IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1190/4//8/12

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16 May 2012

Before:
VIVIEN ROSE
(Chairman)

JONATHAN MAY
PROFESSOR COLIN MAYER

Sitting as a Tribunal in England and Wales

BETWEEN:

SRCL LIMITED Applicant

-v-

COMPETITION COMMISSION Respondent

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H E A R I N G

APPEARANCES

Mr. Paul Lasok QC and Mr. Josh Holmes (instructed by DLA Piper UK LLP) appeared on behalf of the Applicant.

Mr. Daniel Beard QC and Mr. Robert Palmer (instructed by the Treasury Solicitor) appeared on behalf of the Respondent

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THE CHAIRMAN: May it please you, madam, Mr. Holmes and I appear on behalf of the applicant, SRCL.

THE CHAIRMAN: I was just going to say, Mr. Lasok, a couple of introductory things. First, we have seen the notice that has been put out by the Competition Commission extending the deadline for the divestment. Also just to bear in mind, everybody, if we need to sit in Camera at any point, I am not sure if there is anyone in the room who would need to leave if we did go into Camera. Perhaps I could ask the solicitors in the case just to make sure, if we do go into Camera, that there is nobody here who should not be.

Thank you for the skeletons, which we have read, and also the note of the running order for today and a timetable. We will take a break, if it is convenient, at 11.30 or 11.45, so perhaps you might like to bear that in mind.

MR. LASOK: Mr. Beard and Mr. Palmer represent the Competition Commission, and I will probably refer to that as the Commission.

What I was proposing to do was to go fairly quickly through the Enterprise Act, because I am sure that the Tribunal is familiar with it. Before I embark on that I just need to check that we have all got the same bundles. Effectively, everything is boiled down into what I think should now be three bundles. There is one bundle of core documents, and then there are two bundles of authorities. As things have come in it is perfectly possible that you have got an initial core documents bundle that consists of the notice of appeal and the documents that were ----

THE CHAIRMAN: I think that is our bundle 2, but we have also got a core documents bundle called 4, which may be the one.

MR. LASOK: The core documents bundle that came in most recently should have everything in it, because it should have the skeleton arguments, the pleadings and all the documents exhibited to the pleadings.

THE CHAIRMAN: Yes.

MR. BEARD: That is volume 4.

MR. LASOK: Bundle 4, and then in the authorities bundles, of which there are two, there should have been an additional authority inserted at the end of bundle 2 in tab 27.

THE CHAIRMAN: Yes, C532, *Lianakis*.

MR. LASOK: As the Tribunal will appreciate, this is a mergers case. You will have seen that the challenge is a challenge to the remedies package devised by the Commission. That is not because the applicant accepts everything that is said in the report that leads up to the finding of a significant lessening of competition. It is just that this is a judicial review

proceeding, and therefore we have to identify those parts of the report that we submit to be susceptible to an attack by way of judicial review.

If we turn to the Enterprise Act itself, I will go through it, as I say, fairly quickly, because it will be familiar to the Tribunal. This is tab 1 of the first authorities bundle. This was, in fact, a reference to the Commission that originated in a reference made under s.22 concerning completed mergers. If you go to p.19 you have got s.35 which sets out the questions that the Commission has to decide on a reference under s.22, and in 35(1)(b) where the merger situation has resulted, or may be expected to result in a substantial lessening of competition.

Then in (2) there is the reference to an anti-competitive outcome, which in (a) feeds back into the concept of a substantial lessening of competition.

Then in (3) if the Commission decides that there is anti-competitive outcome it must decide various additional questions, and (a) is the question of whether or not action should be taken for the purpose of remedying, mitigating or preventing the substantial lessening of competition, which I shall refer to an "SLC", or any adverse effect.

Then in (c):

> "… if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented."

Then (4) says that in deciding the subsection (3) questions the Commission must:

> "… in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the [SLC] and any adverse effects resulting from it."

Then if we go to s.38, which is on p.22, this is a section dealing with the obligation of the Commission to prepare and publish a report on a reference made under s.22 so far as, of course, is relevant to the present case, and you see in (2) that the report has not only the decisions of the Commission on the questions which it is required to answer, but also the reasons for its decisions, and such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions. That has some importance from the perspective of judicial review because one focuses then on the sufficiency of the reasons that have been given and the information provided in the report in accordance with s.38(2)(c) – that is the information bit.

Then if we go to s.41, which is on p.26, 41 sets out the duty to remedy the effects of a completed or anticipated merger. (1) if the scenario as being one where the Commission has prepared and published a report under s.38 which contains a decision that there is an

anti-competitive outcome. That, of course, feeds back into the definition of "Anti-competitive outcome" in the earlier provision that we have looked at. In (2) we have got effectively a repetition of the requirement to take such action as the Commission considers reasonable and practicable. Then it refers to "remedying, mitigating or preventing the SLC", and "remedying, mitigating or preventing any adverse effects resulting from the SLC".

It is important to bear in mind that the heading to s.41 is, therefore, slightly misleading because it is not a duty to remedy effects of completed or anticipated mergers, it is actually a duty to address the SLC and any adverse effects arising from the SLC. So it is a much more specific focused duty. To put it another way, it is not a duty to reverse the merger, it is a duty to address the SLC and any adverse effects arising from the SLC.

Subsection (3) effectively says that the decision that is made in implementation of (2) has got to be consistent with the decision included in the report by virtue of s.35(3). Then (4) effectively repeats the duty of the Commission to:

> "… in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the [SLC] and any adverse effects resulting from it."

The action referred to in (2) is action under s.82 or 84. Section 82 is about accepting undertakings, and we are really concerned with s.84. Section 82 starts at p.85, and s.84 is on p.86, and in (2) there is a reference to the order made by the Commission containing anything permitted in schedule 8, which is in tab 2. Then in (b) there is a reference to "supplementary, consequential or incidental provisions", which I do not think we are particularly concerned with.

For the sake of completeness if you go on to tab 2 of this bundle you have Schedule 8, and the power that we are considering in the present case is in para.13 of schedule 8, which is at p.152 of the bundle. It starts just above the second hole punch, and that is an order providing for the division of any business, or the division of any group of interconnected bodies corporate.

Subsection (3) refers to the order containing such provision as the relevant authority, which here is the Commission, considers appropriate to effect or take account of the division; (c) refers to the time within which "the property, rights, liabilities or obligations are to be transferred or vested". I do not think anything turns on the scope of the power as it is defined in Schedule 8.

Back to tab 1, and can we go to p.109 of the bundle, we have got s.106 at the bottom of the page, which in (3) obliges the Commission to:

> "… prepare and publish general advice and information about the consideration by it of references …"

On the next page (5) and (6) deal with the object of publishing advice and information, which is explanatory and indicative of how, so far as we are concerned, the Commission expects the provisions of that part of the Act to operate. Then subsection (6) says that the advice or information may include advice or information about the factors which the Commission may take into account in considering whether, and if so how to exercise a function conferred by this part.

The power of the Tribunal is effectively ----

THE CHAIRMAN: Is there a statutory provision that says that the Commission has to have regard to that advice and information when taking a decision?

MR. LASOK: I cannot remember, but the natural reading of this is that if there is a statutory obligation to publish advice and information then, on the face of it, by necessary implication there is an obligation on the part of the Commission to follow the advice and information unless thee is some good reason why it should not, which it would then explain.

THE CHAIRMAN: In the OFT Guidelines on fining, there is a specific statutory provision that says that they have to take ----

MR. BEARD: If it assists, there is not, so it is just the public law duty.

THE CHAIRMAN: Yes, the role of the Tribunal you were getting on to.

MR. LASOK: Yes, that is s.120 at p.132, and 120(1) provides for applications to this Tribunal for a review of, *inter alia*, decisions of the Commission. (4), as the Tribunal will be well aware, says that in determining applications of that sort, the Tribunal applies the same principles as would be applied by a court on an application for judicial review. Then (5) sets out the powers of the Tribunal at the outcome of the proceedings.

What I want to do now is to turn to the Remedies Guidelines published by the Commission, which are in tab.3. And if you go to p.162 (I think we can take this fairly quickly) 1.1 shows that the guidance is part of the advice and information published pursuant to the statutory duty under s.106; 1.3 points out that the guidance reflects the views of the Commission at the time of publication, and may be revised; 1.4 says that the Commission will have regard to the guidance in considering remedial action, but then there is, quite rightly, the reference to the fact that in each enquiry the appropriate remedy will be determined having regard to the particular circumstances, available information and time

constraints, and so the Commission says that it will apply the guidance flexibly and may depart from the approach in the guidance where there are appropriate reasons for doing so. We then get to "The objectives of remedial action", at the bottom of the page, at 1.6. And the Commission starts off by recalling that where a merger situation results in an SLC, the Commission is required to decide whether action should be taken to remedy, mitigate or prevent the SLC or any adverse effect resulting from it; and in 1.7 there is the reference to the statutory requirement to achieve as comprehensive a solution as is reasonable and practicable. And the CC goes on to say that:

> "To fulfil this requirement the CC will seek remedies that are effective in addressing the SLC and its resulting adverse effects, and will then select the least costly and intrusive remedy that it considers to be effective. The CC will seek to ensure, as outlined in paragraph 1.12, that no remedy is disproportionate in relation to the SLC and its adverse effects".

It then deals with effectiveness and, in para.1.8 you see various criteria for assessing effectiveness of a remedy which, apart from drawing the Tribunal's attention to it, I do not think we need to dwell too much on that.

The next heading is "The cost of remedies and proportionality", and in 1.9 it says:

> "Having considered the effectiveness of remedy options, the CC will then consider the costs of those remedies that it expects would be effective in addressing the SLC and resulting adverse effects".

And there is a reference in the latter half of 1.9 to the situation that arises when the CC is choosing between two remedies which it considers will be equally effective, and there it says that it will select the remedy that imposes the least cost or that is least restrictive, and that is colloquially known as "the cost effectiveness aspect of the proportionality test". Later on, in 1.12, there is referred to a different aspect of the proportionality test which is known colloquially as "cost benefit". In 1.10 there is a reference to costs in a remedy being incurred by parties, and in the second sentence the Commission says:

> "As the merger parties have the choice of whether or not to proceed with the merger, the CC will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties than costs that will be imposed a remedy on third parties, the of the and other monitoring agencies. In particular, for completed mergers, the CC will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy as it is open to the parties to make merger proposals conditional on competition

> authorities' approval. It is for the parties concerned to assess whether there is a risk that a completed merger would be subject to an SLC finding and the CC would expect this risk to be reflected in the agreed acquisition price. Since the cost of divestiture is, in essence, avoidable, the CC will not, in the absence of exceptional circumstances, accept that the cost of divestiture should be considered in selecting remedies".

That particular paragraph is relevant to ground C of the application, where we submit that the Commission erred because it failed to take account of the costs of the remedy that it was imposing, and failed to take account of the situation that presented itself at the time when the merger took place. I will come to ground C later on.

Paragraph 113 at the bottom of the page, refers to unusual circumstances in which it is possible that all feasible remedies will only be partially effective; and there is then a reference to the application of the proportionality test in those circumstances. And — really for the sake of completeness more than anything else — we have got on p.166 of the bundle, a heading "Summary of remedies process" which deals with the process followed by the CC, and if you look at 1.22, you will see that the CC's process involves starting to gather the information on remedies and considering options after the basis of a possible SLC has been identified. And then the investigation of remedies is hypothetical provisional findings of an SLC. Then there is the reference to consultation and the publication of a notice of remedies.

In 1.24 it says that the Commission will consider remedy options proposed by the merger parties and others, and will consult with relevant parties. And in 1.25 we have got the publication of the final decision together with the supporting reasons and information. And then if you go to 3.1 which is the part dealing with divestiture (this starts at p.174) and 3.1 explains what the purpose or end sought by divestiture is, which is to remedy SLC either by creating a new source of competition, or strengthening an existing source of competition, and there is a reference in the latter half of 3.1 to the appropriate divestiture package. You will see in 3.2 that the design of the remedy is supposed to seek to address the underlying cause of an SLC; 3.3 is something that the Tribunal will need to bear in mind because it sets out a summary of the three types of divestiture risk. The most important one for present purposes is probably the composition risk, which is one that has played a significant part, apparently, in the designing of the divestment package.

And then if you go to 3.6 (p.175) "Package definition", the Commission says:

"In identifying a divestiture package, the CC will take, as its starting point, divestiture of all or part of the acquired business".

Now, in the present case, the CC took as its starting point divestiture of all of the acquired business and it, at the outset, excluded divestiture of part of the divested business. And that was right at the outset. The cross-reference to that is the remedies notice, which is in the core documents bundle at tab.3, paras.5 and 7.

THE CHAIRMAN: Do we need to go to those now?

MR. LASOK: I am mentioning it, the reference is very very short, and you can see para.5 said, "We think that full divestment is likely to be effective". Paragraph 7 actually excluded partial divestment. It was not even, "We think it is likely that partial divestment may not be effective", it was "It is not effective". So, right at the outset they had opted for full divestment. And one of the points we have made is that the difficulty is when the mind of the decision-maker is coloured right at the outset by that position, then it tends to shape the subsequent discussions.

Reverting to the remedies notice, para.3.7 points to the fact that, in the second line:

"The [Commission] will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap".

And in 3.8 it raises the addition of further assets which the parties may do or may be required to do. So, if you look at 3.6-3.8 the impression given there is that in the ordinary case, unless there is an express reason why you will do something different, but in the ordinary case you start off with looking at divestiture of all or part, and you begin by looking at the smallest viable part, and you may have to expand that, adding more bits to it in order to arrive at an appropriate divestment package. But that in fact was not the thought process that was followed by the Commission in the present case.

Paragraph 3.9 says that:

"The CC will generally prefer divestiture of an existing business that can compete effectively on a stand-alone basis independently of the merger parties, to divestiture of part of a business or a collection of assets. This is because divestiture of a complete business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater speed".

I comment there that the present case was slightly different, as we will see, because the prospective purchaser was going to be somebody who was already a player in the market. It was not a case in which, for example, what was envisaged was a possible divestiture to, let

us say, investors who, you know, wish to buy a business and then have it run by somebody else. The purchaser was actually going to be somebody who was an existing significant, in fact, player in the market.

And then what I would do is just go to 3.26 on p.175, it is under the heading of "Use of divestiture trustees" says:

> "If the merger parties cannot procure divestiture to a suitable purchaser within the initial divestiture period, then, unless this period is extended by the CC, an independent divestiture trustee may be mandated to dispose of the package within a specified period (the trustee's divestiture period) at the best available price in the circumstances …"

This is relevant both to Ground C and Ground D, but more particularly to Ground D, because here we have got a situation in the present case where, if the divestiture does not take place at the earlier date preferred by the CC, then the divestiture trustee will sell the business without there being a reserve price, and we raise an objection to that.

That is all I wanted to look at in the Remedies Notice. The next point that I wanted to turn to was just a couple of authorities on the approach of the Tribunal in the context of a s.120 case. It is at this point that, if the Tribunal has not been doing it already, it is going to be stifling a yawn, because there is not, in fact, all that much that is novel that one can say about the judicial review approach. It is fairly standard. We all actually know what it is about. It may be useful just to refer to a couple of cases which set out aspects of the judicial review approach which, in our submission, are relevant to the present case.

The first one I wanted to turn to for the sake of convenience is the *Somerfield* case which is the second bundle of authorities at tab 15. The facts of the case are not really relevant at all. The only reason for referring to it is effectively for a *dictum* of the Tribunal summarising the position. We get that at p.1041 of the bundle (internal document p.23). If you look at the bottom of 1041 you will see para.57 where the Tribunal says that it was not going to embark on an elaborate or abstract exegesis of the intensity of a review, and then refers to what Lord Justice Carnwath said in *IBA Health*. If you go to the next page there is a quote from what the Tribunal had said in the earlier *UniChem* case. It is a quote from paras.174 to 175 of *UniChem*. I am not going to read out the whole of it. The particular bit that I would draw attention to is in the second half of the quote of para.174 It is the passage that says:

> "Indeed, it appears to be common ground that the Tribunal has jurisdiction, acting in a supervisory rather than appellate capacity, to determine whether the OFT's conclusions are adequately supported by evidence, that the facts have

> been properly found, that all material factual considerations have been taken into account, and that material facts have not been omitted."

The other case that at this stage I would like to refer to is the *TalkTalk* case, which is the first authorities bundle at tab 7. This, in fact, is a case under the Communications Act 2003, but the passage to which I would like to refer, which is paras.119 to 120 is relevant in the present context of judicial review. Paragraph 119 starts at p.482 of the bundle, and it is just a series of quotes from well established public law authorities regarding the decision maker's obligation to conduct to sufficient enquiry and carry out a proper consultation. Again, what I do not want to do is to read the whole thing aloud, but there are four quotes that are, in our submission, relevant so far as the approach to be adopted by the Tribunal in the present case is concerned. The particular passages that I draw attention to are in sub-para.(b), the quote from the *Southwark* case:

> "… the decision maker must call his own attention to considerations relevant to his den, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case …"

There is the quote in (c), the *Coughlan* case, the third of the quote:

> "… consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response …"

In (d) *The Chief Constable of Norfolk* case:

> "… a decision maker has an obligation to equip himself with the information necessary to take an informed decision."

In our submission, that sets out the basic approach that forms the backdrop to the consideration by the Tribunal of the challenge that we have raised under s.122, the remedies part of the report.

That brings me to the SLC. In our submission, the starting point, when one considers the merits of the Commission's report – my learned friend does not like that because he says that is redolent of something that falls outside the scope of judicial review. Of course, in judicial review you challenge a decision if you do not like it. You think that it does not have merits. The point about judicial review is that the grounds that you can take are unlimited. It is not an issue about whether or not you are attacking the merits, it is what grounds you are relying on.

In our submission, the starting point for all this is to identify what the SLC was because it was that the Commission had to address when it was considering the remedies that it had a statutory obligation to devise.

The SLC, in our submission, arose from the fact that as a result of the merger SRCL became the collection and treatment operator owning the treatment plants closest to customers located within the Avonmouth plant area.

Other collection and treatment operators had treatment plants that were too far away to be a sufficient competitive constraint and collection only companies were not capable of a constraint comparable to that of an independent collection and treatment operator with a treatment plant within or closer to the Avonmouth plant area. It was that situation that gave rise to the SLC which was the resulting dampening, if you like, of competition.

What I have just said we get from certain passages in the report that I am now going to draw the Tribunal's attention to because it seems that this understanding of what the SLC was and where it originated from, what caused it, is something of a dispute between the parties..

The report is in bundle 4, the core documents bundle, and it should be in tab 1. In the original core documents volume, of course, it was also tab 1. Can we start off at p.7 (internal p.4), para.12. This is in the summary section of the report. Paragraph 12 contains a summary of the pre-merger competition, and the conclusion there was that:

> "… before the merger Ecowaste Southwest was active in bidding for only a small proportion of the tenders within the wide area of up to 100 miles from the Avonmouth plant. However, for customers located within the Avonmouth Plant Area, Ecowaste Southwest and SRCL were each other's closest competitor."

Then if you go to para.16, the third line says:

> "… the reduction in the number of potential bidders in the Avonmouth Plant Area brought about by the merger could have an adverse impact on prices and service quality. We did not think that the constraint from this competitor …"

This is the one that is referred to in the first sentence –

> "… in itself, particularly given that the competitor plant was close to full capacity, was sufficient to mitigate the anti-competitive effect of the merger when compared with competitive conditions that would have arisen were the Avonmouth plant operating independently of SRCL."

Then 17, the second sentence, refers to the fact that:

"… the constraint exercised in the Avonmouth Plant Area by the nearest competitor plant would be significantly less than that provided by the independent operator of the Avonmouth plant."

So there again it is a continuous theme that it was all about effectively the lack of a constraint within the Avonmouth Plant Area due to the fact that plants other than the plant owned Ecowaste Southwest and other than by SRCL were too far away.

Paragraph 18 refers to collection only companies, and you have got the conclusion at the end of para.18 that there were not capable of providing a constraint comparable with an independently owned collection and treatment company.

Paragraph 19 looks at the possibility of a rival entering the local market, and they did not consider that entering would be likely, timely and sufficient to constrain the merged entity – that is the last sentence of 19.

In para.20 they look at buyer power, and in the second half of 20 they say:

"This merger has resulted in the loss of a credible bidder for LQG and SQG customers in the Avonmouth Plant Area. We therefore did not believe that LQG or SQG customers possessed sufficient buyer power …"

That led to 21, first sentence:

"We have therefore concluded that the merger has resulted in an SLC."

In the second half of para.21 there is a reference to the consequences of the SLC, and that is in the last sentence which says:

"This can be expected to lead to a worsening in the price and non-price factors compared with the situation in the absence of the merger in which we believe Ecowaste Southwest would have continued as a competitor to SRCL, but in the hands of a third party, most likely another company operating in HRW, that is healthcare waste, which would have been financially stronger than Ecowaste Group".

And then, if you go to para.7.141, on p.64, that is the conclusion on the assessment of the competitive effects of the merger, and in the third line we have got the point that before the merger Ecowaste Southwest and SRCL were the closest competitors in the Avonmouth plant area. The plant, the Avonmouth plant, competed most closely with the two SRCL plants mentioned there, and it says:

"This reflects the fact that Frome is the closes part of the Avonmouth plant. The closest constraint on the parties came from rival integrated collection and treatment companies".

And then we have got, in 7.142:

> "In the absence of the merger we considered that an independent operator of the Avonmouth plant … would have continued to compete closely with SRCL for LQG and SQG customers in the Avonmouth Plant Area".

They then summarise the position regarding other competitors and whether they were capable of providing a significant constraint, which they were not. And that led to the conclusion in 7.145 that the constraints on the merged entity would not be sufficient to counteract the loss of competition resulting from the merge. And you then have the conclusion on the SLC test in 7.146:

> "We have therefore concluded that the merger has resulted in an SLC in the market for the collection, treatment and disposal of HRW for LQG customers in" —

what is then effectively the Avonmouth plant area, and they then refer to the same relation to SQG and they say that this could be expected to lead to a worsening in the price and non-price factors.

It is important to note that we have here, once again, the idea that in the absence of the merger, Ecowaste Southwest would have continued as a competitor but in the hands of the third party most likely another company operating in HRW which would have been financially stronger than Ecowaste Group.

The assumption that I have just read out was an important assumption; it was an assumption that there was an alternative buyer already present in the industry who was stronger financially than Ecowaste Group, and who would provide a sufficiently strong competitive constraint. And that is referred to in a number of additional places in the report. So far as the counter-factual is concerned, it appears earlier in the report at para.9 which is on p.7 of the bundle. Paragraph 9 deals with the counter-factual, and if you look at the last six lines, it is the conclusion that in the absence of the merger, Ecowaste Southwest would have been sold to a third party, and we see there the hallowed phrase,

> "… most likely another company already operating in the treatment of HRW which would have been stronger financially than Ecowaste Group. Ecowaste Southwest would therefore have continued as a competitor to SRCL but without limitations caused by the financial difficulties of its parent company".

And one adds, although it is not stated in this particular paragraph, that of course the existing competitor would have resolved its inability to act as a competitor of constraint within the Avonmouth plant area because it would have got the Avonmouth plant. And

I have already read out para.21 which is also a phrase we have seen. It appears again in para.6.26, again in the context of the counter-factual — 6.26 is on p.24 of the bundle. In fact 6.26 does nothing other than set out what was set out in para.9 which I have read out. And then if you go to s.8 dealing with, which was concerned with remedies, and look at 8.45, this is on p.73 of the bundle. Page 73 of the bundle starts off at the top with the heading, "Divestment package", and para.8.45 dealt with the point about whether or not there should have been any transfer of back office functions when the divestment took place. In fact back office functions had not been transferred to SRCL and therefore forcing SRCL to transfer back office functions in the context of divestiture of Ecowaste Southwest would actually have involved forcing SRCL to divest itself of more than it had acquired through the merger. But that is a slightly different point.

If you look in the middle of para.8.45, a distinction had been drawn between what were called "standard back office functions" and "operational back office functions". And, so far as the latter were concerned, the Commission said this:

> "As regards the operational functions, we would expect a suitable purchaser (which we would expect to have industry expertise and a track record of successful operation) to be able to provide these".

And then if you go to 8.58, which is on p.76, this is the second paragraph under the heading, "Ability to find an appropriate purchaser", and there the Commission says, in 8.58, that it:

> "… would wish to satisfy itself that a prospective purchaser is independent of SRCL, has the necessarily capability to compete (with access to appropriate financial resources, expertise and assets), is committed to competing in the relevant markets (specifically the collection and treatment of HRW for LQG and SQG customers), with an appropriate business plan".

So what was envisaged was that in terms of the counter-factual, it was envisaged that there actually had been an alternative purchaser stronger than Ecowaste Southwest that was present in the market. The divestiture package was directed at trying to get an appropriate purchaser and, given the fact that certain back office functions were not going to be part of the divestiture package, because it was assumed that the purchaser was going to be somebody who already had these technical back office functions, they were looking at an appropriate purchaser who was an existing player. But it would be one of these people who did not have a plant sufficiently close to the Avonmouth plant area to provide the sufficiently strong competitive constraint that they felt had been removed as a result of the merger. Hence all this arose from the fact that the plants servicing, or closest to, or most

competitive in meeting the demands of customers within the Avonmouth plant area, those plants were all under one ownership and you could therefore resolve — at face value, you could resolve the SLC and the consequential adverse effects by going for, by divesting the plant and ensuring that it came into the hands of an appropriate purchaser, as was the intention.

Now, what was actually the Commission's approach to this, we say that instead of actually addressing the SLC and identifying what actually needed to be done to remedy, mitigate or prevent the SLC, and that is identifying the proportionate remedy, which in this case appears at first sight to be a divestment of the Avonmouth plant, the Commission, we say, went off on a tangent with a fixation about full divestment. And the reason for this appears to have been a confusion in the Commission's mind between the SLC and the counter-factual. And we see this confusion appearing in the defence and in the Commission's skeleton argument. In the defence, by way of example, we can see it in para.64B. The defence is in, I think, the core document bundle 4, and it will be earlier than the report. I think it is tab.B.

THE CHAIRMAN: When you refer to "the Avonmouth Plant", in this context, what do you include in that?

MR. LASOK: Well, it is the plant. It is the treatment facility.

THE CHAIRMAN: And the vehicles, or the bins, or the ----

MR. LASOK: Apparently, according to the Commission's skeleton argument, vehicles are not an issue. Once of the proposals that we put forward under our Option 2 included the provision of vehicles, but the reality was that the critical thing was the absence of a plant, because if the appropriate purchaser was somebody who was already present in the industry and would be present in the market in the sense of the market in England and Wales, obviously if you define the market geographically as the Avonmouth plant area, it was not sufficiently a competitive constraint there. That is the basis on which the report was, and the conclusion in the report came to. But, if you are talking about an appropriate purchaser, which among other things has already got the operational back office functions and things like that, you are going to be talking about somebody who has got their own vehicles.

THE CHAIRMAN: But, mostly, it seems to me, that you are contrasting what you refer to as "the Avonmouth plant" with a package which includes the contracts with the customers.

MR. LASOK: That is the real issue, because the way we look at it is this: when you just read the report, the focus is on the Avonmouth plant. That plant is a treatment facility, and I have not taken you through the section in the report which deals with where they analyse the state

of competition pre-merger for the purpose of seeing why it was that other collection and treatment operators did not offer the kind of competitive constraint that pre-existed the merger within the Avonmouth plant area. That section of the report is all concerned with the problem posed by the fact that if you do not have a treatment plant sufficiently close then you are not able to be as competitive. From our perspective, transport was not an issue, because you could stick a lorry or some bins into the divestment package. That was not, from our perspective, the break point. The break point was, which I will explain in greater detail later on, the fact that the way we read the report is that it is crucial to divest the Avonmouth plant. That is, we would say, all that you need to do on the basis that the purchaser is going to be somebody already present in the market.

If you need to do something else like throw in some bins and a truck, we have got no problem with that. What we did baulk at was being told that we had to sell off the whole shebang because we took the view that, reading the report, that was not justified on the basis of the findings made in the report.

THE CHAIRMAN: Yes, thank you.

MR. LASOK: I was trying to make good the submission that the problem appears to have arisen because the Commission confused the SLC with the counterfactual. In the defence, if you go to para.64(e)(ii)-(iii). It is the internal p.24. I do not think there is any external bundle pagination for this. If you look at (ii), you have got in the last sentence:

> "That is precisely what the CC sought to do in the present case – it discounted partial divestment options not least because they would fail to reflect Ecowaste Southwest's business as a collection and treatment operator."

That was not the point. The point was, what is the SLC? How are you addressing the SLC? Why is it that the partial divestment does not address the SLC?

Then in (iii), four lines down it says:

> "The 'focus' of the SLC was the fact that (on the counterfactual situation that Ecowaste Southwest had not been acquired by SRCL) Ecowaste Southwest would have continued to operate as an independent collection and treatment operator under the ownership of a third party, competing closely with SRCL for both LQG and SQG customers (and with the continued benefit of its existing pre-merger contracts)."

So again they are saying that their focus was the counterfactual. If you go to the Commission's skeleton argument, which is in tab D, para.8 says:

> "It was both rational and appropriate for the CC to seek to seek to identify a remedy which ensured that the level of competition which would have existed under the counterfactual, existed as a result of the remedy. If that did not occur, the remedy was not effective."

Then in para.55, in the third line from the end, we have got the phrase "in order to ensure competition was restored to its pre-merger state". The problem about all this is that what they were actually supposed to be doing is addressing the SLC. The SLC is an "SLC", it is not an "LC". That is perhaps a trivial way of making the point that going back to the status quo is not necessarily performing the statutory task because a merger could give rise to a lessening of competition, but it might not be a significant one. If it is not a significant lessening of competition, then the statutory provisions do not authorise the Commission simply to roll back the position to what it was pre-merger. What the Commission has to address is not any old lessening of competition, it is an SLC. Hence the necessity not to be misled by the fact that a convenient way of going back into the past may be full divestment. That is not the issue. The Enterprise Act does not say that where certain circumstances exist the Commission is authorised to require the unwinding of the merger. It is not like that. What it is talking about is the adoption of measures necessary in order to address an SLC. That is why it is important that the Commission should address its mind to the statutory question and not to some other question.

Addressing the counterfactual, or something of that nature, is not addressing the statutory question. Reference to the "counterfactual" does not appear in the Act. The counterfactual is a technique. It is an analytical tool. It is not the statutory test, which remains the SLC. So our submission is, and this effectively is our Ground A, that what happened was that the Commission misled itself because it ignored, or rather it did not give sufficient prominence to what the statutory test actually was, which is addressing the SLC. It jumped to the conclusion that what it should be doing was reversing the position so as to get back to the counterfactual or what would have happened in the absence of the merger.

It is entirely possible that in certain merger cases that approach will be entirely consistent with the statutory obligation to address the SLC. One cannot proceed on the basis that in all cases that will be so. In fact, in this particular case, as I have sought to explain, the problem that arose here, the SLC, was related specifically to the fact that the existing collection and treatment operators, other than SRCL and Ecowaste Southwest did not have a treatment plant sufficiently close to the customers in the Avonmouth plant area to offer the kind of competitive consultant that would itself have rectified the position resulting from the

merger. Hence the cure to that scenario would have been the divestment of the Avonmouth plant to an appropriate purchaser, who was perceived by the Commission to be a player. Once, in our submission, one says that if you define the SLC in the way it was defined in the report it presents to you what the remedy is, and that is a remedy based upon divestment of the Avonmouth plant itself.

It may be for composition risks or other risks it is necessary to add a little more into the package, but that is the starting point. The starting point is not rolling the whole thing back achieving complete divestment because, as we submit actually happened here, the Commission is not really focused on addressing the SLC, it is doing something else, and that is it is seeing its power as being one to reverse everything, to go back to ----

THE CHAIRMAN: To recreate the counterfactual?

MR. LASOK: To recreate the counterfactual. That is where we say that the approach of the Commission went wrong. It is the only explanation for the fact that it had excluded partial divestment from the word go without even giving any consideration to it at all. Basically that, in our submission, is Ground A, and Ground A is well-founded.

I wanted to make this supplementary observation which actually concerns not Ground A but Ground B, and that is that this error of trying to recreate the counterfactual or recreate the old Ecowaste Southwest business, but not actually address the SLC, this error is something that pervades the Commission's reliance on the composition risk. This is a reference to para.8.34 of the report. If you go to 8.34, which is back in the core documents, tab 1, pp.70-71 of the bundle, and the last sentence, which occupies the last four lines of the paragraph is considering Option 2, and compares Option 2 to full divestment and says that there are significant composition risks in Option 2.

One of the points that I am going to come to - probably after the break, because I suspect that we are now around about the time when we should have the break, and it would be a convenient point – concerning para.8.34 is the problem regarding the customer relationships on which great emphasis is placed. Actually, one of the problems that arises in relation to the composition risk referred to in the last sentence of 8.34 is that it is actually going back to this idea, not of addressing the SLC, but recreating the counterfactual. Here it ignores the fact that divestment is not going to be to a passive investor, somebody who is not in the business who is just interested in the money, it is actually going to be divestment to an existing player. As soon as one accepts that the purpose of divestment was to get a sufficient group of assets to an existing player in order to remedy the SLC, one sees, in our

submission, that the starting point should not have been full divestment, as it was. It should have been partial divestment.

For me this is a convenient point to break.

THE CHAIRMAN: Very well, thank you, we will come back at 11.30.

(Short break)

MR. LASOK: Madam, I am coming now to Ground B and the reasoning against Option 2. The Commission's reasons for not accepting Option 2 are in the report in the sequence running from paras.8.29 to 8.40, and we have made detailed submissions on that part of the report in the notice of appeal and the skeleton argument, and I am not going to repeat all of that. There are certain important issues arising from the debate between the parties that we do need to go into.

I am going to make two introductory observations before moving on to the substance of Ground B. The first is that the Commission's skeleton does not appear to answer or deal with paras.75 to 78 of our skeleton. I think it is customary in those circumstances to some pointed jibe about one's opponent, but I am not going to do that.

THE CHAIRMAN: Which paragraphs of your ----

MR. LASOK: It is our skeleton, paras.75 to 78, which do not appear to be answered in the Commission's skeleton.

The other introductory point concerns the Commission's skeleton at para.25. The first sentence of para.25 of the Commission's skeleton argument asserts that in our skeleton argument we contended that the Commission did not address the effectiveness of Option 2 in relation to the SLC but compared it with full divestment. In fact, para.27 of our skeleton argument makes the point, which I think is common ground, that in the sequence in the report, 8.29 to 8.40, you have certain parts that appear to be directed to the question of whether or not Option 2 is effective. Then there are other bits in which what the Commission does is to compare Option 2 with full divestment. One example of that is the last sentence of para.8.34, which I took you to immediately before the break, because there it is a straight comparison between two remedies.

Logically, you cannot test the effectiveness of one remedy by comparing it with another, and I will give you an example. Let us suppose that the object of the exercise is to find a device that the police can use to stop a criminal in his tracks and there are two devices that are compared. One is a taser and the other one is a rocket propelled grenade. You cannot say that the taser is ineffective when it is capable of stopping the criminal in his tracks merely because it is not as devastating as the rocket propelled grenade. You fire the rocket

propelled grenade and it blows the criminal apart. You certainly stop him in his tracks. The comparison between the two relates to something else. The comparison relates to proportionality, not effectiveness.

The point that we have made in our skeleton argument was that when the Commission, in this sequence of paragraphs, 8.29-8.40, starts looking at comparisons with full divestment it is actually taking its eye off the ball because it is no longer looking at the question of effectiveness, it is looking at something else. And that was the point that we were making, and I do not think that it has been answered successfully by the Commission, because in its para.25 it says that (this is the top of p.9 of the skeleton argument, and I am looking at line 3):

> "Comparison with the effects of Option 2 ['of the effects of Option 2' it should be] with the effects of full divestment … is … relevant … in assessing whether Option 2 represents a comprehensive and effective remedy because",

and then we have

> "i it amounted also to a comparison between Option 2 and the situation absent the merger",

that is the counter-factual error, and then;

> "ii it was necessary to identify whether Option 2's disadvantages would arise also in the case of full divestment",

but that is a proportionality issue, it is not an effectiveness issue. You measure effectiveness just by looking at the remedy. You do not need to look at any other remedy to work out whether a particular remedy is effective.

So, to take my example, again, of the device used to stop a criminal in his tracks, I took the comparison of the taser and the rocket-propelled grenade. Let us suppose that the comparison was between a feather duster and a rocket-propelled grenade — well, you do not need a comparison between a feather duster and a rocket-propelled grenade to tell you that a feather duster is going to be ineffective. So, this idea of a comparison is a complete red herring. So that the mere fact that the Commission went down this route of introducing irrelevant considerations into the analysis is significant in our submission when one looks at the sustainability of the Commission's conclusion.

That brings me to customer relationships. One theme running throughout this part of the report (and it is 8.29-8.40) is a theme encapsulated in para.8.30. Paragraph 8.30 is on p.70 of your bundle 4, and I want to focus on the last sentence of 8.30:

"In our view, the business with the pre-existing customer relationships would have a good chance of retaining the customers when their contracts were retendered".

Now, by "pre-existing", the Commission means existing or current. It does not mean relationships back in the past. We get that, I do not propose to take you to this, but it does appear in the defence.

THE CHAIRMAN: It means at the time the contracts are tendered.

MR. LASOK: Yes, it is a relationship that is existing at that time, and it is a relationship with the entity that is re-tendering the contract, not somebody else. It is important to note that the Commission is not talking about a marginal or unimportant edge that you have over a competitor. It is saying that incumbency gives a good chance of winning the contract, and therefore non-incumbency, not being the incumbent, is a loss of competitiveness, and that is effectively what it says in the defence at para.71. And this is a theme that underpins the Commission's belief that full divestment would be an effective remedy, whereas partial divestment would not be effective, and it is a theme that is emphasised at great length in the Commission's defence and also — even more so, in fact — in the skeleton argument. In our submission, in order to look at this question, it is important to see what the context of this debate actually is. If we reduce matters to their essentials, Ecowaste Southwest had physical assets and it had some contracts. And the contracts gave it a revenue stream that was of finite duration. The most important contracts were the — they are called in the report "four key contracts", and they were coming up for re-tendering in 2012 and 2013. The cross-reference there is to para.8.50 of the report on p.74 of the bundle. You will see that just before footnote 157 in para.8.50, there is a reference to the fact that they will all be renewed in 2013, and there will be a lead time for the tendering process. If you look at the end of sub-paragraph (a) you have got the commencement of the re-tender for one of the contracts, second half of 2012. Towards the end of sub-paragraph (b) you have got a reference to a date in August 2013, which is when the first of the three other contracts was to be starting, that is to say the whole process had to have been completed by then.

So, the other fact to bear in mind, or group of facts, is that we are looking at a bidding market in which competition between operators focuses on the formulation of bids as and when these contracts come up for tendering, and they come up for tendering only on an intermittent basis due to their relatively long duration, and that we can see in the report, and I will just give the references, it is paras.7.99, 7.100 and 8.31 of the report. Those are some of the paragraphs in fact which explain that the nature of the market, that it was a bidding

market, the fact that the competition focuses on the particular bid stage when people are formulating their bid and the intermittent nature of these contracts coming up.

So, the position was that when SRCL acquired Ecowaste Southwest, the then existing contracts that Ecowaste Southwest had got had longer to run than they do now, and the result is that from the point of view of revenue stream, Ecowaste Southwest is less valuable now than it was at the time of the acquisition. If you view matters from a commercial perspective, which is the way SRCL approaches it, divestment in terms of its viability cannot be divorced from the need for a revenue stream, but the existing revenue stream is drying up, contracts come up only intermittently and therefore are of relatively long duration, and there is no incumbency advantage — at least that is the way we see it. And when you have got no incumbency advantage, then you have a need to do something else to address the question of divestment, and it is that that generated Option 2, because Option 2 is divestment of the plant plus a volume guarantee that ensures that there is a revenue stream. Option 2 of course, as it evolved, had got various bits and pieces added to it, but I do not need to go into those. The general form of Option 2 addressed the viability question arising out of divestment.

Now, the Commission dismisses Option 2 because they say it is not good enough for the purchaser of Ecowaste Southwest to have only two of the four key contracts, and the reason given in the report for the perceived disadvantage in having only two of the four key contracts has got nothing to do with revenue streams. It is about what happens when the contracts come up for re-tendering, because that is the sole topic of discussion in paras.8.30-8.34 of the report.

The result is that the Commission's preference of full divestment is based on the idea that, if the purchaser of Ecowaste Southwest gets the existing contracts, then its chances of retaining them will not be prejudiced, and it will therefore be able to compete effectively. It is all about the perceived competitive disadvantage and competitive advantage that an incumbent has.

In the context of proceedings under s.120 of the Enterprise Act, the issue is not who is right. The issue is different because it is whether or not the Commission's conclusion is sustainable on standard judicial review grounds. But, as I have said, what underpins the effectiveness of full divestment and the supposed ineffectiveness of Option 2 is the belief expressed in para.8.30 of the report that incumbency gives you a good chance of retaining a customer or a competitive advantage, a serious competitive advantage in retaining a customer when a contract is re-tendered. And this belief was expanded a little bit in the

Commission's defence at para.69B, and if we go to the defence, and to 69B on p.28, and so what they say at the bottom of p.28 is this:

> "Existing customer relationships would be important to assessments of quality and reliability in the consideration of any tender".

So, that is how they explain the role of customer relationships. And in the skeleton argument we have got similar passages in paras.35-36 of the Commission's skeleton. So, if you have the Commission's skeleton, it is p.13, and if you look at the end of the fourth line from the bottom, we have got this:

> "The non-discriminatory criteria upon which such tenders would be assessed include quality and reliability in practical terms, such assessments often made on scoring sums which reflect a qualitative judgment, will often be informed by the customer's experience of existing customer relationships".

And then, para.36 in the second half, they say:

> "A bona fide assessment of the quality and reliability of a bidder's service, however, could not be impugned. The fact that the procuring entity has current day to day experience of the bidder's services, however, will, in practice, frequently admit of a more confident assessment of their quality and reliability",

and this is what is supposed to lie behind the assertion that incumbency gives you a good chance of getting a contract when it is re-tendered. There are two aspects to this part of the report. One is a legal aspect, and here the issue arises out of the application of the public procurement rules because contracts of this nature will ordinarily be tendered. They would have to be relatively small value to fall outside the scope of the public procurement rules. The second is a factual aspect. In the bids, for example, in the skeleton argument that I have just read out, I paused and emphasised words like "often", "in practical terms", "in practice", "frequently", these are basically assertions of fact, and there are a number of other assertions of fact that lie behind all this, and it is important to know actually whether there is any evidential basis for this.

I am going to start off with the legal aspect. There is actually no indication in the report that the Commission took into account the application of, or the impact of, the public procurement rules on its belief in para.8.30. And, in the light of the further explanations of that belief that the Commission has given in the defence and in the skeleton argument, we can see that the Commission appears to have been operating on the basis of a number of errors of law.

Now, the first relates to the passage in para.35 of the skeleton argument where the Commission asserts that tenders would be assessed by reference to the quality and reliability of the contractor. Now, as a matter of law, tenders are assessed and a contract is awarded by reference to the contract award criteria which under the public procurement rules can be only either lowest price, or the most economically advantageous tender. The law in this area, in our jurisdiction, is contained in the Public Contracts Regulations 2006 which are in tab.11 of the authorities bundle, and they implement an EU Directive 2004/18 and in some respects it is easier to get the flavour of it if you look at the Directive, as I shall now show, I hope.

If you go to the first authorities bundle and go to tab.10, you have got there the Directive. And, like all other EU legislation, it has got a preamble which is quite useful, because it tells you what the purpose and function of the content of the legislative measures in question are. If you go to, it will be the bundle p.549, you have got a recital, 46, and you see there that contracts had to be awarded on the basis of objective criteria ensuring compliance with transparency, non-discrimination and equal treatment and guaranteeing the assessment of tenders and conditions of effective competition, and for that reason you have got two award criteria. And in the next paragraph of the recital there is a reference to ensuring transparency to enable tenderers to be informed of the criteria, and so forth. And if you go down to, it is the third paragraph of the recital, the one beginning, "Where the contracting authorities choose", and there is a reference here to the most economically advantageous tender. They have to assess the tenders in order to determine which one offers the best value for money, and they have to take into account the economic and quality criteria enabling them to determine which tender is the most economically advantageous one.

MR. BEARD: I am sorry. Whilst we are on this, it would be helpful if the Tribunal read on through that passage of that recital, because I will come back to that if necessary in due course.

THE CHAIRMAN: Yes.

MR. LASOK: So, the gist of it is that you have got two award criteria, one is lowest price. When it is lowest price, you only look at the price. And the other one is most economically advantageous, and there you can look at a range of identified factors that they all have to relate to the tender, not the tenderer. The operative provision dealing with this is Article 53 of the Directive, which is at p.576. It is 53.1 which sets out the two award criteria. Now, the quality and reliability of the tenderer which is what the Commission claims to be

relevant to the assessment of the tender, cannot lawfully be taken into account when you are assessing the tender and awarding the contract. And the authority for that is the *Lianakis* case which is in vol.2 at tab.27. Now, *Lianakis* was decided by the European Court in 2008, but I perceive that we do not have in this extract a proper citation. So, we will provide the Tribunal with the correct citation. (It will be 2008 ECR-I something, but I cannot remember the page number offhand). If you go to p.4 of 8, it is p.1519 of the bundle, towards the bottom of the page you see a heading "The dispute in the main proceedings and the question referred", and if you look at paras.9-10 you will see that the case arose out of a call for tenders for a contract, and in para.10 it says that:

> "The contract notice referred to the award criteria in order of priority and these were proven experience on projects, the firm's manpower and equipment, and ability to complete the project by the anticipated deadline together with the firm's commitment and its professional potential".

And what happened was that a dispute arose, the details of which we do not really need to go into, but it was really about the question whether or not you had to stipulate weighting factors for those criteria. The question referred is in para.20 which is on the next page just below the first hole punch. But what happened was that the European Commission, when it put in its written observations, said that there was another point that had first to be addressed, and that was whether or not these were permissible criteria at all for the award of the contract. And the Commission's objection is summarised in para.22 of the judgment. And the European Court decided to take that point and the paragraphs in the judgment in which it deals with this are paras.25-32, and 25 starts under the heading, "Criteria chosen as award criteria".

Now, the legislation referred to is Directive 92/50 which was one of the pieces of legislation that preceded 2004/18, but the provisions in 92/50 that are relevant are still to be found in 2004/18.

MR. BEARD: I am sorry. Can I just clarify? Is it being suggested that the recital which has been referred to - Recital 46 - was in Directive 92/50?

MR. LASOK: I have no idea what you are talking about.

THE CHAIRMAN: You have referred us to a Recital in the Directive. You are relying on this case because you are saying there is no material difference between Directive 92/50 ----

MR. LASOK: Yes - the operative provisions. For example, Article 23(1) of Directive 92/50 is currently Article 44 of Directive 2004/18. In fact there is a concordance table, or correlation table, which forms Annex 12 to Directive 2004/18 which enables one to see

where these provisions have been replicated. So, if you look at para. 25 of the judgment in *Lianakis* it says,

> "It must be borne in mind that Article 23(1) of Directive 92/50 provides that a contract is to be awarded on the basis of the criteria laid down in Articles 36 and 37 of the Directive, taking into account Article 24, after the suitability of the service providers not excluded under Article 29 has been checked by the contracting authorities in accordance with the criteria referred to in Articles 31 and 32".

If you then look at the Directive which is in Tab 10 of the first authorities bundle and go to Article 44 which is on p.571,

> "44(1) Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24 which is about contractual variance, after the suitability of economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of the economic ----"

So, what we have is the same pattern. The provision in both directives is that contracts were to be awarded on the basis of the contract award criteria, which were the same in both Directives, after the suitability of the economic operators had been assessed. That is the reason why, in *Lianakis* the European Court came to the conclusion that you could not include assessment of the tenderer as part of your contract award criteria. The contract award criteria focus on the tender because you have already looked at the suitability, and so forth, of the tenderer at an earlier stage. Now, I say "earlier stage" -- If you look at para. 26 of *Lianakis*,

> "The case law shows that while Directive 92/50, does not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules".

You then have, in paras. 27 and 28 the contrast between assessment of suitability of tenderers and, in para., 28, the assessment of the tender which is by reference to the contract and award criteria. In para. 29, in relation to the most economically advantageous tender which is what the latter refers to, what was then Article 36(1) of Directive 92/50 does not set out an exhaustive list of the criteria which may be chosen by the contracting authorities, and therefore leaves it open to the authorities awarding contracts to select the criteria on which they propose to base their award of the contract. Their choice is nevertheless limited

to criteria aimed at identifying the tender which is economically the most advantageous. At para. 30,

> "Therefore, award criteria do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question".

I do not think I need to read any further.

So, they laid down an interpretation of the then existing public procurement legislation which is equally applicable under the current public procurement legislation and, as far as I know, has never been disputed by anybody - namely, that you assess things like quality and reliability; the suitability of the tenderer by reference to what is currently Article 44 and following of the Directive, but you assess the tender by reference to the contract award criteria, and you can only take into account, when you assess the tender, factors which relate to the tender - not the tenderer. That is a fundamental point laid down in *Lianakis* concerning how contracts are awarded when they are subject to the Public Procurement Rules.

The upshot is that one of the major problems that we have here is that the Commission's belief that incumbency gave you a good chance of retaining a contract is simply inconsistent with the shape of the Public Procurement Rules because retaining the contract involves looking at the stage at which the contract is awarded, and at that stage you cannot take into account factors relating to the tenderer because you are restricted to factors that relate to the tender. So, you can compete on the merits of the respective bids, but you cannot compete at that stage on the basis of the respective merits of the tenderers.

It is, of course, necessary to cast an eye over the provisions in the Public Procurement Rules which are addressed to the question of verification of the suitability of tenderers. I am not willing to leave this argument on what could be criticised as a formal distinction between assessment of a tender and assessment of a tenderer. We know that verification of the suitability of tenderers has to be transparent and non-discriminatory. That is actually referred to in Recital 39 of Directive 2004/18. The more detailed provisions that deal with the assessment of tenderers are to be found in Article 44, which we were looking at a moment ago. So, if we go back to Article 44, at Article 44(1) we can see that you look at suitability of the economic operators first, before you come to the award of the contract. There is, firstly, the possible exclusion of operators under Articles 45 and 46, and then the checking of the criteria of economic financial standing, professional and technical

knowledge or ability. Then there is as reference to non-discriminatory rules and criteria referred to in para. 3.

If we go through these we start off with Article 44(2) which provides that the contracting authorities can require candidates and tenderers to meet minimum capacity levels. That has to be done in accordance with Articles 47 and 48, which are on the following page. Both Articles 47 and 48 contain a provision that an operator may rely on the capacities of other entities. In other words, if the economic operator is Ecowaste Southwest and it is owned by an existing player in the market, it can also rely on the capacities of its owner. The cross-reference there is to Articles 47 para. 2 and 48 para 3. But, if we move back to Article 44(2), the second sub-paragraph refers to "minimum levels of ability". Now, these are minima. So, you can set a floor. There is no indication that there is any ranking of people once they are above the floor. It is a binary question: You are either above or below. The minimum levels, as you can see, have to be required for a specific contract and they have to be related and proportionate to the subject matter of the contract. They have to be indicated in the contract notice.

Then when you get to para. 3, here we move to a different aspect of selection of tenderers. This is the possibility that in what is known as a restricted or a negotiated procedure you can limit the number of tenderers. But, you have to have a sufficient number of tenderers. The limitation has to be done by reference to objective and non-discriminatory criteria or rules. The minimum number has to be identified. You can have a maximum number and that has to be identified. In the Regulations the cross-reference to this is to Regulations 15, paras. 11 to 12 which deal with open procedures. It is Regulation 16, paras. 7 to 12 which are restricted procedures. It is Regulation 17, paras. 9 to 14 which are negotiated procedures. The bundle page numbers to those passages are 699 through to 704.

If you stay within Article 44 and go to its continuation on p.572 in the first column, you have a reference to the fact that in the restricted procedure the minimum number of tenderers has to be five; in a negotiated procedure the minimum can be three. But, it then says,

> "In any event, the number of candidates invited shall be sufficient to ensure genuine competition".

It then provides that,

> "The contracting authorities have to invite a number of candidates, at least equal to the minimum".

It then goes on to say,

"Where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum, the contracting authority may continue the procedure by inviting the candidate with the required capabilities".

Now, that is a "may" provision. In our implementing rules we do not do that. The UK implementing measure which is Regulations 16(11) and 17(13) make it possible to go below the minimum number only if the remaining number of candidates is sufficient to ensure genuine competition. So, the process of selecting candidates cannot bring about a situation in which there is less than genuine competition for the contract.

I should say, of course, that there are procedural provisions which require the giving of reasons for decisions, including decisions of failing to consider a candidate - i.e. excluding them at an earlier stage; breach of these rules is a breach of a statutory duty and is enforceable.

The upshot is that we have a legal regime which is specifically directed at removing an incumbency advantage of the very sort that the Commission was hypothesising. The Commission's case is actually based on a hypothetical, factual permutation in which the contracting authority, for some unknown reason, does a number of things in relation in particular to assessing the suitability and so forth of tenderers, such as setting minimum criteria -- such as limiting the number, but then does it in such a way as to give the incumbent a good chance of getting the contract.

Now, how is this actually possible? That is actually a rhetorical question because the difficulty is that none of these provisions is analysed by the Commission, yet it is clear that if we take these things in stages, if a minimum level, such as is permitted by Article 44(2) is in play, you either have to be above it or below it. Well, how does incumbency advantage come into that? Is it being suggested that the contracting authority is going to massage its assessment of the quality and reliability of the incumbent in order to get it above the minimum threshold when it surely should not properly be above the threshold? Is that the scenario? If the incumbent is clearly above the minimum threshold, it is going to be above the minimum threshold whether it is an incumbent or not an incumbent. So, why is incumbency giving this advantage? It is the hypothesis that the contracting authority is going to be massaging its own criteria for the benefit of the incumbent.

Let us take another stage which is the possibility that the contracting authority is going to limit the number of tenders. Well, is it or is it not? What is factual basis for saying that the contracting authority is actually going to do that? If it does do it, again we have this problem. If it is limiting the number and applying objective non-discriminatory criteria

determining whether people are in or out, what is the Commission's case? The Commission's case must be that the incumbency advantage causes the contracting authority to massage its appreciation, or assessment, of the incumbent in order to get it in the group of selected tenderers when it should not be. But, are we really supposing that contracting authorities are going to be doing that? Why would they want to do it? Even if they did do that -- Even if you had all these things going on, at the end of the day you cannot have a number that is less than sufficient to ensure genuine competition. At that point, whatever advantage the incumbent had is going to disappear because at that point the contracting authority is going to have to award the contract by reference to its contact award criteria - presumably most economically advantageous tender - and it has to look at the tender and the merits of the bid.

In our submission there is simply no legal basis for the Commission's fixation on customer relationships. It is actually inconsistent with the legal regime which would be applicable to contracts awarded under the Public Procurement Rules.

I want to turn now to the factual aspect of this. Again, what I am addressing is the case advanced in the report, particularly para. 8.30, and explained in the defence and in the skeleton, that incumbency gives you a good chance -- It is a competitive advantage.

This case, as articulated in the report, as far as I can see, was not put to SRCL in the material on which the Commission relies before the tribunal. Secondly, the material that is before the tribunal does not actually support the assertion - in particular, the assertion crystallised in para. 8.30. Thirdly, what the Commission has actually done is to base itself on its own interpretation of some inconclusive comments made by SRCL, usually taking those comments out of context and ignoring the qualifications that SRCL put on them. Fourthly, the Commission has ignored other statements put to it by SRCL which are inconsistent with the Commission's belief. Lastly, the Commission has not brought forward any evidence that does address, in a supportive way, its factual assertions.

In order to make good those points it is necessary to look at what the Commission has relied on - which is essentially comments made by SRCL at two hearings - the transcript of which is to be found in the core documents - Bundle 4, Tabs 8 and 13.

THE CHAIRMAN: Mr. Lasok, I am rather concerned about the timing of this. You need to wrap up really by a quarter to one.

MR. LASOK: Yes, certainly. I want to press on really quickly. It may be that the best thing to do is if I give you the references rather than read these things out. So, the first reference is the core document at Tab 8, at p.339 of the bundle. That is an inconclusive statement by SRCL.

The second one, in the same tab, is at pp.58 to 60 of the transcript/pp.352 to 354 of the bundle. That is a follow-up on the previous entry, but it is a follow-up on a point made by SRCL that the customer relationship was important for the purpose of getting additional revenue. They did not follow up on the "good chance" point in para. 8.30.

The next reference is in the same bundle at Tab 13, at p.381 of the bundle, going to the top of p.382. This is a situation in which the Commission get negative feedback on the customer relationship point. They promptly interrupt SRCL in mid-sentence with the word, "Yeah" (p.382). The next passage is in the same tab at p.3l89 - a passage which does not help the Commission. Then we have pp.397 to 398, which is a contrary indication from SRCL. Finally, at pp. 400 to 402 - another contrary indication. Pages 400 to 402 are quite interesting because at p.400, line 19, it starts off with SRCL actually indicating that they did not place any importance on the existing customer relationship because they thought that any relationship with a customer could be relied upon. Then, when you get to p.401, line 21 through to p.402, line 16, what they rely on is line 11 on p.402 where Mr. Lloyd of SRCL has been asked whether customer relationship is a key to winning contracts. "Is that a fair assumption?" He says, "I think it's an important factor. But, as we have said, it is not the be all and end all". Then he talks about price. So, when he says, "I think it is an important factor", this is seized upon to support para. 8.30 in the report. However, para. 8.30 in the report is not, "This is an important factor". Paragraph 8.30 in the report is, "Existing customer relationships give you a good chance of winning a contract".

The upshot is that when you look at all this in the round -- If you look at all the relevant material on this point, you have the Public Procurement Rules and you have this stuff that the Commission has drawn to the attention of the tribunal in support, and when you read it in its totality in our submission it simply does not support the finding or the conclusion in para. 8.30. It cannot do so because whenever anything is tendered under the Public Procurement Rules you do not have an incumbency advantage of this sort.

In addition to that, of course, elsewhere in the report, there are further contrary indications. We have Appendix F of the report, which is in the documents bundle at pp.106 to 107, which gives two instances of the incumbent being dethroned by an interloper. We have, in Section of the report, no mention of customer relationships - apart form a cross-reference to para. 8.30. The cross-reference is in para. 7.71(d). Paragraph 7.71(d) says, with the cross-reference to para. 8.30, says that this was something that they discovered only when they were looking at remedies. One simply asks rhetorically, "If incumbency gave you a competitive advantage, should this not have come to light when the Commission was

analysing the state of competition in the market?" Its analysis of competition which preceded the remedies discussions did not bring to light this factor. That is extremely surprising if this factor did actually exist. But, as it is, it is something that the Commission has ramped up apparently on the basis of two stray remarks in a transcript where they ignore the context in which the remarks are made and the qualifications placed on the remarks by SRCL.

That brings me to the volume guarantee point which I can take rather more quickly. The volume guarantee point, in our submission, takes on a completely different significance once one accepts that the Commission's belief that the importance of customer relationship is seen to be unfounded and to be irrational. Once you remove the customer relationships then there is no rational ground for an objection to the volume guarantee. The real problem of course, is that, once you remove the customer relationships, one sees how exposed to failure the full divestment option actually is.

Now, in the Commission's skeleton argument (at paras. 45 to 47) there are two objections to the volume guarantee. The first is that there is a supposed tying of the purchaser to SRCL for a substantial quantity of business. The second is a concern about SRCL obtaining information.

The first objection actually is based entirely on the Commission's belief that full divestment was a better remedy than partial divestment because the purchaser would retain the direct relationship with the customer. That is what is said in the Commission's skeleton argument at paras. 46 to 47. That is a comparative point. It is not a point going to effectiveness, but, more importantly, that point is dependent entirely on the sustainability of the Commission's conclusion about customer relationships. Once that goes, then this comparative point disappears.

The second objection, which is the one about information, has been explained so far in three different ways by the Commission. The first is in the report at para. 8.35 - the last sentence. The second way is in the defence at para. 73(d). The third way is in the skeleton at para. 46. I do not know which of these is the case that they are advancing. But, what I am going to do is to assume that the latest iteration is the case that we have to meet. If you go to the Commission's skeleton at para. 46, at the last sentence they say,

> "As for information being obtained, the CC was concerned that SRCL would obtain confirmed data on volumes since those figures would impact on how the guaranteed volumes would be priced. SRCL would be aware of Ecowaste's remaining capacity as a volume threshold was passed".

The point here is this: You have a volume guarantee. There is a contract between SRCL and the purchaser of the Avonmouth plant, Ecowaste Southwest. Under that contract SRCL would obtain confirmed data on volumes. That appears to be the volumes being treated in the plant - not just SRCL's. That would enable SRCL to be aware of Ecowaste's remaining capacity as a volume threshold is passed.

Now, what is this? Probably the easiest way to see what this is about is actually in the core documents bundle at Tab 13. It is a passage in the second transcript? If you go to p.391 and look at the passage between line 8 to line 17. If you look at line 8 the Commission is embarking on a question about the pricing under the proposed volume guarantee and asks whether it was an open book arrangement. The answer was,

> "No, because SRCL was anticipating a commercial negotiation. The price would be set and then that would be it".

Then the CC says, "And you would not care what they did with the plant?" The answer is, "No". However, in the proposed agreement what would happen is that there would be a variation, if either capacity hit 2,400 tonnes or you got to the beginning of Year 4 (this was a five year thing). In our skeleton argument we point out that this variation, in fact, would, if anything, have operated as an incentive on the purchaser of the Ecowaste Southwest business to get on and get more business in because if you got to Year 4 and you scaled back the commitment, then they would be being told, "Look, you know, you have to find a replacement". The 2,400 tonne position was, again, the idea that if they were getting in lots of other customers, and putting a lot of throughput through the plant, then the significance of the volume guarantee in terms of support for the purchaser was diminishing.

The point about this is that what was actually envisaged, as you can see here, is that at some point in the course of the five year volume guarantee a threshold would be passed - 2,400 tonnes. That is the volume threshold that the Commission is focusing on, or referring to, in the skeleton argument. But, the difficulty is that there is no arrangement here for SRCL to know, or receive, confirmed data about volumes. All that it would get would be, if at all, the information that the 2,400 tonne threshold had been surpassed. Before then you would not know what the volumes were ----

THE CHAIRMAN: Would it not want to check? Would it be prepared to rely on the purchaser saying, "Oh, we need to let you know that we have just passed that threshold. So, you do not need to provide us with the volume any more"?

MR. LASOK: That is the kind of thing that you can deal easily with because all you do is get an independent person to go around and tell you if the 2,400 tonne threshold has been

surpassed. You do not get this independent person to tell you what the volumes actually are. It is only when they are surpassed. So, there was only one point in time at which - unless they also had the 3,600 - though I think the 3,600 was the capacity of the plant -- There would be no ongoing flow of information about volumes. If 2,400 tonnes was exceeded there would be no information transmitted to SRCL as to by how much it had been exceeded. In any event, as we understand it, the actual volumes are already publicly available information because the Environmental Agency publishes reports on these things. So, if it is only volumes it is not an issue.

The upshot is that neither of these objections to a volume guarantee actually stand up.

That brings me to my final submissions - fortunately, given the time. I will just make two final points

The first of the final points is about Option 2. There are certain objections to Option 2 which were equally applicable to full divestment. These are objections contained in paras. 8.33, 8.37 and 8.40 of the report. The objection in paras. 8.33 and 8.37 is an hypothesis that the purchaser would not be able to retain any of the key contracts. Of course, that hypothesis is equally applicable as a hypothesis in the case of full divestment and could not, therefore, have rationally been an objection to partial divestment. In fact, partial divestment is a better option because of the volume guarantee.

The objection raised in para. 8.40 is concerned with the possible cancellation of contracts under a change of control provision. But that was equally applicable whether there was full divestment or partial divestment. The Commission's case on this in para. 48 of its skeleton is to say that it was open to the Commission to have regard to the fact that the residual risk would not be as significant in the case of full divestment, and it says that it had a concern that there would be a greater risk in the case of partial divestment - a split of Ecowaste Southwest. However, the problem is that there is no fact stated in the report to indicate that any of these concerns had any foundation whatsoever because the Commission itself said that it had no concerns where the purchaser was a player in the market. But that would be so whether it was full divestment or partial divestment.

I have dealt essentially with Ground C and in view of the lack of time I am not going to develop that.

Ground D is a straightforward point about the provision for sale without a reserve price. It can be dealt with fairly quickly. In our submission an interference with a property right is clearly justified when it is in the public interest and it is proportionate. Nobody can object to it in those circumstances. The criteria of justification in the public interest and

proportionality we can get from the Enterprise Act or we can get from the Human Rights Act. It does not matter. Essentially the test is ... Obviously divestment may well be justified in the public interest by reference to the criteria set out in the Enterprise Act. However, it does not follow that divestment without a reserve price is justified and proportionate. What is the justification advanced for sale -- divestment without a reserve price? The only one advanced by the Commission is set out in para. 54 of its skeleton argument where it says that having divestment without a reserve price encourages a quick sale and prevents or undermines gaming of the remedies implementation process. That is a hopeless argument because it is manifestly disproportionate. If we want a quick sale it is sufficient to say, "Right. If you have not completed the sale by a certain date, a divestment trustee is going to do it". Then you take the sale out of the hands of the merging parties. They do not have control over the divestment trustee. They are left to the judgment of the divestment trustee. But, you do not have to add on to that, "Oh, and by the way, the divestment trustee can see at zero --" or one penny, or whatever - in other words, there is no reserve price reflecting the real value of the assets being divested.

As to gaming, this is a complete puzzle. The same reasoning applies. If you want to stop gaming then you have the threat that the divestment process will be taken out of the hands of the merging parties. But, you do not have to add on that there is not going to be a reserve price. The problem is that if you do not have a reserve price, then you are creating a different incentive to game. That is the incentive given to potential purchasers to game the system. So, the absence of a reserve price is, on any view, unjustified and disproportionate.

PROFESSOR MAYER: Can I just clarify two points? First of all, what do you envisage happening if the trustee is selling and the reserve price is not met? Secondly, can you just clarify what gaming you envisage without a reserve?

MR. LASOK: If there is no offer at the reserve price the hypothesis is this: the reserve price is effectively the open market value. The problem is that if you go below local market value you are using the system to distort competition because you are making available an asset at an undervalue. You should not be doing that because that, itself, is a distortion of competition. The asset should be made available at, at the very least the lowest of the band of prices that reflects its open market value, whatever that value happens to be. But, if you do not get a purchaser, even at that level, then there may be a problem with the divestment remedy itself. That would then get you back into a reconsideration of the question. There is a reference in the remedies guidelines which I drew the tribunal's attention to, to what happens when there are problems with the divestment remedy. It is also possible that that

will reveal that the finding of an SLC was misconceived because it may well be that they got the process wrong right from the word 'Go'. There you are. That is one answer.

The answer to the second question is that I am not the person who is raising this gaming argument. It is the other side who are raising the gaming argument. However, it is perfectly obvious, I would suggest, that if the Commission embarks upon a practice of requiring divestment and stating that beyond a certain date things will be taken over by the divestment trustee and there will be a sale at any price without there being any kind of reserve or base price, then you are creating a risk of potential purchasers gaming the system by holding back until the date has passed. Then it is in the hands of the divestment trustee and you do not know what is going to happen next. That is a gaming issue which is not considered by the Commission when it runs this argument that the justification lies to prevent or undermine gaming. If you want to run a justification of that nature then, in our submission, you actually have to address the gaming issue in its entirety and not just pick out some aspect of gaming and forget the other possibility.

I apologise for taking so long. Those are our submissions. If there are any questions, I will be perfectly happy to deal with them.

THE CHAIRMAN: Perhaps if there are we can raise them in reply. Thank you very much. Mr. Beard?

MR. BEARD: Madam Chairman, members of the tribunal -- In the period up one o'clock, if I may, I will just try to deal with one or two preliminary issues and then move into the meat of it after lunch.

Mr. Lasok took the tribunal to the Enterprise Act. There are just one or two passing remarks I wanted to make in relation to one or two provisions. Authorities Bundle 1, Tab 1. (Pause): Mr. Lasok took you through s.35 which is the section dealing with the questions that have to be answered. Just for clarity, s.35, although (in his words) it is repeated in s.41, it is doing slightly different things. Section 35 is telling the Competition Commission what it must do in respect of its report. Section 41 is imposing duties to carry out remedial action. But, before I go on to s.41 -- Section 38, which talks about the preparation of the report and the decision that the Commission has to make on the questions which it is required to answer by virtue of Section 35 -- It there says that it must give “its reasons for its decisions; and such information as the Commission considers appropriate for facilitating proper understanding of those questions and of its reasons for its decisions”.

So, it is just worth emphasising the sort of breadth of the discretion here being provided by statute. Then, at (3), which Mr. Lasok did not refer to,

"The Commission shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section".

So, again, a broad discretion in relation to these matters. I will come on briefly to deal with why that matters in relation to judicial review tests. Section 39 are the timing provisions which, of course, were operated here. Section 41 -- It is just worth emphasising that we are talking about a duty in s.41(2), at p.26.

"The Commission shall take such action under section 82 or 84 as it considers to be reasonable and practicable".

Of course, there is a broad discretion in that regard because the requirement upon the Commission is to remedy, mitigate or prevent the SLC which has been identified. It is worth bearing in mind, of course, that this is a duty to remedy effects of completed or anticipated mergers. So, in some ways 'remedy' is more applicable to completed mergers, and 'prevent' is more applicable to anticipated mergers. But, the duty is still there.

There was a suggestion that somehow the title was inappropriate or in some way misleading in s.41. We say not. We say that this is precisely what s.41 is doing. It is imposing a duty to remedy the effects of completed or anticipated mergers. Those effects are the substantial lessening of competition and/or any adverse effects that have resulted from the substantial lessening of competition. So, the title is unimpeachable.

THE CHAIRMAN: So, you say that the effects covers both (a) and (b) - so, it is not just referring to the adverse effects.

MR. BEARD: Yes. Absolutely. It is clearly not. "Substantial lessening of competition" is clearly an effect.

Section 41(3) was referred to. It is just worth emphasising in s.41(4) that of course it does reflect the provision in s.35(4) which is part of the range of questions that have to be answered. But, in making a decision under sub-section (2) - so, carrying out its duty,

"the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it".

So, it is requiring the Commission, under its duty, to come up with a comprehensive solution as is reasonable and practicable to the effects of SLC and then consequential adverse effects. Again, that duty and the terms of that duty are going to be important when one comes to consider what is actually required of the Commission, and what it is required to have done in relation to preparation of the report and then its remedies.

Now, the other point that I did want to highlight briefly related to the judicial review approach. Mr. Lasok referred to one or two cases where he tried to pick out particular quotes which suggest, "Well, of course, you need a proper evidential basis for any finding". There is no issue taken with that. Indeed, what I take from Mr. Lasok's submission is that actually he does not take any issue with the outline of the law set out in the defence at paras. 23 through to 39. If you might just turn that up at Tab D in the core bundle at p.7 of the internal numbering -- (Pause): I am not going to go through the authorities in the bundle, but I will just briefly refer to the points we have made in the defence.

The first is at para. 24 - that, of course, notwithstanding the expertise of this tribunal ordinary standards of judicial review apply. We then set out a range of possible heads of judicial review and we have dealt with some of the case law under them because there is a degree of vagueness in precisely how the case is being put against us in relation to the various grounds. The first is the duty to take into account material considerations and, of course, not to take into account irrelevant considerations. There are just two particular points I wanted to raise there. One is that the weight to be given to any consideration is a matter for the decision-maker - that is at para. 25. We have cited *Tesco Stores* [1995] as the relevant authority in that regard and we have provided the reference.

Then, para. 26 articulates what is referred to as the "CREEDNZ principle" - that is to say that when you are assessing whether or not a consideration is a material consideration, actually the decision-maker has a broad margin of appreciation in that regard. If statute says that you must have regard to a consideration, then of course it is material. No doubt about it. No issue taken. Equally, if the issue is so obvious that you could not but take it into account, then public law will require it as a material consideration. But, there is a very broad spectrum of issues and considerations that may or may not be considered relevant in particular circumstances. It remains for the decision-maker to decide whether or not a consideration itself is relevant. It is only if it is acting irrationally that effectively it will have been required to treat a particular consideration as material. That is what is set out over, effectively, three House of Lords' authorities in relation to these matters. They are all included in the bundle, albeit we have I hope set out the most relevant quote in that regard. However, it goes back to the point I was making: When you are thinking about judicial review challenges, there is a broad discretion to the decision-maker (the CC) in relation to its activities, but that broad discretion, just as a matter of public law, does extend to what it takes into account by way of considerations and, therefore, how it goes about its exploration of particular issues is going to be influenced by that. What is evidence that it needs to

obtain is going to be influenced by that. The point is that those discretions really are broad and when it comes to remedial consequences - as we see from authorities from this tribunal - there is a particularly important reason why it is that a decision-maker should be afforded a very broad margin of appreciation, not least because in dealing with remedial issues it is making assessments about the future. When you are making judgments and assessments about the future of course people can differ in relation to these matters. But, the relevant institutional competence lies with the Competition Commission. This tribunal notwithstanding its expertise and knowledge of these matters must of course be cautious in the way in which it deals with such matters.

Authority for that proposition is *BAA v. Competition Commission*, the recent decision of Mr. Justice Sales sitting in this tribunal. That is cited at para. 30 of the defence. I note in passing para. 31 - the question of materiality of any consideration also needs to be taken into account in judicial review.

Duty to act on evidence. Here is perhaps just the antidote to the extracts which Mr. Lasok cited in this regard. We have quoted *Stagecoach Group* and emphasised that the duty to act on evidence and decide that there is sufficient evidence in these circumstances is not a test that says, "Well, the evidence might have supported an alternative account. It might have supported an alternative conclusion". That is not the judicial review test that we are dealing with It is the question of whether there is no evidence at all to support the Commission's conclusions or that on the basis of the evidence the Commission could not reasonably have come to the conclusions it did. So, again, the irrationality threshold is being talked about in respect of evidence.

The same thing in relation to duty to make sufficient inquiry. Again, in para. 34 we have quoted *BAA* which helpfully, we thought, captured this point. I am sorry if this is slightly... but it is important to set the relevant context for the way in which these matters are to be dealt with, particularly given the fluidity of the way in which SRCL has put forward its ground. So, again, duty to make sufficient inquiry effectively becomes one of irrationality.

On duty to give reasons -- Of course, at numerous points Mr. Lasok has referred to, "Well, these things did not appear in the report -- This thing was not particularly mentioned. It was all dealt with rather broadly. Certain statements were made in a certain way". Well, there, we suggest that the authorities we have cited - in particular, at para. 37 and the quote from *South Buckinghamshire District Council v. Porter (No. 2)* - is important. What we are talking about, as was then recognised in *BAA* in the context of a hearing before this tribunal, is ensuring the reasons are sufficient to enable someone to understand what was going on

and to bring a challenge. That is enough. It is not that there must be a rubric dealing with each and every point that was raised by a particular interested party in the course of proceedings. Of course, one of the great ironies about the challenge that is being brought today is that many of the points did not even whisper during the course of the proceedings before the Competition Commission. Indeed, they barely whispered even in the Notice of Application. The interesting excursion through the world of public procurement is something which had not been raised at all as a basis for challenge in relation to the Notice of Application. But, I will come on to explain why, notwithstanding the fact that there may be very good reasons why that should not have been permitted as a ground at all, actually it has no basis. The authority which has been so heavily relied upon, which appeared at four o'clock yesterday evening, is not the solution to Mr. Lasok's and his clients' difficulties.

After the short adjournment I will turn on to deal with Ground A. Just in anticipation of that I will just set out the position. It is this: The Competition Commission identified the competition concerns caused by the merger. It did so by reference to a counter-factual, given that we were dealing with a completed merger - in other words, what would have happened without the merger? What would competition have been like? In doing that it identified a substantial lessening of competition in relation to markets not just in relation to treatment, but collection and treatment. The reason I emphasise that is in anticipation of dealing with Mr. Lasok's point, “Oh, well, if you got rid of the plant, everything was fine”. That was not the SLC analysis that was undertaken and found - and is unchallenged in these proceedings.

Having found that substantial lessening of competition, the Competition Commission had to find an effective remedy. It did so. It found one effective remedy and that was full divestment. It decided that an alternative - a lesser divestment than full divestment - of the acquired entity was not effective. That was what was needed to remedy the SLC. It was not blind to the fact that there might have been alternative lesser remedies. It went out of its way to consider the possibilities of lesser remedies. It extended the time of consideration in order to enable SRCL to flesh out as far as possible the inchoate, in part, alternatives that had been put forward. But, in the end it decided they did not solve the SLC. That is not an error on the part of the Competition Commission, confusing matters with the counter-factual. It was directed precisely at the SLC. That is why its decision is unimpeachable. I will deal with that more fully after the short adjournment.

I am grateful to the tribunal.

THE CHAIRMAN: Thank you very much. We will come back at two o'clock.

(Adjourned for a short time)

MR. BEARD: Good afternoon. The way I intend to deal with matters is, and it may be a little tedious and it may be familiar if the Tribunal has read the report, but I intend to go through the report and on the way pick up a number of points, in particular points about effectiveness and volume guarantee, and I will then touch on some of the evidence about why the pre-existing contractual arrangements did matter. I will deal with some of the public procurement points and also touch on one or two issues to do with pre-judgment, which although Mr. Lasok did not major on this morning, I think it is important that the Tribunal is alive to the lack of pre-judgment in relation to these matters. That I hope will have covered issues in relation to Ground A and Ground B, such as have been put this morning.

With that, I would ask you to break open tab 1 of the core bundle, which is the report. I am not going to focus upon the summary. The report is in a rather standard form for those that are familiar with Competition Commission merger control reference reports. It starts in section 1 with a brief outline of the reference, although the reference is always set out in appendix A to these reports. Then sections 2 and 3 set out some of the background, the basic factual background on healthcare risk waste, and the companies concerned at section 3, p.13. Then there is a discussion about the completed merger and the relevant merger situation, so the jurisdictional questions. Then we get into the meat of matters at the bottom of p.15 in section 5, market definition.

The market definition section here follows the orthodox approach – I will not go to the guidelines on the matters – but it looks at the market definition in relation to product and geographic dimensions, as is orthodox. There is not really a temporal dimension here. It is perhaps worth just noting that it starts off by carrying out the analysis, looking at the extent of horizontal overlap between the parties concerned – in other words, Ecowaste Southwest and SRCL. That is at 5.4, p.16. I am going to refer always to the external page numbering, because that is then consistent throughout.

> "Ecowaste Southwest and SRCL overlap in the provision of an integrated service comprising the collection, treatment and disposal of CL waste."

The reason, as I anticipated before the short adjournment, that that is important, it is not just about having a plant, it is not just competition in relation to treatment, it is completion in relation to integrated services. That is where the overlap lies. That then becomes the orthodox basis for the analysis applying the snip test, that is how products and geographic market are analysed.

As can be seen, starting at 5.7, just across the page, p.7, 5.7 poses a series of orthodox questions about how one is going to do the products and geographic market definition. What I think is perhaps just worth noting here is that what you see in the market definition section, section 5, is lots of cross-references to section 7, which is the section concerned with the assessment of competitive effects of the merger.

The reason that that occurs is fairly obvious. What you are doing when you are considering the competitive effects of the merger tends to be a consideration of the dynamics of the market with which you are concerned. Therefore, it is the same considerations and it is just simply an avoidance of repetition, but you do get an awful lot of cross-referencing here. Nonetheless, with the cross-referencing what you see is an orthodox approach to market definition. There were questions about whether or not heat treating or alternative treating plants, integrated collection and treatment companies which operated those different sorts of plants constrained one another. That is considered at 5.9. The emphasis is at 5.10, that not only do they constrain one another, HT and AT operators, but the constraints exist between SRCL, Ecowaste Southwest and other integrated competing for different categories of customer, so the large quantity generators and the small quantity generators.

They then find that there is a degree asymmetric competition in that collection only companies do compete for small quantity generating customers, but they do not compete for the large quantity generators.

So at 5.12 you then get these product market definitions. Again, I may be labouring the point but the markets that are identified and the market for the supply of the collection treatment and disposal of health risk waste for SQG customers and the market for the supply of collection treatment and disposal for LQG customers, and the reason it is delineated is because of the asymmetries of competition between the two markets, and therefore a lack of homogeneity in the market if you treated it as a whole. That is set out explicitly at 5.13.

Then, of course, it goes on and discusses the geographic market. It defines the geographic market as the "Avonmouth Plant Area". It is dangerous to slip into the fallacy that that means the geographic market is simply focused on the plant. It is not. The geographic market is delimited by reference to the plant because of issues to do with distance of transportation, and so on, that were analysed in the course of the inquiry. That does not alter the product market definition. It does not suddenly turn it into a treatment market just because you define geography by reference to a distance from the particular plant.

Having been through and defined the markets, in 6, quite properly, as can be seen at 6.1, there is consideration of the relevant counterfactual, and an explanation is given as to why the counterfactual inquiry is required:

> "We must decide if the merger has resulted, or may be expected to result …"

that is just the statutory test –

> "… in an SLC. To do this, we considered what would have happened had SRCL not purchased Ecowaste Southwest. This situation, referred to as the counterfactual, is the bench-mark against which we compared the competitive effects of the merger."

There is nothing in any way remarkable about that. It is entirely straightforward. It is not a misdirection as to the role of the counterfactual, it is what you need the counterfactual to do. The counterfactual is then analysed in 6, and although SRCL came out with all sorts of stories about why it was that Ecowaste Southwest would have folded up and disappeared, that was not accepted. The only reason I mention that in passing, although Mr. Lasok did not refer to it this morning, it did feature in his skeleton argument that there were certain considerations that should have been borne in mind. That was a matter that was determined in relation to the counterfactual. You can see that in particular at 6.16.

The assessment of the counterfactual is considered, the threat of insolvency is considered, and the conclusion on the counterfactual is reached at 6.26. As I say, it is setting the benchmark against which you assess competitive effects. Inevitably when one comes to consider what it is you are seeking to remedy here, there are going to be references to counterfactuals, or the counterfactual in this case. Of course, what you are doing is assessing whether or not there has been a substantial lessening of competition in relation to a situation where in the counterfactual world there would have been competition because Ecowaste Southwest would have been bought by an entirely different entity with greater financial backing, because that was at the essence of the problem here.

So then we get to s.7, which is the meat of the assessment of competitive effects of the merger. I am not going to go through this in great detail, but I think it is important that the Tribunal is alive to the extent that the Commission went through and carried out a thorough and detailed analysis of the dynamics of competition in this market and looked at a variety of aspects. Of course, in the course of a challenge of this sort what gets done is that a forensic magnifying glass is placed upon particular points within the report, and particular issues are focused upon.

This Tribunal and other courts have repeatedly said that it is terribly important that the report is considered not as a statute but as a whole and read in context. That is important for when we come to the remedies section, that section 7 is informing the way in which all of the considerations were undertaken. What you see in 7.2 is:

> "We first considered the nature and extent of pre-merger competition. We assessed
>
> (a) the extent of competition for LQG and SQG customers between different providers …"

and that is no matter what sort of treatment work they may then carry out –

> "(b) the factors that influence competition between integrated collection and treatment companies …"

So it is again focusing on the relevant market that has been identified –

> "(c) the closeness of competition between SRCL and Ecowaste Southwest and whether the competitive conditions differed by customer type or location."

So again, quite a detailed analysis focusing on tenders within 100 miles of the plant and in areas closer to the plant.

Then, because perhaps section 7 is going to be the most important, 7.3:

> "We then assessed the effects of the merger against the competitive position in the absence of the merger where, as we describe in the counterfactual, we expected Ecowaste Southwest to have been sold to a third party, most likely another company already operating in the collection and treatment of HRW, which would have been financially stronger than Ecowaste Group. Ecowaste Southwest would have continued as a competitor to SRCL, but without the limitations caused by the financial difficulties of Ecowaste Group."

That is then dealt with at 7.63 to 7.128.

The next pages talk about the various factors that have been highlighted there – the nature of competition between different facilities, the nature of competition for different customers (p.28), competition from integrated collection and treatment plant operators (p.29, starting at 7.19). It is just worth emphasising that the closest competitors to Ecowaste Southwest and SRCL are other integrated collection and treatment companies, albeit, as is found later, they are the closest competitors to one another.

Then 37 begins the assessment of pre-merger competition. As we turn on, there is a good deal of detail about the nature of pre-merger competition, but then we get to p.45, the effects of the merger. At 7.63 it outlines what is coming in this section in the final sentence:

"… we consider competition post-merger and the constraint we anticipate from integrated collection and treatment companies and collection-only companies on SRCL."

In other words, it is testing the question here of the extent to which the merged entity would be kept honest by third party constraints. So it is not just standing back and saying, "Well, you were close competitors, you merged, that inherently is going to result in an SLC". They went further and they looked at these further constraints.

So as part of this assessment, as they set out at 7.64, they look at the ability of independent operator of the Avonmouth plant, i.e. separate from SRCL, to compete in future tenders for LQG and SQG customers. So what they are thinking about there is what would be happening in the counterfactual situation. Mr. Lasok will no doubt highlight the fact that it only says Avonmouth plant, but as is clear from the section that we then come on to deal with, it is considering the issue in relation to an integrated operator competing for tenders for LQG and SQG customers. Indeed, the ability of rival integrated collection and treatment companies to constrain is what is dealt with at 7.77 to 7.111 onwards.

So 7.65 to 7.76 may be the most material for these purposes. 7.65 is just worth noting, although it is confidential, and I am not sure whether or not there is anyone not in the confidentiality ring, as it were, here.

THE CHAIRMAN: We just need to be careful also about the transcript to delineate when there are matters which should not be in the transcript.

MR. BEARD: It is a trivial point, SRCL made points about the abilities of Ecowaste Southwest in relation to particular tenders. You can see from the last three lines what is said.

THE CHAIRMAN: Let us have a look at what they say.

MR. BEARD: I do not think I need to read it.

THE CHAIRMAN: (After a pause) Yes.

MR. BEARD: Then at 7.66 it is set out that SRCL was arguing that in relation to those particular tenders in fact it would not be possible for any alternative owner, or Ecowaste Southwest to actually compete sensibly for those matters.

7.67 is perhaps relevant when we come back to issues to do with Mr. Lasok's new public procurement points, consistent with a view expressed by North Bristol NHS, UH Bristol NHS told us that it was aware of concerns about Ecowest Southwest's performance, and it would have had reservations about using the Avonmouth plant based in inspection from the last tender exercise and conversations with Ecowaste Group Management. And then, 7.68:

> "We note that this tender process began after the acquisition of SRCL. If an independent operator of the Avonmouth plant had bid, it would have been able to refer the trust to its existing NHS customers which have reported to us their satisfaction with Ecowaste Southwest's prior performance".

So there it is talking about the sort of pre-existing customer relationships, albeit it is not in connection with bidding for the re-tendering of those customers — that is something that we come on to — but it is to do with the importance of holding those sorts of contracts so that when you go to tender for others, you have effectively got referees in relation to the matters. I do not know whether Mr. Lasok says that is wholly irrelevant given the public procurement rules, but undoubtedly that was evidence that was put forward and considered by the CC. Then it goes in, in 7.69 and 7.70 to talk about various issues concerned with the Bristol NHS University Hospital tenders and the capacity that would be required for it and the various arguments that were put forward by SRCL and in the end concludes that, in 7.70, Ecowest Southwest would be able to compete for such contracts or parts of such contracts because they may have been split if it had been under an independent operator. And then 7.71:

> "Based on the evidence we have received, to bid effectively for LQG and NHS SQG customers, bidders have to satisfy customers of a number of requirements:
>
> (a) customers have to ensure that HRW is disposed of appropriately. The NHS Trusts we have spoken to have emphasised the need to satisfy themselves about the quality of their provider for collection and disposal services; and
>
> (b) experience in providing an HRW service and a trading history have been highlighted to us as important factors for a company to be considered for an NHS tender".

Now, before it is suggested, and I am talking here about pre-existing contract relationships at the time of re-tendering, that is not, that is to do with a broader experience in the industry, but nonetheless, pre-existing contractual arrangements at the time of re-tendering are going to be, effectively, *a fortiori* general trading history or HRW service experience.

> "c) a number of trusts, in particular acute hospital LQGs, expressed a preference for their HRW provider to operate its own treatment facility;"

And then:

"(d) we also note … from our discussions on remedies with customers with whom Ecowaste Southwest has Key Contracts strong customer relationships are also important".

Now, Mr. Lasok seems to want to dismiss this because it had come up in the course of the remedies consideration. It is still relevant evidence that was properly taken into account in the overall assessment here. It cannot be dismissed. The idea that there is not evidence here, it is evidence from customers — the best sort of evidence in this regard.

Now, it refers across to 8.30, which I will of course come on to, but 8.30 itself simply reflects those points, indeed it expands upon them, because it talks about a rival integrated service provider also giving such evidence in addition. So, 7.72 is perhaps less germane to what we are talking about in the context of these proceedings. At 7.74:

"We consider that, particularly looking forward, the Avonmouth plant would have been in a strong position to meet the requirements of both LQG and SQG customers. Ecowaste Southwest would have been able to refer to the strong customer relationships it had developed with its existing customers to demonstrate its credibility in bidding in future tenders for LQG and SQG customers".

And that is both for re-tendering and for other tenders. So, those are factors that were taken into account in the consideration of how the dynamics of the competition worked in these markets. And therefore to suggest, as Mr. Lasok did, that these matters have never really been a matter of any consideration in the overall appraisal is just wrong. So, there we have one of the sections within 7.

THE CHAIRMAN: But, at 7.74 are you also saying that that is referring to something broader than just an incumbent advantage Mr. Lasok would have put it.

MR. BEARD: Yes. Yes.

THE CHAIRMAN: Its general track record and happy customers are important when you are tendering.

MR. BEARD: Well, I think there are two issues: track record can obviously be stretching back over some time.

THE CHAIRMAN: Yes.

MR. BEARD: What this is undoubtedly talking about is existing bilateral arrangements that a putative new owner would have with particular customers that could be referred to. Now, *a fortiori* when you are talking about re-tendering for that particular business, the experience that the customer has in relation to the existing provider of the service is going to be a

strong effect as compared with just references from a third party. But, here, it is talking about all of that credibility.

So, then there are some conclusions at 7.75, 7.76, I am not sure that that takes us much further in these matters. The ability of integrated collection and treatment companies and collection only companies to constrain the merged entity, so this is the external constraints now being considered in some more detail. That then takes us on, I just pause at p.53 because Mr. Lasok appeared to be making a point about the analysis of competition in bidding markets, and I think in passing he was suggesting that well, where you are talking about bidding markets, as you are in relation to integrated HRW service providers winning LQG or SQG business, you know, it is **a unit each time and you get an awful lot of competition and the existing customer contracts really are not satisfactory or necessary in these circumstances. It is just worth bearing in mind that, although it is accepted as being a bidding market, the CC was very careful to say that it really was not an idealised bidding market, and that you could not make generalised assumptions about the way that the bidding market would work from simple models, and that is found at 7.105. Then we have got material on competition from collection-only companies, and I would then just take you on to the conclusions of this section at p.64, 7.141 you have already been referred to in part, albeit that Mr. Lasok took the Tribunal to these matters, emphasising that the references here were to the Avonmouth plant. It competed most closely with SRCL Frome and with SRCL Bridgend, and this reflects the fact that Frome is the closest plant to Avonmouth. And somehow this suggested that the focus should be on the plant, the treatment plant itself, and particularly when remedial considerations came along. That just is a mis-reading of the report in context. It is plain that what is being talked about is the constraint on the parties from integrated collection and treatment companies and not simply focusing on particular plants.

THE CHAIRMAN: No, I do not think he was focusing on plant, that is why I asked him the question, what does he include in "plant", and I thought his answer was, he was not dealing with plant in the context of treatment versus treatment and collection; in referring to "Avonmouth plant" he could include in that sufficient equipment both to collect and to treat. As I understood his point, it was that the reason why it was found to be an SLC was that none of the other integrated companies had a treatment plant that was close enough, or had equipment in the facility as close as Frome and Bridgend and Avonmouth. And that is what meant, that is why it was concluded that they were not of sufficient competitive constraint.

MR. BEARD: That is certainly true in relation to LQG, where there is particular emphasis there. It is also true that the geography and the reach of a particular business from where it provides treatment does have an impact. But Mr. Lasok, as I understood it, was taking it further, because his submission was that, really, the starting point for the remedial consideration should be focusing, should have been focusing on just divestment of the plant alone, "Maybe we'll throw in some bins and lorries", as he put it, although that was something that only ever came along right at the end of the remedies process, notwithstanding Mr. Lasok's generosity. But the point that I am making is that he had emphasised that one needed to look at the SLC and consider what the SLC was and what you were trying to remedy. I agree with that entirely, but I am emphasising that the SLC was in relation to markets that went beyond treatment and were not just focused on ensuring competition by reference to a particular treatment plant, but in relation to competition in respect of the integrated service that was going on. And that means that when you come to consider what is a comprehensive remedy, you need to be ensuring that there is competition in relation to the integrated service, not just in relation to the plant, and that then feeds through into the significance of starting points, the way in which you consider alternative remedies and divestments. I am not putting the point any higher than that. So, 7.142:

> "In the absence of the merger, we considered that an independent operator of the Avonmouth plant … would have continued to compete closely with SRCL for LQG and SQG customers".

Well, here it is the independent operator offering the integrated service that is being referred to here, not just operating the treatment plant. If Mr. Lasok has not taken that point, that is fine. But I simply emphasise it here because it was a point that was taken against us earlier on in the notice of application and with which we had to deal specifically in relation to these matters in our defence.

7.143, just to close this out:

> "We therefore concluded that the constraint from X would be significantly less than that provided by an independent operator of the Avonmouth plant. This would be the case for both LQG and SQG customers. We also found that the competitive constraint on SRCL from other integrated collection and treatment companies would not have been as strong as the competitive constraint that would have arisen in the counterfactual".

In other words, the independent operator of the Avonmouth plant offering integrated services would be the closes constraint and therefore would engender the competition that

was being lost by reason of the merger. It was the loss of that competition that was the SLC. And that is made clear. They would not have provided as strong a constraint on the merged entity as an independently owned collection and treatment company.

So, those are the conclusions that lead to the findings on the SLC that can be seen in 7.146, that the SLC in relation to both LQG customers in the Bath, Bath & North East Somerset, North Somerset, and South Gloucestershire area which is called the "Avonmouth Plant Area", but only for shorthand. The reason I emphasise it is that to move away from this focus on the treatment plant alone, this can be expected to lead to a worsening in the price and non-price factors compared to the situation in the absence of the merger, where Ecowest Southwest would have continued as a competitor to SRCL, but with more financial backing. So, it is against that background we then move to the remedies, 8.1:

> "Having concluded the merger has resulted, or may be expected to result, in an SLC, we are required to decide whether action should be taken to remedy, mitigate … the SLC or any adverse effect resulting from the SLC. This section discusses possible remedies",

It is just an outline of the requirements of s.35(3). Then 8.3 is obviously setting out the importance of that condition, that the obligation is:

> "… the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC."

Then the remedy options are considered. This broadly replicates or echoes the approach that is described in the Merger Guidelines which in broad terms says structural is better, because behavioural remedies carry with them all sorts of problems. So you want structural remedies if you can find them. Behavioural remedies, you will need some persuading that they are an appropriate alternative. I am obviously paraphrasing, but just to move through it.

Then we get to the SRCL proposals:

> "In its response to our Remedies Notice, SRCL said that the CC had not shown that there was an SLC."

They were maintaining throughout that there was not an SLC. At one point they said there was a small SLC. A "small" substantial lessening of competition is one of those epistemologically difficult concepts, but it was not accepted.

"We base our discussion of this remedy option…". They then consider Options 1 and 2, and they base their discussion of Option 2 on the final version of the remedy that SRCL proposed, and I will come back to the various iterations in due course.

It is worth just pausing a moment on the access remedy, Option 1, because effectively this was a behavioural remedy. What was being offered here?

> "Under this remedy option SRCL would agree to make capacity equal to the average annual throughput of the Avonmouth plan prior to its acquisition by SRCL available to one or more suitable parties at an agreed price, which would be guaranteed for the duration of the contract. SRCL later added that it would be willing to make more capacity available."

So it is effectively just volume guarantees here.

THE CHAIRMAN: Under this, they would keep hold of the treatment plant themselves, but they would promise that they would make it available to somebody else operating as a collection only company.

MR. BEARD: Yes, that is right. In addition, SRCL would transfer ----

THE CHAIRMAN: There is something confidential coming up.

MR. BEARD: Yes:

> "In addition, SRCL would transfer one contract to a purchaser, which SRCL believed would give the purchaser both credibility in the market and a base from which to build its market presence."

I will come back to that in due course, but obviously, even in relation to its behavioural offering, it was being recognised that the provision of bilateral contracts did give credibility to a tenderer or a participant in the market. In any event, what is highlighted at 8.16 onwards is that this remedy is essentially an access remedy and does not create a competing collection and treatment business to SRCL. There it is described effectively as being a behavioural and that a behavioural remedy may result in distortions compared with a competitive outcome.

> "The option [in particular] would create a reliance by the purchaser on SRCL and the purchaser would not be as independent as it would be compared with a full divestment as proposed by the CC. As noted in our remedies guidelines, purchasers should not have continuing links with the merger parties after divestment except for a limited period."

So that's CC8, which is in the authorities bundle at tab 3, para.3.18. In other words, severing the links is important. Life support systems are dangerous, they distort the way in which the entity on life support will operate.

Then at 8.18, as you rightly anticipate, madam Chairman, it is described as effectively creating a collection only company.

That is therefore dismissed and plant divestment under SRCL's Option 2 is then considered. What we see in 8.20 to 8.22 are various of the proposals that were put forward early on in the remedies consideration process. At that point:

> "SRCL said that it would plan to retain the Ecowaste Southwest corporate entity (in order to retain the customer contracts without the need for novation or transfer). Some other agreements would be transferred from Ecowaste Southwest to the purchaser and staff would be transferred under a TUPE arrangement."

Later in the remedies process, they added various bits and pieces. I say "bits and pieces", but the first was a selection of a collection assets which may be potentially quite valuable in relation to these matters. So bins and vehicles necessary to service contracts. Of course, the major change there was the inclusion of two key contracts, but not the other two key contracts, or any of the other contracts that would have been otherwise retained by Ecowaste Southwest, and there would be a reduced volume guarantee.

Then we turn on to 8.29, assessment of the effectiveness of Option 2.

> "8.29 We note that the value of Ecowaste Southwest includes the existing business (ie contracts with customers) as well as the physical assets, permits and licences etc. We note also that in proposing its Option 1, SRCL said the inclusion in the package of a contract would 'give the acquirer' credibility in the market and a base from which to build its market presence.
>
> During our discussions with customers of Ecowaste Southwest, the importance of strong customer relationships became clear to us."

This was what had been previously referred to in 7.17(d):

> "In addition Tradebe told us that that the value of the business lay in the contracts and the associated customer relationships. In our view, the business with the pre-existing customer relationships would have a good chance of retaining the customers when their contracts were re-tendered."

So there is a specific evidential base for the identification of holding these pre-existing relationships as being significant for the entity of Ecowaste Southwest, its ability to trade and to win re-tendered contracts.

> "Four contracts together represent around X per cent of the revenue of Ecowaste Southwest …"

Those are the four key contracts, and they are discussed further at 8.50. Then 8.32:

"Option 2 would give the purchaser two of the Key Contracts. As such this remedy goes part way to allowing the purchaser to develop beyond being a treatment-only operator which processes waste collected by other companies, as compared with Option 1."

Here it is recognising that Option 2 goes further than Option 1 in this regard, because Option 1 was focused on being collection only.

"This is important because Ecowaste Southwest was an integrated collection and treatment business before its acquisition by SRCL. We have seen evidence that customers, particularly LQGs, prefer integrated collection and treatment providers which are able to provide a 'cradle-to-grave [service].

However, under this option SRCL would retain all but two Key Contracts it has offered to transfer. The Key Contracts are long-term contracts. They are due to be re-tendered with a view to being awarded in 2013 and unless the purchaser was successful in the tender process, the purchaser would be locked out for a period of three to five years. We note that SRCL has proposed to include a clause in the contracts it will retain, which would allow the customer to terminate the contract on 90 days' notice. However, in practice we consider that customers would be unlikely to wish to cancel a contract and undertake another lengthy re-tendering exercise without very compelling reasons."

So there there is a concern being expressed that if you are not in a good position to win the key contracts next time then that could have a significant impact on you and SRCL have come up with an offer of a break clause for customers, but it was not seen as being in any way significant.

"SRCL also said that the two Key Contracts it was proposing to retain were due to be re-tendered within the next 12 months so there was nothing stopping the purchaser from bidding for these contracts … We note in paragraph 8.50 that we understand that, of the four Key Contracts, RUH Bath will tender independently of the three PCTs. The three PCTs plan to re-tender as a cluster and it is therefore likely, based on previous tenders, that one waste treatment provider will be successful in winning the ender for all three PCTs. The purchaser of Option would service only one of the three PCTs for the period between the divestment and contract renewal."

So SRCL is coming in, buying Ecowaste Southwest, taking the benefit of the contracts, giving two back under Option 2, but one of them it gives back is one of a cluster of three. It

would be retaining two of those. As I will come to, if you think about how that works in practice, Ecowaste Southwest, the purchase was completed at the beginning of 2011, so there would be a relatively short period of 18 months or so when SRCL would be running those two contracts, and clearly what is being said here is that that will give the incumbent in relation to those two contracts a significant advantage in relation to bidding for these matters.

THE CHAIRMAN: Yes, and the nub of this case which we will have to decide is whether there is enough evidence in this report to justify your relying on that ground to insist on full divestment rather than Option 2, given that the full divestment is a much more intrusive remedy, SRCL say. That is the crux of it. What we are comparing is Option 2 or a divestment without contracts, not just of the plant but just divestment of everything but the contracts, or whether you are justified in insisting that the contracts should be transferred as well.

MR. BEARD: I hope, by going through the report, what I emphasised is that evidence was being received by the Commission about the significance of existing customer relationships. What is being put in context here is the additional factor in relation to the cluster. Those are significant, but these are part of the assessment of whether Option 2 is effective. Of course SRCL wants to focus only on that component, but it is also important to consider matters such as the volume guarantee, because this was a package that was being considered here, not simply a particular element that was under scrutiny on its own. Therefore, going back to the point about the forensic magnifying glass being applied, yes, there was a good basis why pre-existing contractual relationships are important, yes, the CC concluded that it was important that all contractual relationships were retained by Ecowaste Southwest. That meant that you had a situation where you had a viable competitor to SRCL as an integrated operator that had that basis, and it was not dependent on a volume guarantee.

That viability was part of the assessment of effectiveness. That is being entirely left out of account by Mr. Lasok in all of this. He focuses only upon whether or not you get an incumbency advantage in terms of re-tendering. That, the CC found, did exist on the basis of the evidence it considered, and it was a factor in it determining that the package put forward by SRCL was inadequate. It is wrong just to focus on that alone, and it is for that reason that I have gone through the report, emphasised the sort of evidence that was being heard, the evidence that was being taken into account in section 7, and how that then fed through into the consideration of these matters in relation to section 8.

So, yes, it may be what SRCL has put as the nub of the case. If it is on the basis, is there any evidence? Yes, there is. Was it a material consideration? Yes, it was. We decided it was and we took it into account. Was it lawful for us to do so? Yes, it was. What is the basis on which a JR challenge then subsists in this case?

They may put it as a nub of the case, but at the moment, unless Mr. Lasok's error of law on the basis of public procurement comes good for him, he does not have a case even on this part of the effectiveness of Option 2. Whether or not the Tribunal considers that to be the nub of the case is a matter,, of course, for the Tribunal in due course.

I think it is important to say that actually the judicial review standards in relation to these matters, they are already made out.

> "The purchaser of Option would service only one of the three PCTs … As such the purchaser would be in a less strong position at the next tender than if it had all three of the PCT contracts."

That is just an unimpeachable conclusion. SRCL do not like it. It may be that a different Competition Commission with different individuals could have reached a different conclusion. That is not what we are here to argue about. What is the JR basis for a challenge to that conclusion?

> "In addition, we have seen no evidence that the customers of the two Key Contracts SRCL proposes to transfer would agree to a transfer. In our view, since the purchaser of Option 2 would only have two Key Contracts there would be significant composition risks which would limit he ability of a purchaser to operate as an effective competitor compared with a full divestment of Ecowaste Southwest."

So it is assessing the matters in the round. One of the things it is concerned about is the transfer of the contracts.

It is of course right that when SRCL bought Ecowaste Southwest there was a transfer of ownership, and it is possible therefore that if there are clauses within the NHS contracts that say "On transfer of ownership we can terminate the contracts", and it did not, as we understand it, so it did not happen.

What the CC is identifying here is that if you effectively break up the package of contracts that is going on, particularly when three of them were tendered as a cluster previously, you do have a residual risk in relation to these matters. It just cannot be neglected. Again, people might differ about the degree of risk that existed here, but the CC has identified that as a relevant risk, and it goes to the overall concerns about effectiveness.

Then we move away from the issues to do with the particular contracts, and we move on to the volume guarantee, but it is wrong to see these as just entirely separate because, going back to what we are doing here, it is the assessment of the effectiveness of the package.

THE CHAIRMAN: Is it right to see a volume guarantee as in a way a substitute for the other two key contracts?

MR. BEARD: I am sure that is what SRCL would like it to be.

THE CHAIRMAN: That is why they were putting it forward.

MR. BEARD: I am sure that is the thinking behind it. I am not suggesting otherwise. The problem then is that if you have got difficulties with the contracts and you have got difficulties with the volume guarantees, you have severe concerns about the effectiveness of the package that you are dealing with. It is not right to say, "Oh well, do not worry about the volume guarantee, that could then be got rid of, you go back only to partial contracts". You cannot do that. As we will come on to see, the process of throwing out remedy proposals that were more or less refined, more or less detailed through the remedies process, and then adding things along the way was something that actually creates difficulties for the Commission in dealing with it and led to the extension of time to ensure proper consideration.

You do have to look at the package as a whole and how it would interrelate. 8.35 is saying effectively this volume guarantee that may be being looked at as a sort of surrogate or substitute for the volumes you would have got under the contract, it is nothing of the sort, because of the fundamental concerns that are retained when you have the two closest competitors in a geographic product market effectively dependent upon one another in relation to a substantial flow of business. That is not how competition works. Agreements between competitors are precisely the meat and drink of Chapter I and Article 101. The idea that you come along in a merger control process and say, "Oh well, it is all right, you should have a close relationship", it would turn SRCL into, on the basis of these figures, Ecowaste Southwest's largest customer. This would be a remarkable solution when you have identified an SLC as being the SLC, the loss of competition between the two of them. You are just starting from the very fundamentals, and it is straightforward to see why there is a problem with volume guarantees and why it is that they are frowned upon in the Guidelines.

What we see here in relation to 8.35:

> "In our view, the volume guarantee creates a reliance by the purchasers on SRCL, which would not be the case in the full divestment option and as such

> SRCL and the purchaser would not be as independent as they would be compared with a full divestment as proposed by CC."

Mr. Lasok did not focus on comparison here. He did earlier on in relation to 8.34. It is just worth emphasising, what is being talked here is not the proportionality issue, it is the effectiveness issue. What is being looked at is, if you have entirely separate companies, are you going to have a better dynamic of competition than if you have them effectively one on a life support system from the other? The answer is obviously yes. The idea that this is somehow a confused approach is quite wrong. His emphasise, I should say on comparison was the tail end of 8.34. He said that last sentence betrayed some terrible error on the part of the Competition Commission.

If I might go back to it, I am sorry, I did not cover this in dealing with 8.34:

> "In our view, since the purchaser of Option 2 would only have two Key Contracts there would be significant composition risks which would limit the ability of a purchaser to operate as an effective competitor compared with a full divestment of Ecowaste Southwest."

That is simply using independence as a benchmark, it is not doing anything untoward. It is a perfectly proper exercise when you are talking about effectiveness. It is also worth bearing in mind that if you cannot find a fully effective remedy then you do end up looking at partial remedies, mitigations, under the test. At that point it is a relevant question to be asking how effective a particular remedy might be. So it is not wholly irrelevant, given the approach that is set out in the statute anyway. But it does not betray any terrible error of law in the assessment of effectiveness. There is some confusion between proportionality and effectiveness.

To the contrary, what the Commission is very careful to do is say, have we got an effective remedy? Have we got more than one effective remedy? If we have got more than one effective remedy then obviously the less intrusive is going to be the appropriate one, no doubt about it. They found that there was only one effective remedy and that is because here they say that option is not effective on the basis of the evidence they have, and the focus here is on volume guarantee not being adequate in 8.35 and contract transfer not being adequate in relation to the preceding paragraphs running through to 8.34. That, as a whole, is the way that one has to focus on effectiveness.

As I say, the nub of this is the global assessment of effectiveness. It is not just one component of it. It is not focusing on a part of the component of it. It is the overall assessment of effectiveness.

As I say, the first point is generalised one in 8.35, if I might go back to the volume guarantee. Then it says:

> "To the extent that the volume guarantee provides any kind of fallback it would reduce competition compared with the situation without it where the purchaser of the option has to compete for all its volume."

What is effectively being focused on here is a range of considerations about how this interaction could work. Then it says:

> "In addition, it is unclear how SRCL would be able to determine the precise volumes of waste that the purchaser was processing in order to adjust the price paid for waste treatment without access to data that is commercially sensitive to the purchaser."

What we have got are fundamental concerns about this behavioural type remedy by reason of the tying to your nearest rival. We have got the concern that if you have got a volume guarantee it just affects the way you will operate your incentives to go and get other business. It is recognised that there will be incentives to get other business where you have capacity, but it changes those incentives.

It does give rise to concerns about the information that will be transmitted. Mr. Lasok says there is no problem here, it is all public. If you could just turn back to 7.9 on p.27, we were interested in the assertion that actually all of these processed amounts were all public. If you look at the table 1 what you will see is lots of scissors in the table. Those are redactions for third party confidentiality. The yellow bits, that is confidentiality demanded by SRCL. We have conscientiously gone on the basis that when they said those volumes were confidential, what they meant was that the volumes were confidential and not published by the Environment Agency. So it was interesting to hear Mr. Lasok say that that is all public information.

Actually we think that if you have a mechanism that changes pricing at different levels of volume you are going to have contact considering what the levels of volume are. It may well be enquiries being made saying, "We think you are covering loads of volume and actually you are fleecing us", say SRCL, "because you have crossed the relevant threshold". How do you resolve that without actually getting into it?

Mr. Lasok posits a third party being involved. Each time it becomes more complex and something new is thrown in. It should have been part of the package for consideration if this was to deal with it. Actually the problem is that even with a third party, what you do is you get signals about the level. If SRCL comes along and says, "You are actually

processing X tonnes that rigger the relevant threshold", you send a third party in who goes through the books, checks the machines, and says, "Actually no they are not", that gives SRCL valuable information about the amount that its rival is actually carrying at a particular time.

It also potentially gives all sorts of strange incentives to the new owners because they are not going to want to trigger the relevant thresholds early. It might be that, giving pricing of other business, they would be willing to.

It becomes a question of economics, I quite understand, and we are not saying that it would necessarily mean that they do not trigger the thresholds as soon as they possibly could. We do not know. This is precisely the sort of problem that arises, and we are concerned about the information flows. It is just yet another reason why the package that was being put forward was inadequate. It was not effective in order to restore competition, not, as Mr. Lasok says, restore the world precisely as it was. It is to get rid of the SLC, get rid of that substantial lessening of competition. That was always the focus of the Competition Commission's exercise. If you have an effective competitor in the integrated collection and treatment business restored to the market you will have got rid of the SLC. That was the CC's position. If you do not have an effective competitor in the integrated collection and treatment business, you are not going to have got rid of the SLC. It is not a question of somehow tinkering around with whether or not there is a lessening of competition but not a substantial lessening of competition. If you do not have an effective integrated collection and treatment operator you just are not getting rid of the SLC. That was the assessment reached by the Competition Commission. It was plainly a conclusion it was entitled to reach.

THE CHAIRMAN: Do you say then that this distinction that Mr. Lasok was drawing between finding a package that was effective to remedy the SLC, which he says was what you should have been doing, whereas what he says you were doing was to find a package which recreated or created the position that you posited in the counterfactual that there is not much difference between them.

MR. BEARD: It ends up being quite difficult to work out precisely what he means we were supposed to have been doing in these circumstances. We were focused on getting rid of the SLC. That was the be all and end all of it. That was the measure of effectiveness that we were using.

In certain circumstances you can end up with remedies that get rid of the SLC and it is said there is still some respectful lessening of competition. It was one of the arguments that

arose in the ITV/Sky merger, where Sky bought 17.5 or 17.9 per cent of ITV, so it crossed the material influence threshold. There was an argument about whether there was a need for the entirety of the shareholding to be ordered to be divested or only enough to ensure beyond reasonable doubt and because there is a very broad margin of appreciation for the Commission, it can be quite conservative about what it requires. In that case my recollection is that the order was to take the shareholding down to 17.5 per cent.

It might well be that if you are someone that is interested in takeovers and mergers, you might say, hang on a minute, even a 3 per cent shareholding on a shareholders' register can be quite significant. Maybe that can impact on the degree to which these rival media entities compete. So perhaps the residual shareholding did some sort of lessening of competition effect. I have no idea.

The point is that there, quite properly, what was targeted was the SLC. Here the only way we can target the SLC is if we can have an effective competitor in the market. So we are restoring competition. We are not asking ourselves whether we are restoring precisely the same entity. It happens that the only effective remedy we can find is akin to restoring the entity that was there before. But, that is not a radically surprising situation when you are talking about the closest competitors in a market, the idea that actually you can, it is almost like being in a car race. Two cars, closest competitors in the race: one buys his closest competitor, takes it to one side, the race organisers say, "No, you cannot do that, you cannot just buy your rival, you have got to hand it back". And so the rival says, "Yes, well, we'll hand it back, but you can have the chassis and the bodywork. We won't give you anything else", and then there is a negotiation and eventually you get an engine and a couple of wheels. But you still do not have the competition in the race that is, you do not have sufficient competition in the race as to solve the problem that was created by you buying your closest rival. And so it may well be that the outcome there will be to say, "Well, you have got to just sell the car as it was. You have got to give it to somebody else.

PROFESSOR MAYER: I am not quite clear now whether or not you are saying that in terms of measuring whether competition is effective, you are taking as the benchmark what a full divested situation would be. Is that the benchmark?

MR. BEARD: Well, the benchmark is obviously the counter-factual, which is why I took the Tribunal to the report. So, absent the merger, what would competition have been.

PROFESSOR MAYER: Well, you use the counter-factual for saying whether or not there was a substantial lessening of competition which is fine.

MR. BEARD: Yes.

PROFESSOR MAYER: But, are you now saying that that is the benchmark for determining whether or not, whether the remedy is effective competition?

MR. BEARD: When we are looking at the reduction in competition that resulted from the merger, we ask ourselves, if there has been a substantial lessening of competition, how can we remedy that? If the benchmark was the counter-factual, then obviously what we are seeking to remedy is the reduction in competition that has arisen as compared with a counter-factual situation. If you are asking that if there were hypothetically a remedy, that restored competition very substantially but not precisely to the same level as has arisen under the counter-factual, then I think the answer must be that would be an effective remedy, because you would have substantially restored competition. If you have substantially restored competition, then for substantial lessening of competition as compared with the benchmark falls away.

PROFESSOR MAYER: Right.

MR. BEARD: So, theoretically there can be a difference, undoubtedly. The difficulty is when you come to deal with the practicalities of what constitutes a package of assets, rights, what-have-you, that is a business that can engender competition so that competition is substantially restored in the market, you cannot necessarily do that fine-grained tweaking. And what we were looking at here was a situation where one package just did not substantially restore competition in the market, that was Option 2, it was not effective because that is what we need to do, something is not effective if it does not substantially restore competition; and the other, which effectively goes back to the position prior to the merger, albeit slightly changed, but very much akin to the counter-factual, did operate an effective remedy. In those circumstances there is only one choice for the Competition Commission, it cannot rationally say "No, we'd rather have the ineffective remedy in those circumstances". I do not know whether that answers the question in terms of benchmarking, but it is to do with substantiality. There is no -----

THE CHAIRMAN: I suppose what might have happened was, as a last throw of the dice, SRLC might have said, "Well, all right you can have all four key contracts. We will just keep a few SQL, SQG contracts. So, "We will just keep a few of those", I suppose then you might have said, "Well, that is not going, returning to the counter-factual, because in a counter-factual they would have got everything".

MR. BEARD: Yes.

THE CHAIRMAN: "But if they have got the four key contracts, and particularly all three of these which are going to be re-tendered in a cluster, and we do not want the volume guarantee for different reasons because that does more harm than good".

MR. BEARD: Yes.

THE CHAIRMAN: That might have been enough.

MR. BEARD: It might.

THE CHAIRMAN: But you say that was the exercise that you were undertaking, not trying to create the perfect return to

MR. BEARD: You cannot possibly do it, because there may not be an infinite number of variables, but there is a very wide range of variables that you are dealing with here. I will take you briefly to the guidelines that say, you know, "We have a starting point where we know that a full divestment of a simple completed merger is going to provide an effective remedy save in some very odd circumstances", so we use that as a starting point. But we recognise that people, the wit and creativity of business people and lawyers in combination perhaps with a smattering of economists is not something that we pretend that we can predict or deal with. We will listen to the suggestions that are put forward. We will consider them when they are provided to us, and we will look at the reasoning. If they had said, "Oh no, actually we held on to two SQG contracts because they are just particularly interesting to us for whatever reason", I have no idea, then the answer might have been different. It is impossible to predict. But, again, we are in territory that is miles away from a judicial review test because the question is, "Faced with what we did in the circumstances where we had this package put before us, did we err in a relevant sense in judicial review terms?" and the answer is just plainly not.

So, I was finishing 8.35 and volume guarantees. Just for your note, the concerns about ensuring independence vis-à-vis the volume guarantee issue. Authorities bundle 1, tab.3 where the relevant guidelines are, and the paragraph references are 3.9 and 3.18, but I think I have laboured the point already, I am not going to take you back to guidelines.

So, 8.36:

> "SRCL said that a new contract could be drawn up with an effective dispute resolution mechanism",

so it is slightly different from the third party visitor — or perhaps, sorry, to be fair, perhaps, the third party visitor would be involved in the dispute resolution mechanism so there was no need for continued monitoring of the arrangement:

"We accept that it should be possible to draw up a contract as envisaged by SRCL such that no further monitoring would be required. However, as we note in para.8.35 above, a remedy in which the purchaser is reliant on SRCL creates risks which would not be the case in the full divestment option".

And one of the most obvious ones is, in a way, that SRCL needs to be financially sound because, of course, you have a concern as a competitor, that SRCL can actually pay you under the volume guarantee. It may be that no issue arises here, but that is the sort of thing that we would end up talking about.

"We have seen evidence from several parties that waste treatment plants need to operate at high capacity utilisation",

so this is to do with the level of volume guarantee.

"As we have explained above, we do not consider the volume guarantee proposed by SRCL would lead effective competition. However, we also do not consider that the plant would be viable if it had to rely on the volume guarantee alone, if it lost the two key contracts in the upcoming tender process".

So, there is another viability consideration, another problem of volume guarantee. At 8.38, it is really bringing these things together:

"We consider that the purchaser would be a stronger competitor if it had all the customers that Ecowaste Southwest presently services (including all key contracts) since it would be able to demonstrate its ability to service a more substantial base of customers in the Avonmouth Plant Area … We also note that if the purchaser had all the contracts that Ecowaste Southwest had, this would be the same as the situation in the counter-factual".

Well, that is true, but it is not that that what was being aimed at; it is noting that that would actually be the fact rather than being the target, as Mr. Lasok seemed to suggest was the Commission's project in this remedies section.

8.39 really just reiterates the points in relation to volume guarantees, and 8.40:

"A further aspect of this option that would create a risk to the asset being divested is that it does not involve the divestment of the Ecowaste Southwest legal entity and so there will be a risk that customers could cancel the contract on change of control".

As I have already indicated, we entirely accept novation issues could have arisen with the initial transfer, but given the splitting that could occur, that risk remained, in particular, for

Option 2, so then 8.41 the effectiveness, it is not held to be an effective remedy in terms of sections 35 and 41.

Then it goes on to consider full divestment, at 8.42, the aim of divestment:

> "As our guidance explains, the aim of divestment is to remedy the SLC by either creating a new source of competition through disposal of a business or assets from the merger parties".

So, again, it is emphasising just the basic approach that is taken here, that it is identifying the SLC, it is not just targeting the counter-factual. And then, again, 8.43 talks about the guidance explaining that:

> "A successful divestment will effectively address at source the loss of rivalry resulting from the merger by changing or restoring the structure of the market".

But it is "change" or "restore", it is not just defaulting to the way things were before. Now, then in relation to the divestment package itself:

> "The transaction referred to us involved the acquisition of SRCL by Ecowaste Southwest, that is, the entire business, assets including the Avonmouth plant and all the customer contracts. The transaction did not include certain back office functions".

Now, Mr. Lasok seemed to focus a little on the back office functions. The question that is then posed in 8.45 is whether or not actually SRCL has to add to the divestment package some back office functions in order to make it a viable working entity that will provide this competition. So, actually, there are circumstances where you go beyond the simple counter-factual in some sense, you actually have to take assets from the acquiring party, because it bore the risk when it completed on an unconditional basis. But, it decides that because it expects that the acquirer will be someone that is active in the market. You do not need to do that because that is likely to be the sort of function they bring with them. But, it is notable that that is the focus for what the acquiring party can bring. This notion that they suddenly cannot turn up with a whole range of track record that means that there is no issue in relation to consumer contracts, or that they have got all the collection vehicles just sort of sitting waiting to be rolled out, that is not accepted. That is not what is the focus of the concern here, and I think it was part of Mr. Lasok's case that, because the acquirer would be active in the industry, they would implicitly bring things with them. That was not the assumption on which the Commission worked, and there is not a good basis for that assumption. But what is important is that the Commission did focus on what an acquiring party active in the industry would bring; and it did say it would bring back office functions.

So, they directed their minds to this point for the purposes of judicial review language. At 8.46

> "We require all the assets necessary for the effective operation of the Ecowaste Southwest business, including all the physical assets on the Avonmouth site, all the staff employed… and all of the contracts".

Then, in 8.47 there is a discussion about the fact that SRCL had actually put in certain additional assets including a spare shredder, and SRCL said "Look, surely we do not have to give them this", and the CC said, "No, actually, to make this an effective remedy you do, you have to leave this behind". There was an argument then about access to HT treatment plants because this, the Avonmouth plant is an AT treatment plant, there is some waste that has to be heat treated, therefore if you are running a collection and treatment business you still need to subcontract some heat treatment if you run an AT plant. The Commission considered whether or not it was going to need to mandate that sort of arrangement with SRCL and decided that component could be fixed by way of negotiation.

Then we turn on to customer contracts, so:

> "In addition to the transfer of physical assets, we consider that an effective divestment package would include all of Ecowaste Southwest's customer contracts. Without these customer contracts we consider that Ecowaste Southwest would not be a viable competitor".

So, it is this notion of the viability of Ecowaste Southwest as an entity, the ability to offer an effective competitive threat to SRCL in the integrated market in the relevant area. Then there are considerations about the specific re-tendering process which are considered in 8.50 and 8.51. The concerns arise about particular timings in relation to the key contracts.

I think that these are probably less relevant to the overall assessment if the Tribunal has probably read these provisions, I do not want to skip over them if there is anything that wants to be read. But I think these do result in the concern that gave rise to the debates at the CMC about the relevant timing of the remedy that are then spelt out rather more fully in 8.51 and 8.52, because what is said at 8.50 is essentially the key contracts will be renewed in 2013 and there will be a lead-in time for the tendering processes, and 8.52 says:

> "We consider it is necessary to divest Ecowaste Southwest so that the new owner will be able to establish itself before the process of re-tendering the key contracts commences. This will allow the new owner an opportunity to bid for them. Given our understanding that the re-tender for RUH Bath will commence in the second half of 2012, we require that SRCL sells by X",

and obviously that has been subject to the material change of circumstances notice that you referred to, madam Chairman, at the outset. It should be noted that in this context there is a real concern being expressed in 8.51 to ensure that the new divested business would be able to compete effectively and how to preserve the viability of the business. So, it is in that context.

Now, at 8.53 and 8.54 what was considered was the roles of monitoring trustee, but also the application of the non-compete agreements, essentially there was a period when it was suggested by the Commission that there should be actually a non-compete period running after divestment, effectively to shelter the new acquirer and give them a leg-up in relation to competition, because having been under the control of SRCL and SRCL having been running the contracts, and so on, it was considered that that would actually be necessary to shelter them when it came to the re-tendering. In the end, it was decided that was not appropriate because, of course, it is itself a distortion of competition. And so that was moved away from, and the only non-compete agreement subsists whilst SRCL still retains Ecowaste Southwest, so that if a contract comes up for tender at the moment, SRCL cannot bid against Ecowaste Southwest for it.

THE CHAIRMAN: But, how would that work, given that they are both the same thing?

MR. BEARD: Well, in the end it matters very little. But the point is that post-divestment —

THE CHAIRMAN: Suppose that — maybe in the contract they have to specify whether they are going to treat the waste at Avonmouth or at Frome. Anyway —

MR. BEARD: Yes. Anyway, the main point to bear in mind is that actually the Commission had actively considered more extensive protection because of these concerns about viability, stability, being able to re-tender the contracts or win contracts afresh against SRCL given the period during which they have been controlled by SRCL and operated under the SRCL flag. But that was something that was decided was not necessary or proportionate in order to engender an effective remedy. So, again, it is consideration of the package as a whole here that goes to the question of effectiveness.

In the circumstances, we then move on to some conclusions on the effectiveness of full divestment. There is a section at 8.57 through to 8.61 on appropriate purchaser which is obviously important, but is not the subject of any part of the challenge so far as we understand it today. And then, of course, we move on to cost of remedies — I am sorry, Professor Mayer —

PROFESSOR MAYER: Can I just, on that particular point, there is in a sense a challenge in relation to that when it comes to the suggestion about the process of bidding for the

company and whether or not there would be a lot of potential competitors and purchasers. Is that something that is evidently the case, and that therefore a limit price might not be necessary?

MR. BEARD: That a divestment trustee would not be necessary

PROFESSOR MAYER: No, no, that a floor price would not be necessary.

MR. BEARD: I think those are two points. The first is, yes, the evidence is that there were a number of potentially interested parties. Mr. Palmer very kindly provides me with a copy of the defence at para.88 just for your reference, which gives particular references to transcript points of when it was made clear that it was anticipated that there would be a range of purchasers. So, that answers the first part of your question. The Commission thought that there would be evidence to that effect. In relation to your second point going to a floor price which, again, goes to Ground B, we confess we do not really understand the notion that you can somehow calculate in abstract what a market value floor price is, this seems to us somewhat oxymoronic. If you have got a bidding process for an asset where you afforded time for that bidding process, if you have a situation where you only have one bidder come forward, if you only had one bidder that was interested, then you would have a problem whatever. It does not mean that whatever the bidder offers is not a market price, but actually we do not perceive that to be the problem here because we do see a range of parties and we do not know how you will begin to set a market price, a floor price, in relation to these matters. We have set this out in our response to Ground D. As we understand it, this has not been done before, the idea of setting a floor price. The idea of a divestment trustee is something you do not want to have to happen. It places incentive on the vendor to ensure that the sale goes smoothly, because if they do not do that then they lose control of it. There are provisions in undertakings and orders that mean if there is some catastrophic change of circumstance, then there might be possibilities of changing the way that the structure works. But otherwise it really does give a degree of certainty and focuses the mind to ensure that the bidding process really does work, and that is common whether or not you are talking about the period in this report and this remedies process, which is obviously confidential, or other periods no matter what in other situations. So, again, I am not sure I have answered your question entirely but —

PROFESSOR MAYER: Clearly, the second part does depend on your observation in the first part that there would be —

MR. BEARD: That is our current understanding.

PROFESSOR MAYER: I see. Right.

MR. BEARD: And therefore — but we have conceptual difficulties beyond that in any event.

PROFESSOR MAYER: Okay. Yes.

MR. BEARD: And we certainly do not understand on what basis it is suggested that it is unlawful in judicial review terms. So, we have difficulties on a range of bases.

So, I just highlight the proportionality consideration because, having decided there was only one effective remedy, we did then still consider proportionality. We did not just stop at that point. We did consider whether or not it was proportionate, because there can be circumstances where notwithstanding the fact that the full effective remedy is the only one, it is so disproportionate that, actually, you end up falling back on a partial remedy in mitigation. And not to direct your mind to that would obviously be wrong. So, we directed our mind to it. There are various fairly minor criticisms made, I think, of the proportionality exercise itself, in fact the thrust of the criticism of our proportionality exercise is somehow we should have been identifying two effective remedies and then balancing them, and Option 2 was effective and less disproportionate and in those circumstances should have been gone for. That does not tell you anything about the correctness of our proportionality analysis, it was perfectly right, and our approach to the costs in particular of the merging parties in the divestment is entirely unimpeachable here.

(a) it is not suggested what these theoretical costs are; but

(b) in any event, as set out in our guidelines, if you go about a merger on an unconditional basis, you cannot then say, "Oh well, we can't divest because it would be terribly expensive for us to do so, given the way that we have tied ourselves into this deal". That would plainly be wrong, and that is set out in the guidance.

So, I am not sure that that takes matters very much further.

I think in the main that will advance, at Grounds A and B, that there are just one or two points that I wanted to pick up along the way. I have already highlighted in relation to the evidential basis for why continuing customer relationships mattered, in particular the evidence that is referred to from customers — and indeed rivals — at 8.30 and 7.71(d). Mr. Lasok said, "Oh well you referred to other things that SRCL said and actually there are all sorts of contraindications elsewhere in the evidence". Well, with respect, even if he is right that there are contraindications elsewhere in the evidence, that does not matter. The point is the Commission weighed up the evidence in relation to these matters, and reached a conclusion. Mr. Lasok and his client do not like it. We understand that. People do not love having orders of requirements to divest companies they have bought.

THE CHAIRMAN: The question is, the question for us, is — is there sufficient evidence highlighted in the report to mean that it was not irrational for the Commission to rely on that evidence in the way that it has, or give it the weight that it has?

MR. BEARD: That is quite right.

THE CHAIRMAN: Given that weight is a matter for you and not a matter for us.

MR. BEARD: Yes.

THE CHAIRMAN: And as regards what evidence there is that you point to, you are saying that you are not relying on those comments from SRCL.

MR. BEARD: No, no. I am, what I am saying is that there were a range of pieces of evidence that, the ones that are specifically referred to in the report are evidence from customers and from rivals. But, as we have set out in the defence and in the skeleton, actually when we were asking SRCL about these matters, we were getting indications that SRCL itself thought that these customer relationships were very important. Just to dispel a myth, we are not saying that price is not important. Of course we recognise price is extraordinarily important in these matters, but that does not mean it is the only important factor. Not at all. We say that the evidence we received suggests that actually there is other material and we do not need to have specifically highlighted it in the report. That is not the duty of our reasons to have done that. We provide the summary of where we have got to, we have indicated the basis of evidence that we rely upon. This is not specifically referred to in the report, but it is material that supports the finding, and therefore it is entirely appropriate that it is referred to by the Commission in the course of these proceedings. Indeed, when you say, madam —

THE CHAIRMAN: Wait a minute. I did not quite understand that because you have not filed any evidence in these proceedings.

MR. BEARD: No, no.

THE CHAIRMAN: So which, I just want to be clear —

MR. BEARD: The evidence that we have included is not -----

THE CHAIRMAN: You refer to para.8.30 and 7.71(d) which refer to the fact that you have had from customers and rivals that these relationships are important.

MR. BEARD: Yes.

THE CHAIRMAN: And that, and are you now saying that you do not have to have set out in the report precisely what that evidence is. The fact is you summarise that you have received that evidence.

MR. BEARD: Yes.

THE CHAIRMAN: There is nothing to suggest that you are untruthful in that.

MR. BEARD: No, no.

THE CHAIRMAN: And therefore the weight that you attach to that is then not seriously susceptible to judicial review.

MR. BEARD: That is right. That is all right. And then there is an additional issue that we have highlighted in our submissions the fact that SRCL itself in relation to questions itself was talking about the importance of pre-existing contracts, and you say, madam, we have not filed evidence. What we have not done is provided some new witness statement. What we have done is included some of the material that was before us, including the relevant transcripts. In other words, that was the sort of evidential material that we include, so, to be clear, it is evidence, and it — of course the transcripts of hearings, the content of those hearings, does go into the consideration by the Commission and no, it is not required to specify references to transcripts in order to be able to take that material into account and for it to be relevant and to be able to refer to it in the course of these sorts of proceedings, which is precisely what it has done. But, it is undoubtedly an extra part of the material that we have relied upon in relation to the consideration. But it is material. If you are getting evidence from customers and you are getting evidence from rivals, and you are getting evidence from the person that is concerned in this merger, it is consistent with that, that is material. And for them then to come along and say, "No, no, no, you've got it all wrong, and your position is unsupported by evidence and you should have carried out some sort of other enquiries", that is material to the way in which that challenge should be treated. So, just briefly, if I may, if you have the core bundle, tab.8 — I should stress, as Mr. Palmer says, everything from tab.8 onwards in the core bundle was filed by the CC prior to that. Tabs 1-7 were SRCL's —

THE CHAIRMAN: Yes, I see.

MR. BEARD: Now, 339, what we see is a question being put by Mr. Finbow of the group at line 7:

> "Why is option two more attractive to SRCL, or, if you prefer to put it this way, seen by SRCL as a more proportionate remedy, than total divestment would be?
>
> "One of the main reasons from our point of view would be that we have, I think as I have mentioned on a number of occasions, plans to try to sell additional services to all of our customers in the NHS throughout the country. So, one of the key things from our point of view would be to be able to manage the

relationship with those customers so that we can then go and offer additional services".

I am just concerned that in the report there is reference to these particular additional services being confidential, and I do not want to stray, but the last sentence:

"So, from our point of view that is one of the key attractions: to be able to maintain the relationship with those customers".

So, maintaining relationships is important for offering additional services, no doubt. Then the other, line 19, sorry:

"In order to put yourself in a better position when re-bidding comes around, and to have established a good track record with them for extra services, you mean?"

"Not necessarily – partially, in some cases, but for the revenue associated with additional services as well".

So, it is a relevant factor. Then if we move on in particular to tab.13, 401 —

PROFESSOR MAYER: I just interpolate to say that stages 352-353, which is where they did follow on, they did not revert to this question about the effect on the renewal of the contract.

THE CHAIRMAN: Well, we will have to read the whole transcript through and form our own view.

MR. BEARD: Yes, I mean, I think it is slightly dangerous to embark on these sort of general ad hoc discussions, but it is true that later on in the transcript they also emphasise how the additional services really are not the real revenue drivers here, and it is the mainstay of the contract that is important to them, but 401 in tab.13, so, this is the second hearing that, this one is just to deal with remedies.

"Q (Mr. Thompson) [who is a member of the staff] My last question, I think, on this is, just why is this an attractive option for SRCL? [This is Option 2].

A (Mr. Lloyd) I suppose it is that it seems to us the best way of getting competition into the south-west without disrupting the customer relationships and the service to the customers. There is a minimum disruption to the customer base, so you would [have to] say customers should not really be impacted [at all] by all this sort of process ongoing. They need to have that seamless service.

Q (Mr. Whiticar) From a customer point of view that is obviously how they are attractive, but from SRCL's point of view where is the monetisation of that, do you think?

A (Mr. Lloyd) Well, I suppose it enables us to continue to manage the customer relationships, and to offer the customers the additional services that we have for waste audits and that sort of thing.

Q (Mr. Whiticar) Is that because when it comes to actually bidding, and the bidding processes only come up every so many years, that customer relationship is key to winning contracts? Is that a fair assumption?

A (Mr. Lloyd) Well, think it is an important factor, but as we have said in terms of Yorkshire, it is not the be-all and end-all, because at the moment the NHS is very much more driven by price. The softer issues that over the past few years have been there, in terms of carbon footprints and everything else, at the moment, I think, are much lower down their agenda. They are really looking at the price".

And then there is further discussion. So, it is not that we are saying price is irrelevant. We are not suggesting that customer relationships are the be-all and end-all. But they are relevant and important factor, and the point that is to be made here is that here we have SRCL giving evidence that is consistent with other people's evidence that we are relying upon, and yet it turns up and says that we cannot rely on this, and that the matter is unsupported, and that it is irrational to reach these sorts of conclusions. And of course as I emphasise again, it is part of the overall assessment of package Option 2, it is part of that, not the entirety of it.

THE CHAIRMAN: Is that a good time to have a short break?

MR. BEARD: Yes. I will review, I should be relatively brief.

THE CHAIRMAN: We will come back, then, at a quarter to four.

(Short break)

THE CHAIRMAN: Yes.

MR. BEARD: Madam Chairman, just two quick points before I move on, the non-compete clause subsisting when the two entities were in the same ownership, it matters because there were whole separate undertakings in place. As soon as you asked the question I thought that I did not have a proper answer.

The other point, just to make, before the short break we were talking about the evidence that was provided, and evidence from customers. I should emphasise that all that evidence is made available, it is actually on the Commission website, it is just that since there has not been any challenge to it, we have not been exhibiting that, but if you go on to the Commission website you will see all sorts of material from a range of PCTs and so on.

So, with that in mind I am just going to move on to deal with the couple of procurement points, if I may. It is worth perhaps just tracking very briefly back through how these arose, if you could take the notice of application, internal page numbering 23, para.67, this is Ground B, the first objection was to the effect that strong customer relationships are important, and that a business with pre-existing customer relationships had the best chance of securing the contracts (well, that is not quite a correct characterisation of what was being said, but leave that to one side):

> (a) is failure to take account of all sorts of considerations, but
>
> (b) is the first time that public procurement gets mentioned. As far as I am aware, it was not ever mentioned by SRCL in the course of the enquiry, even the extended enquiry:
>
> > "Further or alternatively, the CC ignored its own finding in the Remedies Paper preceding the Report that price will be the key determining factor: Remedies Paper, para.72, fn16. This finding is consistent with the public procurement rules to which the tenders will be subject, under which existing customer relationships should <u>not</u> be a determining factor. Again, these relevant considerations were neglected by the CC".

Well, if one turns on to tab.5 in the core bundle, and p.260, you see para.72 which is the one that was quoted in the notice of application, this is in a consideration of Option 2:

> "The proposed remedy would not give the acquirer access to any of Ecowaste's customer contracts. In the long term it is unclear how the acquirer would develop into something more than a treatment-only operator which processes waste collected by other companies".

I should say at this stage, of course, the Option 2 did not involve any contracts.

> "Contracts are usually three to five years long so the major NHS contracts which Ecowaste currently has would be unavailable for it to compete for over a protracted period. It is also clear that there are incumbency advantages which would give SRCL some advantage if it retained all of the customer-facing staff. [Footnote 16 Although we recognize that relative price would be a key factor at contract renewal]".

So, we accepted that there. The application is just a misrepresentation of the position. The CC ignored its own finding in the remedies paper preceding the report that "price will be <u>the</u> key determining factor". It is just not what the CC said, and so we picked that up in the defence at para.69B and said, "Look, this just isn't what was said in the remedies paper. It

doesn't give you any traction at all because it is a submission built on sand", and we said existing customer relationships, sorry, this is in tab.B internal page numbering 28. And there we said, "Look it is just a misrepresentation" is the first part of that paragraph:

> "In fact, as set out above, SRCL had itself expressed the view that its ability to continue to manage customer relationships were "an important factor" in winning contracts when contracts were re-tendered",

and that is the part of the transcript I have taken you to.

> "Existing customer relationships would be important to assessments of quality and reliability in the consideration of any tender",

and the footnote says:

> "Although SRCL refers non-specifically to public procurement rules, it does not appear to suggest (and at no time has suggested) that quality and reliability assessments would or should be left out of consideration in any procurement process; any such suggestion would be directly contradicted by the evidence given to the CC by third parties, including RUH Bath".

Indeed, the final sentence of 69B says:

> "See further the other criteria to be met by bidders set out at paras.7.71-7.74".

Now, I will not take you back to that, but that was all to do with quality assessments and the concerns that had been expressed to the CC about quality. So, we — I am sorry, just for clarification, Mr. Palmer kindly reminds me that the reference to RUH Bath itself is in footnote 91 to 7.71D, just to close that particular loop. You may well have spotted it but, just to make good the point.

In any event, we then found in the skeleton argument that the public procurement argument began to take on a rather broader life, and it started suggesting that public procurement rules effectively undermined the evidential basis. Now, this is an unusual way of proceedings in relation to these matters. Not to have raised it in the notice of application having never raised it in the course of the process, now says that this is crucial to what Mr. Lasok says is the nub of the case. As I have already indicated, we do not agree that it is the nub of the case. Furthermore, in focusing on incumbency advantages, it does not deal with those issues to do with viability and volume guarantees and considering Option 2 as a package as a whole, so it is not an answer at all to the points that we have made. But, actually, when you consider it just in terms of public procurement law, it is not an answer at all, because actually what you have in public procurement is, it is true, a two-stage process of selection and award, and it is true that at selection stage you are dealing with minimum criteria that

focus on the nature of the tenderer. But when it comes to the award, what you are looking at are issues to do with quality and performance, and after-sales and all sorts of other services. And those are the sorts of criteria you can justifiably rely upon in relation to any award you make under the public procurement rules.

And the reason I drew the Tribunal's attention to recital 46 was because recital 46 to that Directive that was relied upon by Mr. Lasok, recital 46 first of all it was not in the previous version of the Directive. So, I will come back to that when we turn to deal with his authority on the proposition.

But if we look at recital 46 tab.10 authorities bundle 1, what it does it, it says "Yes, when it comes to the awards stage, there are two different types of criteria: lowest price for the most economically advantageous tender. But when you are considering the most economically advantageous tender, there are going to be a range of considerations that are going to be material here".

Effectively, as long as you are transparent and you are setting out what those criteria are, the breadth of those criteria that you may use is very wide indeed, and it certainly encompasses quality and reliability.

THE CHAIRMAN: Yes, I think that it appeared from the authority that the old Directive also allowed you to do either price or a range of quality things. The question that seemed to be being posed was, how far is it legitimate, as a person deciding which bid to accept. It is presumably all the tenders say, "We will do this, we will be absolutely ace quality and we will be totally 100 per cent reliable", etc, they will also say that. The question is how far can the person who is scoring the tender take into account their background knowledge of the track record of the person who has put in the bid in deciding, "Well, they may say that, but actually they have been pretty rubbish so far, so we are not going to score them highly on that", or, "Yes, we have had them, they have been marvellous, better the devil you know, let us give them a high score". How far is that legitimate?

MR. BEARD: What we did was we took evidence. Our evidence was that when it came to the tender process issues like quality and reliability did matter, because that is what we found specifically in 7.71. So we found, when we went out and checked, that these were legitimate concerns.

Mr. Lasok is trying to create a legal edifice that says somehow we got our assessment of the evidence wrong. He puts it as high as saying it is an error of law. It is not at all.

THE CHAIRMAN: I think what he was hinting at was that if you are right that there incumbency advantage, you have to rely on evidence which is effectively that they are not properly

applying the procurement rules, and is it legitimate for you to take that into account as part of your role? I am just playing not Devil's Advocate, but Mr. Lasok's advocate for the moment. That is, I think, what is being put.

MR. BEARD: It is a long reach of the basis of a case put in at four o'clock yesterday that somehow actually we were foreclosed from considering evidence that was put to us, because effectively the actions of the NHS PCTs with whom we spoke was illegal. That is quite bold as a submission at this stage in judicial review proceedings, the matter never having been raised previously, the matter not being put in those terms in the notice of appeal, and the authority he provides not providing an adequate basis for such an inordinately bold submission.

If you look at *Lianakis* (tab 27, authorities 2),what occurred in *Lianakis* was quite a strange situation. If you go to para.10 they say that they were trying to obtain the most economically advantageous tender. Then the criteria they used was proven experience, the firm's manpower and the ability to complete the project by the anticipated deadline. It does not take a rocket scientist to work out that there are some gaping holes in the criteria. If you are really looking for the most economically advantageous tender there. Past experience, manpower and ability to compete to a deadline are not really telling you an awful lot about the most economically advantageous of the tenders you are facing. So it is not really that surprising that parties came along and said this was not very fair given the overall test you are applying, and it equally not very surprising that the Commission came along and said, "If you look at these three current criteria taken as they are in isolation, what you have is a situation where you are really not connected with the test of whether or not the tenders you are scoring are economically the most advantageous". That is what the court then deals with in para.25 through.

What it says in 30 is quite instructive. It says:

> "Therefore 'award criteria' do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question."

If you do not link the criteria at all, and your assessment of judgment and scoring to the most economically advantageous criterion that is the one that you are supposedly going for, is not inordinately surprising that the court turns round and says, "Hang on a minute, they are not just connected here". If they are not connected you cannot use those criteria as the

adjudging the bids. So the people that complained about it were justified in those complaints.

That is a vastly different question from whether, if you set down a series of criteria such as those that you are concerned about in the light of recital 46 and Article 53.1(a), which is where you are looking at, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service and technical assistance, delivery date and delivery period or period of completion. You are looking at a range of matters where you will bring to bear your credibility, the credibility of the tenderer in that tender.

Mr. Lasok made a big deal about the difference between the tenderer and the tender. In the end it is the credibility of the tender in hitting those matters that will be important, and the people that are doing the things are going to be crucial to the tender. So the idea that you can hermetically seal these issues and ignore quality and reliability, it is just not borne out by the Directive or his own authority. Therefore, to have brought this at the last minute in circumstances where his principal authority relies on a Directive that does not include the recital to which I have referred you, which does colour the way in which you should interpret the Directive, in circumstances where it really does not provide the bold basis for a submission that somehow we should have ignored the evidence that we were receiving consistently from customers that quality and reliability mattered, and when they were coming for tenders customer relationship mattered ----

THE CHAIRMAN: It is not whether quality or reliability. Of course those matter. It is whether it is legitimate on the part of the person reading the bid to look behind what is actually set out in the tender and consider from their experience of the company that is tendering how likely they are actually to achieve what they say they are going to achieve.

MR. BEARD: Yes, and our evidence is that they do bring to bear that sort of experience and this does not go far enough to close that out for Mr. Lasok. If it does not close it out he has not got a basis for challenging us.

THE CHAIRMAN: There is no requirement that tenders are put in on an anonymous basis. You always know who the bidder is, I think.

MR. BEARD: My understanding is that in public procurement it is not sort of double blind wine tasting.

THE CHAIRMAN: All right.

MR. BEARD: It really does take him anywhere close to as far as he needs to go with a point that, as I say, has been pulled out of the pocket rather late.

I am very briefly going to deal with the pre-judgment issue, if I may. That involves just going through one or two documents in the core bundle, if you would not mind. I am just going to provide you with a reference to start with. I am not going to ask you to turn it up. It is Rule 11.1 of the Competition Commission Rules, which sets out the basis on which the CC is required to give notice of possible remedies which it considers might be taken for the purpose of remedying the SLC and any resulting adverse effects. Just for your note, that is in authorities bundle 2, tab 13, p.981. That, of course, is what the Remedies Notice was served pursuant to. The points I emphasise of course are that we are dealing with possible remedies that might be taken for the purpose of remedying the SLC.

Can we then go the Notice itself, tab 3 of the core bundle, Mr. Lasok was keen not to go to this. It is p.206, para.3:

> "This notice sets out the actions which the Group considers might be taken by the CC, including any recommendations it might make for action on the part of others for the purpose of remedying the SLC and any resulting adverse effects identified in the provisional findings, and invites comments on possible remedies (see note (i))."

And (i) is referring back to the provisional findings document.

Paragraph 4:

> "In choosing appropriate remedial action, the Group shall regard to the need to achieve as comprehensive a solution as is reasonable … When deciding on an appropriate remedy, the Group will consider the effectiveness … Between two remedies that the Group considers equally effective, it will choose that which imposes the least cost or restriction. For completed mergers, the CC will not normally take account of the costs or losses that will be incurred by the merged parties as a result of a divestiture remedy."

No shock there.

The "Possible remedies on which views are sought" – "possible remedies". First of all, it says divestment is likely to be effective, and it invites on purchasers. At 7 it considered whether divestiture of less than whole of Ecowaste, only the plant or certain of contracts could be a feasible alternative but does not consider that such a remedy would be would be effective in this case..

> "The Group is not at this stage, proposing other remedies for discussion as it considers that behavioural remedies are unlikely to be effective …

> 9 The Group will consider any other practicable remedies – structural or behavioural – that the parties or any interested third parties propose in order to address the expected SLC and any resulting adverse effects."

Then there is stuff to do with consumer brand benefits which are obviously an exception, and then it says, "Copy posted on the website and it will then be considered further". Of course, when we are considering this material it is, of course, relevant to have in mind what is said in our merger guidelines in relation to these matters, and those can be found at tab 3 of the first authorities' bundle. At p.166, para. 1.23, third sentence, the remedies notice:

> "…will contain details that may address the SLC effectively and is a starting point for discussion of remedies with the relevant parties to the inquiry including merger parties, customers, competitors, any section or regulator in the OFT. The CC will consider remedy options proposed by the merger parties and others in addition to its own proposals. The parties will be expected to demonstrate that their proposed remedy options will address effectively the expected SLC and the resulting adverse effects. Parties will also be expected to provide evidence to support any claims concerning relevant customer benefits. The CC will consult with relevant parties to explore remedy options prior to arriving at a provisional decision on remedies. The CC will then consult on this provisional decision with relevant parties prior to making a final decision."

It is an entirely transparent and open process; if you want to raise things you can. The remedies' process with a notice like that is not precluding anyone from suggesting anything. It is not indicating that any end conclusion has been reached; a starting point is a starting point. In *Somerfield*, as we have set out in our defence and skeleton argument, this Tribunal said that was an entirely proper way to deal with matters.

The various options that have been put forward are outlined in the relevant paragraphs of the defence, but I will just give you some references in the core bundle. If we turn on to tab 4 in the core, we have the response to the notice of possible remedies from SRCL. At this stage they were arguing about option 1 and option 2, albeit option 2 was effectively Avonmouth and associated assets, no contracts involved. This was served at the same time as the response to the provisional findings. As can be seen from the text of this there was a wholesale argument going on from SRCL about all aspects of the provisional findings both substantial and remedial, SLC and consequences thereof, they knew full well everything could be discussed, they were raising what they wanted.

Then if you turn on beyond the remedies' working paper, obviously what we have is the remedies' working paper at 5 that they received, it was not published. You have a response from them at 6, you have further submissions on remedies at 7. You have a hearing on 9th January which deals both with substance and with remedies. The Chairman said in opening (p.297) that what was at issue:

> "Alongside the provisional findings we published a notice of possible remedies in which we said the divestiture by SRCL of Ecowaste South West is likely to be effective in addressing the SLC but that we would consider any other practical remedies, structural or behavioural, that parties or interested third parties proposed in order to address the expected SLC and any resulting adverse effects."

It really could not be plainer. Then turn on, if you would, to p.345. At the bottom of the page Mr. Finbow, line 24 :

> "Are there any other remedies beyond Options 1 and 2 that you would like to propose and you would like us to consider?"
>
> MR. GILLESPIE: Not that this stage, now, okay, fine. Perhaps just taking that a stage further, what we have been discussing so far is that it is, as you know, more customary to do this to be thinking in terms of divestments of the assets rather than any forms of divestments, but just to be clear are there any other alternative proposals for divestment, other than divestment of Ecowaste or its assets? You would like to get right rid of Stroud for example?
>
> No, it's not that unattractive but …"

and then there is a discussion about the confusion about Stroud and Frome, and I will not go on to the chairman's comments about the differences between Stroud and Frome. (Laughter).

If one turns on there is an exchange, 12th January, about the Competition Commission sent an email saying at the end of para.1 [p.359]:

> "It was apparent from the responses to some of the questions that SRCL's thinking in relation to some aspects of its proposed remedies, including details of how they would operate in practice was still developing."

I think that may be seen as perhaps polite, almost euphemistic. Tab 10, there are further responses to certain issues that have been raised, including matters to do with Option 1 and Option 2 where at p.364 there is consideration of what is referred to as "Option 2 ½" ----

THE CHAIRMAN: Yes, I think we get the gist of what you are saying there.

MR. BEARD: Then I will not labour it, it is in the defence. The idea that the Competition Commission approached this with a closed mind and that this process, whereby it culminates in it extending time, having another further remedies' hearing, considering in detail anything that was being put forward was somehow a sham and was pre-judging what was going on, and that there was any sense in which the starting point to determine the outturn in relation to these proceedings is just without any foundation at all.

That really only leaves me, I think with Grounds C and D. To some extent I have already traversed those in dealing with the various points in the report.

As you will recall, Ground C was:

> "Competition Commission erred in law insofar as it concluded no account was to be taken of the interests of SRCL when considering what remedy was to apply."

It is really difficult to understand quite what is the criticism here. In the main it appears that this criticism only arises if there were two effective remedies. In the circumstances there is nothing in it. I refer the Tribunal to the points made in our defence in relation to these matters.

I should just cross refer to authorities' bundle, tab 3, p.164 our Guidance at paras.1.10, Mr. Lasok referred briefly to this. That concerned the indication that there may be exceptional circumstances where the cost of this divestiture might be taken into account, there is no suggestion that such exceptional circumstances obtain here.

In relation to Ground D:

> "The Competition Commission failed to have regard to SRCL's legitimate interest in securing fair value for Ecowaste South West by publicly stating the business will be sold without a minimum price."

So the challenge is actually to the publicity of the absence of a floor in relation to the divestiture trustee. We do not understand remotely on what basis that sounds as a ground for judicial review - the publicity in relation to the matter of the absence of a floor. We have dealt with it in our defence in the skeleton explaining why it is that the divestiture trustee process exists, why it is that a floor has not been put in place, why that is entirely appropriate, normal and right. We do not rely on normality to justify something that otherwise was unlawful; normality would not justify it. We say that this is an entirely proper process. We really do not understand on what basis it is said that this warrants any judicial review challenge whatsoever.

THE CHAIRMAN: I think the exchange between you and Professor Meyer was relevant insofar as it suggested that if parties who are thinking of bidding for a business know that if they

were to all sit on their hands and wait they will get it at a knock-down price once it has got moved to the divestment trustee. The answer that you gave to that, I understand, is that you were expecting there to be quite a few bidders so that would be a very risky tactic for one of them to decide not to put in a bid now, even though we really want this business, in the hope that nobody else would bid and then we would get it at a good price.

MR. BEARD: The absence of floor does not matter if you have multiple bidders unless they are colluding - unless I am misunderstanding how bidding theory would work.

PROFESSOR MEYER: No, that is exactly the point, but that is why it hinges critically on there being multiple bidders.

MR. BEARD: Well it may or may not hinge critically on that because it goes back to the point of how on earth do you structure a remedies process that involves anticipation of the fact that there might only be one bidder? If you knew for certain that there was no one else interested then things might be different, one can see that. If you know that there cannot possibly be anybody else and therefore the bargaining position is changed by reason of the fact of knowledge of divestiture, but it is really very, very difficult to see how any such situation would arise, because how you have that level of certainty that means that you somehow have to engage and, of course, at that point it is not really that you are engaging in setting a market value, as Mr. Lasok says. If what he is saying is that the market value should be the floor that is an internally inconsistent position.

PROFESSOR MEYER: As I understand it the argument is if it transpires that there are a few bidders and the process very low this suggests that, contrary to the position that you are attaining it might suggest that this is not the appropriate remedy.

MR. BEARD: Well that is what was said. To be fair that is not the way that Ground D has ever been put, and it is very difficult to see why that is the case; why, even if there were a lower number of bidders that we understood from the evidence to be the case that that means somehow the remedy is not effective, or that the price that is paid in the circumstances is not the market price for the business. We recognise and accept that there may be circumstances where the price of a business is low or zero - or close to zero. We accept that that may be the case. We are not suggesting that is the circumstance here at all, we do not anticipate that, and we have not put in place a remedy structure based on any such suggestion and, to be fair, I do not think SRCL themselves suggest anything of the sort, because it is from them as much as from other people that we have understood that there bidders out there, because it is their evidence we have cited, I think in particular in the defence, para. 88. Of course it was actually confirmed at the CMC, as Mr. Palmer pointed

out. So in these circumstances we are dealing in third order hypotheticals that really do not apply here. If that were to be ever a circumstance that the Competition Commission had to deal with the Competition Commission would have to deal with it and look at how a remedial structure works in those circumstances. But whether or not that ever engendered the divestiture trustee with a floor price I would not have the temerity to presume.

THE CHAIRMAN: Thank you very much, Mr. Beard.

MR. LASOK: Madam, I would like to start by taking together two points made by Mr. Beard relatively early on. The first point he made shortly before lunch. This relates to this confusion between the counterfactual and the SLC. The immediate response to it is that we, for our part, have said that the SLC found by the Commission was in relation to collection and treatment. The point we are making is that it does not follow automatically from that that the remedy need go beyond divestment of the plant.

The related point, which is the point that Mr. Beard started off after lunch, concerns his emphasis on the fact that the report refers to competition in relation to the provision of an integrated service - this goes back to the idea of integration between collection and treatment, and it is really the same point put in a slightly different way, but it is one that we have addressed anyway.

What I want for a moment to do is to focus on the relationship between an SLC and a remedy. Mr. Beard put forward the example of motor cars, and I would like to pursue that one for a short time. Let us suppose that you have a Formula 1 competition, and let us suppose that Team A buys up Team B; it buys up Team B lock, stock and barrel - the cars, the drivers, the engineers, the spare parts, etc. Let us also suppose that there is a Team C, and Team C is unable to compete because, for one reason or another it has lost all its cars. It has the drivers, it has the engineers, it has everything but it does not have the cars. Then somebody comes along and says: "We need to introduce competition here because it is not good that Team A owns Team B", so the solution is divestment. What do you divest? The answer is that the proportionate divestment is that you say to Team A: "Sell your cars to Team C" because Team C has everything else. You do not say to Team A: "Sell the whole of Team B to Team C". Team C only needs the cars, it does not need another set of drivers, and another set of engineers and so forth. That is a simple illustration to show that the fact there is an SLC in relation to a particularly defined market does not necessarily determine the scope of the remedy, because the remedy must be directed to achieving a solution to the SLC, not necessarily something else. There are bound to be cases in which Team A must

divest itself of the whole of Team B but in the hypothesis that I have put forward to do so would be disproportionate and unnecessary.

The related point is this: the Commission did not actually object to Option 2 on the ground that it failed to address this idea of integration between collection and treatment; the objection it was different.

This centres around a debate between the parties that focused originally on para.8.32 of the report because that was the paragraph that we criticised for saying that our proposed remedy meant it was a partial solution to the problem and it referred to collection. We said: "Why is this only a partial solution?" and we were criticised by the Competition Commission for our criticism of this in para. 44, p.16 of their skeleton argument which you now need to look at, because para.44 said in (a) that we had simply misunderstood about the point about 8.32 because they said at the end of (a) that Option 2 did not create an effective remedy for the reasons which follow in the ensuing paragraphs, i.e. 8.33 et seq, that was the reason, not the argument set out in 8.32. Then in (c) they say:

> "The point made does not turn on the availability of collection of assets, but on the availability of collection and treatment contracts."

The same point is made in (d) where they criticise us as follows:

> "This point also repeats the error that the Competition Commission was concerned with collection, assets or facilities, rather than local contracts."

So the point is simply this, that we have always actually addressed the question of how you find the solution to the SLC by reference to the SLC as we understood it to be, which was concerned with a situation in which you had an integrated collector and treater of HRW, our point was that your hypothetical purchaser is going to be somebody who is going to have all the bits and bobs with the sole exception of the Avonmouth plant, and that is the problem. The argument that has been put forward by Mr. Beard, in the first two points that he started off with, does not actually answer therefore the criticism that we have been making of the report.

I will now turn to consider the vexed question of the customer relationships. A side point was made by Mr. Beard, in relation I think to para.767 of the Report, suggesting that we were indicating that a person cannot obtain references from a customer in order to boost up their reputation and standing when bidding for a contract. That is precisely the point that we are not making, but it is also the point that the Commission is not making in para.8.30 of the Report, which is the one that is the fulcrum of their case, and here I think one needs to look back again at 7.71(d) and compare it with 8.30.

7.71(d) is, I think, the only subparagraph of 7.71 which is not footnoted. There is no reference in 7.71(d) to any material to support it. Instead you have the cross-reference to 8.30. 8.30 consists of three sentences, the third sentence is the conclusory sentence, and on the face of a fair reading of 8.30 what happened was that the Commission drew an inference from evidence, the gist of which is summarised in the first two sentences, and the first two sentences do not refer to any evidence that actually says what the third conclusory sentence says. In other words, the third sentence says: "The incumbent has a good chance of retaining a contract", but the first two sentences do not say: "We were told by X, we were told by Y that incumbents had a good chance of winning a contract, or retaining a contract", they do not say that. The first two sentences talk about different things, such as: "We were told about the importance of customer relationships.

We were told that the value lay in the contract, but those propositions, those statements themselves are wholly ambiguous because they do not identify what was the importance of the customer relationship, and the Commission had been told by SRCL on a number of occasions that it saw the customer relationship as being important because of the ability to sell additional services. The value of the contract, or rather the value of the company lying in the contracts, that is the revenue stream. So where in these two sentences do we find an identification of evidence that supports and justifies the conclusion in the third sentence? We do not have it.

It would have been open to the Commission to have exhibited the evidence, the statements made to it that are the source of the third sentence in para. 8.30. They have declined to do so. Instead they say that what has happened is that they were told by SRCL things that corroborated or supported these other mysterious undisclosed statements that give rise to the finding or the conclusion in the last sentence of para.830. That is as far as they go.

In our respectful submission that is simply not good enough. If the Competition Commission has evidence on which it wishes to rely then it discloses it so that we know what the evidence is, so that we, for example, make submissions on that evidence and say: "Maybe this evidence has been misunderstood", or that we may abandon our point because we may say "yes, we now see the evidence; yes, it is crystal clear. We will not waste the Tribunal's time with this point". But you cannot decide a case, in our respectful submission, even on the judicial review type approach on the basis of an assertion made by the decision maker that it had somewhere, some evidence that it thinks supports, on one interpretation at least, a conclusion that it has set out in a decision that is supposed to be reasoned, and is

supposed to be backed up by evidence. That is not the way, with all due respect to the Commission, that we do things in this country.

I will jump to the public procurement and *Lianakis* point. Recital 46 has been relied on by the Commission in support of a proposition that it is difficult to identify but can only be the proposition set out from the third sentence of para.8.30 of the report, because that is what we are arguing about. Recital 46 in fact does not provide any support for para. 8.30 at all. The point about recital 46 is, as one can see from looking at the body of the Directive in the *Lianakis* case, there is a clear distinction drawn between looking at the suitability of a contractor or tenderer to perform the contract and looking at the suitability of the bid, and recital 46 is all about looking at the suitability of the bid by reference to the contract award criterion that has been adopted by the contracting authority. The most economically advantageous tender is about the characteristics of the bid, the quality of the bid, for example if the bid offers three collections a day then it is of a better quality than a bid that offers two collections a day. *Lianakis* makes it crystal clear that it is not possible to take into account at the contract award stage factors relating to the reliability or quality of the tenderer because you have passed that point, you are looking at the tender, the bid, and there were very important reasons for that. In the legislation they deal with suitability of the tenderer in a particular way because what they are trying to address is the problem posed by the possibility of there being an incumbency advantage that works to the detriment, in particular, of foreign contractors who have no track record in the Member State in which they are seeking ----

THE CHAIRMAN: It could be an incumbency disadvantage. Suppose you have an incumbent, they are supposed to make three collections a day, in fact quite often they are late, they always have excuses, their vehicles are breaking down, they do not have enough drivers and you are generally quite unhappy with them. You re-tender, they put in a bid, they are not such a disaster that you are going to exclude them from the competition altogether, and they say in their tender they are going to make three collections a day, are you saying that the person deciding on the bids has to entirely put out of their mind their experience, in fact although they are supposed to make three collections a day they have not been very good at it?

MR. LASOK: That is one of the problems with the straitjacketed approach that is taken in the public procurement field. This is why *Lianakis* was criticised when the Judgment was handed down. *Lianakis* is not a new case. But the point that I am making is that there is this separation between gauging the suitability of the tenderers or the candidates, which is at

one stage, and then proceeding to a different stage of awarding the contract, because if you want to solve that problem you have to find a way of doing it at the initial stage at which you are identifying suitable tenderers or candidates. You cannot do it at the later stage. You have to follow the rules, but you do it at this earlier stage. You can have your minimum levels, you can have, as I pointed out, the limit on the maximum number but you have to have a minimum number of tenderers; that is how you do it, you do it at that point. This is where the Commission's case completely falls down because they have taken no account whatsoever of the public procurement rules, and this is despite the fact that at para.2.5 of the Report they refer in the footnote to the fact that I think most of the contracts will be tendered pursuant to the public procurement rules. We are criticised for not citing *Lianakis* until 4 o'clock yesterday I think; that was a logistical issue, but the public procurement point was made in the notice of appeal. The point was made absolutely unambiguously. It was not beyond the wit of man or the wit of the Commission to actually go and have a look at the public procurement rules to see what we were talking about, because this is not exactly producing something out of a hat or something that nobody has ever conceived of. The public procurement rules are there.

We are told, again by a reference to completely unidentified information, that in fact the practice that is followed by the NHS entities is completely different, and my learned friend said that a few moments ago. I have no idea where this is coming from, who has told him this, what document or other source of information lies behind it. What can I do? It is very simple, you cannot rely on this kind of thing. If the Commission wants to make a statement of fact it must identify where it gets the statement from. If it does not identify what the source is, it cannot be regarded as putting before the Tribunal something that has credibility. If there is something there, there is a source for it and no excuse or reason has been put forward to explain why this source, if it does exist, has not yet been put before the Tribunal.

I will have to wind up on other points fairly quickly. One correction, I think, may be appropriate. SRCL has not been operating the Ecowaste South West contracts, under the old separate arrangements it has been precluded from doing so - I think there was some suggestion from Mr. Beard that that might not have been the case.

A point was made about table 1, which is immediately before para.7.9 of the report, and it is suggested that we had asked for redactions. My instructions are that we did not ask for redactions.

Mr. Beard made the submission - as I wrote it down anyway, and I apologise if my written record is slightly inaccurate - I wrote him down as saying that the Commission did not

assume that because the purchaser would be an existing player it would be bringing something with it. I think that relates to the player coming along with additional assets and so forth. However, that is in fact what the Commission did assume, and it set that out as its assumption in paras. 8.45 and 8.58.

On the question of purchaser interest, my learned friend ended up with some suggestion that there was some evidence about purchaser interest. In our submission the problem with purchaser interest is that it is a rather fragile and, at the moment, speculative issue. There is a bit in the core documents bundle, tab 8, p.302 line 15 to p.321 line 14 that is a statement of the position as SRCL understood it at that time.

I think probably that is all I need to say, except that I am reminded that SRCL do refer to the public procurement rules in its initial statement, that was right at the beginning of the process but, of course, it was not until we got to the Report in its final form that we had the statement in 8.30 that caused the alarm bells to ring.

Those are our submissions.

THE CHAIRMAN: Thank you very much everybody. It has been a very interesting and useful day. We will, of course, let you know the outcome as soon as we reasonably can, even though the deadline has been extended we assume everybody wants to know where they stand as quickly as possible.

MR. BEARD: In relation to that, Madam Chairman, I understand the Tribunal does not know the extent of the change of the deadline.

THE CHAIRMAN: Well, do we need to know?

MR. BEARD: No, not necessarily but it remains as the position was articulated at the CMC, that the Competition Commission would be extremely grateful for the urgent consideration of this matter, and your indication just now, madam, that you would deal with it expeditiously is most gratefully received. If the Tribunal were to decide that it was a matter where a decision followed by reasons would be the most efficient way of dealing with matters then we would quite understand, but of course it is a matter for the Tribunal how to dispose of these matters. It is just a concern that the Tribunal should not be under any misapprehension that the extension is, without wishing to be ----

THE CHAIRMAN: Takes the pressure off! (Laughter)

MR. BEARD: Yes - "unduly extensive" is the term I was looking for.

THE CHAIRMAN: Well, we hear what you say, Mr. Beard. Thank you very much.