices). In any event, the purpose of integration is to improve and increase public transportation output which is unlikely to restrict, distort or prevent competition. CEC has statutory duties to manage public transport in an integrated and efficient manner which the revised Governance structure is intended to service.

### **Health and Safety and CDM Regulations**

3.7 This is the subject of separate DLA Piper advice papers. In summary, the introduction of TEL, as **tie**'s manager, does not alter the position that, from an external perspective, liability for accidents cannot be specifically allocated or buffered by the existence of Operating Agreements or internal protocols amongst the public sector client organisations. The protection for the Boards, CEC officers and project management is founded on the robustness and compliance of the health & safety plans and processes themselves as designed by **tie** and their effective implementation and monitoring under clearly discharged lines of responsibility. The analysis of CDM Regulations as far as TEL's role is concerned is the same as for **tie**, whereby primary CDM responsibilities sit with Infracore and their designers.

## **Area 4**

### **Third party agreements**

4.1 Numerous third party agreements exist to support implementation of the ETN. There are effectively three categories: agreements entered into by CEC directly; agreements entered into by **tie** directly (some are also countersigned by CEC); and less formal commitments made during the parliamentary process. Many of the earlier agreements make no provision for CEC to assign its interests. This is not an immediate issue; however to the extent that the relevant third party has recognised **tie** as its "*de facto*" counterparty, care would be needed if TEL wished to take over that function.

### **MUDFA**

4.2 The revised Governance arrangements have no effect on this agreement where **tie** acts under delegated powers from CEC. There is no contractual requirement upon **tie** to notify the

contractor about TEL's function. We do not understand there to be any thought at present for MUDFA to be assigned to TEL.

### **Collateral Warranties**

- 4.3 Under the Infraco Contract, **tie** is entitled to obtain collateral warranties in favour of TEL from all key ETN subcontractors. **tie** itself is also entitled to these commitments. A decision is required on whether both **tie** and TEL require collateral warranties from key ETN subcontractors as well as CEC requiring these. These are important as a component of best contractual protection and as part of any project exit strategy and the process is influenced by the Infraco in terms of its obligation to obtain these warranties from its supply chain.

## **D. Detailed Considerations and Advice**

Where there is sufficient maturity already on how the single economic entity will progress into the ETN operational phase, we have set out the relevant more detailed advice.

### **Area 1**

#### **Do any of the revisions to Governance impinge upon Infraco's obligations or entitlements under the Infraco Contract?**

- 5.1 Under the revised Governance arrangements, there is no change to the contractual counterparty to Infraco under the Infraco Contract. **tie** remains the front-line client. CEC's guarantee of **tie**'s financial obligations under the Infraco Contract remains unaltered. Unless the new Governance arrangements somehow manifestly and adversely affect **tie**'s continuing function as the client under the Infraco Contract, BSC has no grounds for asserting any contractual ability to obstruct, comment upon or influence the revisions to ETN Governance. If BSC had somehow wanted these entitlements (and could have justified having them), provisions delineating such rights would have sat alongside **tie**'s express rights to adjust its requirements (Infraco Contract Clause 74.9) in terms of parent company guarantee if Infraco's corporate ownership changes. There are no such provisions for Infraco's benefit in the Infraco Contract. It can in any event be shown that the revisions to Governance concern transport integration planning more than they concern any different approach to the project management of the Infraco Contract.
- 5.2 On the subject of BSC possible commentary on ETN Governance, we would observe that the absence of contractual entitlement has not stopped BSC in the past from commenting upon or

attempting to encourage others to draw prejudicial inference about **tie**'s project management practices and competence. We have advised separately on corporate reputation and defamation. Our view would be that uninvited critical commentary emanating from BSC about how the TEL-**tie**-CEC axis is likely to affect them should be silenced very crisply, on the basis that TEL is taking up an exceedingly important role and BSC has neither *locus* nor evidence to comment about TEL. Lastly, **tie**'s own freedom to arrange its affairs as it sees fit is expressly protected by Clause 6.4 of the Infraco Contract.

5.3 In order to forestall uninformed BSC internal discussion fermenting the idea that the ETN Governance revisions could be studied as an opportunity to cause mischief, **tie** might use a senior management meeting (Clause 6.5 of the Infraco Contract) to brief BSC and impress upon them that it will be business as usual. The most likely areas that BSC could seek to question/use to bolster arguments about **tie**'s contract administration are where the client-side decision making process could be portrayed as being:

- layered and by definition likely to result in delay;
- too remote from the project (unlike BSC, BSC might say, where the Consortium Board comprises managers more involved in the commercial core of the Infraco Contract) and therefore prone to unreasonableness; or
- necessary to replace what has proven to be ineffectual or a tacit admission by CEC that there must have been flaws in **tie**'s performance which impacted, by implication, adversely on BSC.

5.4 Of these, the first two contain straightforward contractual remedy: if **tie** is culpably slow or demonstrably unreasonable, the Infraco requires to make and sustain its case through a competent claim. The last, we believe, requires specific **tie**/TEL senior management comment to BSC to re-inforce the trust and confidence in **tie**'s project management team. The plainest evidence of this is the fact that **tie**'s Representative, nominated under the Infraco Contract, remains unchanged, as does the **tie** Project team and the fact that the recent CEC Report stresses that the objective is to streamline internal project Governance, not to correct external contract administration difficulties.

That meeting would also be further good evidence of CEC/TEL standing behind **tie**.

- 5.5 Formal assignation of the Infraco Contract to TEL is dealt with under Clause 98 which was the subject of quite intense negotiation during February to April 2008.
- 5.6 The Infraco cannot assign, novate or transfer the Infraco Contract without **tie's** and CEC's express prior consents. In contrast, **tie** is entitled to assign, novate or otherwise transfer the whole or any part of the Infraco Contract to:
- CEC or the Scottish Ministers without any consent from Infraco; and
  - TEL without the Infraco consent but subject to the assignation being in accordance with the Tram legislation i.e. TEL's role notified to Scottish Ministers and to TEL's obligations being irrevocably guaranteed by CEC or Scottish Ministers (such guarantee being in a form reasonably acceptable to Infraco, acting reasonably).
  - We see no legal or other reason why the form of guarantee would not be satisfied by an undertaking identical to the one provided by CEC at contract signature date in May last year, unless CEC's credit rating has been downgraded. However, we can envisage BSC attempting set up a "reasonable" argument that TEL (as opposed to **tie**) is not resourced to administer the Contract efficiently and therefore requiring that the substance of CEC guarantee should be converted into a guarantee of performance as well as financial obligations; the strategy was to engage CEC's covenant for the ETN project at the most unintrusive operational level. This potential BSC point could of course be countered by TEL explicitly taking over **tie's** resource under contract.
  - any other person under the same conditions as TEL; and
  - generally with Infraco's consent which can be reasonably withheld if the objection is made because of the position of one of Infraco's sureties (currently Deutsche Bank and ANZ Bank).
- 5.7 The Infraco Contract assignation provision does not contain any specific obligation on **tie** to notify Infraco of its intention to assign in advance, but this would happen anyway in the case of TEL, since Infraco is required to be satisfied as to CEC's guarantee.
- 5.8 The Infraco Contract contains provisions which address interface between the Operator (designate) at ETN commissioning and system acceptance testing phases and the Operator (actual) during operational phase post Service Commencement. This reflects the procurement strategy founded on tram and infrastructure delivery by a separate organisation from

Transdev, appointed in May 2004 under the DPOFA arrangements. In summary, a failure by the Operator to interface properly with the Infraco would result in a Compensation Event for the Infraco if material impact on their programme or maintenance activities could be demonstrated. Failure by Infraco to support, or to interface properly with, the Operator would be an Infraco Default for which a contractual warning notice could be issued by **tie**.

- 5.9 the implementation of the revised Governance arrangements will have no relevance to these contractual obligations until such time as TEL becomes the counterparty to BSC under the Infraco Contract. Our understanding is that TEL will also take over the client function from **tie** pursuant to DPOFA in due course.
- 5.10 BSC have no contractual ability to influence an assignation of DPOFA to TEL. They are protected contractually (see above) were **tie** or TEL to be proven to have failed in the management of the Infraco - Operator interface. Any claim against **tie** (TEL) by the Operator that Infraco has prevented it from discharging its DPOFA responsibilities or has caused the Operator loss is the subject of an Infraco indemnity to **tie** (TEL) and CEC under the Infraco Contract.
- 5.11 The assignation provision in DPOFA permits a transfer of the contract to TEL (as a replacement client) without need of consent from or consultation with Transdev.

**Are there specific provisions of the TEL Operating Agreement or the proposed MoU which BSC might use to further arguments regarding its interpretation of and claims under the Infraco Contract?**

- 6.1 Since the thrust of the revised Governance arrangements is to place more authority in TEL's hands, we consider that were BSC to seek to use the revised Governance structure to support their claims, the most visible risk is a BSC contention that **tie**'s diminished authority is having a negative impact on contract administration. There is also a possibility that BSC will launch FOISA requests to try to expose CEC past or present reporting concern about **tie**'s performance.
- 6.2 We regard it as extremely important that care is taken on commencing or requiring documented retrospective exercises to look at what **tie** did or did not do. In BSC's hands, that category of report would not enjoy any kind of privilege and could be prejudicial to **tie**'s arguments, in particular about proportioning of fault for delay or design management in DRP cases.



- 6.3 In the absence of BSC detailed stated DRP cases(s), we do not consider that there is any one provision or set of provisions in the OA or MoU which are placed into singular relief.
- 6.4 It is not possible to provide a general assurance that BSC will never seek to use an interpretation of part or parts of the revised CEC-TEL-**tie** relationship as background support for a primary assertion. As an example, the apparent irrelevance/marginality of CEC's formal authority to contract did not stop BSC instructing their lawyers to cause a diversion ( despite previous confirmation that their due diligence on authority was complete) 72 hours before contract signature. There are a number of disputes already exposed to DRP where it can be shown that the core arguments have nothing whatsoever to do with the client-side Governance arrangements e.g. designated scope of works or estimation and valuation competency. There are, however, arguments - e.g. delay and design development - where the role of the client-side organisation as an interface to BSC is prominent. But this is at project, as opposed to strategic, level and there would need to be a direct connection between what is being proposed on Governance and a prior project level approval process for any sensible causal and financial link to be established by BSC. This seems to be a remote risk on present expectations of what BSC will seek to justify factually.

## Area 2

### The Tram Acts

- 7.1 It is important to remember that CEC itself holds the legal powers to construct and operate the ETN. The delegation of those statutory powers is permissible pursuant to the Tram Acts, provided the delegation is within the ambit of sections 69 and 68 respectively. To extent that any harm or inconvenience is caused to third parties during the construction or subsequent operation and maintenance of the ETN, CEC enjoys the benefit of contractual indemnities from the Infracore, as well as insurance cover. Where harm is alleged because of nuisance, provided that the ETN is being built or operated/maintained as allowed under the Tram Acts, CEC can present a statutory defence. Thus where either **tie** or TEL are carrying out CEC's functions and entitlements as the Authorised Undertaker, it is legally important to make sure that their activities are connected to the Tram Acts authorised works and operations. Hence clear delegated authority is required for TEL confirmed by its operating Agreement, the CEC Resolution in December 2007 and the due notification to Scottish Ministers mentioned earlier.

## Area 3

## Procurement Law

- 8.1 We are satisfied that the engagement of **tie** and TEL by CEC to provide project delivery services and transport system integration remain exempt from the requirement for competitive procurement on grounds that both are 100% owned CEC subsidiaries engaged as 'in-house providers'.
- 8.2 The following is a summary of the factors to be measured when deciding whether an undertaking (TEL and **tie**) will be considered internal to a public authority (CEC) under applicable public procurement law, thereby bringing into effect the 'in-house exemption' rule. EU jurisprudence has set out and re-affirmed standard tests to determine how this exemption may apply. These standard tests are important when considering the legitimacy of dispensing with competitive tender.
- 8.3 Public service contracts may be awarded to a public sector entity without the need for a competitive tender if it falls under the 'in-house exemption'. The exemption is effective if certain specific conditions are fulfilled. These conditions focus on: (1) the degree of control the contracting authority has over the entity; (2) the types of functions the entity carries out; and (3) the terms of appointment.

### Control

The contracting authority must exercise a level of control over the entity that is similar to that which it exercises over its own departments. We consider this test is satisfied by the revised Governance arrangements and the authority of TPB.

The awarding authority (CEC) should hold such control over the entity to enable it to have a decisive influence over both the entity's strategic objectives and its significant decisions. We consider that CEC's ownership of TEL and **tie** and CEC participation on the TPB and on **tie** and TEL Boards, combined with the OAs and the MoU (if signed in present draft form) is consistent with this requirement.

The 'in-house provider' should not have a Board of Directors with managerial powers which it may exercise independently of the contracting authority, even if the share capital is held entirely by another joint stock company whose majority shareholder is, in turn, the contracting authority. The intervention of such an intermediary may weaken any control exercised by the contracting authority by virtue of share ownership. But we consider that

CEC's corporate control over TEL (alongside the TEL OA) addresses this aspect of control over TEL. **tie** is managed by TEL and is also controlled under the **tie** OA and the MoU.

### **Function**

The entity must carry out the essential part of its activities with the controlling local authority. This requirement is satisfied as a matter of fact by the scope of services delivered for CEC by TEL and the single purpose nature of **tie**'s ETN remit.

The entity's activities (i.e. all those activities which that company carries out as part of its mandate for the awarding authority) are to be devoted principally to that authority (TEL and **tie** implement CEC policy and objectives) and any other activities are to be of only marginal significance, irrespective of who the beneficiary is (i.e. the authority or a user of the services); who pays the company (i.e. the authority or the user of the services); and where the activities are carried out.

'In-house provider' exemption applies for TEL and **tie** as ETN transport integration manager and ETN delivery agent respectively:

- CEC can demonstrate a degree of control that is similar to that which it exercises over its own internal departments, with ability to have a decisive influence over **tie**/TEL strategic objectives and all significant business decisions;
- the essential part of **tie** and TEL's activities are devoted to the service delivery outsourced by CEC contracting authority.

### **State Aid**

9. The revised Governance arrangements themselves do not disturb the earlier analysis and conclusion that no State aid issues arise. Nevertheless, the curtailment of DPOFA (which was a contract awarded after competitive procurement, thereby establishing a primary defence to any argument that payment for the tram operating service might amount to State aid) and replacement of Transdev by TEL/LB as the ETN operator will require examination regarding how CEC will support that function and service delivery as part of the integrated transport

system. That analysis is beyond the scope of this advice and would require a completed ETN operations management structure to test.

## Transport Act 1985

10.1 In order to focus on the residual relevance of this statute and the transfer of Lothian Bus to the ownership of TEL, the impact (if any) of the provisions of the Act is summarised in answers to a series of questions:

- **What was the primary purpose of the Transport Act 1985 (TA85)?**

The relevant sections were aimed at the one-off anticipated corporatisation and eventual privatisation of local authority owned and controlled bus divisions. We do not consider that the TA85 had perpetual intent to control how a transport company (i.e. LB) would continue its operations.

- **What are the relevant provisions?**

TA85 Section 63(7): which requires (helpfully) that CEC is under a duty "*to conduct themselves so not to inhibit competition between persons providing or seeking to provide public passenger transport services in their area.*"

TA85 Section 73: which essentially states that CEC must ensure that its public transport company (LB) uses any corporate powers regarding borrowings or asset disposal in a manner which is entirely aligned with CEC's own powers and to ensure that LB does not borrow from anyone except CEC (with exception of short term loans and overdrafts).

Additionally, CEC is to ensure that the number of LB Board members who are non full-time LB executives is restricted as stipulated in LB's Articles. Section 75 stipulates that CEC may dispose of LB shares as it sees fit provided it obtains Scottish Ministers' (Secretary of State's) consent.

- **Does any of the above restrict CEC's influence on how LB manages its operations or how CEC can control its subsidiary?**

Only to the extent that LB management have normal voting rights at Board meetings.

- **Does the TA85 prescribe how, when or to whom CEC can dispose of LB shares?**

No, subject to compliance with LB Articles of Association (see below).

- **Does the TA85 establish restrictions on the way CEC can exercise its rights as owner of LB?**

There are no such restrictions.

- **Does the TA85 prevent or prescribe conditions on LB shares being transferred to another CEC entity?**

No.

- **What are LB share disposal legal requirements?**

Compliance with LB Articles in terms of "offer round" protection for minority shareholders.

Submission of written proposals to Scottish Ministers to secure formal TA85 consent.

- **In order to address the need for LB directors to be acting in best interests of LB when integrating with ETN:**

We recommend amendment to LB Articles to state that LB has an objective of transport integration and ETN integration as introduced by CEC on basis of its duties as transport authority and its general purposes.

#### **LB as ETN operator**

- 10.2 There is one potential separate legal issue which concerns the unique character of LB as a transport company under the TA85. LB was set up as a single business operation and intended to be privatised as such. We are not aware of anything explicit in the TA85 which would expressly prevent LB's owner from directing it to take on operation of a tram network. We would wish to research this in detail to remove as much ambiguity as possible (the question of course arises as to who, other than Scottish Ministers, would have any *locus* to complain about that, but in the context of a challenge by judicial review, it would be a negative if not bottomed out). The alteration of LB's articles (highlighted in 2004 as an action to be considered in the context of the single economic entity and potential LB directors conflict of interest) to align its core objects with public transport integration and the general duties of CEC as transport authority would, in our opinion, assist positively here.

10.3 Procurement law: the issue is how to make sure that the best case is there for LB qualifying as an 'in-house provider' in order to legitimately avoid the need for a competed appointment. The majority of cases on 'in-house provider' have studied local authority wholly owned entities specifically created for a public business purpose (e.g. running car parks or providing captive insurance to grouped local authorities). Challenge has happened because the entity may have enlarged its scope of activity or exercised more autonomy than its owners first envisaged. LB is a fully operating business managed by a company which emerged corporatised from being a department of CEC. The key here is: under what terms would LB run the integrated transportation system, how much autonomy would LB have and how would CEC/TEL control LB. For the 'in-house provider' shelter to be effective, the applicable tests would need to be satisfied as laid out in this report at section 8.

Though it was some time ago, CEC did run (through **tie**) the fully compliant DPOFA procurement competition resulting in the award of a 15 year contract which included the ETN operations component. Placing tram operational management with LB without competition (though a severance of DPOFA prior to TEN service commencement is clearly foreseen and permissible in the contract) may well invite questions from private sector operators, particularly if Tram Line 3 was thought to be in the offing.

10.4 LB is wholly owned by local authorities which is one of the essential characteristic of an 'in-house provider'. It is not necessary for it to be under sole ownership, particularly given CEC's majority stake. LB, as a transport company, carries out an essential part of its activities with CEC, as statutory transport authority. The fact that there are statutory constraints under the TA85 on what LB is permitted to do as a subset of its parent local authorities' permitted actions is helpful. The more recent jurisprudence reinforces the view that the fact CEC holds a majority interest in LB tends to indicate that the control test is satisfied. However, a position that LB is independent of CEC and CEC is not permitted to control LB runs contrary to an 'in-house provider' status. The terms of any operating agreement under which LB was authorised by TEL to run the tram network would be very important indeed as would the use of a delegation to TEL of CEC's authorised undertaker powers (to operate the ETN) under the Tram Acts.

## Competition Law

11. We summarise here the thrust of the opinion of Nicholas Green QC (obtained in 2004) with regard to the application of competition law (UK and EU) to the conglomerate of CEC, tie, TEL and LB. Our view is that this analysis remains valid.
- 11.1 Any hypothesised restriction of competition would arise as a result of the co-ordination of bus and tram services between TEL and LB. Any arrangements between TEL and Transdev would not be caught by competition regulations for the following reasons:
- CEC would remain the owner of the system assets, even if the system was provided by BSC and paid on availability (which is not the case);
  - Transdev's role is governed by DPOFA. It will not own the system and will not have unilateral freedom to set the commercial parameters of the tram system. Thus from first principles of competition law, any potentially infringing action could not be undertaken by Transdev. Potential for anti-competitive or restrictive practice infringement lies between TEL and LB who form one undertaking and **as a result are exempt** from Competition Act Chapter 1 infringement.
- 11.2 In any event, it is not clear that integrating publicly owned bus and tram systems in Edinburgh would be a restriction, distortion or prevention of competition law because:
- 11.2.1 the purpose behind integration of tram and bus will be to increase output of transport generally;
- 11.2.2 as such there is a strong argument that any agreement to increase output in a particular service (transport) does not restrict, distort or prevent competition.
- 11.3 Even if in ultimately increasing competition, by increasing output of transport generally, integration between bus and tram were to curtail competition, exemption for such integration would be available through a balancing exercise undertaken under the exemption formula set out in Article 81(3)EC Treaty:
- 11.3.1 such exemption does not require formal notification to the EU Commission or the OFT; and
- 11.3.2 CEC transport policy behind ETN presents strong grounds for claiming exemption even where, for the sake of argument, an agreement between TEL and Transdev

might have fallen within the prohibition in Article 81(1) EC Treaty or Competition Act 1998 Chapter 1.

- 11.4 If the **tie**, LB and TEL single undertaking was challenged under Article 82 EC Treaty and Competition Act 1998 Chapter II (abuse of dominance) then the conduct of the undertaking could be objectively justified as non-abusive.
- 11.5 Exemptions available under Article 86(2) EC Treaty and Schedule 3(4) Competition Act 1998 apply to an "undertaking entrusted with the operation of services in general economic interests" and can be used as an exemption to allow CEC, TEL, **tie** and LB to introduce and co-ordinate bus and tram services in the public interest.

**DLA Piper**  
**21st September 2009**