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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1577/12/13/23 (T)

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8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Monday 3rd – Tuesday 4th July 2023

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14 Before:
15 The Honourable Mr Justice Marcus Smith
16
17 The Honourable Lord Young
18
19 Professor David Ulph CBE
20
21 (Sitting as a Tribunal in England and Wales)

22
23
24 **BETWEEN:**

25
26 The Durham Company Limited **Appellant**

27
28 v

29
30 Durham County Council **Respondent**

31
32
33 **A P P E A R A N C E S**

34
35 Michael Bowsher KC and Ligia Osepciu (On behalf of The Durham Company Limited)

36
37 Aidan Robertson KC and Richard Howell (On behalf of Durham County Council)

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Monday, 3 July 2023

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(10.30 am)

Opening remarks

THE PRESIDENT: Mr Bowsher, good morning.

Before you commence with the introductions, my usual warning regarding the live streaming of these events. These events are being live streamed on our website. An official recording is being made, and an authorised transcript by our direction will be produced. It is, however, strictly prohibited for anyone else to make an unauthorised recording, transmission, photographing or otherwise in audiovisual form transmitting these proceedings, and a breach of that rule is punishable as a contempt of court.

With that warning, I can say we have read your reading lists with some care. In particular your very helpful written submissions, so we are well up on the material and I will hand over to you.

MR BOWSHER: I am much obliged. While technical matters -- a point I am bound to forget -- I imagine that the tribunal will want to have a transcriber's break at some point in the morning. I don't know if you have a particular view about what time that should be. I was going to push on until about 11.45. But as you know, I always forget.

THE PRESIDENT: We will try to mutually remind one another, but yes, we will rise for ten minutes at a time which is convenient to you. If we think you are forgetting, we will raise it, but don't expect us to remember ourselves. I am sure we will be reminded by someone in the courtroom.

MR BOWSHER: I am obliged.

1 **Submissions by MR BOWSHER**

2 **MR BOWSHER:** Good morning. I appear today for the appellant, Max Recycle, with
3 Ms Ligia Osepciu. The respondent, Durham County Council is represented by my
4 learned friend Mr Aidan Robertson KC and Mr Richard Howell. As the tribunal will
5 be well aware, this is the hearing of the first challenge brought under the Subsidy
6 Control Act 2022 under the specific review procedure provided for under section 70
7 of that Act.

8 You have already indicated you have had written submissions from both of us and
9 written materials, and been able to read in. Accordingly, I will take some matters as
10 read. I intend, subject to how matters go, to structure our submissions as follows.

11 Firstly, to make a few what I loosely call high level observations about the proper
12 characterisation of the County Council's trade waste business and its support to that.

13 Second, a short review of the Act and some of the other related legal matters.

14 Then to open the key documentary and statutory material, which explains the issue
15 today. I don't propose to go through the facts in great detail, or open the facts. To
16 some extent I am going to blend the two together because you have an agreed
17 statement of facts and it is probably more convenient that we try to deal with the two
18 at the same time, if you see what I mean.

19 **THE PRESIDENT:** No need. Can I say this? The agreed statement I personally
20 found extraordinarily helpful in understanding the background and the issues
21 between the parties. So we are very grateful to the parties for that.

22 **MR BOWSHER:** To a considerable degree the facts and the law overlay each other,
23 so there is no point in trying to separate them out too far.

24 Then review our challenge following the analysis of the separate limbs of the
25 definition of subsidy. I will be following the sequence that we used in our skeleton,
26 which is not strict alphabetical sequence as set out in the guidance, but we will be

1 using the limbs from the statutory guidance, if I can put it that way, but not in the
2 alphabetical order that they are set out in the guidance, sir, but in the order that we
3 put in our submissions. Then there are a few other matters to address, particularly
4 some of the jurisdictional issues which are raised by the council.

5 In terms of timing, my learned friend Mr Robertson and I had a brief exchange about
6 this last week. Given that I will have to open some of the material, maybe at a little
7 bit more length and detail than people will do in six months' time when the tribunal
8 has had a few more runs at this, I will anticipate that I will take much of today.
9 Mr Robertson was kind enough to say that, as long as I can make sure that he was
10 on his feet first thing tomorrow, we should be able to deal with matters tomorrow.
11 Obviously we will need some reply, but not too much, I hope. Most of the points
12 have been fairly well foreshadowed, I would imagine.

13 Without more ado, let me get started on our overview.

14 The case I present today is simple. It is simple because on a number of key matters
15 the council has, for whatever reason, found itself in a position where it doesn't know
16 the key facts. You will have seen from the agreed statement of facts in a number of
17 cases the agreed fact is that the council does not know what the facts are, which
18 does mean that to a considerable degree this has to be a matter of principle for the
19 tribunal to determine where the matter goes.

20 The respondent council throws up many points and arguments and we will seek to
21 address them and demonstrate why they are wrong or just distractions or
22 misdirections, but to do that I do have to set out some context.

23 But in short, we say the effect of what the county council is doing is to support a part
24 of its waste operation in a manner that distorts competition in a market which was
25 deliberately set up by statute to be open to competition. We will come onto that. It's
26 been set up that way for some considerable period now, but the effect is to distort

1 competition, or at least to be capable of distorting competition. That's all we need to
2 show today. You know from our evidence that we say that it plainly does distort, but
3 we don't need, for today's purposes, to actually go that far.

4 Our client is an SME seeking to compete in that market, and is affected by it, by the
5 support and the matters that are produced -- the effects that are produced by the
6 council's support.

7 Once one has established that there is support from an economic activity derived
8 from public resources, the question for the tribunal will become really very simple:
9 whether the situation involves the grant of subsidy within the meaning of the Subsidy
10 Control Act 2022, and whether it engages those specific limbs of the statutory test.
11 In practical terms, once you identify that there is an enterprise which receives
12 financial support, and that support is capable of distorting competition, our case is
13 made out for today's purposes. Clearly there's more work to go on -- and we will
14 come on to what relief we are asking for -- because it simply establishes that yes,
15 there is a subsidy. What then happens will be a question for relief.

16 **THE PRESIDENT:** Yes, but, I mean, assuming we get so far, isn't it the usual
17 quashing and obligation to revisit?

18 **MR BOWSHER:** Exactly, yes. The tribunal does not need to trouble itself with what
19 actually the practical effect of this is, what the prices of competitors might or might
20 not be and all of those sorts of things, but what I might loosely call the sort of things
21 you might have an expert report on. One of the reliefs we actually ask for, whether
22 that's the route the tribunal goes down or not is another thing, is for someone to go
23 and do that work, to work out what the pricing in normal market conditions would be.
24 But that's not work for today.

25 **THE PRESIDENT:** No, because it is, as I understand it, common ground that if the
26 subsidy control questions needed to be asked, they weren't.

1 **MR BOWSHER:** Exactly.

2 **THE PRESIDENT:** So the question is, did they need to be asked?

3 **MR BOWSHER:** Exactly.

4 **THE PRESIDENT:** Yes.

5 **MR BOWSHER:** Financial support can, of course, be delivered in any number of
6 indirect means and we will look at some of those cases. The ferries case, the BAI
7 ferries case is one example which we will come onto where you have a support
8 provided by purchase of an excessive number of tickets by way of voucher to
9 support an activity, or through an overcompensated contract or whatever. We know
10 that financial support can be delivered in a number of different ways.

11 The support here, we say, is delivered from benefits derived from the household
12 business and the ability to fund that household business from public funds, including
13 but not limited to tax. Again, we don't need to get into the detail as to what actually
14 the different sources of the funding for that business are, but we know that that
15 household business is funded out of public funds.

16 In the simplest terms, the subsidy here is a subsidy from public revenue which
17 enables a commercial business to reduce its charges for its services in the trade
18 waste business. We are not saying that the council -- contrary to what the council
19 suggest we are saying -- we are not saying the council is driving around on
20 unnecessary journeys, journeys generating exhaust fumes just for the sake it. What
21 we are saying is that the trade waste business should be charged for on the basis
22 that a competitive business would be charged in providing that trade waste business
23 charging that in normal market conditions. In those conditions, it would not have an
24 opportunity to cover a considerable part of the underlying costs such as fixed costs
25 of the vehicle assets which are described -- dealt with in some detail in our witness
26 evidence, or disposal contract charges from a publicly funded activity, and then use

1 that support from the publicly funded activity in supporting its trade waste business.
2 By charging less than that rate, it is subsidising its trade waste activity with public
3 funded support, and that is a specific advantage received by the trade waste
4 business and in consequence the beneficiary competes at an unfair advantage.

5 The tribunal has had -- turning now to the Act -- no doubt many months, if not years,
6 to introduce itself to the Act over time, so I tread a little bit lightly. Probably views
7 have already been formed about it, but again, given the nature of this hearing, it is
8 probably appropriate that I take a little time just to go through the Act, if not to
9 overlabour it.

10 The Act is to be found in our authorities bundle, which is page 165, tab 10 of the
11 authorities bundle.

12 **THE PRESIDENT:** Yes.

13 **MR BOWSER:** The relevant obligation, which is really the starting point for that, is
14 section 12, page 174. That is the obligation which you've just -- sir, you have just
15 alluded to, before making a subsidy you must consider the principles.

16 The making of a subsidy scheme is covered by 12(2) and 12(3), so that if this is
17 a scheme rather than a -- a subsidy scheme rather than a subsidy, then that also is
18 engaged by section 12 thereafter.

19 In making a subsidy, the authority must have regard to the energy and environment
20 principles. If I can just briefly make this point here: one of the points which has been
21 made against us in the past is that we are trying to -- we are only trying to make sure
22 that the council charges more and that this somehow undermines some policy of
23 looking after business in the council's area. I paraphrase, but this is at previous
24 hearings.

25 This may not be directly relevant to the proposition that the tribunal has to engage
26 with, but it goes to the merits if I can put it that way, and that is simply that the

1 polluter pays principal is engaged here.

2 In our skeleton we referred to the Environment Act 2021 and the statement there.

3 I think on reflection the first way one gets to the polluter pays principle is through this

4 provision in section 13 which provides that:

5 "A public authority.

6 "(a) must [have regard to] the energy and environment principles before deciding to

7 give a subsidy [relating] to energy and environment."

8 You don't have in your authorities bundle, the principles. We did hand them up -- we

9 have not yet handed them up, we are just about to hand them up. They are in

10 schedule 2 to the Act. My apologies that -- if we put them in pageless at the end of

11 tab 10, that probably makes sense.

12 As I say, it doesn't go to the point of principle today, but just to illustrate the point.

13 Principle B is another formulation of the polluter pays principle. I simply put it in now

14 just to make the point that it is an important part of this legislation that polluters do

15 pay for their waste.

16 So to simply say "we want to be able to charge businesses less", is not an answer.

17 That is indeed quite the contrary. In a number of different ways the statutory policy

18 is to the opposite effect.

19 **PROFESSOR ULPH:** Could I just ask a question of clarification?

20 The polluter pays principle is there any agreement not accepted, but is there any

21 agreement as to how the polluter should pay or how much the polluter should pay?

22 **MR BOWSHER:** Not in this case, no. It's not a matter we have engaged with in the

23 papers -- on the papers in this case, no.

24 This is a case run as a subsidy control case and we treated it as a case about the

25 operation of the Subsidy Control Act. I only mention the principle now because

26 certainly, I think -- I can't now remember -- one of our previous outings in previous

1 claims when we were dealing with this, this point was made. I just wanted to, as it
2 were, get my retaliation in first, to put it bluntly, that the polluter should be paying
3 something and should be paying fairly.

4 **PROFESSOR ULPH:** It's just at some points in your skeleton you seemed to be
5 implying that paying more is a good thing.

6 **MR BOWSHER:** Appropriately. I wouldn't say pay more, but you should pay
7 appropriately when considering -- if you, as an authority, are establishing a subsidy,
8 it is important that you have regard to this policy, that you should not be relieving
9 polluters of their responsibility to pay. It's a matter for the authority not for us.

10 **PROFESSOR ULPH:** Okay, thank you.

11 **MR BOWSHER:** In terms of further material informing the definition of a subsidy,
12 section 79 tells us that the guidance -- and section 79 is in the authorities bundle at
13 page 187 -- may deal with determination whether assistance constitutes a subsidy
14 and that an authority must have regard to that guidance. So that sort of lays the
15 groundwork for the different bits of statutory material.

16 Section 2 is the definition of subsidy. It is defined in section 2(1) of the Act, but it is --
17 that definition is elaborated in the guidance and I am going to come to it in the way in
18 which it is set out in the guidance.

19 Sections 3(2) and 4(2) are then also form part of that definition. Again, we will come
20 to it again when we look at the guidance because it is simpler to look at it in one
21 place and it is all pulled together in the guidance.

22 Section 7(1) is then the definition of enterprise:

23 "... 'enterprise' means a person who is engaged in an economic activity that entails
24 offering goods or services on a market, to the extent that a person is engaged in
25 such an activity."

26 Pausing there, and thinking about the council here, we say the council is engaged in

1 an economic activity, certainly that the trade waste business is an economic activity,
2 it's part of the broader commercial waste business, it offers goods or services on
3 a market -- that's a market which is explicitly competitive -- and it is an enterprise to
4 the extent that it is engaged in that activity. So to the extent that it is involved in that
5 activity it is an enterprise.

6 **THE PRESIDENT:** Don't we need to start with section 6 of the authority?

7 **MR BOWSHER:** Yes.

8 **THE PRESIDENT:** So we are all agreed that the council is a public authority within
9 section 6?

10 **MR BOWSHER:** Yes.

11 **THE PRESIDENT:** So it is a person who exercises functions of a public nature, and
12 then we have certain carve-outs which are not material.

13 **MR BOWSHER:** Yes.

14 **THE PRESIDENT:** Now, you are saying that the ambit of a public authority means
15 that if you take a person that is a public authority you are enabled by this scheme of
16 the legislation to draw a line between certain functionalities.

17 **MR BOWSHER:** Yes.

18 **THE PRESIDENT:** So what you are saying is that at one and the same time,
19 a public authority can be an enterprise.

20 **MR BOWSHER:** Yes, or part of it. To the extent that it is engaged in that activity, it
21 is a person who is an enterprise.

22 **THE PRESIDENT:** Yes.

23 **MR BOWSHER:** There is not a direct correspondence necessarily between that
24 person and the public authority, but they are, from a legal sense, the same person.

25 **THE PRESIDENT:** Yes. That's a nice way of putting it. So the same person
26 depending on what they are doing --

1 **MR BOWSHER:** Yes.

2 **THE PRESIDENT:** -- with their rights to act as a person --

3 **MR BOWSHER:** Yes.

4 **THE PRESIDENT:** -- can be, depending on function, a public authority on one hand

5 and an enterprise in the other?

6 **MR BOWSHER:** Indeed.

7 **THE PRESIDENT:** So it can subsidise itself?

8 **MR BOWSHER:** Indeed.

9 **THE PRESIDENT:** Does that necessarily follow from the scheme of the fact?

10 I mean, isn't it equally plausible to construe the two entities as -- in this way. That if

11 you are a public authority, ie being a person who exercises functions of a public

12 nature, then you are and cannot be an enterprise, and so you don't fall within

13 section 7, you fall within section 6.

14 Why is the Act not a bright line separating these two definitions?

15 **MR BOWSHER:** There are probably -- there's probably more than one answer to

16 that question. In no particular order, the first partial answer is section 7(2), which

17 doesn't directly meet your point, but section 7(2) identifies that:

18 "... an activity is not to be regarded as an economic activity if or to the extent that it is

19 carried out for a purpose that is not economic."

20 That is plainly a carve out for, I would submit, activities which are separate from the

21 economic activity and that is one of the points which my learned friend relies upon.

22 He says, well, we are not -- our trade waste business is a non-economic -- it is

23 associated with a public function. That does not actually answer the point, that is the

24 point for the tribunal: is this, or is this not, an economic activity?

25 **THE PRESIDENT:** Yes, but that is assuming that the public authority is an

26 enterprise and then, if that's right, you can have the 7(2) carve out. But that is

1 assuming that which I'm putting to you as a proposition.

2 **MR BOWSHER:** Well, if you go back to the definition of subsidy --

3 **THE PRESIDENT:** Yes, of course. Section 2.

4 **MR BOWSHER:** Section 2. If the county council is a public authority --

5 **THE PRESIDENT:** Yes, which we are agreed it is.

6 **MR BOWSHER:** Which we are agreed it is. And if the county council is also

7 a person engaged in economic activity, which we say it is, and section 7(2) may be

8 a battleground about whether it is or it isn't, but it is plainly capable of being both

9 a public authority and an enterprise under section 7(1). There is nothing in section 6

10 or section 7 that says you couldn't be both.

11 **PROFESSOR ULPH:** Isn't it the case that 7(2) refers to a purpose that is not

12 economic, so the issue is not so much about the nature of the activity, it's about the

13 purpose of the activity?

14 **MR BOWSHER:** Sorry, just focusing on the question: there is nothing in section 6 or

15 7 which says that you can't be both a public authority and a person under

16 section 7(1). There is no carve out to that extent.

17 **THE PRESIDENT:** Well, that's the problem, isn't it, because if you look at, say, 6(1),

18 what it says is a public authority means a person who exercises functions of a public

19 nature.

20 Reading those words literally, isn't it the case that if you are exercising functions of

21 a public nature, the label that attaches to the exclusion for these purposes of all

22 others is the public authority label? So, for my part, it seems quite hard to say it

23 means that you can be both, because wouldn't the language of section 6(1) be

24 differently articulated so that you would have it clearer on the face of the wording that

25 you can actually be both?

26 I mean, section 2, I don't think helps you -- though do feel free to push back --

1 because all that's saying is that a subsidy is something that involves financial
2 assistance moving directly or indirectly from a public authority to an enterprise. So
3 all one would be saying is that one cannot subsidise one's self as a public authority.
4 I quite see your line. You are saying that cross-subsidisation falls within the Act, and
5 therefore you can have a public authority as public authority subsidising itself as an
6 enterprise. My only point is that sections 6 and 7 seem to be drawing quite a clear
7 distinction between these two labels.

8 **MR BOWSHER:** Sorry, I am just trying to juggle a couple of references to respond.
9 I am just wondering which way round -- where I am going next to the guidance and
10 the --

11 **THE PRESIDENT:** Mr Bowsher, don't let me take you out of your way.

12 **MR BOWSHER:** No, no, it's an important point.

13 **THE PRESIDENT:** It's an important point, but do take it in the order you wish to run
14 it.

15 **MR BOWSHER:** This is the place to deal with it, but I just want to make sure that
16 I have dealt with it in the best -- perhaps the starting point would be the EU
17 Commission notice in the authorities bundle at tab 49. That's page 113. 1129. So it
18 is tab 49, page 1129 is the EU Commission notice. Obviously, some various points
19 have been made about the relevance of EU materials here, but clearly this is part of
20 the context against which -- the backdrop against which this legislation was passed.
21 And at least to a degree, if there had been expected to be a substantial change from
22 the position established here, one would have expected that to be flagged up.
23 Paragraph 7 at 1131 is the general principles on the notion of undertaking an
24 economic activity:

25 "The Court of Justice has consistently defined undertakings as entities engaged in
26 an economic activity regardless of their legal status and the way in which they are

1 financed."

2 And then there is a reference to case law there:

3 "The classification of a particular entity as an undertaking thus depends entirely on
4 the nature of its activities."

5 This has three consequences. If one goes from there to paragraph 18:

6 "Insofar as a public entity [page 1133] exercises an economic activity which can be
7 separated from the exercise of public powers, that entity acts as an undertaking in
8 relation to that activity."

9 **THE PRESIDENT:** Yes.

10 **MR BOWSHER:** In contrast:

11 "If that economic activity cannot be separated from the exercise of public powers ..."

12 Et cetera, et cetera.

13 So that's the position under, as it were, the pre-existing law. If one then turns to the
14 guidance, that is at tab 20 of the authorities bundle, starting at page 318. This is the
15 statutory guidance.

16 **THE PRESIDENT:** Just a moment. Yes.

17 **MR BOWSHER:** This is arguably not quite as clear as the notice. It is
18 paragraph 327, paragraphs 2(16) and 2(17).

19 Again, given the context of this legislation, one would have expected a change from
20 that fundamental position under the pre-existing law to be certainly more clearly
21 signposted. What that says is the financial assistance is given directly or indirectly
22 from public resources by a public authority. That, we say, is exactly what's
23 happening here.

24 **THE PRESIDENT:** Yes.

25 **MR BOWSHER:** And limb (b), it confers an economic advantage on one or more
26 enterprises.

1 **THE PRESIDENT:** But isn't that your problem? Because the language of
2 "undertaking", is, of course, something we are all familiar with from European Union
3 law, and is embedded in our own law in, for instance, the chapter 1 and chapter 2
4 prohibitions?

5 But going back to the Act that we must construe, the problem is the language of
6 undertaking is not used. Instead we are talking about persons. Not undertakings,
7 but persons. It's quite clear that the Act in sections 6 and 7 is not using the unit of
8 account of the undertaking, it's going back to a more, if I may say so,
9 United Kingdom centric view of persons, which is legal persons. One sees that both
10 in the use of the word "persons", in 6(1), and rather more clearly in 7 where
11 "enterprise" again is defined as "either a person or a group of persons". So one
12 wouldn't need that language if one was talking about the undertaking because
13 persons are united by the common economic functionality that is the core definition
14 of undertaking, but not, I am putting to you, the core definition of person.

15 I suppose what I am saying is how much do we get out of the EU Commission notice
16 at tab 49?

17 **MR BOWSHER:** Well, firstly that you would have expected an intention to move
18 from that to be more clearly flagged by the legislator and the fact that one is using,
19 as it were, deliberately different words doesn't actually change the economic nature.
20 This is a piece of legislation dealing with a set of facts and economic conditions
21 governed not just, of course, by domestic legislation but by other international norms.
22 And the problem is the same problem. The problem, as we referred to in our
23 submission, the problem of cross-subsidy -- internal cross-subsidy -- is a problem
24 identified generally in the context of those broader norms.

25 Now, the fact that this -- the words of "person" and "enterprise" are used rather than
26 "undertaking", in my submission shouldn't detract from the fact that the basic

1 principle that a public authority is capable of subsidising itself to the extent that it is
2 an undertaking shouldn't apply here as well. Just looking at the language, the fact
3 that public authority is a -- the person is a public authority and has public revenue,
4 public funds that it is able to deploy to support enterprises and does so, and does so
5 by supporting that part of itself which is acting as an enterprise, doesn't take itself out
6 of the Act. On the contrary, that falls within the Act -- it may not be expressly flagged
7 as a particular sort of set of facts or scenario contemplated by the Act, but it's
8 certainly not, from a lawyer's point of view, illogical.

9 Just taking myself, if I had access to funds as -- I don't know, in one capacity --
10 I happen to have some responsibility in, let's say, in a public function, let's say the
11 Bar Council -- I have access to funds and I use those funds to subsidise myself in
12 some other activity, I am not somehow exempted from inspection by saying, well, it's
13 all me, just taking money in my capacity as one thing and subsidising my activities in
14 another capacity. I do have, as a person, to -- I am desperately trying to avoid
15 hats -- I do have two separate identities in that sense.

16 The public authority is no different from that. The public authority has public funds, it
17 has the ability to deploy those funds. If a part of that public authority, as a person,
18 operates as an enterprise and it uses that enterprise -- and the enterprise benefits
19 from the funds which it has that public authority, it falls slap bang within sections 6
20 and 7.

21 It is almost too obvious to need to be said. It should have been said more clearly,
22 perhaps, but in my submission there is nothing about using the words "person" that
23 creates some sort of indivisibility that you can't look inside what that person is doing
24 within different activities that that person has. The very fact that section 7 looks at
25 the person to the extent -- that is the wording in 7(1)(a) -- and looks at that part of
26 that person to the extent that that person is engaged in activity, that defines the

1 enterprise as being something different. Probably only a portion of that person is, in
2 fact, the enterprise because it's only that portion, to the extent that the person is
3 engaged, that is the enterprise. So it is the person as a broader thing, a broader
4 entity, that provides the public resources that it has and confers it on that enterprise.
5 Sorry, I have probably taken too long --

6 **THE PRESIDENT:** Not at all, no. This is an important point, Mr Bowsher. But
7 doesn't it lead to this question. Let's get the definition of "enterprise" up in page 170
8 of your bundle tab 10.

9 **MR BOWSHER:** Yes.

10 **THE PRESIDENT:** So an enterprise is -- I stick to 7(1)(a):

11 "a person who is engaged in an economic activity that entails offering goods or
12 services on a market..."

13 Now here, isn't there a difficulty in pigeon-holing the local authority into section 7,
14 because the household waste services that it is engaged in cannot be described as
15 offering goods or services on a market, because first of all the local authority is
16 obliged to do the collecting --

17 **MR BOWSHER:** I am sorry to contradict. It's not obliged to do the collecting, it's
18 obliged to arrange for collecting.

19 **THE PRESIDENT:** Fair enough. But one of the ways in which it exercises its
20 functions --

21 **MR BOWSHER:** Yes, sir.

22 **THE PRESIDENT:** -- is either by doing it in-house or by exporting it to be done
23 outside, but it can properly do it in-house.

24 **MR BOWSHER:** It can properly do it in-house.

25 **THE PRESIDENT:** Second point, it must not charge the person whose waste is
26 being collected for that.

1 **MR BOWSHER:** Yes.

2 **THE PRESIDENT:** How is that offering goods or services on a market? It isn't;

3 would you accept, or how does it work?

4 **MR BOWSHER:** We have agreed that it is not for this purpose.

5 **THE PRESIDENT:** Right.

6 **MR BOWSHER:** For household waste. But that is not -- the household waste is not

7 the beneficiary of the support, it is the trade waste business which is a separate

8 business --

9 **THE PRESIDENT:** Right.

10 **MR BOWSHER:** -- which was and is sufficiently separate and distinct for the EU

11 Commission to have asked for separate accounts for that business, and for the

12 council to have agreed to prepare those accounts. We don't know the detail of how

13 it's done because a lot of this is not --

14 **THE PRESIDENT:** The detail doesn't matter, I don't think.

15 **MR BOWSHER:** All I am saying, if a business is sufficiently separate and distinct for

16 it to be possible to prepare accounts for that business, that is surely a singular

17 marker that it is something that is being run as a separate entity and could be

18 understood as such.

19 **THE PRESIDENT:** Right. So what you have to do is you have to identify a service

20 which is essentially identical in terms of what is being done, as from the agreed note

21 it is quite clear that commercial waste and household waste are, or can be, dealt with

22 in exactly the same way, using the same lorries, the same functions, but because

23 one has an obligation to provide the service somehow and a duty not to charge, that

24 means you have to draw a line between the goods and services being offered,

25 because the commercial waste, is on your label, regarded as part of an enterprise

26 under section 7, whereas the household waste is a function of a public authority

1 under section 6. Is that right?

2 **MR BOWSHER:** Sorry, I am just wondering whether to go back to Walden and go
3 over the environmental protection legislation to provide the statutory backdrop to
4 this. But let me try to deal with it first before going to the legislation.

5 The council is not obliged to collect any waste. It is obliged to arrange for the
6 collection of household waste and may not charge for that. So it is a fact that it uses
7 public funds for that. And it can choose -- it effectively has the option to keep that as
8 a protected business if it decides to collect the waste itself. It is at its option as to
9 what it does --

10 **THE PRESIDENT:** We are talking about household waste.

11 **MR BOWSHER:** Household waste.

12 **THE PRESIDENT:** Okay.

13 **MR BOWSHER:** The commercial waste -- there is a distinction here between
14 commercial waste and trade waste because trade waste is a subset of commercial
15 waste. The council is only dealing with trade waste which at a very rough
16 approximation is that part of commercial waste which can be collected with
17 household waste assets, because there is some commercial waste which involves
18 different requirements and that the council is not doing.

19 The trade waste business is that part of the commercial waste business, broadly
20 speaking, which can be collected using the household waste equipment and
21 contracts and so on and so forth.

22 The council is also obliged to collect trade waste if asked to do so. It is a different
23 obligation, but it is again, as it were, the collector of last resort, if I can put it that way,
24 for these categories of waste.

25 In both of household and trade waste, it is not a natural monopoly. It is not
26 a situation where there is a protected statutory monopoly where the council is the

1 only person that can collect this waste. On the contrary, in both categories it can
2 provide for the waste to be collected by others. It is a matter for it to choose how the
3 matter is dealt with. But for the trade waste it can charge, and can make
4 a reasonable charge.

5 Now, in our submission, that is -- the very fact that it's making a reasonable charge
6 draws a pretty clear line between the household waste and trade waste business.
7 There is a business for which it can make a reasonable charge -- whatever
8 "reasonable" may mean -- and there is a business for which it can, and it says it has
9 prepared separate accounts. That must be, in a real business sense, a separate
10 business. All that is needed to qualify as an enterprise is that there is a person who
11 is engaged in an economic activity offering goods or services to the extent that the
12 person is engaged in such an activity. But that activity is the trade waste business.
13 That's how we have pleaded it in various ways, and that is the activity which it has
14 been able to provide accounts for.

15 **THE PRESIDENT:** Presumably you could provide accounts for the household waste
16 business, couldn't you?

17 **MR BOWSHER:** I don't know. I simply don't. I am not in a position to say.

18 **THE PRESIDENT:** Okay.

19 **MR BOWSHER:** Maybe you could. Maybe you could, and maybe there could be
20 a separate entity which might not be an enterprise, but our point is that there is
21 a separate enterprise for the trade waste business and that's the enterprise which we
22 are focused on.

23 **THE PRESIDENT:** But why wouldn't it be -- why couldn't the same argument apply
24 to household waste?

25 Let's assume you can have separate accounts for that side and you are offering
26 essentially a service for free, but it is still a good service, you are cross-subsidising

1 that by allowing the trade waste to assist in the costs of the collection of household
2 waste, and you are therefore not going out into the market and paying commercial
3 rates for the collection of household waste. Instead, what you are doing is you are
4 allowing what you can charge for trade waste to subsidise the collection of
5 household waste. So why is the household waste regime not susceptible to attack
6 under this regime as well?

7 **MR BOWSHER:** It's not the attack we are making. It could be, logically -- I suspect
8 logically it could be. You would have to decide -- it would involve deciding that the
9 council is offering goods or services on a market, and it would involve deciding that
10 the provision of household waste collection is a provision of services on a market.

11 Now, for today's purposes we have agreed that's not the basis -- that's not the thrust
12 of our challenge. In a sense, whether or not it could or couldn't be doesn't change
13 the fact that these are clearly distinctly different elements of the business. That's the
14 way in which the council has treated its business when, for example, in its interplay
15 with the EU Commission and so on and so forth, and that is the business that it's
16 provided accounts for.

17 I can see why it might be that way and, indeed, I am not sure I was going to go into
18 this sort of detail, but you may have had a look briefly at the WRAP document. You
19 may recall it's a sort of business plan which the council relies upon as a way of
20 justifying the way it charges. One of the rhetorical flourishes, if I can put it in it there,
21 is that perhaps councils can use trade waste as a way of subsidising household.
22 Whether it does it one way or the other will depend on the economics of those two
23 businesses.

24 We say that in principle there is a subsidy, whichever way you look at it. The point
25 here is that it is not -- it is that there are public funds being used to subsidise the
26 trade waste business is the challenge that we make.

1 **THE PRESIDENT:** I see, thank you.

2 **MR BOWSHER:** For today's purposes, we can't really get any further than that in
3 terms of the economics, because it's agreed that the council does not know further
4 than that. I think that may be slightly exaggerated, I am sorry, but there is a limit to
5 the knowledge of the level of facts that are before the tribunal.

6 **THE PRESIDENT:** Indeed. As you said at the beginning, here we are much more
7 concerned with the in principle question of whether there was an improper failure to
8 ask about the subsidy principles. What the answer might be, if those subsidy
9 principles should have been looked at, is not a function of today's or tomorrow's
10 hearing.

11 **MR BOWSHER:** In our skeleton, we -- I wasn't proposing to take the tribunal to it,
12 there is, as you know, in our skeleton a reference to the OECD document on
13 subsidies conditions which has a much fuller treatment of cross subsidies and --
14 I was not proposing to open it now because it is more illustrative of the problem and,
15 of course, why subsidy is a problem. It is only relevant from an interpretive point of
16 view that plainly -- with the OECD, that is clearly part of the understood backdrop to
17 which these problems of subsidy arise, and cross-subsidy is a well-understood
18 category of subsidy, and internal cross-subsidy as much as any.

19 There is certainly nothing here which -- sorry, I am just being passed a useful note.
20 For what it is worth, I should just finish the first thought before moving to the second.
21 The OECD document simply illustrates that cross-subsidy, from an economic point of
22 view, is understood to be just a category, a class of subsidy problem, and it is not
23 excluded -- indeed it falls naturally, we say, within the legislative language in the way
24 that I hope that we have made clear.

25 Going back to the other point you just made about the status of the different
26 businesses, the council makes clear the basis upon which we are proceeding today

1 in its skeleton. I don't think you need necessarily to pull it up. It is page 12 of its
2 skeleton, paragraph 28(iv), and they just rehearse that:

3 "It is common ground that in collecting and disposing of household waste the council
4 acts as an authority rather than as an enterprise."

5 Now, that's the common ground on which we have been proceeding in this case.

6 Now, something of -- the premise of your question is that that may not be right.

7 **LORD YOUNG:** Can I just ask? I am trying to understand what the key elements
8 are which allow you to say that there are two activities here and not a single activity
9 when they are out collecting material together, why you say you can divide the two.

10 As I understood what you said a few minutes ago, part of that is separate charges
11 and possibly separate accounting. Is there any more than that, though? Do you rely
12 upon any distinction in the statutory wording for household waste compared to --

13 **MR BOWSHER:** I was going to come on to that right now. Can I just make a note to
14 come back to where I reached?

15 **LORD YOUNG:** Yes.

16 **MR BOWSHER:** Let me move on.

17 **PROFESSOR ULPH:** Before you do that, could I just come back the question
18 I raised before, going back to section 7(2)?

19 This says:

20 "For the purposes of this section an activity is not to be regarded as an economic
21 activity if or to the extent it is carried out for a purpose that is not economic."

22 So that the issue here is about purpose, not just the nature of the activity or whether
23 it charges or doesn't, it's about the purpose of the activity.

24 Going back to one thing you said about trade waste, the council was obliged to
25 collect it if asked to do so. Now, a commercial enterprise would have no such
26 obligation. They could choose whether or not to collect waste if it thought it could

1 make a profit in doing that. So to that extent, a commercial enterprise might act in
2 a very different way from the trade waste collection section of Durham County
3 Council.

4 **MR BOWSHER:** Maybe the two points actually come together, if I come onto the
5 legislative context there.

6 It would be helpful, perhaps, to have the agreed statement of facts open, because
7 that summarises the position of the parties. That is in the hearing bundle at tab 4. If
8 we have the statement of facts to one side -- before I put that legislation away, I was
9 going to go through the legislation with the statement of facts with a sort of checklist
10 next to you. I think that's the way we can follow through what the context of this
11 issue is.

12 Then the duties are then described in the agreed statement of facts from paragraphs
13 2 to 11.

14 **THE PRESIDENT:** Yes.

15 **MR BOWSHER:** That is reflected in the legislative scheme which is set out in the
16 Environmental Protection Act 1990 from tab 3. Because of the way we presented
17 them in our skeletons, I am afraid the EPA gets split up in a rather haphazard way,
18 but it's all there, you just need to find it in different places.

19 Section 45 is at page 63 of the authorities bundle.

20 **THE PRESIDENT:** Yes.

21 **MR BOWSHER:** I do have your point about section 70 and the Subsidy Control Act
22 very much in mind.

23 That is the starting point for the duties which are referred to in section 45(1)(a), the
24 duty to arrange for the collection of household waste, and the duty, if requested, to
25 collect any commercial waste or to arrange for the collection of the waste. And that's
26 an important additional qualification.

1 The council does not actually have to do any collection itself. All it has to do is
2 arrange for the collection. You could have a council with no waste collection facility.
3 It will presumably only -- and this is our primary answer to your point on section 7(2),
4 that no council needs actually to collect any waste as long as it has made
5 appropriate arrangements for that collection by someone.

6 The collection activity of that entity is an economic purpose. Whoever does that
7 collects the trade waste for remuneration. If it's the council, they do it for
8 a reasonable charge, which is not further statutory defined other than as
9 a reasonable charge, but it is presumed to involve -- it will certainly cover cost plus
10 some other contribution.

11 If it is a private entity, it will be a private entity competing in that market for that
12 business. In making that reasonable charge, if the council chooses to take on the
13 trade waste collection itself, it is operating in that market and must seek to compete
14 in that market as an entity, and its activity is inherently economic.

15 There would be no -- this is to some extent argued -- the entity has to compete, and
16 indeed this is what the council says it does -- it seeks to win -- sorry, the council says
17 it is not now, but it certainly was once going out to market itself to gain contracts to
18 get business. It now says it's changed its stance somewhat, but that its position is
19 that it is seeking to compete against private entities.

20 When, you as a producer of trade waste, have that trade waste, you either make an
21 arrangement because you think it's in your interest to do so with a private entity,
22 such as my client, or you ring up the council and say, I have trade waste I would like
23 you to arrange to deal with it. Now, the council can then say "that's all right, I will
24 make a reasonable charge". Who actually does the collection, whether it is the
25 council's own operation or some private entity, is not actually specified by the
26 legislation. It is simply for the council to ensure that, having been called and said

1 you need to make arrangements for our trade waste, it has someone come along
2 and do that.

3 It is the parameters that it presumably uses to decide who does that will be
4 inherently economic. It won't be operating an internal waste collection function
5 simply to lose money for the council. And its purpose in doing so itself will
6 presumably be, at the very least, to do it because it thinks that it is more cost
7 effective to have that internal function.

8 So that entity has to participate in the commercial environment in which there are
9 other alternative providers, and its activity as an enterprise, we say, is plainly
10 economic. It is not simply providing the waste collection service because it's
11 required to do so. It is not plainly doing so simply because -- because it has an
12 environmental purpose to keep the streets clean, it is doing so because it is required
13 to meet demand and to make a charge for it. And that is inherently economic.

14 **THE PRESIDENT:** Going back to the household waste example where you can't
15 charge the consumer, let's suppose the -- which is not this case -- the council
16 decides that it is going to contract out its household waste collection service, and so
17 it goes into the market and decides that it is going to pay over the odds, twice the
18 commercial rate, to a third party provider. Presumably you would say that that was
19 an economic activity caught by section 2 as a subsidy? Or would you say it wasn't?

20 **MR BOWSHER:** Well, I would first say it's not the case I am here to meet. Sorry to
21 be --

22 **THE PRESIDENT:** No, no, that's fair enough.

23 **MR BOWSHER:** Is it capable of being? Yes, it would be possible, obviously, to
24 contract with someone -- that would be classic, certainly under EU state aid law,
25 there is certainly plenty of case law that suggests overpayment for a public contract
26 could be state aid and there is no reason in principle why overpayment for a public

1 contract for the collection of household waste should not also be subsidy in exactly
2 the same way. That would be plain vanilla subsidy, and there's no reason why it
3 shouldn't be. But that would be subsidy to --

4 **THE PRESIDENT:** It would be to the enterprise --

5 **MR BOWSHER:** To the enterprise that receives it, whoever it happens to be.

6 **THE PRESIDENT:** Yes, yes.

7 **MR BOWSHER:** The procurement activity would not be economic, but the activity
8 that it is procured by that process is. The service that, as delivered, would be
9 economic. Maybe that's the nub of the point. That the distinction -- going back to
10 your -- sorry, it has taken a while to get there -- the distinction may be around
11 section 7(2) because the statutory function is the arranging here, so the process of
12 procurement is a non-economic function, because that is deliberately -- that is what
13 has to be done in order to fulfil the statutory function.

14 The delivery of the service, whether it's household or trade, at least theoretically --
15 and I don't want to cut across too far the common ground on which we have come
16 here today, but at least in theory the actual delivery, the operation of the contract and
17 the delivery of the contract, would plainly be an economic function.

18 If that economic function, let us suppose, happened to be -- it doesn't actually matter
19 whether it is a function operated by an operating unit of the local authority itself, or by
20 an adjacent local authority, if it is, in fact, engaged in business for remuneration.
21 And that is what is happening here.

22 **THE PRESIDENT:** Thank you.

23 **MR BOWSHER:** That is why it is important that -- and it will become important when
24 we look at the case law -- the extent to which -- there is no protected monopoly in
25 provision of waste collection services. There is an obligation to arrange for those
26 services, but even for household waste there is no actual statutory monopoly. It's

1 not like the Post Office where you have a universal obligation, this must be done by
2 the Post Office, or whatever. This is you are the provider of last resort and this is
3 how it is going to be paid for.

4 There is a meaningful distinction between household and trade waste. The fact that
5 there are different payment means is sufficient in itself as a badge of identifying
6 those two businesses. And presumably also, to pick up the hypothetical example,
7 because of the way in which it is done, the fact that you could contract out separately
8 as well will illustrate that there could be separate businesses and that here we have
9 a separate enterprise.

10 That's not to say that you -- of course, you couldn't also have -- our point is here that
11 you also have some joint components. So, for example, if you have a contract for
12 disposal, we are not -- there has been some points on the pleadings about how --
13 what it is we are attacking on disposal. We have always pleaded -- and it is in our
14 notice of appeal -- that one of the features of this subsidy is that the council has
15 a disposal contract and it shares the costs of that contract across the two contracts.
16 And that is one of the costs. That's a different point from -- sorry, that is simply
17 identifying that you could share a contract across the two businesses but the fact
18 that, for example, the council may be able to take advantage of a contract which
19 benefits from household volumes and therefore may be able to get a different pricing
20 arrangement because it can meet different guaranteed minimum volumes and so on
21 and so forth with the large facility it has to go to, that is just a feature of the
22 arrangements that it makes.

23 But it doesn't mean that they are all one business. It just means that they are putting
24 the waste in two different places -- sorry, putting waste of two different categories
25 into one disposal contract.

26 **THE PRESIDENT:** Yes.

1 **MR BOWSHER:** I was just looking -- so that, I hope, addresses the statutory
2 context, I hope. I don't know if I have left unresolved -- I was trying to deal with two
3 questions at the same time, and there is a danger I answer neither of them.

4 **LORD YOUNG:** I suppose -- I was wondering on a very simple micro level, if we just
5 imagine a pick-up for one commercial company.

6 At what point does the council move from acting as a public authority in your
7 scenario to actually acting as an enterprise? When the telephone call comes in, are
8 they acting as a public authority then, because they have the duty to deal with the
9 request, and is it only when they then collect and charge that that becomes seen as
10 the activity economic activity? Is it possible to see this in a timeline where one
11 changes from acting as a public to acting as an enterprise?

12 **MR BOWSHER:** I think it is a functional test rather than a timeline test.

13 **LORD YOUNG:** Yes.

14 **MR BOWSHER:** It may be that one can identify some separate functions at different
15 points in time, but some functions will be -- there will be two different functions
16 simultaneously.

17 The arrangement does seem to be the statutory function, but once the council has
18 decided -- sorry, once it is determined that this is going to be dealt with by the
19 council rather than any other way, that is then it having exercised its choice to pick
20 up trade waste using its enterprise.

21 Of course, it could -- and the point that may be said, of course -- it could on that
22 same journey be going to pick up some household waste as well.

23 **LORD YOUNG:** I don't think that really matters that much.

24 **MR BOWSHER:** It could be doing both at the same time.

25 **LORD YOUNG:** Yes. Even though the payment for that service is set out in the
26 statute as well as being a reasonable sum, it doesn't matter that it's a payment

1 guided --

2 **MR BOWSHER:** It's just a payment.

3 **LORD YOUNG:** Just a payment.

4 **MR BOWSHER:** The only case law that really goes to what governs that is the
5 Western Riverside decision. It may be worth just pulling that out very briefly. It is
6 authorities bundle, tab 25, page 509.

7 **THE PRESIDENT:** Mr Bowsher, would that be a convenient moment?

8 **MR BOWSHER:** I always bring blotting paper to court, and that probably is why.
9 Yes, that would be a convenient moment, thank you.

10 **THE PRESIDENT:** We can mop up in a variety of ways.

11 **MR BOWSHER:** Mop up matters arising.

12 **THE PRESIDENT:** We will rise in that case for ten minutes. Thank you very much.

13 **(11.42 am)**

14 **(A short break)**

15 **(11.55 am)**

16 **THE PRESIDENT:** Mr Bowsher.

17 **MR BOWSHER:** Let me continue with the strand that I was going on --

18 **THE PRESIDENT:** Of course.

19 **MR BOWSHER:** I will at some point have to go back. There is a little bit of my
20 notes that I will have to come back to about the operation of the Act and --

21 **THE PRESIDENT:** Take your own course. We are very sorry we have been
22 dragging you out of your way.

23 **MR BOWSHER:** Not at all. Don't bother. It is a useful -- it is a note that I may have
24 to come back to at some point.
25 Just to sweep up a couple of points that arise under section 45 before I dramatically
26 brought things to a stop.

1 Just to note that, of course, in saying that there is an obligation to collect household
2 waste, there are, of course, exceptions to that. Under section 45, you will have
3 seen, for example, if it is inaccessible or unduly costly. There is a cost element in
4 the obligation to pick up household waste, but I don't think I need to go further than
5 that, simply because it could be too costly and the council could refuse to take it up.
6 Secondly, and more importantly and more pertinently, the only case which we both
7 refer each other to, Western Riverside, doesn't really take the matter very much
8 further. It is in the authorities bundle at tab 25.

9 **THE PRESIDENT:** Yes.

10 **MR BOWSER:** It's a first instance decision of Mr Justice Evans-Lombe, R on
11 the Application of Western Riverside Authority v Wandsworth Borough Council.
12 I was not proposing to do more than refer you to the headnote at page 509. This
13 was a situation where you can see the claimant was the waste disposal authority for
14 various London boroughs. Wandsworth was the waste authority for its area under
15 a duty to collect commercial waste if requested by waste producers -- we know all
16 this -- and could impose a reasonable charge. Middle of the headnote, it approved
17 the setting of charges for the collection of commercial waste. These prices were
18 based on the cost of collection and disposal of commercial waste from 10 per cent of
19 its pre-existing customers. Consequently, the cost of disposing was significantly
20 greater than had been charged under previous waste collection arrangements.
21 The starting point, whilst it is not terribly helpful, it is a challenge to a charge that was
22 said to be excessive, rather than too low. We don't need to get into the politics of it
23 all, but it is plain when one reads the judgment what the politics of it all was. Plainly
24 Wandsworth was trying to shift collection of waste business to others and the
25 challenge was well you can't be charging that -- the premise was clearly that you are
26 charging too much. And Mr Justice Evans-Lombe then deals with that in the

1 judgment, but it is very neatly summed up in the headnote, paragraph 2:

2 "The court must not attempt to substitute its own judgment for what would constitute
3 a reasonable charge but [had to review the] exercise of [its] discretion to [set] such
4 charges on Wednesbury principles."

5 "It was reasonable for Wandsworth to set its charges for the collection so that they
6 covered, so far as possible, the cost of the provision of the service. The setting of
7 the prices was not done in bad faith or as a result of procedural irregularity and was
8 not unreasonable in the Wednesbury sense and therefore no basis for challenge."

9 That's all fine, but nothing there, in my submission, sets across the application of the
10 Subsidy Control Act. The Subsidy Control Act didn't exist then, whether or not state
11 aid law would have been engaged at that point is really neither here nor there. The
12 fact is there is nothing there which somehow displaces pre-emptively the existence
13 of a separate statutory regime governing the way in which this business was charged
14 for. So we say Western Riverside doesn't really take us that much further.

15 The council is under a duty to arrange for disposal. As I have said already, it has
16 always been a part of our case that one of the -- part of the economies of scale
17 which the council benefits from are the way in which it is able to deal with its disposal
18 costs, and we dealt with that in our notice of appeal at paragraph 21(a), at page 14
19 of the first hearing bundle. I am not sure you need to pull it up, but it's there.

20 **THE PRESIDENT:** No.

21 **MR BOWSHER:** Those are obviously potentially expensive arrangements. But
22 none of this is, as I have put it, a monopoly protected by statute. There is no sense
23 in which the council is given some protected right to do this or obligation to carry on
24 this business, but it does have certain underlying statutory obligations.

25 It remained open to the council to decide how the services were to be delivered and
26 part of that choice is to arrange by retaining either or both of the household or trade

1 waste businesses as a business which it provides for out of its own operations. That
2 is its choice under statute. The distinction between the two is the way in which the
3 charging is dealt with.

4 The practical implementation -- it may not be the only distinction, but that is a key
5 distinction -- the practical implementation of that framework is described in our
6 agreed statement of facts from paragraphs 12 to 26. That's at page 74 of the
7 bundle. I know you will have read this many times, but it is perhaps just
8 worth reading it, albeit perhaps at speed, the council has elected to perform the
9 collection of both functions.

10 **THE PRESIDENT:** Yes.

11 **MR BOWSHER:** So it is collection.

12 **THE PRESIDENT:** Yes.

13 **MR BOWSHER:** It doesn't pick up industrial waste, and I have touched on that.
14 There is then some numerical points about what it does and doesn't do. It doesn't
15 collect waste outside County Durham. It doesn't collect commercial waste in
16 receptacles -- essentially the commercial waste it picks up, the trade waste, is that
17 which corresponds to that which household waste -- the same assets could be used.
18 17, it uses the same 88 vehicles and the same employees to collect all household
19 waste, and the majority of the waste collected by it. Vehicles used by the council to
20 collect both household and commercial waste are not equipped with weighing
21 equipment. The employees engaged in the collection of both strands of waste do
22 not maintain records showing the time spent on the different two strands of
23 collection. A minority of commercial waste is collected by the council using
24 multi-purpose vehicles that are used for other functions other than household waste.
25 Just pausing there, so components that are common would include employees,
26 vehicles -- there is a lot more about vehicles in our evidence. I wasn't proposing to

1 take you to Mr Hawthorne's witness statement, but you know he deals in some detail
2 with notional figures, to give you an idea of the sort of costs that we are talking about
3 here. These are significant costs that are being shared across the two strands, and
4 there are the disposal costs which I have already referred to.

5 Then paragraph 21 onwards: how the council carries out its waste disposal
6 functions. The vast majority of both household and commercial waste is taken in
7 refuse collection vehicles to four waste transfer stations. They are bulked up --
8 sorry, again I am doing this at speed -- the bulked up waste is taken from the waste
9 transfer stations to various premises operated by third parties and SUEZ and Biffa
10 are two of the key destinations. Plainly there are contracts for disposal at those
11 locations.

12 The third parties operating the disposal facilities charge the council for those
13 services pursuant to a contract between them and the council. The council disposes
14 of the waste pursuant to the same contracts with those third parties, they are set on
15 a per tonne basis. The council has made arrangements for the residents of County
16 Durham to deposit household waste at certain waste recycling centres. There is
17 then further information about the waste recycling function in paragraph 26.

18 That's the agreed factual, as it were, application of these obligations. That, we say,
19 is what gives rise to the subsidy in this case, because it is under no obligation to
20 actually make the waste collection. I am sorry, I am in danger of repeating myself. It
21 can make arrangements for others to do this. This will involve -- if it does it itself, it
22 must provide for -- it must have the assets, the staff, the contracts, in particular the
23 disposal arrangements to do that itself, and to the extent that those arrangements
24 meet both the trade waste function and the household function, then those assets,
25 contracts, staff are covered unambiguously by public funds which come from the
26 household function.

1 There is plainly a market for commercial waste collection, regardless of how we
2 characterise the household market and plainly that includes, in this context, a trade
3 waste stream. We divide out trade waste here simply because that is the way in
4 which the council does it. We are not making some point about relevant markets or
5 anything. We are simply saying there is commercial waste. For this purpose we are
6 only dealing with that trade waste which is actually dealt with by the council's
7 enterprise. It doesn't matter whether as a matter of economics there might be some
8 other market engaged, and the nature of the market for the household waste is again
9 neither here nor there. All that matters for the purposes of our challenge is that the
10 household function is the recipient of those public funds which then have the effect of
11 subsidising the trade waste business.

12 So, the effect of that, in terms of the costs overall are summarised from 27 to 30 of
13 the agreed statement of fact.

14 **THE PRESIDENT:** Yes.

15 **MR BOWSHER:** "If the council..."

16 And again it is page 76 of the bundle.

17 "If the council as a waste disposal authority were to arrange for the separate disposal
18 of household waste and commercial cost collected, it would incur higher disposal
19 charges per tonne of commercial waste disposed than the disposal charges it
20 currently charges per tonne of household and commercial waste disposed. The
21 council has not assessed and does not know what the disposal charges per tonne of
22 commercial waste collected would be in the scenario described."

23 The same point arises for collection:

24 "If the council as the waste collection authority were to arrange for collection by
25 wholly separate vehicles and employees than those used for collection of household
26 waste, it would incur higher costs per tonne of commercial waste collected than the

1 costs it currently incurs per tonne of household and commercial waste collected. It
2 has not assessed and does not know what the costs of collection per tonne of
3 commercial waste collected would be in that scenario."

4 **PROFESSOR ULPH:** Can I just ask a question of clarification? To what extent
5 would that mean that the costs of collecting household waste would also be higher, if
6 they had to separate out the two businesses, or the two activities?

7 **MR BOWSHER:** The short answer is that that would be for the council to say, and
8 the council says it doesn't know. I am sorry, that is a slightly glib answer, but it is
9 also -- to answer your question, I would have to step into the shoes of the council in
10 a way that I don't think it would be proper for me to do so.

11 **PROFESSOR ULPH:** Okay. Let me frame the question differently. Would you
12 accept that there could be a higher cost of collecting household waste were you to in
13 some sense separate out the two activities as you envisage --

14 **MR BOWSHER:** It doesn't need to be, no. It doesn't need to be. Because what we
15 are concerned with here is the charge that is made for the trade waste collection.
16 The council can continue, we say, to -- yes, I mean, the council can continue to
17 operate its trade waste business. We are not saying it shouldn't do that, nor have we
18 said it should be driving around and separating out its routes and only driving the
19 trade waste route and then a household waste route pointlessly.

20 What we have said is that it should not be using its household waste assets and
21 contracts, that public funding, to depress the charges that it makes to the producers
22 of trade waste for the collection of trade waste. So in principle it need have no effect
23 upon the cost of household waste collection. It can carry on -- whatever the
24 economic effects are of having these two businesses, it can carry on doing that. If
25 there is an economy of scale from co-collection, I think is the phrase, it can carry on
26 doing that. We are not seeking to interfere with that.

1 At a level of rudimentary economics, it seems highly unlikely that it makes much
2 difference because the relative volumes are -- of the two businesses are 95 per cent
3 household and 5 per cent trade. So it seems inherently unlikely that that's the
4 direction the subsidy works. But that's as far as I could go.

5 **PROFESSOR ULPH:** Thank you. That's been helpful.

6 **MR BOWSHER:** Again, it would require more economics to actually give a factual
7 answer to that, or analysis.

8 **PROFESSOR ULPH:** Thank you.

9 **MR BOWSHER:** Every year the charges for trade waste collection are fixed by the
10 council, and we have some of those in the bundle. If one goes to -- this is the bundle
11 of documents, not the bundle of authorities. Tab 10, page 136, I think that's the first
12 occasion we see the council fixing the trade waste fees. I think the significance of
13 this would seem to be that this was being done after the reorganisation of the
14 council. So it's the first occasion that this entity got to exercise this function. There
15 is some reference here to discussion about how the different entities operate.

16 The trade waste charges are covered at page 145. Sorry, I should introduce it better
17 than that. This is a note, a report from the Corporate Director Neighbourhood
18 Services to the council. I don't think we actually have the decision itself, but I think
19 we take it to be assumed that this was the report that was acted upon. I don't think
20 we actually have a minute of the actual decision. The discussion of trade waste
21 charges is from paragraph 91 to 98 of that document. It is on page 145.

22 This is implementing the statutory power we have already seen under section 45 of
23 the EPA to set a price. It is an implementation of that power, and at least until
24 revoked or replaced, a commitment as to the level of charge, it is the level of that
25 charge that supports the trade business if and to the extent that it undercharges for
26 the delivery of that service and funds that undercharge by using assets, contracts

1 and so forth which have been overpaid for.

2 We don't have each and every occasion when this decision is taken. One infers that
3 it is done on an annual basis. The next version we have it is at 2013, tab 12 of the
4 bundle, at page 162. There is a discussion in paragraphs 8 to 10. We don't then
5 have another version of this pricing until rather later. It is a document which we only
6 received in the course of these proceedings.

7 The significant, perhaps, event for the purposes of these proceedings was that there
8 was then our complaint to the EU Commission concerning this operation, which we
9 will come back to.

10 The next time we see the pricing is at tab 38. Sorry, this is the context. We made
11 the complaint and we only received a record of what happened in the discussions
12 between the council and the EU commission in the course of our state aid complaint
13 after the defence had been served in these proceedings and we'd made an
14 application to the tribunal for this, and the only record we have is at page 330. It's an
15 internal email within Durham recording what happened when Durham County
16 Council went with UK Government representatives to see the commission
17 concerning our complaint. For reference, the complaint itself is at tab 34, but I wasn't
18 going to take time reading it now.

19 There is an introduction in that email -- this is from Mr Sherratt, and you've had
20 evidence from him to others within the council as to what had happened -- then it
21 says, third way down:

22 "This notice has been compiled with input from James Etherington. Please note this
23 is not formal legal advice, however, and further legal advice is likely to be required.
24 First, the EC representatives accepted the assertion that domestic household waste
25 collection was non-economic and there is at least in this member state not a market."
26 That, to some extent, is the premise on which we have all proceeded, despite your

1 observations this morning.

2 Paragraph 2:

3 "We suggested that the commercial waste collection which is economic and there is
4 a market was ancillary in that our main service was to 423,000 households and the
5 trade waste largely collected in passing was only 2,976. They did not, however,
6 agree with this argument as they noted that this is an area where there was an active
7 growing competition and we have about 20 per cent of the market. They accepted
8 that in some areas it may be uneconomical for businesses to collect from, however
9 we need to be able to demonstrate this in some way and in any event our service
10 was county wide. More crucially, if we were basing our charges on cost recovery
11 only, which we currently are, then they felt that gives us a competitive advantage
12 compared to businesses that have to make a profit."

13 Then they identify what they thought needed to be done from a state aid perspective.
14 Firstly, there should be clear separation of accounts. That's paragraph 3(1) and then
15 reference to profit, and then quite a lot of what follows is redacted, presumably,
16 I think, we have been told for privilege purposes.

17 **THE PRESIDENT:** Yes.

18 **MR BOWSHER:** That -- I should have made the point, of course -- that was
19 September 2019, the clock was ticking on our engagement with the EU Commission
20 services at this stage. Necessarily there is a little bit more we will come on to.

21 It is that engagement, though, that leads to the next pricing point, if I can put it that
22 way, which is at tab 43, page 366, which evidently follows on from the engagement
23 the council had with the commission, because it starts that they note that
24 a separation of accounts has been undertaken to clearly identify all commercial
25 waste collection and disposal costs, and set a charge for customers that includes
26 a small profit element.

1 Then there is a narrative in the executive summary to the various proceedings
2 between my client and the council. Firstly, in the High Court, and then regarding the
3 state aid complaint. Then a reference which is followed up, which we have already
4 seen reference to, about the lack of records in paragraph 6 of the note.

5 The implementation of that is then dealt with from page 370. There is a fair bit of
6 repetition. The relevant bit is perhaps on page 371 insofar as one can see what it
7 says. Again, part of this is redacted apparently for privilege, although it is elsewhere
8 said that this is an open document. I'm not quite sure how that works, but anyway.

9 Paragraph 21:

10 "The actual separation of accounts is not as easy as it first may seem as there are
11 no onboard weighing devices to know the exact tonnages received from the
12 business. Nor is there precise time management measurement."

13 Again this is all reflected in our agreed facts of:

14 "What we do have, however, is average industry approved tonnages for trade waste
15 bins to estimate their contribution and we can apportion this to our full costs of
16 collection and disposal, including staffing, vehicles, depots, service overheads and
17 central administration costs. Any staff or vehicles wholly associated with the
18 collection of trade waste are costed in full against the cost of delivery."

19 Then there is a calculation working through which leads to a provision in 29 of
20 "Implications for the 2020/2021 charging". Plainly, the state aid proceedings led to
21 some internal reorganisation and contemplation about how it would deal with
22 matters. It reads slightly discordantly. Perhaps, a little bit later with the line that had
23 been taken in correspondence with us in the pre-action proceeding that
24 correspondence before the High Court claim which you have at page 333. At 334,
25 the council reiterated its position that it was not obliged to keep separate accounts
26 but it was going to do so anyway.

1 As you know, those High Court proceedings were brought as a damages claim and
2 they failed -- well, partly damages claim, but they failed partly because of the event
3 of Brexit, because it was said we wouldn't have been able to get relief in time, and
4 partly because the damages claim it was found by the Court of Appeal did not
5 disclose a sufficiently serious breach -- or could not disclose a sufficiently serious
6 breach to qualify it as a damages claim under EU law. So none of that claim actually
7 engaged with the question as to whether there was or was not state aid.

8 What we then have going from the report on 18 March is a decision which, at
9 page 373, goes through this process of separating out the accounts to fix the
10 reasonable charge, but proposes that the same prices be used from the previous
11 year and that they be rolled on. That's in paragraph 29 of page 373, the 2019/2020
12 prices are rolled on into 2020/21, and the council should continue to monitor costs
13 year on year to ensure that profit is at an appropriate level. They state in their
14 conclusion, the proposition which we disagree with, that they are operating without
15 subsidy.

16 If we then turn to page 430, we have the costings decision taken then, or the pricing
17 decision taken then, which is a decision set out, or a recommendation for a decision
18 at paragraph 5, which simply says:

19 "All fees and charges must be reviewed on at least an annual basis and adjusted
20 where appropriate."

21 **THE PRESIDENT:** Yes.

22 **MR BOWSHER:** That doesn't say a great deal more.

23 Then, on page 432, then there is simply -- this is simply a document in which
24 a number of charges, including trade waste, is dealt with. A whole range of charges
25 under different regimes and trade waste is simply dealt with now apparently on a sort
26 of annual basis, as you can see, with pest control, bereavement services, and so on

1 and so forth, there is clearly just an annual process where the trade waste charges
2 are being dealt with on that annual basis. And the actual trade waste charge is dealt
3 with at page 434.

4 The same again, March 2022, a very similar document with the actual trade waste
5 charges at page 455.

6 **THE PRESIDENT:** Yes.

7 **MR BOWSHER:** The next document, pricing document, would be the document
8 which is from this year, which is the decision which we challenge. It's the document
9 that we learned of as a result of these proceedings being brought. I am sorry, I may
10 have misspoken earlier.

11 Before doing that, it is perhaps worth just spending a moment looking at the WRAP
12 document, because that is the document referred to in the agreed statement of facts
13 as justifying the approach taken in the costings. It particularly is said to justify the
14 way in which averaging of costs is done.

15 That is in the bundle at 33, page 230.

16 **THE PRESIDENT:** Yes.

17 **MR BOWSHER:** This is a document -- you can see it is headed "A guide for local
18 authorities to help determine ..."

19 Et cetera, et cetera. You can see what it says on the front page. WRAP is
20 a document called: The Waste and Resources Action Programme. I don't think we
21 need to get too far into what its composition is, but we can see from page 234 that
22 certainly this document is the product of input from a number of entities, a lot of them
23 local authorities, to try to deal with the problem of costing or how to deal with trade
24 waste collection and its costing and management.

25 There is, at page 232, the realisation or the noting at five lines down that there may
26 be -- the subsidy or support of the two strands, household and trade, may work both

1 ways. You can see that five lines down headed:

2 "In times of austerity, many local authorities have identified this and seized the
3 opportunity to use revenue from providing waste services to help commercial
4 customers to offset those for their residents."

5 Now, of course, it could be going both ways. The subsidy could operate both ways.
6 But it notes at the beginning that there can be such support, indeed that seems to be
7 the premise.

8 There is a reference at the bottom of the page to the VAT position, which I will come
9 on to later. We say not relevant to this case. There is plainly an issue about
10 whether local authorities may charge VAT or are required to charge VAT for their
11 trade waste business, which we will come on to. That doesn't really bear on whether
12 or not there is or is not a subsidy, simply that would be a question of the economics
13 as to how the market operated.

14 **THE PRESIDENT:** Yes.

15 **MR BOWSHER:** The premise of this document is to explain how local authorities
16 may enhance their co-collection, if I can put it that way, and clearly to generate more
17 trade waste, if that is what they choose to do, and to account for it appropriately. It's
18 not an official government document, but it is clearly a document which is used as
19 a tool and it's referred to, as the WRAP tool in various places, as a guide not only to
20 charging but other matters.

21 It starts from the premise that you would and could have co-collection of different
22 strands of waste, and to encourage that you might seek to market the ability to pick
23 up trade waste, and that is encouraged in the document at page 249. At the top,
24 there is a whole list of problems to overcoming in order to get SME recycling and
25 marketing is identified under the headings "Contracts and centrally managed
26 contracts", to explain how you would go about trying to encourage people to use the

1 council's trade waste business. This whole premise, as I say, is explaining to
2 councils how to develop their trade waste business. This table from 246 to 249 is all
3 about the barriers to what's called SME recycling. It is clearly about speaking to
4 the -- engaging with businesses to encourage that strand of business.

5 Section 4 of this document operates effectively as an operational business plan
6 explaining how a local authority should make the most of that opportunity. How it
7 should plan its operation, the model that it should adopt, and that is explained in
8 detail under the heading "Service Model Options", page 266. It explains how you
9 might deal with different types of waste collection in different ways. You might, for
10 example, as it is highlighted in 4.3, you might have more frequent collection for
11 commercial business rather than for household business so as to encourage people
12 to come to your local authority function.

13 There is then a discussion from page 270 as to why onboard weighing of waste
14 onboard the trucks is desirable, because it creates a more accurate basis on which
15 to charge. At the top of page 271, there is a case study relating to Oxford City
16 Council illustrating that if you don't weigh the waste, you may find yourself
17 undercharging because the case study with Oxford demonstrated that people were
18 getting away with putting in -- effectively overfilled bins and not paying sufficiently for
19 their trade waste.

20 All of this -- this is the document which is referred to in the agreed statement of facts
21 as being the tool on which the council --

22 **MR ROBERTSON:** Excuse me for interrupting. This document is guidance. It's not
23 the tool referred to in the agreed statement of facts. The tool is to be found at
24 tab 13, page 170. Just to avoid any confusion.

25 **THE PRESIDENT:** Thank you.

26 **MR BOWSER:** Anyway, this is really the context for the way in which these

1 businesses operate. Plainly this is the document which introduces the other tab 13
2 document, and is the business plan upon which these local authority businesses are
3 operating, or encouraged to operate. It is just guidance. There is no -- it includes at
4 page 284 an indicative explanation under "Costs and Income" of the sorts of things
5 which you could include on costs. It isn't an exhaustive list, it just identifies some of
6 those items.

7 It explains then in more detail how -- from page 287 -- what the benefits might be for
8 charging for commercial recycling and so forth.

9 What is -- the limited statement of agreement, or what we have as the statement of
10 agreement in tab 4 at page 76, is under the heading "How the council charges for the
11 collection and disposal of commercial waste". The council sets the charges for
12 collection and disposal -- sorry, page 76, paragraph 31.

13 "The council sets the charges for collection and disposal of commercial waste with
14 a view to recovering at least the following costs across all persons from whom it
15 collects commercial waste."

16 Then it identifies what it does seek to cover.

17 "When setting its charges under section 45(4) [so that's the reasonable charge] for
18 the collection and disposal of commercial waste, the council sets those charges on
19 the basis of costs that it actually incurs in collecting that waste together and
20 disposing of waste together. It does not set its charges on the basis of an
21 assumption that commercial waste is collected and/or disposed of separately from
22 household waste."

23 So the costs are established with the economy of scale embedded in those costs.

24 So whatever separation has been done, the costs are embedded -- and based on
25 that, as it were, embedded economy of scale and mutual support. As highlighted,
26 the support could operate both ways, it is just inherently likely or clear which way the

1 support is actually likely to operate:

2 "The council's actual costs of household waste collection and disposal activities that
3 are not recovered through charges for commercial waste are met from public funds.
4 It is the council's position that the entirety of the actual cost of its collecting and
5 arranging for disposal of commercial waste is recovered through charges levied."
6 That obviously -- that last sentence -- is obviously an agreed statement that that's the
7 council's position, not that that's the position -- that's the council's qualification to the
8 previous part of that statement. In a sense, that comes to the nub of the point: what
9 actually is the correct allocation of cost?

10 The common costs are then apportioned by means of the -- as set out in
11 paragraph 34. That is where the WRAP tool comes in. As will you have seen -- and
12 I have maybe taken too long over going over it -- but what the guidance shows and
13 what the WRAP tool demonstrates is that it is a means of approximating the weight
14 for the different streams if you don't have any weighing equipment. As we've seen,
15 you can have weighing equipment and get more accurate weights and the Oxford
16 case study demonstrates what the benefits of that might be. Now, we are not going
17 into that aspect of the challenge for today, but it is important to understand that that's
18 what the WRAP tool is about. It is just an approximation as a way of trying to divide
19 up the costs that is divided between the co-stands. But certain things are simply not
20 divided. For example, the capital cost of the trucks, the disposal costs, those do not
21 seem to be divided at all.

22 "The council sets its charges for the collection and disposal [that is paragraph 35] of
23 commercial waste to individual businesses based on bin size and number of lifts."
24 Again, I think this is just about operation, I don't think it matters particularly here. It
25 sets the level of commercial waste collection charges on an annual basis. It last did
26 so on 13 March 2023. That, of course, was after the beginning of these

1 proceedings. That is now our primary position, we say that is where the decision
2 was taken. As you know, I will come on to it and develop it when we come on to the
3 jurisdictional point, but just to make clear it seems to us that the right position must
4 be that it is that annual fixing of the charge is when the decision is taken to make the
5 subsidy. From a pleading point of view, it looks as if our case is the other way round,
6 but that's, of course, when we started the case, (a), that hadn't happened and (b) we
7 didn't know of its potential existence.

8 **THE PRESIDENT:** Yes.

9 **MR BOWSER:** Now, we understand how it is done, that seems -- it is simply an
10 annual setting of those charges.

11 The VAT point is made. Then there is a reference in 38 to our VAT position, to the
12 VAT situation. I wasn't proposing -- I will stop there before going on to the next part
13 of the agreed facts.

14 What is clear from all of these agreed propositions -- particularly paragraph 33 of the
15 agreed statement of facts -- is that the costs which the council would have to charge
16 for collection if it were limited to running a trade business would be greater than are
17 actually charged for. This is reflected in the propositions from 31 to 33. Whatever
18 underlying costs it has to cover to operate its waste function are divided across the
19 publicly funded household function and trade waste function.

20 How this is actually done is by reference to an averaging process rather than
21 empirical weighing or anything like that. Of the commercial waste employees, some
22 of those are treated as shared staff, but apparently no account is taken for a number
23 of other of the charges. Whatever further information one might look for, we don't
24 have. We are simply left in a sort of -- in this situation where the council says it
25 doesn't know, but the costs would be greater.

26 So we end up with the current decision at page 747 at tab 63.

1 **THE PRESIDENT:** Yes.

2 **MR BOWSHER:** This is the report. The actual decision we do have -- we actually
3 have the decision record at page 791, but the content -- so it is dated 14 March. But
4 the basis of the decision is set out in the report at page 747.

5 **THE PRESIDENT:** Yes.

6 **MR BOWSHER:** It is in a format which we have seen before. The trade waste
7 recommendation is at page 752. It is simply an annual document where a number of
8 charges are being fixed for the year. As I say, including pest control, bereavement,
9 allotment rents, football pitch fees and so on and so forth, and trade waste fees are
10 dealt with specifically at page 752:
11 "Trade waste charging is more complex and guidance rates are attached. These are
12 standard rates for small scale contracts. Charges for customers ..."
13 Then there is a separate provision for controlled waste:
14 "Trade waste charges need to be increased annually to offset inflationary cost
15 increases within the service."
16 We don't know as that is redacted:
17 "The service achieved a surplus of 1.4 per cent. Following analysis of other waste
18 providers in the industry, it is proposed to increase the charges by approximately
19 6 per cent from 1 April."
20 The list of proposed charges is at page 761. That's what is then implemented in the
21 decision record which I took you to just now, without any further explanation.

22 **THE PRESIDENT:** Yes.

23 **MR BOWSHER:** But what is perhaps rather understated but plain from that is there
24 is competition because that's -- there's a reference point to competition at page 752,
25 there has clearly been an analysis of other waste providers.

26 **THE PRESIDENT:** Yes. These redactions, they can't be privileged, is it on grounds

1 of relevance?

2 **MR ROBERTSON:** I am told that they are on grounds of privilege.

3 **THE PRESIDENT:** Really, okay.

4 **MR BOWSHER:** That's all we have been told.

5 So we say, very simply, there is a subsidy arising because there is a difference
6 between the costs of the trade waste business as a stand-alone business, and the
7 amounts recouped under the current trade waste charges which cover only
8 a contribution to the common costs of the household and trade waste services.

9 We know that the first, the costs of the trade waste business, is greater than the
10 amounts recouped because that's what the council has agreed in paragraphs 27 and
11 29 of the agreed statement of facts. We cannot quantify the subsidy, because the
12 material doesn't enable us to do so -- and the county says it can't do that, so there is
13 no point in pursuing that further -- but that is evidently a difference which constitutes
14 a subsidy, we say, from the authority to the enterprise. And therefore qualifies as
15 such. It is capable of distorting competition.

16 I did jump ahead earlier. Where I was going to go to next is the limb-by-limb analysis
17 in our skeleton. Perhaps I could leave that until after lunch and just quickly pick up --
18 apologies if this ends up being even more miscellaneous than usual -- bits which
19 I jumped over as I was going ahead in the course of the morning.

20 **THE PRESIDENT:** Entirely fine, Mr Bowsher. We are very happy with that course.

21 **MR BOWSHER:** So apologies. This is probably more generally under the heading
22 of the "Subsidy Control Act", so where I was at about five past 11, or something like
23 that, this morning.

24 We had the Act open then, which is there, in the authorities bundle-tab 10, page 165.

25 **THE PRESIDENT:** Yes.

26 **MR BOWSHER:** We talked about the guidance. We had covered section 2. I do

1 not think I had specifically taken you to sections 3(2) and 4(2), but you will probably
2 be familiar with that now. It's simply this is what assistance is to be treated as
3 conferring an economic advantage. 3(2) is the most convenient:

4 "Financial assistance is not to be treated as conferring an economic advantage on
5 an enterprise unless the benefit to the enterprise is provided on terms that are more
6 favourable to the enterprise than the terms that might reasonably have been
7 expected to be available on the market to the enterprise."

8 We will come back to that when we look at the unpacking of what might actually be
9 the relevant cost, but we say that is engaged in this case -- I will come back to it
10 when I look at the limbs and particularly the analysis -- a cross-subsidy.

11 **THE PRESIDENT:** Yes.

12 **MR BOWSHER:** We have looked at public authority and enterprise in some detail.
13 I should, because we come back to it when we look at the jurisdictional point, look at
14 section 10. One of the points which is suggested by my learned friend is that this is
15 a subsidy scheme. Section 10 covers subsidy schemes. It is said:

16 "A subsidy scheme means a scheme made by a public authority providing for the
17 giving of subsidies under the scheme."

18 And it may be made as you see there.

19 Section 11 deals with subsidies of interest or particular interest. If one wonders -- it
20 may not be strictly speaking -- it doesn't have the statutory authority of the guidance,
21 but the explanatory notes to the Act are useful at page 290, to get an idea as to what
22 might have been understood as a scheme by the legislator, leaving aside the prior
23 EU law. That's at page 290, paragraphs 47 and following.

24 Paragraph 48 is perhaps useful. It gives you examples of the sorts of things that
25 might be a scheme. So if you had a scheme for the giving of grant for a particular
26 industry, and then it gives examples of the Covid financing scheme, the retail grant

1 scheme. If you have a grant arrangement and you say "this is how I am going to
2 hand out money in a way", that would be a scheme.

3 **THE PRESIDENT:** Yes.

4 **MR BOWSHER:** We say this is not a scheme. I will come back to it when we argue
5 it, but in short this is not a scheme, this is just a subsidy which happens to be
6 regranted or granted differently afresh every year when the charges are made. Or
7 when the charges are fixed.

8 There is nothing about this as being a scheme, and certainly whether before or
9 afterwards, I don't think anyone has actually -- there is no document to suggest that
10 the council ever thought that it was entering or setting up a subsidy scheme as it
11 might have done. It might well have other schemes which it has available for
12 businesses in County Durham, but that's not what this is.

13 **THE PRESIDENT:** No.

14 **MR BOWSHER:** There is then provision again relevant when it comes to some of
15 the points made against us to modifications to subsidies and schemes. That's under
16 section 81, at page 189. You can modify -- sorry, this is:

17 "Modifications to a subsidy or a subsidy scheme are to be treated as a fresh
18 subsidy."

19 **THE PRESIDENT:** Yes.

20 **MR BOWSHER:** Unless they qualify for the safe harbour provided for by the rest of
21 section 81.

22 So section 81 says if you modify a subsidy or a subsidy scheme, that's a fresh
23 subsidy. But 81(2) provides for permitted modifications, so effectively provides for
24 a safe harbour. And permitted modifications include legacy subsidies, modifications
25 and so on and so forth. One of the examples is an increase -- if you increase the
26 budget by less than 25 per cent of the original budget -- and there is discussion

1 further on in the section as to how that operates -- again, if one were to rely upon
2 that, for example, you would want to have a budget to refer back to.

3 **THE PRESIDENT:** Yes.

4 **MR BOWSHER:** I will deal with that in more detail when we come to the argument,
5 but it is useful just to note it now.

6 Sorry, I am particularly reminded to look at legacy subsidy modification which is one
7 of the safe harbours in section 81(3)(a):

8 "A legacy subsidy modification means the modification of a legacy subsidy as
9 permitted under the subsidy scheme in accordance with its terms as they had effect
10 before the coming into force of this section."

11 So if you had a pre-existing subsidy which you then modify in accordance with the
12 terms of the subsidy, that again would be protected from this challenge under this
13 Act.

14 We will come back to the guidance itself in terms of the limbs and so forth, but there
15 is detail on that in the guidance when we look at that.

16 In the last couple of minutes, let me just also take you to try to sweep up as much as
17 I can of these references.

18 Section 70 is the basis upon which this review proceeding is brought. Page 180:

19 "An interested party who is aggrieved by the making of a subsidy decision may apply
20 to the tribunal for a review of the decision."

21 **THE PRESIDENT:** Yes.

22 **MR BOWSHER:** The approach to be taken in is section 70(5):

23 "In determining the application, the tribunal must apply the same principles as would
24 be applied in the case of proceedings in England and Wales in determining
25 proceedings on judicial review."

26 That would -- my learned friend, in his submissions, refers in a number of places to

1 the authority having a margin of appreciation in some of these matters. We say the
2 judicial review principle here is that we are assessing the preceding fact as to
3 whether there is or is not subsidy, so we are dealing with a critical question of error
4 of law. That is perfectly consistent with principles of judicial review. There may be
5 points where we have to look at quite where that plays out, but our broad position is
6 that the tribunal looks at this as a question of error of law. This is not a question of
7 was the council entitled to exercise its discretion in deciding whether it was or wasn't
8 a subsidy. But we will see how far that becomes important as the argument
9 develops.

10 **THE PRESIDENT:** I understand.

11 **MR BOWSHER:** Insofar as it is important, the decision defined is that in 70(7), is the
12 decision to give the subsidy or make a subsidy scheme. That, and the challenge, is
13 to the decision to make the subsidy under 70(2). Again, that may be relevant when
14 we come to be look at what the definition is of the subsidy and the time limits
15 defence. The time limits -- I am not proposing to take the tribunal through it,
16 particularly given the time -- but the time limits, when we come to look at it, are, as
17 you will be well aware, are affected by section 71 which actually just puts in place
18 a change to the tribunal rules and interpolates a new rule into the tribunal rules to
19 cover the time limits of this application.

20 If I may just --

21 **THE PRESIDENT:** Please do.

22 **MR BOWSHER:** Just to speed things up, this will take one moment. The relief that
23 is available is provided for under section 72, "CAT powers on review..."

24 And there is a fairly broad range of almost comprehensive list of orders that can be
25 made under section 72. Particularly 72(2). That corresponds -- perhaps it would be
26 useful just to see how that corresponds with what we have sought in our notice of

1 appeal -- the relief we have sought is at page 26.

2 "We seek a declaration that the defendant has granted a subsidy to its trade waste
3 collection business, order prohibiting it from continuing it to do so and order
4 maintaining that the defendant engage a duly qualified expert to assess the market
5 charge..."

6 Et cetera, et cetera.

7 There are more words there, but nothing I don't think that you haven't already
8 contemplated in our discussions from earlier today, but that's how it fits together.

9 Where I was going to go after lunch is what I thought I would usefully call the
10 limb-by-limb analysis. I hesitate to say that I am on track because I need to check
11 what I have missed, but I think I am more or less on track anyway.

12 **THE PRESIDENT:** That's very helpful, Mr Bowsher. Thank you very much.

13 Just before we rise, it's not a point arising out of your argument, but, Mr Robertson,
14 you will know that competition cases fight a regular battle against redactions, in order
15 to have a record that is open to the public. I would be grateful, not at once but
16 before this hearing has finished, if you could have a look at the document yourself at
17 tab 63, volume 3 of the hearing bundle which at page 753 has redactions which you
18 are instructed are privileged.

19 Looking at the purpose of the report, that seems rather hard to understand at
20 page 747. Let me be clear, there is no question of us unredacting, these seem to be
21 peripheral matters and I don't think we need to see them, but just as a matter of good
22 order in this and other cases, I wonder if you would be kind enough to just
23 double-check the position with your team.

24 **MR ROBERTSON:** I will take instructions.

25 **THE PRESIDENT:** I am very grateful. Thank you very much.

26 Mr Bowsher, we will say 2 o'clock. Thank you.

1 (1.02 pm)

2 (The short adjournment)

3 (2.00 pm)

4 **MR ROBERTSON:** If I may just deal with the point of housekeeping you raised.

5 **THE PRESIDENT:** Yes, thank you, Mr Robertson.

6 **MR ROBERTSON:** Which is seeing the document at tab 63, removed -- with the
7 redactions at page 752 removed. I have had a word with Mr Bowsher. I am happy
8 to provide this document, with those redactions removed, but that's not a waiver of
9 privilege more generally. We wouldn't expect it to be the basis for applications for
10 removal of other redactions.

11 **THE PRESIDENT:** Mr Robertson, that's very helpful. I am not going to require
12 either a wholesale review or even a removal of these blanked out portions on
13 page 752, because they don't seem to us to be particularly material. It's just that we
14 have enough difficulties with the redaction of documents on grounds of confidentiality
15 for my wanting to sit quite hard on questions of privilege which are not correctly
16 asserted.

17 Just looking at this document -- and I am not going to say anything more widely --
18 looking at this document it seemed to me an odd document over which to claim
19 privilege. But it is more, as it were, a shot across the bows for litigants generally that
20 I raise it, because we are concerned, as a matter of general practice, as to how
21 much material is blanked out.

22 So your point about general waiver is well made. If you are willing to show to
23 Mr Bowsher these paragraphs, then that's fine but, frankly, we are not going to direct
24 it.

25 **MR ROBERTSON:** I think the sensible thing to do is just hand up the document with
26 those redactions removed. Then the tribunal has it.

1 **THE PRESIDENT:** That's very helpful.

2 **MR ROBERTSON:** I just say, more generally, our approach for redactions for
3 privilege -- which is what we have done -- it's been a process which has been
4 supervised by my learned junior Mr Howell in conjunction with my instructing
5 solicitors. It is a process that has been taken with, to use that overworked phrase,
6 anxious scrutiny.

7 **THE PRESIDENT:** Yes. I am very grateful. Thank you very much, Mr Robertson.
8 Yes.

9 **MR BOWSHER:** Sorry, I was going to say, I should just read it for a second just to
10 make sure I have covered it, but I won't take up more time. If anything important
11 arises --

12 **THE PRESIDENT:** Yes. We will put it in the back of tab 63 of bundle 3 of the
13 hearing bundle files.

14 **MR BOWSHER:** I have put mine in there. I won't comment further on it for the
15 moment, as I have only just had a chance to look at it. It no doubt says what it says,
16 and we will come back to that if necessary.

17 As I indicated, where I was planning to go next was the limb-by-limb argument which
18 we have set out in our skeleton. For these purposes, I was going to really track
19 through the arguments set out in our skeleton from paragraph 59, page 19, because
20 that's really -- we adopt that argument, and I am not proposing to go through all of
21 the material and references there. You have them, so I am not going to go through
22 every part of it.

23 The limbs are as I indicated already. They are the limbs of the statutory test as to
24 whether or not there is or is not subsidy which are drawn from the statutory
25 guidance. We can see that from that guidance which is at tab 20, and they are the
26 limbs from page 327 to 329 of the statutory guidance.

1 **THE PRESIDENT:** Yes.

2 **MR BOWSHER:** Sorry, tab 20 of the authorities. So under the heading "Is it
3 a subsidy, the four-limbed test".

4 **THE PRESIDENT:** Yes.

5 **MR BOWSHER:** So rather than start at the statute, it is probably convenient just to
6 take these, as this is the statutory guidance which sits with the statute, and it breaks
7 them down by limb A, B, C and D. Those are the limbs that I propose to go through.
8 But to do it, as I had said, not in the order there, the first limb that we have started
9 with is limb B. Limb B is:

10 "The financial systems confers an economic advantage on one or more enterprises."
11 We have broken that into two parts and started by the proposition that the council's
12 trade waste business is an enterprise. This starts at page 20 of our skeleton,
13 paragraph 60. I think we probably covered quite a lot of this already. The first
14 proposition is that we say that an enterprise, as we've already covered this morning,
15 can be a part of an authority acting in a manner which is economic. The enterprise
16 definition, as we say in 61 of our skeleton, attaches exclusively to economic
17 activities. It is a person is an enterprise only in relation to those activities which are
18 economic in nature. That, we suggest, aligns with the position under the previous
19 state aid regime which we have referred to -- I won't propose to open it now, to pull it
20 out, simply we have quoted it in our skeleton from the court of first instance decision
21 in *Germany v Commission*:

22 "Insofar as a public entity engages in an economic activity that can be dissociated
23 from the exercise of its public powers, the entity in respect of this activity is as an
24 undertaking while if that economic activity is inseparable from the exercise of its
25 public powers, all the activities of the entity remain activities related to the exercise of
26 those powers."

1 Now, here we say that the trade waste business is separable. It is separable in the
2 sense that it is the operation of a function which it is for the council to decide -- well,
3 it doesn't have to be provided by the council at all, it can be provided to the trade
4 waste provider by any private provider, and it can be provided by the council, either
5 itself or by making arrangements with others to do it for the council. That is a distinct
6 economic activity, distinct from its public function, which we went over in some detail
7 this morning.

8 We have covered in our skeleton the proposition of the characterisation of the
9 household waste service, which is perhaps not the core of the point here. The
10 question is whether or not the council's trade waste business is an economic activity.
11 We start dealing with that from page 22. We identify a number of factors in
12 paragraph 73 as being indicators that the council has operated its trade waste
13 business for an economic purpose. We set those out -- we list them out in
14 paragraph 73. It has described -- we refer in Mr Hawthorne's evidence, the trade
15 waste business is described as being one provided so as to allow more commercial
16 opportunities and income for the council. They have a commercial waste account
17 manager whose job it is to increase the income by promoting the service and
18 increasing the customer base. And you have seen again there is a number of points
19 in the evidence where we identify where they are explicitly operating so as to grow
20 that base.

21 Now, the council makes two points which we address in our skeleton. Firstly, they
22 appear to say, well, that may once have been true but actually we have consciously
23 sort of drawn back from the commercial purpose. Whatever the commercial waste
24 manager might once have done, according to the evidence, that is no longer her
25 function. The fact that they use the assets -- the same assets -- is just incidental.

26 We say neither of these really fly as arguments. The substance of the trade waste

1 business remains. The business of providing a function which is operating in
2 a competitive market. They can choose to compete adequately or inadequately.
3 They may have some advantages or disadvantages, but that they do in return for
4 payment on a commercial basis.

5 In our submission, there really is not any serious basis for saying that it isn't
6 economic -- they are not operating in an economic fashion or operating in
7 an economic activity. Just because they choose not to market that activity as
8 aggressively or whatever, it does not stop it from being an economic activity. It
9 remains just that and they still go out and pick up the trade waste for that reasonable
10 charge. The fact that they set that reasonable charge -- and we have seen the way
11 in which they set it -- they set it by reference to competing charges, we have seen
12 that that is what they have regard to when they are looking at setting the charge,
13 they are clearly operating in a context in which they are looking at competitors and
14 placing themselves in that market, even if they are less active than they once were.
15 They can't switch off their economic activity in that sense.

16 There is no suggestion, as I have said already, that they are required to operate in
17 a particular inefficient or wasteful fashion. All that is required by the legislation is that
18 the charges should be set in such a way that those charges cover the costs that
19 would be incurred by an operator operating in -- a competing operator in normal
20 market conditions, absent the economies of scale which are attributable only to the
21 public resources that are available to them and to them only by virtue of the statutory
22 position which they enjoy.

23 That's what has to be stripped out.

24 But none of that goes to whether or not they are operating an economic activity or
25 not. All that says is that they are operating -- plainly we say operating an economic
26 activity, and operating in a manner in which they have regard for the market and

1 operate accordingly. It goes only to the question of the way in which the costs are to
2 be met.

3 So they can't say that they are somehow simply just exercising a public function
4 when it comes to the trade waste business. Whatever may or may not be the
5 position with regards the household business, which is not part of our case today,
6 because we say all that is necessary is that there are the -- is for us to show is that
7 there is this support coming from the authority to the trade waste business, and that
8 support is reflected in the charges.

9 **THE PRESIDENT:** Yes.

10 **MR BOWSHER:** We have been through the separate nature of the entity, so I don't
11 think it is necessary to cover that again. I think the separateness -- I think I can put
12 a tick by that.

13 The next limb which we deal with is limb A from the statutory guidance, which we
14 deal with limb A and the second part of B. They are closely together: Limb A: the
15 council has given direct financial assistance to the trade waste business from public
16 resources.

17 As we have said in our skeleton, we can deal with that quite simply. The council
18 does not dispute that it is a public authority. It uses assets and resources of the
19 waste service which are financed by public funds. And the use of those resources
20 constitutes financial assistance being the provisions of goods and services. That all
21 seems to come from the defence at paragraph 49. Therefore, we say, it must follow
22 that the trade waste business uses those goods and services as financial assistance
23 directly or indirectly from public resources. It is immaterial whether or not this is
24 a cross-subsidy or not, although again that is a topic we talked about this morning. It
25 still amounts to a subsidy.

26 B2, the council is -- the next stage of this is that assistance confers an economic

1 advantage on the trade waste business that is unavailable on the market. We say
2 starting at that, that is self-evident. No one else has the opportunity, the particular
3 opportunity that they have, in the way that they can control the market through their
4 statutory position. The council, we say, confers an economic advantage on its trade
5 waste business in the form of the access to resources, assets, employees; and they
6 do not dispute that if the trade waste business pays less than market value for this
7 financial assistance, this would be an economic advantage. Again, this comes in the
8 defence at paragraph 50.

9 The point of contention is how you determine whether the rate paid by trade waste
10 customers actually reflects the market rate and whether that does or doesn't reflect
11 an economic advantage. The council says, well, no, the rate reflects -- let me use
12 their words:

13 "The council has been careful to make a reasonable estimation of the costs of the
14 actual services provided to its trade waste business, and if the council invited
15 a private operator to fulfil precisely the same function as undertaken by the trade
16 waste business and paid it to do so using the revenue from the charges it currently
17 collects, there is no reason to suppose that operator could not fulfil the activity using
18 that revenue."

19 Again, those are words from the defence.

20 The second one is perhaps rather speculative. We don't know what an operator
21 would or would not do, but the starting point is the council says that it has made
22 a reasonable estimation of the cost of the actual services. This, in our submission,
23 gets into the true nature of what a cross-subsidy is and why a cross-subsidy may fall
24 foul -- or would fall foul -- of the Subsidy Control Act.

25 It is not for us to show that the current charges of the trade waste business are lower
26 than the cost which would be incurred by someone else hypothetically competing in

1 the market. We have already identified -- and identified before lunch and perhaps it
2 just bears stating again -- why we say that there is a subsidy. We say there's
3 a subsidy because there is a difference between the costs of the trade waste
4 business as a stand-alone business and the amounts recouped under the current
5 trade waste charges which cover only a contribution to the common costs of the
6 household and trade waste services.

7 We know there is a difference. That is acknowledged in the agreed statement of
8 facts and it can't be quantified because the council says it can't be quantified.

9 A cross-subsidy is a direct assistance which confers an advantage unavailable on
10 the market. Almost by definition. That is its nature. The elements of cross-subsidy
11 are developed in some of the discussion papers around -- in the legal materials.
12 That was part of the previous law set out in the commission notice on state aid at
13 paragraph 206, on page 1173.

14 **THE PRESIDENT:** Sorry, which bundle is that?

15 **MR BOWSHER:** Sorry, authorities bundle, 3, tab 49.

16 **THE PRESIDENT:** 1173?

17 **MR BOWSHER:** 1173, paragraph 273.

18 This was under the heading of infrastructure. Some specific clarification, so I should
19 perhaps make clear where this falls. You can see, if you look at the contents page at
20 1130, you can see that this was part of the notice that dealt with specific issues
21 about the use of infrastructure. It is called "Infrastructure - some specific
22 clarifications".

23 **THE PRESIDENT:** Yes.

24 **MR BOWSHER:** Under the heading here: "Aid to the developer or owner". That is
25 where we are, 7.2.

26 Paragraph 206:

1 "If an entity is engaged in economic and non-economic activities, member states
2 have to ensure that the public funding provided for the non-economic activities
3 cannot be used to cross-subsidise the economic activities. This can notably be
4 ensured by limiting the public funding to the net cost (including the cost of capital)..."
5 And that's an important parenthesis there:
6 "... of the non-economic activities to be identified on the basis of a clear separation of
7 accounts."
8 That, we say, self-evidently has not been done from the terms of the agreed facts.
9 It may not be, strictly speaking, a legally binding document, but it is the OECD
10 discussion, background note on the topic and it provides perhaps a little bit of useful
11 context for the discussion as to what a cross-subsidy is and why it is to be treated as
12 another type of subsidy. That is in tab 51; page 1198 is the front page. It is the
13 OECD round table background note.
14 At page 1223, second paragraph:
15 "Cross-subsidisation results from the execution by one company of economic
16 activities both on (1) a quasi monopoly or legally reserved market; and, (2) one or
17 more competitive markets. This set-up may allow the company to price below costs
18 on the competitive market, for instance by shifting costs away from the competitive
19 activities and charging them to the legally reserved activities. This predatory pricing
20 can deter market entry on the competitive market, reduce rival's share of the market
21 or even force them to leave the market."
22 That is the essence of what we are complaining about. Now, this is not a monopoly
23 as such, but we have been through the nature of the market. The household market
24 is different from the trade waste market, and it gives the authority the opportunity to
25 effectively confer on itself those advantages which it can deploy across from the
26 household to the trade waste business.

1 The council has the power conferred on it effectively by statute to retain that
2 monopoly even though it is not a monopoly required by statute. In that it can make
3 that choice for the household waste as to how it deals with it. It can decide we are
4 going to deal with all of it, or we are going to make arrangements to deal with it in
5 a different way. That is its choice to do.

6 **THE PRESIDENT:** The distinction between trade and household waste.

7 **MR BOWSHER:** Trade and household, yes. Sorry.

8 **THE PRESIDENT:** Obviously, it emerges as a distinction by statute. How far is it
9 a distinction that exists in the commercial market? Would a commercial operator
10 draw a distinction between trade and household waste?

11 **MR BOWSHER:** Well, the council does.

12 **THE PRESIDENT:** I know the council does.

13 **MR BOWSHER:** Because the council --

14 **THE PRESIDENT:** The council has so.

15 **MR BOWSHER:** -- has different collection systems and so on.

16 **THE PRESIDENT:** Yes, I wasn't asking about the council.

17 **MR BOWSHER:** In terms of an operator, physically, I mean, it's all waste.

18 **THE PRESIDENT:** It's all waste, yes.

19 **MR BOWSHER:** Obviously the contracting party is different. Perhaps rather
20 crucially, the operator, subject to relevant thresholds and so on and so forth,
21 generally speaking, if the council were to have arrangements for its household waste
22 to be collected by someone else, that would be a process that would have had to
23 have gone through public procurement procedures, assuming that the relevant
24 threshold was exceeded, and given that they are rather low for services, I think that
25 is inherently likely. So you would -- it is probably likely that from an operator's point
26 of view, from an operator's point of view, from a private operator's point of view,

1 because the household waste collection would be collection paid for by the council --

2 **THE PRESIDENT:** Yet again, you are involving the council. I am just interested in

3 how --

4 **MR BOWSHER:** That's different from the operator's point of view. The operator has

5 to bid, the operator has to --

6 **THE PRESIDENT:** Leave the council out of it. Let's suppose I pick up the phone

7 and say I have some waste that I need picking up.

8 **MR BOWSHER:** Okay, sorry.

9 **THE PRESIDENT:** Are they going to ask me "Is it trade or is it household waste?"

10 Or are they going to say "What exactly is it?" in a more undifferentiated way?

11 **MR BOWSHER:** Let me take instructions on that.

12 **THE PRESIDENT:** Of course.

13 **MR BOWSHER:** The short answer is yes, there is a distinction. The waste

14 transfer -- I could not give you a correct answer without going away and doing

15 a short note on it, but I don't think --

16 **THE PRESIDENT:** No.

17 **MR BOWSHER:** The paperwork is different. At the waste transfer station the

18 operator will be required to fill in different paperwork and answer different questions

19 depending on the source of the waste. There will be different codes to fill in and

20 so on and so forth. So operators may or may not choose to -- it's a different choice

21 to take on that business for the operator. It is not functionally the same business

22 because they will have to go through a different process when it comes to the waste

23 transfer station.

24 **THE PRESIDENT:** And the waste transfer station is operated by whom?

25 **MR BOWSHER:** One of the disposal authority -- it can be the disposal authority or it

26 can be a private operator, but each stage regulated.

1 **THE PRESIDENT:** But again, it's a distinction that is driven by the involvement of
2 the council, because the council needs to differentiate?

3 **MR BOWSHER:** It is driven by legislation, because the waste has to be dealt with in
4 a different way by virtue of the environmental legislation. So insofar as it is driven by
5 the council, it is driven by the council through its environmental regulatory function.
6 It's not driven by its waste disposal or collection function, as I understand it, but by its
7 environmental function, which is again an environmental regulatory function rather
8 than its waste collection or disposal function.

9 **THE PRESIDENT:** Yes.

10 **MR BOWSHER:** There may be some footnotes to that. There may be some other
11 bits of the disposal function which also kick in, but the important point is in terms of
12 the environmental regulation there are different hurdles to clear.

13 **THE PRESIDENT:** Thank you.

14 **LORD YOUNG:** If you are collecting commercial waste, does an operator collecting
15 commercial waste have more control over what that waste will be? Will it be more
16 segregated than household waste, for example?

17 I am assuming household waste, you are likely to get whatever the householder puts
18 in the black bag, whereas commercial waste you can potentially control the strains of
19 waste?

20 **MR BOWSHER:** Yes. Again, I am --

21 **LORD YOUNG:** Maybe it doesn't really matter.

22 **MR BOWSHER:** I am sorry, I can --

23 **LORD YOUNG:** It is probably a lack of (overspeaking).

24 **MR BOWSHER:** I have an answer in my head, but I can think of various -- I am
25 concerned that it won't be fully accurate.

26 **THE PRESIDENT:** No, Mr Bowsher, we will leave it there.

1 **MR BOWSHER:** I think the answer is to an extent yes, but not -- if it matters, we can
2 certainly come back and give a perhaps more precise explanation.

3 **THE PRESIDENT:** No, if the answer was on the face of it --

4 **MR BOWSHER:** They are not exactly the same -- sorry, I misunderstood your
5 question, sir, when you started. I was looking at it from a commercial point of view.
6 From the point of picking it up at the street, they are not the same and there will be
7 differences in the way they are dealt with. There may be advantages and
8 disadvantages in different kinds of waste. We can develop that if it is thought to be
9 necessary.

10 From our perspective, from the commercial perspective, the principal difference
11 would be that the commercial operator would only be dealing with household waste
12 through a contract with the council which it would had to have bid for unless it was
13 a complete one-off, very small matter.

14 **PROFESSOR ULPH:** Can I ask a further related question of clarification?

15 **MR BOWSHER:** Yes, sir.

16 **PROFESSOR ULPH:** You talked earlier on about having to bulk up the waste
17 before it was disposed of, so would you bulk up household waste alongside
18 commercial waste, if it was broadly the same type or --

19 **MR BOWSHER:** That can be done, yes. That can be done.

20 **MR ROBERTSON:** I just draw to the tribunal's attention, some of this is covered in
21 the agreed statement of facts.

22 **THE PRESIDENT:** It is, yes, you can bulk up --

23 **MR ROBERTSON:** 24.

24 **THE PRESIDENT:** -- with either, can you not?

25 **MR ROBERTSON:** Yes.

26 **MR BOWSHER:** There is an agreement -- as I say, there are footnotes to a number

1 of those points, but in broad terms it can be bulked up, as we have said in the
2 agreed statement.

3 **PROFESSOR ULPH:** Okay.

4 **MR BOWSHER:** This is all in -- it is all in 21 to 26 of the agreed statement, which
5 I think I covered briefly. But yes, that does address these questions from the
6 council's perspective rather than the operator's perspective.

7 So, going back to -- we covered some of the underlying case law on this in our
8 skeleton under the heading "cross subsidies" from paragraph 53 and the case law is,
9 of course, all case law under the EU state aid regime, which comes with its question
10 as to how far that is to be treated as applicable or not. We say that it is at the very
11 least a useful discussion of these factors. These situations of mixed fact and
12 economic analysis.

13 Insofar as paragraph 206 of the commission notice which I have already taken you to
14 is a fair summary of the problem with cross-subsidy and how that delivers financial
15 assistance and economic advantage to the council's business, then the case law is
16 itself relevant.

17 Taking the first of those, if we go back to the authorities bundle and go to tab 39, we
18 have the SFEI case. The proposition is set out fairly crisply in the headnote at
19 page 843. The aim of what was then the relevant provision of the treaty is to:

20 "... prevent trade between member states from being affected by advantages granted
21 by public authorities which in various forms distort or threaten to distort competition
22 by favouring certain undertakings. This concept thus encompasses not only positive
23 benefits but also subsidies ...(Reading to the words)... but also interventions which in
24 various forms mitigate the charges which are normally included in the budget of an
25 undertaking and which without therefore being subsidies in the strict sense of the
26 word are of the same character and have the same effect."

1 So that, we say, is the starting point for the analysis. We are dealing with effectively
2 a subsidy which is made by certain charges being lifted off, that is taken away from
3 that business. The burden not having to be borne by that part of the business
4 because they are not part of the budget. And that, we say, is the straightforward
5 beginning of the logic. This was a preliminary reference and so in order to extract
6 the costs -- the facts, one has to dig in a little bit.

7 The development of the case is perhaps most easily seen in the opinion of the
8 Advocate General, Advocate General Jacobs at page 849, paragraph 8, where he
9 explains the basis of that case. It is a reference that arises from an action in the
10 Tribunal de commerce de Paris to declare that logistical and commercial assistance
11 afforded by the Post Office in SFMI and Chronopost without proper consideration
12 constitutes state aid.

13 Then it is further fleshed out with a bit more fact at paragraph 10 at the bottom of
14 849. The order for reference does not set out the factual background, but in its
15 written observations, SFEI summarises the alleged logistical assistance as follows,
16 and there is then set out some narrative as to what was the subject of the concern.

17 The proposition stated by the Advocate General is set out on page 861. I have
18 already referred to the headnote in that. The Advocate General's opinion and the
19 judgment, to some extent, are all encompassed within the headnote. But it is worth
20 perhaps just looking at paragraph 61 where he fleshes it out a little bit, page 862:

21 "Applying those principles to the present case I consider the provision by a public
22 body of logistical and commercial assistance to an undertaking in which it has
23 a direct or indirect holding on financial terms that are more favourable than those
24 which the undertaking could obtain from a comparable commercial investor
25 constitutes aid for the purposes of the treaty. ...(Reading to the words)... In the
26 absence of commercial justification, the benefit received by the undertaking is, in

1 effect, a subsidy financed from public revenues whether those revenues come from
2 other activities of the public body itself or from other public funds. In deciding
3 whether there is a subsidy it seems to me it is necessary to consider whether
4 a commercial investor would be satisfied with the level of consideration received for
5 the assistance."

6 There he says that there was aid in that case. The judgment follows on from his
7 fuller analysis. The judgment is at paragraphs 61 and 62 on that point at page 881.
8 But it is somewhat short.

9 We know that support can be provided in a number of different ways. The BAI case,
10 at tab 40 -- another decision of the Court of first instance now -- was one where the
11 court found that there was aid which had been obtained by the purchase by an
12 authority of vouchers for travel on the ferry line which weren't necessarily going to be
13 used. That's a slight over-simplification, because there is an analysis in the decision
14 as to quite what would or would not be aid, but that in itself, in our submission, just
15 demonstrates the broad nature of the way in which aid can be delivered.
16 Importantly, also, in that case the fact that the aid was relatively small did not affect
17 whether or not the aid affected trade between member states. One gets that from
18 paragraph 77. Again, I think we have referred to that in our skeleton.

19 It is worth looking, then, at the decision that we've referred to in correspondence and
20 in our submissions of the court of first instance in Brussels. It is a decision of the
21 Belgian legal system and is therefore what would have been a parallel system to the
22 UK system. But it does illustrate, perhaps on a set of facts closer to this situation
23 than any of the other cases, the same -- it illustrates the same situation in a waste
24 context. It's at tab 47, starting at page 1107.

25 **THE PRESIDENT:** Yes.

26 **MR BOWSHER:** This was a case directly concerned with the way in which assets

1 were being used by a municipal waste function. Obviously not in quite the same
2 way, under a different statutory regime. The summary relevant here is at page 1119.
3 It all sounds quite French in this translation:
4 "Considering that the Bruxelles Propreté unless it opens its accounts ..."
5 The first full paragraph:
6 "... unless it opens its accounts within the scope of the present proceedings fails to
7 refute the above conclusions with conclusive evidence, as the mere facts that ABP
8 would observe today ...(Reading to the words)... the tariffication decree and that in
9 two prongs it would have submitted higher prices than the other bidders."
10 Sorry, it is a slightly backwards analysis:
11 "All of this cannot suffice to demonstrate that with respect to all of its commercial
12 activities its prices cover its costs ...(Reading to the words)... therefore it must be
13 deduced from this that through the so-called cross-subsidisation mechanism
14 Bruxelles Propreté indeed enjoyed an economic benefit compared to its private
15 competitors."
16 So again, a failure to allow internally for cost gives rise to a cross-subsidy. The
17 Chronopost decision --
18 **THE PRESIDENT:** Just pausing there, though, we did cover this this morning. But
19 just to note that we have clocked it, if you go back a couple of pages to 1116, you
20 can see that under heading A, Bruxelles Propreté is an undertaking that is subject to
21 state aid, and we there have the very familiar definition of an undertaking from
22 *Höfner* which is: it is every entity engaged in an economic activity regardless of the
23 legal status of the entity and the way in which it is financed.
24 **MR BOWSHER:** Yes.
25 **THE PRESIDENT:** Which is, as we discussed this morning, not the test but
26 obviously it is in the Act.

1 **MR BOWSHER:** Yes. I know one place to look for it.
2 Chronopost is a working out in more detail of what one might regard as the same
3 problem: how to look at the way in which parallel businesses ought to -- costs should
4 be allowed for within two separate business strands. That is at tab 41, page 913.
5 This was a case where again we had -- this is importantly different because you had
6 an entity which had to deliver a universal service. So it was charged with providing
7 that service. And that is described in the Advocate General's opinion from AG 39
8 and 40 at pages 928. So La Poste had a statutory responsibility to establish and run
9 a network, which involved very high fixed costs as we can see -- as the Advocate
10 General says in AG 39, and it had to be maintained in a particular way.

11 **THE PRESIDENT:** Yes.

12 **MR BOWSHER:** In short:

13 "The logistical assistance in question consisted in making La Poste's public postal
14 network available to SFMI."

15 The cross-subsidy here was the logistical assistance was provided in making La
16 Poste's public postal network available to SFMI Chronopost to pursue its own
17 activities in the express delivery sector. The question was how do you deal with the
18 cross-subsidy by the provision of these services.

19 The decision is found at page 946:

20 "There is no question of state aid to SFMI Chronopost if first it is established that the
21 price charged properly covers all the additional variable costs in providing the
22 logistical and commercial assistance, an appropriate contribution to the fixed costs
23 arising from the use of postal network ...(Reading to the words)... and an adequate
24 return on the capital investment insofar as it is used for SFMI Chronopost's
25 competitive activity and if, second, there is nothing to suggest that those elements
26 have been underestimated or fixed in an arbitrary fashion."

1 That is the process which needs to be undergone in order to ensure that the service
2 which is provided and is the vehicle -- potential vehicle for the cross-subsidy -- is not
3 a vehicle for a cross-subsidy. It has to be charged so that there is that full
4 appropriate contribution of the fixed costs and adequate return to capital investment.
5 Now, Chronopost -- because what one is looking to ensure is that there is not
6 a distortion of competition, and that therefore the outcome is that the beneficiary of
7 the support is not in any better position than another operator operating in normal
8 market conditions.

9 Now, Chronopost, the normal market conditions were rather different from our
10 situation because there was the very highly specified postal network and no one else
11 would have had that network. That network had to be allowed for somehow. No one
12 else would have been able to build that network. It was more akin to some sort of
13 universal service requirement. That is not what we are dealing with here.

14 What we are dealing with here is where there is a situation where there are
15 operators operating commercially and the question is how is it that the council's trade
16 waste business can be allowed for -- and its costs allowed for -- in a way that does
17 not unfairly benefit from support from other parts of its publicly funded business.

18 There is a relevant commercial comparator, because commercial comparators find it
19 worth their while to develop these types of networks or these types of businesses in
20 providing the trade waste and household business, and in this case the normal
21 market comparator would be, we say, the entity which provides the trade waste as a
22 nominally competitive entity using the resources of a normally competitive or efficient
23 entity. And that would be the way of looking at the proper analysis as to what is or is
24 not a fair non-distortive provision.

25 I am reminded that the reference -- here it is specifically said that there is no
26 equivalent on the market in Chronopost for the market. That's in paragraph 37 of the

1 judgment. It specifically said that the singular feature of Chronopost is one had to
2 allow for the costings of a network for which there was no equivalent. Well, that's not
3 our case. There are equivalents for all of these provisions. It's just a question of
4 different councils do it in different ways.

5 **THE PRESIDENT:** Yes.

6 **MR BOWSHER:** So we say this must -- in this case, this must allow -- this must
7 include for more than just an allocation of the common costs taking account of the
8 position of the council. It must allow for the capital, costs of disposal, including costs
9 of long-term disposal contracts and other long-term costs, and in normal market
10 conditions those costs would not be defrayed in part by a parallel household contract
11 and household waste infrastructure paid for out of public funds. That is exactly what
12 has to be looked at as giving rise to a cross-subsidy in this case.

13 This, we say, matches up neatly with where you reach in the statutory guidance on
14 this regime. Under limb B1, under the heading "What is economic activity" and
15 I have been avowedly, to some extent, merging these two points in looking at this
16 analysis.

17 In passing, I note 15.14 -- guidance, tab 20, page 341, limb B1, I should have taken
18 you to 15.14, probably this morning, when looking at the nature of the economic
19 activity. Because it explicitly makes the point that some persons may be considered
20 both public authorities and enterprises with different functions, in the brackets.

21 Page 341 --

22 **THE PRESIDENT:** Thank you. Yes.

23 **MR BOWSHER:** -- which I should have referred you to this morning.

24 Where I was going to go is 15.18, over the page. Taking as read that here we have
25 a situation where the person is both a public authority and an enterprise, 15.18:

26 "Where public authorities provide financial assistance in support of a person or

1 body's non-economic activities, such financial assistance will not be considered to
2 constitute a subsidy where it has ensured ...(Reading to the words)... that the
3 financial assistance cannot be used to cross-subsidise the person or body's
4 economic activities. This can be ensured by the use of a clear separation of
5 accounts or other methods of ring-fencing."

6 So there is not much in the guidance on this, but that is the guidance's starting point.
7 What I've tried to go on in the case law is show that you then have to think about
8 what goes into that ringfenced account; whether the test is appropriateness from the
9 wording from Chronopost or one looks simply at the normal market conditions as
10 a way of assessing what should or shouldn't be there may not matter particularly.
11 The point is it should be that of a normally competitive -- the costs that would be
12 borne by a normally competitive provider.

13 We say there it is clear that there is financial assistance conferred on the trade waste
14 business which confers an economic benefit unavailable in the market. It is
15 essentially self-evident. No one else could obtain on the market the support that is
16 obtained from the household business. So one then has to look at limb C, is the
17 financial assistance specific? The council has provided these goods and services for
18 the use of only one enterprise. There is not any other enterprise. So again, when
19 one wonders how far one has to explain it further, it is self-evident. It is specific to
20 this trade waste business. Even if there were another business, it is specific to those
21 businesses that are capable of using this business. But in this case there is no one
22 else who is benefiting, so in our submission it is plain and evident that on that basis it
23 must be presumed that the economic advantage conferred thereby is selective, just
24 as it was under the old regime. We have referred to some of the case law on that
25 which -- or one of the cases in our submissions. I am not sure that takes the matter
26 much further than the guidance itself which also treats the matter in 15.86, page 358

1 of the authorities bundle:

2 "In order to determine whether a measure which makes financial assistance
3 available to a large number or broad range of enterprises may be considered to be
4 specific, public authorities must establish whether the measure creates a distinction
5 in the treatment of enterprises which are otherwise in a comparable situation.
6 ...(Reading to the words)... If so, the measure will be considered to provide specific
7 financial assistance unless the distinction in treatment of the enterprises is justified
8 by principles inherent to the design of the arrangements of which that financial
9 assistance is part."

10 In our submission, the first part is plainly fulfilled. There is nothing inherent in the
11 system that you cannot find a way of allowing properly for the capital cost disposal
12 charges and so forth so that the charges made by the trade waste business are
13 made in a proper -- at the level which would be appropriate for a competitive
14 operator.

15 Now, it might be -- just pausing there for a moment -- that the council had taken
16 a different course and said: "Well, yes, this is a subsidy but we choose to deal with
17 this in a particular way." And might have gone through the subsidy control principles
18 analysis. One can think of a lot of things they might have considered at that point in
19 a transparent fashion which could then have been considered and, if necessary,
20 reviewed. That, in particular, would have been the point at which to consider
21 Professor Ulph's question from this morning: how much should the polluter pay?
22 Because that would be exactly the point at which to think, well, what is inherent in
23 the system? I have all these different principles, I have the environmental principle
24 to bring to bear, should I be charging less or more or whatever? That's the way in
25 which it should be dealt with. It is not to be simply treated as being part of the
26 question of is there or is there not a subsidy. The question is should this subsidy be

1 granted and is it consistent with the subsidy control principles?

2 Then going back to the Western waste case, which is referred to by my friends in
3 their skeleton, there's nothing there, we say, which affects the specificity or otherwise
4 of this assistance. The assistance is granted to the business and the only constraint
5 is that it be a reasonable charge -- the only constraint other than the Subsidy Control
6 Act -- and there is nothing in either Western waste or Luby that takes that any
7 further.

8 It is perhaps worth just pulling out, though -- my learned friends refer to the Luby
9 decision which I wasn't going to --

10 We have dealt with that in some detail in our skeleton from paragraph 91. I perhaps
11 don't need to pull it out, because we have copied out the relevant passages where
12 both Western Riverside is referred to and Luby as simply adopting the broad
13 definition of reasonable.

14 Whether or not other private entities may or may not have economies of scale is
15 neither here nor there. Somebody else's economies of scale has nothing to do
16 with it. The question is here is what is the benefit of co-collection and is that being
17 properly allowed for or not?

18 Section 7(2) we then deal with again in our skeleton at paragraph 95. We cover the
19 question: is this or is this not inherent in the design of the statutory scheme? I don't
20 propose to add more than we have already covered there, because we've already
21 dealt with that this morning.

22 Finally, the final limb is limb D: is the financial assistance capable of having an effect
23 on competition or investment in the UK? We say, well, self-evidently yes. The
24 starting point for that one gets from a number of authorities. Again, in the EU system
25 it was well understood that competition was -- the question here under the legislation
26 is whether or not the advantage is capable of having an effect on competition in the

1 UK, and that is self-evident from the facts here. There is quite a bit of evidence we
2 have produced as to effects we say it has had. Not surprisingly those effects are
3 contested. But the short proposition is if we are right and there is this financial
4 advantage, it's nontrivial and therefore it is capable of distorting competition. Is
5 competition in County Durham sufficient to engage the threshold? Well, we say
6 plainly yes. So really there is little more to be said about it.

7 There are then a number of points which have been thrown up in submission to --
8 one may loosely call them smoke screens, we would say. In particular, the decision
9 concerning the application of VAT to the trade waste collection. This will probably
10 take me ten or twelve minutes to do. I don't know if that is a convenient moment to
11 stop.

12 **THE PRESIDENT:** If it is for you --

13 **MR BOWSHER:** It could be a good point, actually. I am sort of on course. Then
14 I have mostly the jurisdictional points to cover.

15 **THE PRESIDENT:** That's very helpful. We will rise for ten minutes and resume
16 then. Thank you very much.

17 **(3.07 pm)**

18 **(A short break)**

19 **(3.17 pm)**

20 **THE PRESIDENT:** Mr Bowsher, yes.

21 **MR BOWSHER:** I thought I was about to go to the VAT decision and I will go
22 through in one second, but just to pick up the unredacted document that was
23 produced after lunch, it is relevant to the points I was just covering. One further point
24 which is flushed out by this.

25 At various points in my learned friend's written submissions, they -- as I have already
26 touched on -- allude to a supposed entitlement to rely upon a margin of discretion.

1 I have not picked out all the references, but one of those might be in assessing
2 whether or not there is or is not a financial advantage or an economic advantage or
3 whether or not that is an advantage by way of specific financial assistance. Those
4 sorts of assessments we don't accept as a matter of jurisdictional fact which is it is
5 either right or wrong.

6 Even if there were an issue of mark of discretion in all of this, what one would have
7 expected at that point would have been an analysis to say, we have considered
8 whether or not there is or is not subsidy. For example, you might have gone through
9 and exercised your discretion to consider what would be the relevant components of
10 a proper costing in order to meet the argument that there was or was not an
11 economic advantage of the sort contemplated by the court in Chronopost and
12 discussed elsewhere. And you might think about -- you might exercise -- if that were
13 the right approach.

14 That is not, in fact, the approach that is taken, at least in the report which seems to
15 be adopted as the decision, because if you go to unredacted page 752, which we
16 were provided with just after the break at lunchtime --

17 **THE PRESIDENT:** Yes.

18 **MR BOWSHER:** No, you have it already, but --

19 **THE PRESIDENT:** I fear ours is unnumbered.

20 **MR BOWSHER:** Let me read it --

21 **THE PRESIDENT:** It is the one with the table which has "Authority" and the
22 various --

23 **MR BOWSHER:** Yes, exactly so.

24 **THE PRESIDENT:** Yes, we have that.

25 **MR BOWSHER:** I don't want to take too long for a very short point. It is under B:

26 "Trade waste income budget."

1 **THE PRESIDENT:** Yes.

2 **MR BOWSHER:** A very short point, but if you read the second paragraph, the
3 analysis is not we have considered whether or not there is or is not a subsidy here
4 and we have carried out an analysis as to what the correct approach is to economic
5 advantage. No. It is: "We are fixing a price to avoid state aid challenges" and it is
6 made twice: the two bits which were redacted first in the second line, "we are making
7 the changes to avoid state aid challenges"; and secondly, at the end of the
8 paragraph: "to reduce the risk of subsidy control challenges."

9 So this is not a decision exercising a margin of discretion. It is simply saying let us
10 raise the prices to avoid a challenge. Anyway, insofar as there is a decision, it must
11 be that. That we say is -- I will come back to it when we look at the definition of
12 decision.

13 The misdirections. Looking at the VAT decision, going to where I said I would go
14 next, it's tab 28, page 587. It is bundle 2 if you have the hard copy of the authorities.
15 I apologise I keep pulling the wrong one out and getting confused.

16 **THE PRESIDENT:** Yes.

17 **MR BOWSHER:** These were proceedings between my client and the Revenue.
18 The council was not a party to those proceedings. Plainly, the VAT position may
19 have an effect on the market position of the parties. The starting and short point is
20 that the fact that some local authorities may be entitled to avoid charging VAT for
21 their trade waste services, and get an advantage for that, does not somehow
22 neutralise the effect of the subsidy. It may make it difficult -- it may make it more
23 complicated to understand what the effect of the subsidy is, but -- but it does not --
24 you can't simply say: well, there is no effect on the -- there is no advantage, there is
25 no specific financial advantage, there is no effect on competition, because in any
26 event we have a discount available to us because we don't have to charge VAT.

1 That cannot be logically right.

2 This is a decision of general application, but it's application depends on the facts of
3 individual situations and there are no factual findings in this case that apply to
4 Durham. It might be there are some aspects of this which happen to apply to
5 Durham, but there's nothing in this decision which says "This is the situation for
6 Durham".

7 At page 591, one sees the relevant legislative provision which this case was all
8 about. It's a provision of the relevant EU VAT legislation, article 13(1), which
9 provides relevantly to paragraph 10, middle of 591:

10 "Local authorities shall not be regarded as taxable persons in respect of the activities
11 or transactions in which they engage as public authorities even where ..."

12 Et cetera, et cetera, et cetera. That was the question. It's not the same question as
13 the question here. That was the question before Mr Justice Warren.

14 **THE PRESIDENT:** Yes.

15 **MR BOWSHER:** That was brought into UK VAT legislation by the provision of the
16 1994 VAT Act which is at page 592(d), which simply incorporates by reference the
17 relevant EU provision.

18 In summary, the general position on which the case proceeded is summarised at
19 paragraph 32, which is on page 599. This was evidence from the Local Government
20 Association. There was some other evidence from -- well, they weren't my clients
21 then, but Max Recycle in that case.

22 There was -- there is no evidence from Durham. The fact that this is an
23 authority-by-authority analysis is made plain at page 601, paragraph 47. Mr Bates
24 was appearing for Max Recycle on that occasion. He says -- Mr Bates, for Max
25 Recycle, put forward various propositions and what Mr Justice Warren said at H.
26 Each of those may be true in some places, but I don't know which are true where.

1 **THE PRESIDENT:** Yes.

2 **MR BOWSHER:** That's a slightly glib way, again, but it summarises the position.

3 This decision is simply a decision about whether or not article 13(1) is engaged.

4 That took the court back to EU case law on that VAT legislation which is discussed

5 by the court from paragraph -- just going back -- 12 at page 593. The question is

6 whether or not, for these purposes, they were engaging as public authorities or not.

7 It goes back over ground we have now touched on more than once: you can be

8 a public authority and an enterprise. I think probably logically these things are

9 separate, so I don't need to try to marry them up, but just so see, if necessary,

10 I would simply say it is quite possible to be both a public authority and an enterprise,

11 at least to an extent and to the extent that is true you could be both an enterprise

12 and be covered by article 13. But whether that is or is not true will depend on the

13 facts of a particular situation. Mr Justice Warren explicitly rejected the proposition at

14 paragraph 83, page 609.

15 Sorry, this is a reference back to Western. You see Mr Peretz, who was appearing

16 for the Revenue, referred -- referred to the Western case we have now seen more

17 than once. And at 83, Mr Justice Warren says, that doesn't help me in deciding what

18 powers local authorities were exercising in providing this trade waste business.

19 Then Mr Justice Warren deals with the application of the facts to the VAT legislation

20 from page 612. He discusses whether or not this is a special legal regime and

21 whether or not the authority could or could not be a public authority. He deals with

22 that at 613H and then again at paragraph 106, 613C.

23 In short, we say we don't need to try to marry up the definitions here, these are two

24 separate autonomous regimes. There is no particular reason why the terminology

25 should correspond. As I have indicated, I think they can actually be made in a sense

26 to fit together, but whatever the consequence of VAT legislation may be for the

1 status of Durham County Council for the purposes of VAT does not affect whether or
2 not its trade waste business is or could be an enterprise for the purposes of the
3 Subsidy Control Act.

4 Turning then to the procedural matters, a number of points are made about what it is
5 that we are challenging and/or whether or not we were in time to bring that
6 challenge. I have probably dealt with the legislative framework a little bit too swiftly
7 before lunch, but I think I can probably make the argument fairly briefly without
8 having to get too deeply embedded in it. If necessary we will come back and look at
9 it.

10 We say that if we are right that the council's manner of setting the trade waste
11 charges amounts to a subsidy to the trade waste business, then the decision to give
12 such a subsidy was most recently taken on 14 March 2023 when the council decided
13 to set the fees and charges for environmental services again. That is the document
14 which we were just looking at in its unredacted unpaginated form. The bit on trade
15 waste is at page 752.

16 In fact, the decision itself, as I pointed out, is a few pages further on in the file, but
17 the record of the decision is at page 791, but that doesn't say much more than the
18 decision was taken (inaudible).

19 For good order, I should note that the email chain in which the decision is actually
20 signed off is in the bundle from page 793. A series of emails which -- 793 and 794
21 which are plainly the signing off of the decision recorded at 791. That decision is
22 plainly the recommendation to approve the schedule of fees which is at appendix 2.

23 **THE PRESIDENT:** I see again we have redactions on 794. Given that it is what you
24 say is the decision, I wonder if you could do the same and check with your clients.

25 **MR ROBERTSON:** I had already taken instructions on this point at lunchtime.

26 **THE PRESIDENT:** I see.

1 **MR ROBERTSON:** We are not prepared to waive our privilege over that particular
2 paragraph.

3 **THE PRESIDENT:** You are satisfied it is privileged?

4 **MR ROBERTSON:** Yes.

5 **THE PRESIDENT:** Just to be clear, the document that we were looking at earlier,
6 you are not saying it's a question of waiver, it's a question of it not being privileged at
7 all?

8 **MR ROBERTSON:** No. They are both covered by privilege. I have discussed each
9 one specifically with those responsible for making this claim of privilege --

10 **THE PRESIDENT:** Okay.

11 **MR ROBERTSON:** -- and it is privileged and we are not prepared to --

12 **THE PRESIDENT:** No, no, that's fine. If counsel says so, then I am not going to
13 look behind that. I just wanted to be clear that as regards the document at tab 63,
14 the position is that you are waiving privilege not that you are accepting that the label
15 of privilege wrongly attached.

16 **MR ROBERTSON:** That is correct. It is a waiver of privilege. These claims of
17 privilege, as I said, (inaudible) under the document, there was anxious scrutiny.
18 These claims of privilege are not lightly made.

19 **THE PRESIDENT:** No, I hope not.

20 So it is legal advice privilege you are claiming, is it?

21 **MR ROBERTSON:** It is both legal advice privilege and litigation privilege.

22 **THE PRESIDENT:** Mr Sherratt, Mr Patrickson, they are lawyers, are they?

23 **MR ROBERTSON:** No, they are not lawyers. Mr Sherratt is the deponent of the
24 witness statement --

25 **THE PRESIDENT:** Right.

26 **MR ROBERTSON:** -- that I am going to take the tribunal to when I open the case for

1 the council.

2 **THE PRESIDENT:** Okay. And Mr Patrickson, he's a councillor, is that right?

3 **MR ROBERTSON:** Sir, Mr Patrickson is an employee of the council. He reports to
4 in this case Councillor Mark Wilkes who is an elected county councillor.

5 **THE PRESIDENT:** Right, okay.

6 **MR BOWSHER:** I am going back to the redacted copy because, of course, it has
7 page numbers on.

8 **THE PRESIDENT:** Yes, of course.

9 **MR BOWSHER:** We have the redacted version in the bundle. We now know what it
10 says anyway.

11 There are a few other points of the report for the decision which are relevant.
12 Page 747, it is reported at paragraph 5 that:

13 "All fees and charges [that is (inaudible) presumably] must be reviewed on at least
14 an annual basis and adjusted where appropriate, the increases and fees and
15 budgets are often necessary ... "

16 As I think I have already noted, this appears from the papers to be an annual
17 process of reviewing presumably a raft if not all the charges raised by the
18 environment department, and we see it ranges across a number of different subject
19 matters.

20 There is no minimum standard increase supply. That comes from paragraph 7.
21 There is a corporate fees and charges policy developed referred to in paragraph 8.
22 It is perhaps interesting to note, if you have paragraph 8 on page 748, the last
23 sentence, four lines down, the last word "the":

24 "The policy is built around the following key principles: develop an entrepreneurial
25 approach so that charges wherever new or reviewed are properly considered and
26 consistent ..."

1 And other principles are noted.

2 There is then a discussion about the different bases for different charges at
3 paragraph 10. Self-evidently some charges are purely discretionary, some statutory
4 and so on and so forth. As you can see in paragraph 10, discretionary fees and
5 charges are set by the service without guidance or instruction from government
6 agencies, the main considerations therefore relate to market conditions and how the
7 service contributes to the overall aims of the authority. Again, that just reiterates
8 a point we have already made. We have seen it before from previous years, the
9 rates are set by reference to market conditions.

10 This is made even clearer, again I have already taken you to this passage regarding
11 trade waste, where on paragraph 14B we saw that the rates were set by reference to
12 an analysis of other waste providers in the industry. We have already seen that. It's
13 at page 752.

14 **THE PRESIDENT:** Yes.

15 **MR BOWSHER:** And we have the trade waste charges established in the appendix.
16 What we have here is the council taking a formal decision setting charges for the
17 year. We know, of course, that for trade waste it can make a reasonable charge,
18 and here it is determining that these will be the charges for at least a period until they
19 are replaced. This must presumably be the council's setting the reasonable charge
20 under section 45.

21 We are told it has a broad discretion as to how to set these charges. To the extent
22 that they involve a subsidy, we say that's not actually correct, but this is the exercise
23 of discretion to set those charges. If the level of trade waste charges set by the
24 council for any given year operates to confer a subsidy on the trade waste business,
25 then this must be a decision to give that subsidy. It plainly is that decision within the
26 meaning of section 70(7) of the Subsidy Control Act.

1 It may be the point that it is worth going back to look at what the definition is. The
2 subsidy decision, one has the authority 70(7) at page 180.

3 **THE PRESIDENT:** Yes.

4 **MR BOWSHER:** There are not many words, but it is plain that this is, we say,
5 a subsidy decision.

6 It is only at that point that there is a commitment to give that financial assistance. It
7 is in that sense the internal commitment, internal within the council from the public
8 authority to the enterprise, that this is the basis upon which you can charge and that
9 is the commitment that there will be the support given on that basis.

10 That, in the guidance -- it's not in the legislation, but in the guidance if you turn on to
11 tab 20 in the draft statutory guidance at paragraph 2.9. The date of the binding
12 commitment is taken to be the date of the decision. It is in the brackets at
13 paragraph 2.9, on page 325.

14 **THE PRESIDENT:** Yes.

15 **MR BOWSHER:** Whenever it was, presumably that is the date that the decision was
16 taken. Presumably 14 March or whenever, as a matter of law, that decision was
17 taken.

18 The council has continued with an approach which it had taken to setting charges on
19 18 March 2020, which we have already been to. It's adopted that policy and takes its
20 charging decisions for trade waste on the basis of that policy. But that -- there was
21 nothing fixed. There were no fixed terms at that point in March following up from its
22 interaction with the commission.

23 There is no prior point at which the council has a form of subsidy, of rules for the
24 subsidy or something they could say where it was set that it was simply
25 implementing a subsidy year on year on year. What is plain is that it is each year
26 taking a fresh decision. There isn't a point -- you can't, going back to that 18 March

1 2020 document, and say "Look, this is plainly a subsidy decision and we have
2 decided this is what we will do every year and we will tweak it by reference to this
3 index and that index and this", or whatever it is.

4 It is plainly an understanding, going back probably to 2009, although we have not
5 seen all the steps in between, that it will be looked at every year and the only real
6 change we have seen is yes, that point where they went to see the commission and
7 were told "Do something different", and that's the only change and that change does
8 not create a new subsidy which is being modified today, it means that the decision is
9 taken afresh every single time.

10 The fact that there might have been some policy established in March 2020, or
11 maybe it's not even a policy, really, maybe it's something just a practice or a habit,
12 I don't know. It is not elucidated really very clearly as anything more than just
13 a practice that is done on a yearly basis. None of that suggests that there was
14 a subsidy decision which is continually being implemented or modified, and therefore
15 there is no basis upon which one can bite on that, any earlier decision than the
16 March 2023 decision as being the applicable subsidy decision which is modified or
17 permitted or whatever.

18 Even if there were, there would have to be -- as we have seen, you would expect to
19 see a proper decision taken that there was the basis upon which that was being
20 done, if one was, for example, going to be seeking to rely upon modifications to
21 a subsidy, there would have had to be acknowledgement that this may or may not be
22 subsidy and why it is or is not subsidy and how that is being taken forward. None of
23 the markers that you would need to be able to say there had been some prior
24 decision which was simply being implemented or modified apply.

25 We say that the decision is plainly that in March. I will briefly touch on the way we
26 originally put the claim before we were aware of the March 2023 decision. The

1 council ends up having to say, as it does in its skeleton, that what was done in March
2 2020 is in fact a subsidy scheme. To do that one has to go back to -- one can go
3 back to the document itself at page 366, volume 2, tab 43.

4 This is the alternative way they put it in their skeleton. They rely upon this as being
5 effectively the scheme upon which they rely. Again, it's the same sort of report as
6 before and we know from tab 44 that it was signed off on 18 March by the council.
7 The record we have of that -- I can't read it -- but I think 4037, which is on page 3,
8 two-thirds of the way down.

9 **THE PRESIDENT:** Number 4037?

10 **MR BOWSHER:** Number 4037.

11 **THE PRESIDENT:** This is just a decisions log, is it?

12 **MR BOWSHER:** It's a decisions log. That's the only evidence I think we have of the
13 decision actually taken.

14 **THE PRESIDENT:** I see. The report agreed is the document you took us to earlier
15 at page 366?

16 **MR BOWSHER:** The document at page 366.

17 **PROFESSOR ULPH:** Yes, I see.

18 **MR BOWSHER:** What is being implemented, one presumes, without any other
19 documentary material to explain it, are the recommendations at page 368 under
20 paragraph 11.

21 **THE PRESIDENT:** Yes.

22 **MR BOWSHER:** There is, in fact, only one action because the other two points are
23 just notes in 11, in the recommendations. The three items, two of them to note
24 things. The only action is to endorse the continuance of commercial waste
25 collection. That's all there is.

26 Albeit that there are various options discussed under page 373, and the discussion

1 about the implications for 2021 charging, all that ends up being is a conclusion, in
2 paragraph 29 on page 273, that they will carry on rolling on the existing prices and
3 the report is simply that the county council is acting lawfully in providing collection
4 services without -- and then paragraph 31:

5 "Without subsidisation from Durham County Council and therefore not in breach of
6 state aid."

7 So that is, as it were, its recommendation to itself, but the legal proposition is that
8 they are acting lawfully.

9 **THE PRESIDENT:** Yes.

10 **MR BOWSHER:** It doesn't matter particularly, we have seen the notes of what
11 happened at the commission, I don't think we can actually draw that necessary
12 conclusion from the exchanges there were with the commission, but that's the
13 conclusion which has been drawn.

14 **THE PRESIDENT:** Indeed. It may be academic given the March 2023 decision
15 which now constitutes your primary case, but taking that out of play --

16 **MR BOWSHER:** Yes.

17 **THE PRESIDENT:** -- and looking at your case as it was, how does your Subsidy Act
18 2022 reviewable decision emerge from this document because of course it
19 pre-dates?

20 **MR BOWSHER:** It doesn't. It doesn't. The reason I want to look at that -- if one is
21 going to try and rely upon this as being a legacy scheme or a permitted modification,
22 this is the document which my learned friends take us back to and say, well, if there
23 was a decision you start here. And I am simply saying no, this doesn't take you
24 anywhere.

25 **THE PRESIDENT:** I am very grateful, Mr Bowsher. It is just I wanted to ensure that
26 if there was an alternative case to your March 2023 document, I had it pinned down.

1 **MR BOWSHER:** Yes. I will come back to that.

2 **THE PRESIDENT:** Very good.

3 **MR BOWSHER:** There is an alternative to that. I just want to make good all that
4 there is. Maybe you have all the points so I can perhaps take them briefly.
5 The discussion in that document is a monitoring costs year on year. I have taken
6 you to it at least once already. It is a discussion about monitoring costs year on
7 year. The focus on the document is the binary question whether or not to continue
8 trade waste collection at all. There is some discussion as to how those trade waste
9 services are to be charged for, but this is not the setting out of rules which describe
10 the eligibility and terms and conditions for subsidies to be given under the scheme.
11 In the guidance, in the statutory guidance, there is, in fact, discussion at
12 paragraph 2.23 of the sorts of components that you would see in a scheme. It is at
13 page 329 of the guidance. You probably don't need to turn it up because it is fairly
14 obvious. If you are going to have a scheme, you are going to have rules and that
15 sort of thing. That's what the guidance says. There is nothing of that sort in this
16 document. There is nothing that could be regarded as rules.
17 As the guidance says also in paragraph 2.2(4) not all policies or programmes or
18 projects that distribute subsidies can be considered schemes, we say this is simply
19 not a decision that has the sort of detail or rigour to qualify as a scheme. That can
20 be demonstrated also by the way in which the March 2023 decision corresponds to
21 this.
22 The decision contemplates -- the 2020 decision simply contemplates that trade
23 waste charges would be fixed annually. It doesn't set out how it would be done.
24 Section -- and that is exactly -- there is no context for a subsidy modification of the
25 type that would be required under the Act that would require -- that would enable
26 modification to be done in accordance with the terms of the scheme. So there is

1 nothing here that bites on the sort of thing that a scheme would look like, where you
2 would have rules either for distribution or rules for its modification or rules for its
3 further application in the future.

4 If and insofar as the council seeks to make the point -- or seeks to rely upon the safe
5 harbour that I identified previously, that you might have a permitted modification of
6 a subsidy or a subsidy scheme where you had an increase of less than 25 per cent
7 of the original budget, well, in order to do that you would have had to have taken
8 a decision which involved some sort of discussion as to what that original budget
9 was, or at least gone back and tried to work it out retrospectively, and none of that
10 appears.

11 So indeed, on the contrary, the council accepts, as we have seen, that it doesn't
12 know what the costs of its trade waste business would be if run on a stand-alone
13 basis. So it is not actually in a position to do that which it would need to do in order
14 to make the point, to rely upon that safe harbour.

15 The whole purpose of the reliance upon subsidy schemes is to provide some
16 transparent basis for the distribution of aid. This is not a transparent scheme.

17 There is a sort of side swipe at the way -- at our reliance upon this decision by
18 saying it is fortuitous. Well, it is fortuitous in the sense that we only learned about it
19 because we brought the proceedings, and we brought the proceedings before it was
20 decided. That doesn't stop it being the right target for our challenge. We were not
21 aware of the previous annual decision and in our original pleading we did make
22 a more complicated case, if I can put it that way. I wasn't at the original CMC, but
23 you ordered us to produce particulars of the decision upon which we relied.

24 **THE PRESIDENT:** Yes, indeed. It didn't seem very clear what the position alleged
25 was --

26 **MR BOWSHER:** -- and they are pleaded out. The context for that comes from --

1 again, I don't want to labour too much on what has become our secondary case, but
2 the context for our challenge comes from the pre-action correspondence that we had
3 with the council which is, again, in the bundle.

4 **THE PRESIDENT:** Mr Bowsher, it may be that you might have to revisit it on reply,
5 but for our part we think you can go light on the secondary case. It seems to us that
6 you have, in all respects, a rather more easily capable of articulation primary case.

7 **MR BOWSHER:** Yes.

8 **THE PRESIDENT:** Obviously, if it turns out to matter, we won't shut you off from
9 running your secondary case, but at the moment --

10 **MR BOWSHER:** I will take that cue, if I may. It is a bit more complicated.

11 **THE PRESIDENT:** No, indeed, it is, but let's put down a marker for Mr Robertson.
12 We are not, subject to anything that is said in response, particularly persuaded by an
13 objection based upon happenstance of chronology. So we are minded to look at
14 your 31 March 2023 decision as something which is to be looked at.

15 **MR BOWSHER:** That's much more straightforward and we say self-evidently the
16 right approach. Because obviously what we were seeking to attack was -- we were
17 getting stuck in -- we were indeed seeking to say you must have taken a decision,
18 whatever decision it is you must have taken, it is that we are challenging. Well, we
19 now know what it is.

20 **THE PRESIDENT:** Yes.

21 **MR BOWSHER:** There are various points made about -- I have covered a lot of the
22 material about legacy, subsidy and permitted modification. I think I have covered the
23 main points that need to be covered there and it may be that I best, rather than get
24 too embroiled in the detail of that, to wait for reply.

25 Our short point is that there is a decision. We are in time to bring that challenge.
26 The nub of this issue for the tribunal is whether or not there is or is not a subsidy,

1 and whether or not it falls within the definition -- the statutory definition. We have
2 seen, as I have, I hope, made clear this afternoon, that the guidance itself clearly
3 contemplates that a person -- in this case the authority -- is capable of providing
4 substitute -- support and therefore subsidy to an enterprise which is part of its own --
5 which is one of its own functions. We have seen that in the guidance in
6 paragraph 15.14 in the parenthesis there.

7 It's a question of identifying what that enterprise is. We say it clearly is the trade
8 waste business. And what is needed is to identify whether or not that enterprise
9 benefits from support from the public authority. We say clearly it does, because
10 there are publicly funded assets and contracts which the enterprise is able to benefit
11 from and is able to fix its charges to the market by reference to effectively a lower
12 cost base because its costs are not shared -- not spread across into the enterprise in
13 the way that it would if it were a normally competitive entity.

14 Maybe there are other points I will need to come back to in reply but I think for the
15 moment that is our case. Tolerably simple, I hope.

16 **THE PRESIDENT:** Thank you very much, Mr Bowsher. We are very much obliged.

17 Mr Robertson, do you want a clean start tomorrow, or do you want to have
18 ten minutes now?

19 **MR ROBERTSON:** I am happy to have a clean start tomorrow. In terms of timing,
20 I should be finished by mid-afternoon tomorrow.

21 **THE PRESIDENT:** That's very good. That will leave ample time for Mr Bowsher's
22 reply. In which case, we will rise now and resume at 10.30 tomorrow morning.

23 Thank you all very much. We wish you good evening and until tomorrow.

24 **(4.05 pm)**

25 **(The hearing adjourned until 10.30 am,**

26 **Tuesday, 4 July 2023)**