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4 record.

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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(10.30 am)

Opening remarks

THE PRESIDENT: Mr Robertson. Good morning.

MR ROBERTSON: Good morning, president, members of the tribunal.

One short item of housekeeping before I start my submissions. It is this. My eagle-eyed learned junior, Mr Howell, spotted that in the bundle of authorities the Environmental Protection Act that is reproduced there has various sections which are amended by Scottish and Welsh regulations rather than by English regulations. Nothing substantive turns on this, but we do have the copy of the full English, as it were, to hand up.

THE PRESIDENT: That might be helpful.

Submissions by MR ROBERTSON

MR ROBERTSON: I am going to divide my submissions into four main parts. I am going to deal first with the correct interpretation of the 2022 Subsidy Control Act and other related issues. I am then going to say a few words about the factual background. Third, deal with the first issue of law as it's presented in our skeleton: is there a subsidy decision at all? That's paragraph 4(a)(i) of the directions order of 17 February 2023. So that's the first issue.

Then fourthly and finally deal with the second issue of law: is this a subsidy as defined in section 2(1) of the 2022 Act, and that corresponds to paragraph 4(a)(ii) of that directions order.

THE PRESIDENT: Yes.

MR ROBERTSON: We are not addressing the third of the items in that directions

1 order, whether the subsidy control principles are satisfied. You have our pleaded
2 case on that, and it just didn't arise for reasons that you explored with Mr Bowsher
3 yesterday morning.

4 You also discussed with Mr Bowsher the question of relief yesterday. I am not going
5 to address the tribunal on that topic because, as was recognised, it's an issue for
6 another day and the president directed us not to address it.

7 It's common ground that Max Recycle needs to win on both the question of whether
8 there is a subsidy decision and whether there is a subsidy in order to succeed, so
9 I will address those points in detail later.

10 I want to first of all look at an issue which is at the heart of this case, which is the
11 assertion made by Mr Bowsher that the council must set its charges not to recover
12 the actual costs it incurs in collecting and disposing of commercial waste, but what
13 he described as the costs of the trade waste business as a stand-alone business.

14 I will come later on to why the terminology he used -- that of trade waste and
15 business -- is not helpful. But the effect of Mr Bowsher's case, which is set out in
16 paragraph 9.2 of his skeleton argument, contains a useful admission of what this
17 case really is all about, which is increasing charges for local businesses in County
18 Durham.

19 Max Recycle asserts in its skeleton that if the council increased charges, as it
20 contends should happen, that wouldn't matter because:

21 "The resulting increased revenues would flow to the council and allow it to offset the
22 costs of other public functions, including the provision of the household waste
23 service." [As read]

24 In our submission that would matter, because that's not a permissible approach to
25 setting charges under the Act. For that I would like to take you to an authority,
26 Attfield, which is at authorities bundle -- it's in the authorities bundle at tab 26. It's for

1 this proposition, namely that if the council were to increase charges in order to use
2 the increased charges to deploy against other items in its budget --

3 **PROFESSOR ULPH:** Could you repeat the tab number, please?

4 **MR ROBERTSON:** The tab is tab 26. It's R (on the application of) Attfield v London
5 Borough of Barnet Council and it is on page 540. We can see from the headnote on
6 540, this is about residents' parking charges and a council increasing those in order
7 to use the increased revenue -- or seeking to use the increased revenue -- to
8 subsidise or pay for other transport services. We will see at the bottom that the
9 applicant in that case, Mr Attfield, last line:

10 "Contended that the increase in charges was unlawful because the purpose was to
11 generate a surplus beyond the monies needed to operate the parking scheme to
12 fund other transport expenditure such as road repairs and concessionary fares. The
13 defendants submitted that under the terms of the 1984 Act [which is the Road Traffic
14 Regulation Act 1984] it was entitled to exercise its powers for the purpose of raising
15 a surplus to use for any transport functions provided they fell within the overall scope
16 of that legislation." [As read]

17 So this is really the equivalent of what Mr Bowsher is contending for in paragraph 9.2
18 of his skeleton.

19 That was held to be unlawful by Mrs Justice Lang. We can see that from the
20 headnote, paragraph 2 on 541:

21 "It was a general principle of administrative law [picking up from the end of
22 paragraph 1] there was no evidence that the increase was required to recover
23 increased running costs of the parking schemes. Indeed, the special parking
24 account had always been in credit at year end. It was a general principle of
25 administrative law a public body had to exercise a statutory power for the purpose for
26 which the power was conferred by Parliament and not for any unauthorised purpose.

1 The issue was not whether or not the public body had acted in the public interest, but
2 whether it had acted in accordance with the purpose for which the statutory power
3 was conferred. It was well established that where a statutory power was exercised
4 both for the purpose for which it was conferred and for some other purpose, a public
5 body would have acted unlawfully unless the authorised purpose was its dominant
6 purpose. In identifying the purpose for which a statutory power was conferred, the
7 exercise was one of statutory interpretation." [As read]

8 If I can just take you into the body of the judgment, starting on page 550,
9 paragraph 29, and if I can just ask the tribunal to read that. And paragraph 30:

10 "Mr Goudie for the council did not dispute that the increases were introduced in order
11 to meet road traffic expenditure other than parking. It was the focus of his
12 submissions that it was lawful to do so." [As read]

13 Then if we can move to page 552, paragraph 38, this is the improper purposes
14 doctrine under domestic public law:

15 "A general principle of administrative law that a public body must exercise a statutory
16 power for the purpose for which the power is conferred by Parliament and not for any
17 unauthorised purpose. An unauthorised purpose may be laudable in its own right yet
18 still unlawful. The issue is not whether a large public authority acted in the public
19 interest, but whether it has acted in accordance with the purpose for which the
20 statutory power was conferred." [As read]

21 There again you see the reference to it having to be exercised for the dominant
22 purpose under the legislation.

23 Now, if I turn to page 555.

24 **THE PRESIDENT:** Yes.

25 **MR ROBERTSON:** Paragraph 48, you will see there that Mr Goudie for the council
26 said that unless you could attack the council's decision to raise parking charges on

1 | Wednesbury unreasonableness grounds, then it was lawful. But that was rejected.
2 | You still have to look at the purpose, the dominant purpose, of the statute, and his
3 | submission was rejected at paragraph 49.
4 | Then perhaps finally on page 558, paragraph 59:
5 | "As the surplus funds in the special parking account may only be used in accordance
6 | with the objectives of the legislation, there can be no wider use of the funds." [As
7 | read]
8 | That's because in the last line of paragraph 59:
9 | "The 1984 Act is not a revenue raising or taxing statute." [As read]
10 | So it doesn't have a wider revenue raising purpose, it's just there to enable parking
11 | charges to be imposed to regulate parking.
12 | And the final conclusion to judgment is set out over the page on page 580,
13 | paragraph 64. If you can just see there that Mrs Justice Lang accepts the claimant's
14 | case.
15 | In our submission, Attfield is important because it is a complete answer to the point
16 | made by Max Recycle in paragraphs 91 to 92 of its skeleton and repeated yesterday
17 | by Mr Bowsher on page 77 of the transcript, namely that the only constraints on what
18 | he described as the council's broad power to set charges under section 45(4) is
19 | Wednesbury. He submitted the public law constraints on the council were effectively
20 | negligible and the council can charge any price it chooses. That's a very basic
21 | misunderstanding of the legal position. The power to fix charges or to charge
22 | a reasonable charge can only be exercised for proper purposes.
23 | Now, in our submission, what this case is really about is making small businesses in
24 | County Durham pay more for waste collection in the hope that Max Recycle can
25 | make more profit. In reality, it's Max Recycle that wants to be subsidised by
26 | imposing greater costs on small businesses in one of the less well off parts of

1 northern England. So much for levelling up.

2 **PROFESSOR ULPH:** Could I ask you a question?

3 **MR ROBERTSON:** Yes.

4 **PROFESSOR ULPH:** There are two elements to Mr Bowsher's argument. One of
5 them was that you should do the calculus on the basis of what would have
6 happened -- what the cost would have been had this been a stand-alone waste
7 collection exercise. And then, as a consequence, the rates would go -- the rates that
8 were charged would go up.

9 You have essentially focused on the issue about the rates going up and raising the
10 charges. What's your argument in relation to the first element of Mr Bowsher's
11 argument, that way of calculating the rates was appropriate not?

12 **MR ROBERTSON:** His way of calculating rates is contrary to the purpose of the Act.
13 So the Act allows a reasonable charge to be levied which must be cost reflective.
14 You can't charge more than that. So you just don't get into the sort of calculus that
15 Mr Bowsher would like the council to engage in.

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

17 **MR ROBERTSON:** It's impermissible as a matter of law. Attfield demonstrates that.

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

19 **MR ROBERTSON:** So I want to address the first of my four parts now. The correct
20 approach of the interpretation of the 2022 Act and the legal and policy framework.
21 I want to deal with the Act, the role played by other sources of law. I will then deal
22 with the role of guidance under the 2022 Act, and include a few other responses to
23 Mr Bowsher.

24 Mr Bowsher asserts at paragraph 5 of his skeleton that a subsidy under section 2(1)
25 of the 2022 Act is very similar in definition to state aid under article 107 of the treaty
26 on the functioning of the European Union. That's a point that runs consistently

1 through their skeleton argument.

2 Mr Bowsher even said yesterday that if any aspect of the law had changed in the
3 transition from EU law to the 2022 Act, it would need to be clearly flagged. We ask
4 rhetorically how much bigger a flag than Brexit does one need?

5 Now, in our submission, it would be an error of law simply to apply the EU cases as if
6 they determine the meaning of the provisions of the 2022 Act. They do not. The Act
7 is to be applied without any presumption that it was intended to replicate EU state
8 aid law on a domestic purpose post-Brexit.

9 The starting point is that the EU law of state aid no longer has any domestic effect in
10 EU law. That's clearly set out in regulation 3 of the 2020 State Aid Regulations
11 which are in the authorities bundle -- I don't think we need to turn them up -- at
12 tab 14, page 242. We are no longer dealing with supranational law with direct effect.
13 We are now concerned with the interpretation of domestic primary legislation.

14 **THE PRESIDENT:** Well, Mr Robertson, of course you are right, but doesn't it all
15 depend on the nature of the provision one is talking about? I mean, take the
16 construction of, say, the chapter 1 or chapter 2 prohibitions where one has
17 something which was pre-Brexit, always intended to track 101/102 TFEU. We are
18 absolutely entitled to look at and treat as persuasive decisions of the Court of Justice
19 in relation to 101/102 in understanding chapter 1, chapter 2. That's because they
20 are the same beast, with a couple of changes.

21 Is not your better point that your ability to read across EU law has to be contingent
22 upon what exactly is being put in place, in that if one has a word-for-word identical
23 provision, then the inference would be that one is going to look to the Ancien
24 Regime. But if it's different, then presumably it's different for a reason.

25 **MR ROBERTSON:** It's important to understand -- and I am going to take the tribunal
26 through this -- that the 2022 Act isn't there just to, as it were, replace the Ancien

1 Regime. It's there to ensure that the UK complies with its international obligations
2 under the trade and cooperation agreement between the EU and UK and the UK's
3 international obligations under the World Trade Organization agreements, in
4 particular the agreement on subsidies and countervailing measures.

5 I will go through the mechanics of that. The other point, of course, is in relation to
6 the chapter 1/chapter 2 prohibition. There you have primary legislation, section 60A
7 of the Competition Act, telling you you must apply or have regard to pre-existing EU
8 legislation. So that operates the linkage there as set out in section 60A of the
9 Competition Act 1998. Here there is no such linkage to EU law. In fact, there is
10 a positive disavowal of a linkage to EU law, and I will explain that.

11 **THE PRESIDENT:** Okay.

12 **MR ROBERTSON:** So, dealing with -- so the position is the TCA does use some
13 terms which are similar to EU law, but also terms that one sees in the WTO
14 agreement on subsidies and countervailing measures.

15 This is a point that Mr Howell and I, in fact, had when acting for the Department for
16 International Trade -- or Secretary of State for International Trade -- in the British
17 Sugar case. The British Sugar judgment isn't in the bundle of authorities, but I drew
18 it to my learned friends attention on Friday of last week. We have copies to hand up
19 and I just want to draw the tribunal's attention to one particular paragraph where
20 Mr Justice Foxton sets out how you approach the subsidy control provisions in the
21 Trade and Cooperation Agreement. **(Handed)**

22 Just very briefly, what this case was about. It's obviously not a case under the
23 Subsidy Control Act, it predates that, it was a case under the interim regime that
24 applied post the applicability of EU state aid law and under the Trade and
25 Cooperation Agreement as given effect through the EU Future Relationship
26 Act. So you were looking directly at the trade and cooperation agreement in this

1 case and the dispute in there was whether a change in tariff treatment for imports of
2 raw cane sugar, allowing the creation of a duty free import quota up to a certain level
3 constituted a subsidy to importers of raw cane sugar.

4 **THE PRESIDENT:** Yes.

5 **MR ROBERTSON:** The court held that it didn't.

6 But the relevant provision is on page 17, paragraph 54, where Mr Justice Foxton
7 observed:

8 "The subsidy control provisions under the Trade and Cooperation Agreement have to
9 an appreciable extent a different legal pedigree [to EU state aid law, that is], having
10 been derived in part from the rules of the World Trade Organization which regulate
11 issues relating to the freedom of trade between signatory sovereign states rather
12 than members of a particular trading block. Reflecting this, the language of the
13 subsidy control provisions is to a significant extent drawn from WTO sources. The
14 dispute resolution regime provided for by article 375 of the TCA is for an arbitration
15 tribunal or dispute resolution by the dispute settlement body under the WTO
16 agreement. Article 516 provides that the interpretation and application of the
17 provisions of this part shall take into account relevant interpretations in reports of
18 WTO panels and of the appellate body adopted by the dispute settlement body of the
19 WTO as well as in arbitration awards under the dispute settlement understanding.

20 There is no role for the European Commission nor any obligation to seek the
21 sanction of the European Commission before implementing a subsidy." [As read]

22 So that was, under the TCA, a different legal pedigree to what you referred to as the
23 Ancien Regime.

24 The subsidy control provisions of the TCA have now been implemented under the
25 2022 Act, but that different legal pedigree, in our submission, needs to be reflected in
26 the approach to the interpretation of the 2022 Act. This difference of approach is

1 also seen in the 2022 Act's pre-legislative material, which indicates a clear intention
2 to depart from the position under EU law.

3 The white paper which accompanied the subsidy control bill, which is in the
4 authorities bundle at tab 17, page 266, states at the top:

5 "Now the UK has left the European Union, we are no longer bound by the EU's
6 prescriptive and bureaucratic state aid rules, the government is bringing forward
7 legislation for a new tailored UK-wide subsidy control framework to reflect our
8 strategic interests, strengthen the Union and help to drive economic growth and
9 prosperity across the whole of the UK." [As read]

10 Then we also see that there is an excerpt from the explanatory notes to the bill,
11 which is in the next tab and that extract is, in fact, cited by Mr Bowsher at
12 paragraph 40 of his skeleton.

13 **PROFESSOR ULPH:** Sorry, which tab are you talking about?

14 **MR ROBERTSON:** Sorry, this tab that we are on now is tab 18 of the authorities
15 bundle.

16 **THE PRESIDENT:** Which paragraph?

17 **MR ROBERTSON:** Actually, the paragraph I want to refer to from the explanatory
18 notes is, in fact, cited by my learned friend in his skeleton argument at paragraph 40,
19 where he says -- so this is the provision I want to refer to -- paragraph 40 of his
20 skeleton argument, paragraph 4 of the explanatory notes:

21 "Having left the European Union, the UK is no longer subject to EU state aid rules,
22 the EU's particular approach to subsidy control. In September 2020, the government
23 announced its intent to design a new domestic subsidy control regime that best
24 suited the needs of the UK representing value of money to the UK taxpayer and
25 complying with international obligations." [As read]

26 That's what my learned friend referred to in his skeleton.

1 So those changes set out in the white paper and in the explanatory notes could
2 hardly have been more clearly flagged. The 2022 Act recognises that the court
3 might have regard to the TCA but not to EU state aid law as such, when interpreting
4 the 2022 Act.

5 You will see that from the Act itself which is in the authorities bundle, tab 10,
6 page 193. The provision is section 89(2). Section 30 of the European Union Future
7 Relationship Act 2020, interpretation of agreements, public international law applies
8 where a court or tribunal has regard to the trade and cooperation agreement or
9 a supplementing agreement for the purposes of implementing this Act.

10 Section 30 is to be found at tab 8, page 147. It is headed "Interpretation of
11 agreements:

12 "A court or tribunal must have regard to [article 4] of the Trade and Cooperation
13 Agreement public international law when interpreting that agreement or any
14 supplementing agreement." [As read]

15 I just note there that you will see the reference to article 4 is in square brackets.
16 That's because the original Trade and Cooperation Agreement had working
17 numbering when it was agreed and it then went through a process of what I think is
18 called legal scrubbing to renumber it.

19 **THE PRESIDENT:** I see.

20 **MR ROBERTSON:** That's why it is article 4 in its final form.

21 Article 4 is to be found at tab 37 on page 799. So this is the Trade and Cooperation
22 Agreement, the principles of interpretation and definition. Article 4, public
23 international law, paragraph 1:

24 "The provisions of this agreement and any supplementing agreement shall be
25 interpreted in good faith in accordance with their ordinary meaning in their context
26 and in the light of the object and purpose of the agreement in accordance with the

1 customary rules of interpretation of public international law including those codified in
2 the Vienna convention on the law of treaties." [As read]

3 Paragraph 2:

4 "For greater certainty, neither this agreement nor any supplementing agreement
5 establishes an obligation to interpret their provisions in accordance with the domestic
6 law of either party." [As read]

7 So you don't interpret the TCA -- or interpretation is not required to be in accordance
8 with the laws applicable in the UK or EU law, it operates in public international law.

9 Then if one turns over the page to 800, one final point, paragraph 3:

10 "For greater certainty an interpretation of this agreement or any supplementing
11 agreement given by the courts of either party shall not be binding on the courts of the
12 other party." [As read]

13 So it emphasises that the TCA operates at the level of international law. It's not
14 constrained by interpretations of EU or indeed national law. So that's the
15 background to the 2022 Act which implements the TCA. So that's the guidance that
16 you are given in the TCA that you approach this in the light essentially of article 4 of
17 the TCA.

18 That point is then emphasised in the Court of Appeal judgment in the previous
19 iteration of this litigation, the Francovich state aid challenge brought by the
20 appellants which was rejected by His Honour Judge Keyser KC, and then that
21 reverse summary judgment upheld in the Court of Appeal. That judgment, if we go
22 to tab 33, and we go to page 775 of the judgment, paragraph 52, this was my
23 learned friend's attempt to keep those proceedings in play for the purposes of
24 obtaining a declaration as to breach of the state aid rules which he was arguing
25 would inform the approach that would then be taken under the impending subsidy
26 control legislation which we are now concerned with.

1 Lord Justice Arnold said this about two thirds of the way down:
2 "The subsidy control Bill [subsidy control bill] applies a different legal regime which is
3 intended to comply with the WTO rules and with the UK's obligations under the TCA
4 with the EU, but is not intended to comply with EU law. Counsel for TDC
5 nevertheless argued that a declaration as to the position under EU law could cast
6 light on the position under the bill, assuming it becomes law. In my view, this was a
7 hopeless argument, it would plainly do no such thing." [As read]
8 That's an observation that both of his colleagues in the Court of Appeal,
9 Lord Justices Edis and Coulson agreed with. Lord Justice Edis at paragraph 54,
10 although he dissented on another ground, and Lord Justice Coulson at
11 paragraph 56.
12 To summarise where that takes us in our submission, of course we accept that the
13 EU state aid case law may be of assistance in the same way as WTO case law, but
14 it's not binding as to the meaning of the TCA, and in any event, the tribunal must
15 apply the 2022 Act informed by the TCA rather than the TCA directly and you
16 approach this, subject to those points, on normal principles of statutory
17 interpretation.
18 That leads to a second aspect to interpretation to which I referred, which is the status
19 of the statutory guidance issued pursuant to the 2022 Act on which my learned friend
20 places a certain amount of reliance. Indeed, he started off his submissions on
21 meaning of subsidy by taking you to the statutory guidance rather than to the statute
22 itself.
23 The status of the guidance is this: section 79(1) of the Act, which is authorities
24 tab 10, page 187, headed "Guidance":
25 "The Secretary of State may issue guidance about the practical application of the
26 subsidy control principles." [As read]

1 Then who is that guidance addressed to? It's addressed under subsection 6, over
2 the page on page 188, to public authorities:

3 "A public authority must have regard to guidance issued under this section so far as
4 applicable to the authority and the circumstances of the case when giving a subsidy
5 or making a subsidy scheme." [As read]

6 The guidance doesn't apply to the CAT when exercising the function of reviewing
7 subsidy decisions under section 70, 72, 74 of the Act. Not because the CAT is not
8 a public authority -- plainly it is -- but because the CAT is not giving a subsidy or
9 making a subsidy scheme. That's when the guidance is applicable: it's applicable to
10 public authorities when they are doing that.

11 Furthermore, just taking first principles to statutory interpretation, the guidance hasn't
12 been approved by Parliament. It's not legislation. It doesn't have, unlike the
13 guidance applicable elsewhere in this tribunal, it doesn't have the status of a practice
14 direction. It plainly cannot bind the CAT as to the interpretation of the 2022 Act
15 which is a question of law for this tribunal, that's really the scheme of the Act, it
16 places a large degree of weight on the shoulders of the CAT to interpret and apply
17 the Act. That's essentially the scheme of it.

18 I should also mention the guidance itself -- I won't take you back to this, but in
19 paragraph 1.3 of the introduction, it points out that it is not an authoritative statement
20 of the law. It is for the tribunal to form its own view as to the meaning of the statutory
21 provisions without being dictated to by the government in its views in the guidance.

22 Two further points I wish to make about the statutory context before turning to the
23 factual background. The first of those further points is that to the extent -- and this
24 really picks up from Attfield again -- to the extent that the council's statutory duty not
25 to exercise the charging power for an improper revenue raising purpose is said to
26 involve the giving of a subsidy by the council to itself, that subsidy is provided by

1 means of a duty imposed by primary legislation and is accordingly exempt from the
2 subsidy control requirements, so complying with duties imposed by primary
3 legislation don't, under the Act, involve the granting of subsidies. We can see that
4 from the Act, section 78, which is on page 187. Section 78, subsection 2:
5 "Nothing in this Act applies to the giving ..." [As read]
6 Perhaps I had best start at paragraph 1:
7 "Schedule 3 applies provisions of this Act in the case of financial assistance provided
8 or schemes of the provision of financial assistance made by means of primary
9 legislation. Subsection 2. Nothing in this Act applies to the giving of any such
10 assistance or the making of such schemes except so far as provided for in that
11 schedule." [As read]
12 Then we turn to schedule 3, which is at page 200 in this tab. At paragraph 4:
13 "In this schedule references to a subsidy provided by means of primary legislation
14 include references to a subsidy given by a public authority under a duty imposed by
15 that legislation.
16 "(b) do not include references to a subsidy given by a public authority under a power
17 conferred by that legislation." [As read]
18 So, the premise here is that a subsidy is being conferred as a result of the council's
19 statutory duty not to charge for more than the authorised purpose, as per Attfield.
20 Section 78(2) provides that:
21 "The financial assistance provided by primary legislation is not subject to the Act
22 save as provided for in schedule 3." [As read]
23 The second and final point I wanted to raise under part 1, approach to interpretation,
24 is the late appearance of the polluter pays principle. It is not foreshadowed in my
25 learned friend's pleadings. It now appeared in his skeleton at paragraph 9.3, and
26 also paragraph 97, and yesterday in submissions. I think the first that we heard

1 about it -- or rather my learned friend Mr Howell heard about it -- was that
2 Mr Bowsher had indicated during the Court of Appeal cost capping hearing, which
3 I didn't attend as I was in another hearing in which Professor Ulph is sitting,
4 Prochlorperazine, that Mr Bowsher was intending to run a point that the polluter pays
5 principle was somehow relevant.

6 In our submission, this argument is just totally without merit. The point was put in his
7 skeleton on the basis of the Environment Act 2021, but I think Mr Bowsher has had
8 second thoughts on that because he didn't pursue that legislation yesterday. It was
9 a thoroughly bad point because -- just for your notes -- sections 17 to 19 of the 2021
10 Act, the Environment Act 2021, concerned policy making made by ministers of the
11 Crown. In his skeleton he accepted it does not bear directly upon the defendant's
12 pricing activities. Durham County Council is not a minister of the Crown, so it is
13 difficult to see where that one was going. It was only a "have regard" obligation in
14 any event.

15 Mr Bowsher's new case on polluter pays in submissions yesterday is based upon
16 schedule 2 to the Subsidy Control Act. This is the schedule that is now at the final
17 page of tab 10 of the authorities.

18 **THE PRESIDENT:** Yes.

19 **MR ROBERTSON:** This is what he relied upon. You get to section 2 in reliance
20 upon section 13. So if we turn back to page 174, section 13, paragraph 1,
21 subsection 1:

22 "A public authority must consider the energy and environment principles before
23 deciding to give a subsidy in relation to energy and environment. It must not give the
24 subsidy unless it is of the view that the subsidy is consistent with those principles."

25 [As read]

26 Subsection 2:

1 "Doesn't include a subsidy given under a subsidy scheme." [As read]
2 Now, as the tribunal obviously knows, the council denies there is any such subsidy,
3 but in any event, Max Recycle has never alleged a breach of section 13 as opposed
4 to section 12, so this is just simply an unpleaded point.
5 Leaving that to one side, turning to schedule 2, which is the final page of this tab, the
6 energy and environment principles, principle B, which is what he does rely upon:
7 "Subsidies in relation to energy and environment shall not relieve the beneficiary
8 from liabilities arising from its responsibilities as a polluter under law of England and
9 Wales, Scotland or Northern Ireland." [As read]
10 The alleged beneficiary of the subsidy -- the alleged beneficiary of the subsidy here
11 is the council. It's not being relieved of any liabilities as a polluter under the law of
12 England and Wales. Even if one were to look at the council's customers -- ie those
13 paying the charges for commercial waste collection -- who are not the alleged
14 beneficiaries of the subsidy, the alleged beneficiary is the council, the users of the
15 commercial waste service are under an obligation under the law of England and
16 Wales in section 45(4) to pay a reasonable charge. So the point goes nowhere as
17 concerns them either because there is no suggestion -- nor could there be -- that the
18 charges being levied are unreasonable.
19 Finally, just standing back from all of this and looking at the reality, which is that the
20 council is making the most efficient use of its fleet of bin lorries. That's
21 fundamentally good for the environment as well as being good for local businesses,
22 even if Max Recycle would prefer other arrangements were adopted in the hope of
23 allowing it to boost its bank balance.
24 In his submissions yesterday, Mr Bowsher sought to persuade you that Mr Justice
25 Warren's VAT judgment was somehow irrelevant. That's a point touched upon in
26 their skeleton at paragraph 57.

1 Just to run through the points which are relevant from that judgment, but without
2 dragging you back through it, the key points are the services here are provided
3 under section 45(4) of the 1990 Act, not the Localism Act 2011. There is no power
4 to provide them on a commercial basis under section 45(4). Mr Justice Warren
5 rightly doubted -- although he didn't need to decide the point -- that it was lawful to
6 provide commercial waste collection services through a company on a commercial
7 basis. You see the final conclusion on that at paragraph 97 of the judgment on
8 page 612. So he didn't have to decide the point, but he doubted that it was lawful to
9 provide commercial waste collection services through a company on a commercial
10 basis.

11 So, contrary to paragraph 57 of my learned friend's skeleton, it's not the case that
12 commercial waste collection services could:

13 "Perfectly well be carried out through a separate company as contemplated by
14 section 4(2) of the Localism Act." [As read]

15 Finally on a standard of review. We are in agreement with Mr Bowsher that whether
16 there is a subsidy is a question of precedent fact. The same was true under state
17 aid law. It's how I first got into this subject more years ago than I care to remember
18 in the Lunn Poly litigation in the late 1990s, a judicial review as to whether
19 something, in that case differential rates of tax treatment under insurance premium
20 tax, were notifiable state aid. It is an issue of precedent fact.

21 But it doesn't follow from that that the council should be afforded no margin of
22 discretion on any issue. So when I come to applying the criterion of economic
23 advantage under section 3 of the 2022 Act, the issue there turns on reasonableness.
24 Where the council has made an assessment of what a market price has been in the
25 way it's done, it does have a broad margin of discretion. As we've set out in our
26 skeleton argument, that issue was well traversed in previous state aid litigation, the

1 Sky Blue Sports case, which went to the Court of Appeal, not once but twice, and
2 where we have given the reference in paragraph 58 of our -- sorry, footnote 58 of our
3 skeleton, and the issue of judging what a market price is, that's something on which
4 a public authority does have a wide margin of discretion in making that judgment.
5 Just making that point clear, we nevertheless agree that the question of whether
6 there is a subsidy is a question of jurisdictional fact for the tribunal.
7 I now have some points to make on the factual and statutory background. Forgive
8 me if these points are a bit bitty, but I am responding to my learned friend and these
9 are points that I think will take me up to about quarter to and we can have
10 a transcriber's break before coming back to look at subsidy decision.
11 Mr Bowsher reverted yesterday to calling the household waste service a household
12 waste business. As I will come onto, there is in fact relatively little to distinguish the
13 council's activities of collecting and disposing of household and commercial waste,
14 which was really the point that Lord Young was raising yesterday.
15 Trying to distinguish between the two, my learned friend relied on charging. Most
16 household waste is collected free of charge, of course, but not all. So
17 section 75(5)(d) -- perhaps if we just turn that up, it's in tab 4 of the authorities at
18 page 94.
19 Sorry, my learned friend reminds me to start perhaps at page 90, which has in
20 section 75 subsection (5) the definition of household waste. We will see that covers
21 domestic property, caravan, residential home, (d) premises forming part of
22 a university or school or other educational establishment, and then (e), premises
23 forming part of a hospital or nursing home. So the definition of "household waste"
24 goes a bit further than just simply the sort of waste that you or I would stick outside in
25 our bins.
26 We then go to section 75 on page 93, so that's just repeating the definition. Sorry,

1 the provision I want to go to is in the regulations at tab 13, on page 237. Having
2 established the categories of household waste, we then go to the Controlled Waste
3 England and Wales Regulations in tab 13, which begin on page 225, and the
4 relevant provision starts at page 235, which is regulation 4:
5 "Household waste for which collection and disposal charges may be made". [As
6 read]
7 Then that sets out those types of what would otherwise be household waste
8 collected free of charge, exceptions to that for those for which a charge may be
9 imposed. You will see at page 237, item 15, waste from premises forming part of
10 a university, school or other educational establishment.
11 This was addressed in Mr Justice Warren's judgment at paragraph 80 where he
12 noted the duties in respect of chargeable household waste were the same for
13 commercial waste.
14 So for some types of household waste, the same charge is levied -- or the same
15 approach to a reasonable charge being levied for collection of the household waste
16 applies as it does to commercial waste. So that's not a great point of distinction for
17 my learned friend.
18 The next point that he made was that there is a market for commercial waste
19 collection but seemingly not for household collection. The first point we make on
20 this -- and this is just a purely forensic point -- when we looked at their website
21 yesterday, we see them advertising household waste collection services. If you are
22 unhappy with the service you are getting from the council, why not use us?
23 That's not in evidence. The more technical point on the legislation is this -- and it's to
24 be found in authorities bundle 9. This is in the Environment Act 2021, which amends
25 the 1990 Act. It's not yet in force, so this is a prospective amendment that's been
26 passed by Parliament but has not yet been brought into force. The relevant

1 provision is on page 158. It is one of these provisions that has any number of letters
2 after it. This is a provision that's going to be section 45AZA:

3 "... separate collection of household waste from relevant non-domestic premises.

4 "(1) This section applies in relation to arrangements for household waste to be
5 collected from relevant non-domestic premises in England by a person who...

6 "(a) is acting in the course of a business (whether or not for profit), or

7 "(b) is exercising a public function (including a function under section 45(1)(a))."

8 So it is addressing a situation where there is household waste being collected by
9 a person acting in the course of business. So that's recognised as being something
10 for which Parliament is legislating.

11 There's also Mr Hawthorne's evidence in the hearing bundle tab 5, page 84,
12 paragraph 12, where Mr Hawthorne explains that:

13 "They can compete with other private sector operators and local authorities
14 including, the defendant to supply trade waste collection to traders [ie to businesses
15 large and small] and also schools and other public sector charitable entities." [As
16 read]

17 Schools waste, as we have seen, is classified under the Act as household waste, so
18 they do collect household waste in the course of their business. So that doesn't
19 seem to be a relevant point of distinction either.

20 Thirdly, my learned friend relied upon the existence of separate accounts. Obviously
21 the council keeps accounts for its refuse and recycling services as a whole, and the
22 commercial waste collection services which are part of it. We can't see that's a point
23 of serious distinction.

24 The final point my learned friend made yesterday was that there was something
25 different in the regulatory obligations concerning household and commercial waste.

26 He made that point at page 65 of the transcript.

1 Now, in substance, the waste is similar, as we have seen. As is explained, the
2 council bulks up both types of waste into two heaps at waste transfer stations --
3 that's residual and recycling -- for disposal. But the central regulatory obligations
4 applicable to controlled waste are set out in sections 33 to 34 of the 1990 Act. They
5 apply to all forms of controlled waste alike, albeit there are some exceptions for
6 things done by householders. And the definition of "controlled waste" under
7 section 75(4) of the 1998 Act is that it simply means household, industrial or
8 commercial waste or any such waste. So we can't see that there's any really
9 significant difference in the regulatory obligations.

10 After all, when the council's bin lorries come loaded up with both household waste
11 and commercial waste to the waste transfer station and it is deposited there and
12 separated and then sent for onward recycling or, in the case of residual waste,
13 I believe most of that goes to be burnt to produce energy.

14 Sorry to dot around a bit. I am just picking up the point, the suggestion that was
15 made at their skeleton that there is no statutory mandate for the council proactively
16 to promote its commercial waste collection activities or to seek to attract customers.
17 Just to reiterate the point that I made, I think in intervention yesterday, that the
18 council does not do that now. In practice, that's set out in the agreed statement of
19 facts at paragraph 39 to 41 and that's really -- that practice is really in consequence
20 on the Mr Justice Warren treatment and the VAT treatment. So that's the
21 explanation as to why things are done now the way they are done now.

22 Sorry, I said 39 to 41, it should be 39 to 42 of the agreed statement of facts.

23 Mr Bowsher suggested yesterday that there had been no exercise by the council --
24 from transcript page 79:

25 "... to consider what would be the relevant components of a proper costing in order to
26 meet the argument that there was or was not an economic advantage..."

1 That's simply not true. The efforts the council has made to calculate the actual costs
2 of collecting and disposing of commercial waste before the decision of the 18 March
3 2020 are set out in great detail in Mr Sherratt's evidence. Can I just go to the most
4 recent set of accounts to illustrate that? That is at -- in the hearing bundle at tab 76,
5 at page 819.

6 There you will see the council's trade waste financial statement. This is the council
7 working out what its costs are as a basis for -- in the top left-hand corner --
8 calculating trade waste costs. Mr Bowsher suggested that the capital costs of trucks
9 and disposal costs had not been accounted for by the council. That's not right. The
10 entry for refuse vehicle costs includes, as one can see in the entry for -- the entry for
11 refuse vehicle costs includes capital financing costs. That's under "Key activities",
12 second line down:

13 "Refuse vehicle costs, budget area, refuse collection transport costs."

14 There is a figure, and then that is covering vehicle servicing, MOT, excise duty,
15 insurance and financial costs.

16 And then further down, the sixth line down:

17 "Trade waste disposal costs."

18 There's the cost:

19 "Cost to dispose of trade waste and recycle it based on calculated tonnages,
20 including haulage."

21 So it just really doesn't stand scrutiny to Mr Bowsher's suggestion that somehow the
22 council disregards actual costs being incurred in carrying out its activities. It just
23 doesn't withstand scrutiny. It is there set out in those budgeting schedules.

24 Sir, I am bang on target for a transcriber's break and then turning to the subsidy
25 decision.

26 **THE PRESIDENT:** Very good. We will rise in that case for ten minutes and resume

1 then. Thank you very much.

2 **(11.44 am)**

3 **(A short break)**

4 **(11.54 am)**

5 **THE JUDGE:** Yes, Mr Robertson.

6 **MR ROBERTSON:** Before I turn to subsidy decision, there is one small point that hit
7 the cutting room floor in my determination to be bang on 11.45. It is this. It is two
8 sentences really. It is a terminological point. Mr Bowsher asserted yesterday that
9 trade waste is a subset of commercial waste. We have addressed that at length in
10 our defence, at paragraph 21 in our skeleton, paragraph 43. The short point is that
11 there is no evidence that any type of commercial waste can't be collected in
12 containers larger than 1100L wheelie bins and industrial waste may require other
13 facilities. That's not the subject of these proceedings. I just want to put that on
14 record. It's a point I wanted to take you to. I didn't, and now I have done it.
15 Subsidy decision. I have inverted the order in which my learned friend took these
16 points, but as further to the subsidy decision, that it is capable of review under the
17 Act, is really a jurisdictional point. Then I think logically that comes first.
18 So when was the decision under appeal taken? Mr Bowsher, yesterday, focused on
19 the decision on 14 March 2023. It was the focus of his challenge. His secondary
20 case, there was a decision taken on 4 January 2023. That seems now to be held in
21 reserve and following Mr Bowsher's exchange with the tribunal yesterday afternoon,
22 recorded on page 93 of the transcript.
23 If I can start on the agreed statement of facts, paragraph 51, which records that it is
24 an agreed fact that the council adopted its current approach on 18 March 2020, and
25 that has not changed since that time. It is common ground that the council's
26 approach to charging has not changed since 18 March 2020.

1 That 2020 decision was, of course, prompted by the European Commission state aid
2 investigation which in turn was prompted by Max Recycle's complaint to the
3 European Commission, a complaint that in the end did not lead to the result for
4 which they were hoping. But that investigation, which of course is an investigation
5 into the UK, the UK then takes it up with the council. But state aid complaints
6 operated within the EU at an intergovernmental level.

7 It is the UK that is alleged to have been in breach of the state aid rules so it is for
8 central government to respond involving the council to the extent to which central
9 government thinks fit. That process required the council to reconsider the basis on
10 which it provided its commercial waste collection service.

11 As Mr Bowsher explained yesterday, the original decision was taken when the
12 council was set up as a unitary authority in 2009. The council took over from
13 a number of more local authorities in County Durham. That is covered by
14 Mr Sherratt in his witness statement, paragraphs 29 to 33, and then he explains at
15 paragraph 34 that there have been -- there had been some changes since the
16 original 2009 decision. Things like changing the frequency of recycling collections,
17 so you have every other week waste, every other week recycling. It's fairly standard
18 now, I think, across many local authorities. That's the 2009 setting up the original
19 approach, taking over from the local authorities.

20 It is a completely minor point, but Mr Bowsher said yesterday that there was no
21 minute of the original decision in 2009. In fact, the report to which he did take you is
22 minuted as having been received by the council's cabinet on 9 March 2009. Just for
23 the tribunal's note -- there is no need to turn it up -- that's in the hearing bundle,
24 tab 11, pages 157, specific consideration, 160, it's item A8.

25 I have taken you to the document showing the careful separation of costs, that the
26 decision -- we are now here talking about the March 2020 decision -- entailed. If

1 I can first of all take you to the decision document which is in the hearing bundle at
2 tab 43.

3 **THE PRESIDENT:** Yes.

4 **MR ROBERTSON:** That starts on page 366.

5 **THE PRESIDENT:** Yes.

6 **MR ROBERTSON:** So it is headed "Ordinary decision". It is a report of the
7 Corporate Management Team. We see there the individuals involved and the
8 councillor who has that portfolio. It affects countywide and the purpose of the report
9 is set out at paragraph 1:

10 "To consider and to confirm that the council wishes to continue its direct collection of
11 commercial waste on request rather than alternatively fulfilling its statutory
12 requirements by making arrangements for collection through third parties." [As read]

13 Then the second purpose of the report:

14 "To note that a separation of accounts has been undertaken to clearly identify all
15 commercial waste collection and disposal costs and set a charge for customers that
16 includes a small profit on it." [As read]

17 I have taken you through those accounts and things like vehicle financing costs and
18 so on.

19 **THE PRESIDENT:** Yes.

20 **MR ROBERTSON:** That is then explained over the page. It starts with the heading
21 "Executive summary". It starts over the page at paragraph 6, setting out --
22 paragraphs 3 and 4 set out the background, refer to the fact there have been legal
23 challenges. Then paragraph 5, council invited to respond to a series of questions
24 through the state aid registry of the European Commission as well as attend
25 a meeting in Brussels to explain its services in greater detail. And there we see what
26 the European Commission representatives had advised.

1 Then paragraph 6:

2 "There are no accurate on-the-ground measurements of bin weights and staff time.

3 The separation of accounts has, however, been undertaken on an apportionment
4 basis from the estimated percentage of trade waste tonnages compared to total
5 domestic and commercial tonnages, and apply that to all costs including staffing,
6 vehicles, depots, vehicle overheads and central administration costs. Furthermore,
7 any specific dedicated costs, eg an accounts manager dedicated to the role, has
8 been attributed in full." [As read]

9 Then we get some more explanation of pricing, determining the charge,
10 benchmarking that with charges elsewhere. Then paragraph 10:

11 "On balance, it is recommended that the council continues to deliver an in-house
12 commercial waste collection service with clear and transparent accounts for both
13 customers and external providers alike, including operating to a target profit of
14 between 4 to 10 per cent in line with industry practice and that this profit element be
15 reviewed annually in order to ensure it remains appropriate to the external market."
16 [As read]

17 Then the recommendations are set out at paragraph 11. Then over the page,
18 starting at paragraph 12, you see a much more detailed explanation of the
19 background. Its original constitution on a countywide basis at the time of local
20 government reorganisation, taking over from seven district councils, and the point
21 I mentioned, paragraph 14, alternate weekly collection coming in in 2012.

22 A real, detailed explanation of the background and then detailed explanation, from
23 paragraphs 17 onwards, under the heading "Legal challenge and separation of
24 accounts".

25 An explanation over the page, on page 371, paragraph 21, the actual separation of
26 accounts is not as easy as it may first seem. That's a paragraph to which my

1 learned friend took the tribunal yesterday. You will see the comparison with other
2 providers at paragraph 24, calculations then on paragraph 25.

3 The options set out from paragraph 26 onwards. Paragraph 26:

4 "Strong argument to continue with direct provision. The existing fleet and staff,
5 through efficient route optimisation, have been able to accommodate these
6 collections alongside domestic waste collections without the need for increased
7 vehicles or personnel. Furthermore, notwithstanding that the Council is
8 demonstrably making a profit, overall the costs to businesses are reasonable and
9 offer a good value method of meeting commercial waste needs." [As read]

10 Then paragraph 27:

11 "A complete withdrawal of the service may not be viable as whilst this proposition
12 would need to be first tested through market engagement, it is considered that
13 collection from more rural remote areas would either be prohibitively expensive, if it
14 relied on private sector bespoke collections, or that they would have little interest if
15 servicing these areas. By default, these businesses may then have to rely on
16 Council collections of their waste." [As read]

17 Just to -- I think it was the point being made by Professor Ulph yesterday, that
18 obviously commercial providers, they have a choice who to service and essentially
19 you can -- we would say you can cherry-pick from the more densely populated
20 areas, but that leaves the more remote areas high and dry. I will just add this, just
21 from -- this is just personal observation, speaking as the grandson of a Durham
22 miner from north-west Durham, there is a historic issue with rural depopulation in the
23 more remote areas to the north-west of the county. It's actually quite a big political
24 issue as to how you support former coal mining areas like Stanley, which is where
25 my family is from. So there is -- this is a real issue in a remote county like County
26 Durham.

1 Then paragraph 28:
2 "Given the legal powers to undertake commercial waste collections and the benefits
3 to both County Durham small businesses and the environment from doing so, it is
4 suggested that direct collections continue where there is a request for such service."

5 [As read]

6 Then paragraph 29, which my learned friend took you to, makes the point that:

7 "The exercise of separating the accounts for commercial waste services has
8 highlighted that we are making industry profits and above with our existing price
9 structure. In the spirit of fairness to our customers and in fulfilling the legislative
10 requirements of providing a commercial waste service at a reasonable charge, it's
11 suggested to use 2019/20 prices for 2020/21 and to continue to monitor costs year
12 on year in ensuring that overall profit from the service is at an acceptable level." [As
13 read]

14 That's what the decision -- that's the decision to review this on an annual basis to
15 continue to monitor costs year on year to ensure that the overall profit from the
16 service is at an acceptable level, so it is fair to customers to levy a charge -- to levy
17 a reasonable charge.

18 Then there is a conclusion. Paragraph 30:

19 "Acting lawfully; paragraph 31, service operating without subsidisation from the
20 council. There are strong arguments for the direct collection to continue in
21 supporting business waste needs including hard to reach areas, while reducing
22 carbon emissions as collections are often linked to domestic rounds."

23 Then paragraph 32 finishes off with separation of accounts and regular monitoring
24 costs.

25 There is the fully thought through and reasoned decision of March 2020. So the
26 short submission is that the council here determined on the principle of in-house

1 collection, the principles by reference to which it would set its charges for that
2 activity, and the fact that charges would be reviewed each year for consistency with
3 those principles.

4 **PROFESSOR ULPH:** Can I just ask, those principles, if we look at paragraph 29,
5 the second sentence there.

6 **MR ROBERTSON:** Yes.

7 **PROFESSOR ULPH:** "In the spirit of fairness to our customers and in fulfilling the
8 requirements of providing a commercial waste service at a reasonable charge ..."

9 [As read]

10 Is that what you were taking to be the principles lying behind this? I think Mr Sherratt
11 in his evidence called this trying to avoid postcode lotteries in the pricing mechanism.

12 **MR ROBERTSON:** Yes, that's the point about hard to reach areas.

13 **PROFESSOR ULPH:** Yes.

14 **MR ROBERTSON:** Because it is really the point I made in relation to paragraph 27:
15 collection from more rural remote areas would either be prohibitively expensive, if it
16 relied on private sector bespoke collections, or they would have little interest in
17 servicing those areas. They would not be interested in cherry-picking up on the old
18 north-west Durham coal field. That's the point Mr Sherratt is explaining and it's
19 summed up there in paragraph 29.

20 It is ensuring that no matter where you are in the county, the same bin, same size of
21 bin, same type of waste, is collected for the same price. So it doesn't matter if you
22 are down in the flesh pots of the city of Durham or in the areas like -- I have to be
23 careful now where I refer -- I can refer to Oxhill which is where my mum is from up in
24 north-west Durham. That's the point.

25 **PROFESSOR ULPH:** Thank you.

26 **MR ROBERTSON:** In our submission, what you see in the March 2020 fully

1 reasoned decision is if you are going to categorise this -- and all of this is for the
2 sake of argument because over overall submission is there is no subsidy here -- but
3 if it were to be classified, you would classify that as a subsidy scheme; failing that, as
4 a decision to award subsidy.

5 Mr Bowsher says it can't be a subsidy scheme because it doesn't fit with the
6 statutory guidance on the meaning of subsidy scheme. Just to take you to that,
7 that's paragraph 2 -- sorry, that's authorities tab 20, and that starts on page 310.
8 The relevant provision here that he relied upon is at page 329, and it is
9 paragraph 2.23. Under the heading "What is a scheme?" the authors of the
10 guidance say:

11 "A scheme is a set of rules which describes the eligibility terms and conditions for
12 any number of possible subsidies to be given under the scheme." [As read]

13 And then continues. And that's -- and Mr Bowsher says, well, there have to be rules,
14 sets of rules.

15 Now, in our submission, this is an unhelpful gloss on the statutory language. There
16 is no basis in the Act for defining subsidy scheme in such a prescriptive manner. If
17 you go to the definition of the subsidy scheme in the Act, that is at authorities tab 10,
18 page 172, section 10, subsection 1:

19 "In this Act, subsidy scheme means a scheme made by a public authority providing
20 for the giving of subsidies under the scheme." [As read]

21 So it is set out in non-prescriptive terms and does not dictate the form in which
22 a scheme should take effect. Now it is in contrast to a subsidy decision. A decision
23 is a one-off. As you have seen, the decision of March 2020 isn't a one-off, because
24 it provides for its continued application going forward with annual reviews of costs to
25 ensure that the charges being made pursuant to it are reasonable and therefore
26 comply with the legislative requirement of the 1990 Act and don't lead the council to

1 making unnecessarily high profits which would run the risk of contravening its
2 limitation for not charging charges for an improper purpose.

3 So interpreting section 10(1), we say that there is no requirement in the legislation
4 for a set of rules that describes eligibility terms and conditions. It is just simply not
5 there, and there is no need to read that into the Act.

6 **THE PRESIDENT:** Mr Robertson, I think we can agree that a subsidy scheme is the
7 vehicle through which subsidies are processed.

8 **MR ROBERTSON:** Yes.

9 **THE PRESIDENT:** What you are saying is that there's nothing inconsistent with the
10 definition of subsidy scheme to have the processing in a temporally sequential way.
11 So what you are saying is that the scheme is produced in 2020 --

12 **MR ROBERTSON:** Yes.

13 **THE PRESIDENT:** -- and then annually thereafter one has a series of subsidy
14 decisions under that.

15 **MR ROBERTSON:** That the scheme continues to apply.

16 **THE PRESIDENT:** Yes.

17 **MR ROBERTSON:** It's not -- so there is then a review of the charge --

18 **THE PRESIDENT:** But nothing else.

19 **MR ROBERTSON:** But nothing else.

20 **THE PRESIDENT:** So you wouldn't accept the characterisation of the later decisions
21 as an affirmation of the previous decision to make a scheme?

22 **MR ROBERTSON:** They are not.

23 **THE PRESIDENT:** They are not.

24 **MR ROBERTSON:** They are referring back to what had been put in place in March
25 2020.

26 **THE PRESIDENT:** Right. So let's suppose there has been a significant change in

1 | circumstance between March 2020 and the decision primarily relied upon by
2 | Mr Bowsher, the decision of 14 March 2023. Let's suppose that as at 14 March
3 | 2023, the bottom has fallen out of the commercial waste disposal market and prices
4 | are at a tenth, a hundredth of what they were previously. You simply look at your
5 | rates and say "that's great, we will just look at our rates and move on"?

6 | **MR ROBERTSON:** That would be correct if it is still working on the principles laid
7 | down in 2020. If it is just an adjustment of rates, it's just making sure the charge
8 | continues to be reasonable as required by the statute.

9 | We will see when we come on that there are -- the legislation provides for permitted
10 | modifications to subsidy schemes, so to deal with where you have to revisit
11 | a scheme. But in this case -- and so now I am setting back from your Lordship's
12 | hypothesis and returning to the facts -- in this case there has been no revisiting of
13 | the 2020 --

14 | **THE PRESIDENT:** I understand that. But my point is the time at which you would
15 | work out whether the scheme as you call it is viable for the future is surely the time
16 | that you review the rates?

17 | **MR ROBERTSON:** If you were to review the rates and say the scheme is no longer
18 | viable, we have to do something else.

19 | **THE PRESIDENT:** Well, it's viable, it's just overcharging.

20 | **MR ROBERTSON:** Well, if it is just overcharging, then these principles are you don't
21 | overcharge, it wouldn't be fair and it wouldn't be a reasonable charge. But that's an
22 | application of the scheme adopted in 2020.

23 | **THE PRESIDENT:** It might be reasonable in accordance with the council's costs.
24 | What I am hypothesising to you is a situation where it is now far better value to
25 | export these services into the market, because the rates are a 100th of what they
26 | were.

1 **MR ROBERTSON:** That would then be a decision no longer to apply the 2020
2 scheme and to adopt a new scheme.

3 **THE PRESIDENT:** I appreciate we are dancing on the head of a pin, but it seems to
4 be a pin that matters, at least to you.

5 The point I am suggesting to you is that in reviewing the rates annually, and in
6 particular in reviewing the rate on 14 March 2023, one is dealing with that and one is
7 also, as a responsible body would, endorsing the decision, affirming it going forward
8 for another year.

9 **MR ROBERTSON:** You are just continuing to act in accordance with what has been
10 decided in 2020. There's no separate process of going through the exercise that
11 was done in 2020, looking at all the assumptions, weighing up all the factors and
12 then deciding, yes, this continues to be a good scheme. That's not what is being
13 done at a subsequent point.

14 **THE PRESIDENT:** Right.

15 **MR ROBERTSON:** It's purely a pricing issue.

16 **THE PRESIDENT:** So when on your case would that occur?

17 **MR ROBERTSON:** On our case, if the council looks at the scheme and thinks:
18 "Well, the principles we thought were applicable in 2020 no longer hold good, we
19 have to reconsider this. This scheme may no longer be fit for purpose." At that
20 point, there would be -- if they did what they did in 2020 -- a full reconsideration and
21 then they would put a new scheme in place, because of the change of
22 circumstances.

23 **THE PRESIDENT:** Yes.

24 **MR ROBERTSON:** Now, at that point, that would be a decision to adopt a new
25 subsidy scheme --

26 **THE PRESIDENT:** What is "that point"? What time are you thinking of?

1 **MR ROBERTSON:** On your hypothesis it is -- the bottom has dropped out of the
2 market, prices are totally different to what they were in 2020. So it is -- it would be
3 the council management team, I think here, saying what we decided to do in 2020 is
4 no longer necessary/reasonable in the light of these change of circumstances. We
5 need to reconsider our approach to commercial waste charges.

6 **THE PRESIDENT:** Right.

7 **MR ROBERTSON:** And if they go through that: right, we are going to withdraw or
8 cease what we did in 2020 and we are going to put something else in place; then at
9 that point it would involve going through the same sort of reasoning process that the
10 council did in 2020.

11 At that point, I would accept, yes, that would be the adoption of a new subsidy
12 scheme to replace the one that was in 2020, just as in the same way in April 2009
13 the council had to adopt arrangements to replace those that had been engaged in by
14 the seven district authorities from which it was taking over.

15 **THE PRESIDENT:** Yes. And why can't it, or why isn't it an equally good way of
16 looking at it as a series of decisions? The first decision is more unpacked than the
17 later decisions, but what you are doing year on year is you are looking at the
18 decision. Sure, you are primarily looking at the charges, but you would also be
19 looking at this annual review to see whether there is the change of circumstances, to
20 see whether the earlier decision still remains fit for purpose? Why isn't that another
21 way of seeing it?

22 **MR ROBERTSON:** Well, two answers to that. Firstly, that's not what's happening
23 on the facts of this case, as I will take the tribunal on to look at.

24 **THE JUDGE:** Okay.

25 **MR ROBERTSON:** Secondly, if you take that approach to a subsidy scheme and
26 say it's effectively a scheme implemented by a series of, in this case, annual

1 decisions, then every year you are adopting, on your analysis, a new subsidy
2 scheme open to challenge under the Subsidy Control Act.

3 **THE PRESIDENT:** No, on my analysis you are making a new subsidy decision
4 every year, not a scheme.

5 **MR ROBERTSON:** Either way, you are laying yourself open to someone saying
6 "right, this decision, we are going to challenge it because it's a new subsidy".

7 **THE PRESIDENT:** Well, yes, okay --

8 **MR ROBERTSON:** But you would. You would have challenges --

9 **THE PRESIDENT:** I entirely agree, Mr Robertson, you would be exposing yourself.
10 Assuming the 2022 Act applies, you would be exposing yourself to that sort of
11 scrutiny, but the answer to that is surely that's a good thing?

12 **MR ROBERTSON:** Well, in adopting a twin approach to subsidy decisions which
13 are one-offs and then subsidy schemes, Parliament has set up a structure that
14 allows you to have a subsidy scheme put in place. If there's going to be a challenge,
15 it's challenged there and then. But once it's in place, the whole point of it being
16 a scheme is that it can continue to operate for the future without subsequent
17 challenges.

18 **THE PRESIDENT:** I would venture to suggest that a temporally segregated scheme
19 is quite unusual. Normally it would be a scheme where you've got multiple
20 applicants and the aim of the scheme is to ensure consistency between applicants
21 for the subsidy so that they are all treated similarly. So you make one scheme
22 saying we are going to allocate resources in this way, and you then have a series of
23 decisions taken in accordance with the scheme whereby the scheme ensures
24 uniformity of application across matters.

25 So, yes, you have a series of decisions, but they are not only temporally distinct,
26 they are distinct as to the recipient.

1 **MR ROBERTSON:** That seems to rule out having a scheme that operates going on
2 into the future until terminated --

3 **THE PRESIDENT:** No, I am not ruling it out, Mr Robertson. What I am suggesting
4 is that there are natural ways of seeing things and the natural reading of the scheme
5 is one where a public body is providing for the giving of multiple subsidies.

6 **MR ROBERTSON:** I think in this case --

7 **THE JUDGE:** In this case you are saying it's temporally elongated or segregated,
8 yes, I understand that.

9 **MR ROBERTSON:** Yes. And our submission is there is no reason why a scheme
10 should be so limited to being a one-off dealing with a large number of applicants on
11 at a particular point in time, and is limited or constrained as applying going into the
12 future.

13 If you have a scheme that you think operates -- that you think should operate and
14 continue to operate, then why -- what's the problem with having a scheme that says
15 "Until further notice this is how -- you know, people who want subsidies can come
16 and apply for subsidies."

17 In terms of legal certainty, having that scheme put in place and then it can be
18 operated and everyone knows where they are unless it has been successfully
19 challenged at the outset, that provides legal certainty, administrative certainty.

20 Whereas saying that a subsidy scheme can only operate as a one-off really makes it
21 no more than a subsidy decision, a one-off subsidy decision. That can't be what
22 Parliament intended by having the separate approach to subsidy schemes from
23 subsidy decisions.

24 **THE PRESIDENT:** Yes, okay.

25 **LORD YOUNG:** What do you say is a hallmark of a scheme compared to the
26 decision? Is it simply the one-off nature?

1 **MR ROBERTSON:** Yes.

2 **LORD YOUNG:** That's all it is?

3 **MR ROBERTSON:** Yes. A scheme is something that is in accordance with
4 whatever principle adopts continues to apply.

5 **LORD YOUNG:** What do you mean by one-off? Do you mean a decision which is of
6 a single subsidy on one occasion which cannot then be reviewed, cannot continue
7 beyond a set amount of time? What do you mean by one-off?

8 **MR ROBERTSON:** I am trying to avoid giving a glib answer, because it's one that
9 that's not -- it's one that's not a scheme.

10 I am also trying to avoid giving you the non-answer of, whether, it will be a matter of
11 fact and degree. But it will be.

12 So for a one-off subsidy decision, the decision is taken, the subsidy given to those
13 that are eligible for the subsidy, and then that's the implementation of the subsidy.
14 And there can be a challenge to the legality of it, but that's -- the subsidy is given.

15 So a subsidy to build a gigavolt factory -- to take a topical example, also from the
16 north-east -- now you might then say, well, what if there's going to be further funding
17 for that --

18 **LORD YOUNG:** That's what I was wondering about.

19 **MR ROBERTSON:** Yes.

20 **LORD YOUNG:** There might be further funding, you know, set out for the amounts
21 of money -- certain conditions, it may be conditional; is that a scheme or is that
22 a decision?

23 **MR ROBERTSON:** That would typically be a decision, because you then have
24 a decision that if milestones are reached then further funding is available in
25 accordance with these principles. That's, from my limited experience under state
26 aid, that's the typical approach to it.

1 Whereas a scheme is something which is of more general application.

2 **PROFESSOR ULPH:** So is one idea of your scheme that it guarantees some kind of
3 temporal consistency --

4 **MR ROBERTSON:** Yes.

5 **PROFESSOR ULPH:** -- of approach?

6 **MR ROBERTSON:** Yes.

7 **PROFESSOR ULPH:** That is what you mean by legal certainty?

8 **MR ROBERTSON:** Yes.

9 **PROFESSOR ULPH:** So if I was a company thinking of setting up in business,
10 I would have a decision whether I do that for this year or next year, I have some idea
11 what I might end up paying in broad terms, or the principles which would determine
12 what I pay by way of waste disposal --

13 **MR ROBERTSON:** Yes. If you were a small business seeking -- and were
14 approached by a commercial provider, such as Max Recycle, and they offered you,
15 say, a three-year deal for disposing of your waste and you thought, hang on,
16 I already get it from the council. I think the council's charges have been reasonable
17 so far, then their approach continues to be no more than reasonable charges,
18 therefore I won't switch and go for the three-year deal, I will just carry on relying on
19 the council. I think that's predictable. So that's pretty much shoe is on -- put oneself
20 in the shoes of an operator of a pub or a corner shop or a hairdresser, the sorts of
21 businesses we are talking about in this case, that's the decision I can make, I can
22 continue to rely upon the council.

23 **PROFESSOR ULPH:** Thank you.

24 **MR ROBERTSON:** Unless there are no further questions on this topic, I think that is
25 all I have to say on the matter.

26 **THE PRESIDENT:** No, thank you very much.

1 **MR ROBERTSON:** I was going to take you to the March 2023 decision which is at
2 tab 63.

3 **THE PRESIDENT:** Which bundle?

4 **MR ROBERTSON:** It is in the hearing bundle, tab 63, page 747.

5 We can see that this is -- this again is headed:

6 "Proposed fees and charges environmental services."

7 It's a joint report from Mr Sherratt, Head of Environment, who is sitting behind me,
8 whose witness statement you have seen in these proceedings. We see what the
9 purpose of the report is in paragraph 1:

10 "To update and seek approval from the Neighbourhoods and Climate Change
11 Management Team with regards to 2023/24 proposed fees and charges for
12 environmental services." [As read]

13 You will see the executive summary. So the service managers have considered fees
14 and charges, and where appropriate increased non-statutory charges.
15 Recommendation is to approve the schedule of fees and charges. The background
16 to it is -- my learned friend took you to this -- all fees and charges must be reviewed
17 at least on an annual basis.

18 It sets out what the context is. My learned friend took you to paragraph 8, first bullet
19 point. The third bullet point points out -- so it says:

20 "The policy is built around the following key principles, key identified entrepreneurial
21 approach ..."

22 Secondly, compliance with Local Government Act. Thirdly, adherence with
23 the financial duty to ensure income does not exceed costs. So it is recording that as
24 the context.

25 Then paragraph 11, under the heading:

26 "Statutory regulation and discretionary charges

1 "Increasing prices is only one part of a more strategic approach to be taken in
2 ensuring that environmental services meets its challenging income and efficiency
3 targets for 2023/24. While importance has been placed on the generation of
4 revenue through price increases, during the current difficult economic climate
5 consideration has also been given to the public perspective and the impact that any
6 increase in charges will have upon them." [As read]

7 Obviously it has been set by a democratically accountable council.

8 Then you see it is a whole range of charges, so pest control, moving down to the
9 charges for individual types of pest types, bereavement services, allotment rents and
10 then we get, on page 751, to refuse and recycling services and it sets out the basis
11 upon which they recommend changes in charges.

12 The actual fees are then set out in an appendix, which is at 761. Reference to
13 recycling, proposed fees and charges. So that's the detailed recommendations for
14 changes in prices.

15 This is a decision taken to fix annual charges consistently with the principles
16 established back in March 2020. Mr Bowsher will sort of pray in aid the limited
17 reconsideration of these issues, but that's because the decision on 14 March was
18 within the framework of the 18 March 2020 decision. It was just simply updating the
19 charges annually to ensure they covered the relevant costs. It didn't involve any
20 decision at the level of principle, it was applying the principles already set.

21 Then just to complete this, we see at tab 69 -- you have already seen this email -- at
22 page 793, the exchange of emails between the Durham County Council employees
23 and Councillor Mark Wilkes, whose portfolio this is. I can't resist, while we are on
24 page 793, taking you to the bottom. I say he's a county councillor, and it lists there
25 the wards for which -- or the villages for which he is county councillor, and it includes
26 the wonderfully named "Pity Me", which is a great place name in Durham. We have

1 a number of other similarly left field place names in Durham, but I will leave it to the
2 tribunal members to come and visit and find them out for themselves.

3 There wasn't any decision at the level of principle on 14 March, it was just
4 reconsideration of the charges and then a decision approved and exchange of
5 emails. A complete contrast to what happened in March 2020.

6 How does that then impact under the Act? If we are right that any subsidy was given
7 in March 2020, and has just been continued under a scheme, how do you analyse
8 that under the Act? Well, the position, we say, is that subsidies given under the
9 2020 scheme are legacy subsidies and exempt from any challenge under
10 section 48(1)(a) of the Act. That's back to tab 10, page 179. This is section 48
11 which is headed "Legacy and withdrawal agreement subsidies".

12 Subsection (1):

13 "The subsidy control requirements do not apply to the following legacy since
14 subsidies and schemes." [As read]

15 So it is both individual subsidies and subsidy schemes:

16 "(a) a subsidy given on or after the day on which the section comes into force under
17 a subsidy scheme made for that date." [As read]

18 **THE JUDGE:** Yes.

19 **MR ROBERTSON:** If we are right and March 2020 is a subsidy scheme, then on my
20 learned friend's case that March 2023 is giving a subsidy, it's a legacy subsidy and
21 it's immune from challenge under section 48(1)(a), subject to the question of any
22 permitted modification.

23 As to modification, we can turn to page 189 in this tab, section 81, modifications to
24 subsidies and schemes. My learned friend took you to this using the phrase "Safe
25 harbour" to describe permitted modifications.

26 Subsection (3):

1 "A modification to a subsidy or subsidy scheme is a permitted modification if it is
2 a modification of any of the following kinds:

3 "(a) a legacy subsidy modification ..." [As read]

4 And in subsection (4):

5 "A legacy subsidy modification means the modification of a legacy subsidy or legacy
6 scheme as permitted under the subsidy or scheme in accordance with its terms as
7 they had effect before coming into force of this section." [As read]

8 **THE PRESIDENT:** Yes.

9 **MR ROBERTSON:** So that's what we say the decision of the 14 March 2023 is: the
10 18 March 2020 decision expressly entailed updating the charges each year, as we
11 saw a few moments ago, so it's a permitted modification.

12 We do say that the consequences of rejecting the council's case on this point would
13 be very significant. It would mean that every occasion where an authority revisits the
14 level of charges annually in accordance with principles established before the Act
15 entered into force, its entire approach becomes reviewable. And that, we say, can't
16 have been the intention of Parliament. It's what section 81(3)(a) was intended to
17 prevent.

18 While we are in section 81, we also rely on 81(3)(f), which says -- again this is part of
19 the list of permitted modifications -- an increase of up to 25 per cent of the original
20 budget for the subsidy or subsidy scheme. In short, any change in the amount of
21 subsidy is permitted provided it isn't an increase of 25 per cent or more.

22 Mr Bowsher sought to suggest to you that you needed a document called a budget
23 at the time of the original decision, but that isn't required under the legislation. All it
24 means is that the value of the subsidy scheme mustn't increase by more than
25 25 per cent. That hasn't happened. You can see from Mr Sherratt's evidence,
26 paragraph 50, that -- and I don't think we need to turn this up -- the figures are that

1 the commercial waste service operated at a 3.3 per cent loss in 2021. That was
2 a year hard hit by Covid. Recovered to a 1.4 per cent surplus in 2021/22. And that
3 the council increased its charges to offset inflationary cost increases this year.

4 The suggestion that subsidies become more -- 25 per cent more valuable just
5 doesn't square with the facts as set out by Mr Sherratt. We say that you have
6 sufficient evidence before you in the form of accounts and Mr Sherratt's evidence to
7 form that judgment on this.

8 Our fall-back, even if the decision on 18 March 2020 is simply a decision to give
9 subsidies, and not a scheme, modifying that decision does not necessarily amount to
10 a new decision. The modification may be permitted if there is no increase in the
11 budget of more than 25 per cent. We submit that's the case.

12 **THE PRESIDENT:** Yes.

13 **MR ROBERTSON:** Sir, I am about to turn on to a new topic, and it is no less
14 convoluted.

15 **THE PRESIDENT:** In that case, should we rise now and resume at five to 2?

16 **MR ROBERTSON:** Yes, sir.

17 **THE PRESIDENT:** How are you doing time wise? Are you still to the minute?

18 **MR ROBERTSON:** I am on course to finish by 4 o'clock, which would leave
19 Mr Bowsher 15/30 minutes in reply. I will do a bit of tailoring over the lunchtime.

20 **THE PRESIDENT:** I don't want anyone to feel pressed.

21 Mr Bowsher, it is early days, but what sort of length of reply are you envisaging?

22 **MR BOWSHER:** I would hope less than an hour, but I think 15 minutes would be
23 certainly on the tight side. I would be gabbling to everyone's costs probably.

24 **THE PRESIDENT:** We certainly don't want you to gabble, Mr Bowsher, no. We will
25 discuss how long we can go after 4.30.

26 **MR BOWSHER:** Thank you.

1 **THE PRESIDENT:** So we will see where we go, but we will start again at five to 2.
2 Thank you.
3 **(12.56 pm)**
4 **(The short adjournment)**
5 **(1.55 pm)**
6 **THE PRESIDENT:** Good afternoon, Mr Robertson.
7 **MR ROBERTSON:** Good afternoon. Shall I give an update on timing, where
8 I expect to be?
9 **THE PRESIDENT:** Yes, of course.
10 **MR ROBERTSON:** I have had a word with my learned friend. I think with a fair wind
11 I should be finished by 3.30. It would be then an appropriate moment for
12 a transcriber's break. That would then give, if the tribunal is able to sit until 4.30 --
13 **THE PRESIDENT:** We have discussed matters. We can run to quarter to five if that
14 assists, so there is a little bit of leeway.
15 **MR ROBERTSON:** So if Mr Bowsher is on his feet by 3.45, that should be enough.
16 **THE PRESIDENT:** Thank you.
17 **MR ROBERTSON:** There is one final point I wanted to deal with under the heading
18 of "Subsidy decision". That is my learned friend's argument that based upon 2.7 of
19 the statutory guidance that the 2023 charging decision represents the moment when
20 there is a binding commitment to the recipient of the subsidy.
21 2.7 of the statutory guidance refers to section 2(5) of the Act. As we have already
22 submitted you go to the Act rather than to the guidance. Section 2(5) says that
23 financial assistance is to be treated as given to an enterprise if the enterprise has an
24 enforceable right to the financial assistance.
25 So that's a deeming provision about when financial assistance is deemed to have
26 been given, it does not deem a decision to give a subsidy to have been taken on

1 a particular day. As we have pointed out in our skeleton argument at paragraph 19,
2 subparagraph (2), the Act draws a distinction between a decision to give a subsidy
3 and the giving of a subsidy.

4 Section 2(5) deals with the latter, about the giving of a subsidy.

5 Mr Bowsher also referred yesterday to the statutory guidance at paragraph 2.9,
6 which is not a part of the guidance that deals with subsidy schemes, which provides
7 that in general the date the financial assistance is given, ie the date the binding
8 commitment is made, will generally be the same date as the subsidy decision, the
9 confirmation of the decision to give a subsidy. That, we submit, again confuses two
10 things. A public authority can decide to give financial assistance, ie to make
11 a decision to enter into a contract, before it in fact enters into the contract, conferring
12 the legal right on the counterparty to that contract. So the decision to give the
13 subsidies on the former date -- the decision to give the financial assistance -- not the
14 latter date.

15 But in any event, this was all somewhat unreal. This is a subsidy allegedly given by
16 the council to itself. It can never have an enforceable right to something from itself,
17 because it couldn't sue itself in court, and Mr Bowsher has made no attempt to
18 explain how it could. Therefore section 2(5) can have no application to cases of
19 alleged cross-subsidy. As a result, the decision to give the subsidy must bear its
20 natural meaning, even if the deeming provision in section 2(5) might otherwise
21 modify it.

22 As I said, I am not going to address Mr Bowsher's alternative case on January 2023
23 in view of the exchange yesterday. That allows me to move on to the fourth and final
24 part of my submissions, which is existence of a subsidy.

25 There are four issues and Max Recycle has to win on each one to show that there is
26 a subsidy, as defined in section 2(1) of The Act. The four issues are -- I will give

1 cross-references to skeletons at this point, so that enables the tribunal, when
2 reviewing the transcript, to locate where the various written submissions are, and
3 also enables you to marry up Mr Bowsher's use of limbs with the issues that we list.
4 The four issues are: is the council acting as an enterprise when collecting
5 commercial waste? That is in our skeleton, 26 to 29. That's Max Recycle's limb B1,
6 60 to 77.
7 Two, is an economic advantage conferred? Our skeleton 30 to 36; Max Recycle's
8 limbs A and B2, 78 to 87.
9 Is any financial assistance specific? That's the third of the four issues. See council's
10 skeleton 37 to 43. That's Max Recycle's limb C, 88 to 98.
11 And is the financial assistance capable of having an effect on competition or
12 investment within the UK. Our skeleton 44 to 46, Max Recycle's limb D, 99 to 110.
13 Unless the answer to each of those questions is yes, then Max Recycle's application
14 must fail because there is no subsidy falling within the definition of section 2(1) of the
15 2022 Act.
16 Dealing with the first of those four issues: is the council acting as an enterprise when
17 collecting commercial waste? Can I start with an element of common ground in light
18 of the discussion between the tribunal and Mr Bowsher yesterday? As set out in our
19 skeleton at 25(5), we accept that a public authority can act as an enterprise in
20 respect of certain of its activities. Where we part company is that we do not accept
21 that the same activity can be simultaneously a public function and an enterprise.
22 Max Recycle, we think, concedes that at paragraph 65 of its skeleton, but some of
23 his submissions yesterday made me wonder.
24 **THE PRESIDENT:** Approaching that in stages, the notion of a subsidy involves the
25 shifting or conferring of an economic advantage from a public authority to an
26 enterprise.

1 **MR ROBERTSON:** Yes.

2 **THE PRESIDENT:** So the first stage in any analysis has to be is the entity doing the
3 conferring a public authority?

4 **MR ROBERTSON:** Yes.

5 **THE PRESIDENT:** It is obviously common ground, since we wouldn't be here, that
6 the council is a public authority under section 6.

7 **MR ROBERTSON:** Yes.

8 **THE PRESIDENT:** Why, according to the schema in 6 and 7, is it the case that
9 a public authority, a person exercises the functions of a public nature, can also be an
10 enterprise?

11 **MR ROBERTSON:** You have to look at it function by function.

12 **THE PRESIDENT:** Why?

13 **MR ROBERTSON:** Well, I am just going to explain how a public authority -- a public
14 authority might have conferred upon it by legislation the power to act as an
15 enterprise. In other words, to carry on offering goods or services for consideration in
16 a given market. For example, if a council were given the power to promote pop
17 concerts for attracting tourists to a particular area, and so if the legislation says to the
18 council, you have the power to act as a pop concert promoter.

19 Now, as a pop concert promoter, it can't do that under its normal powers, it has to do
20 that -- if it has statutory authorisation to do it, because it is a creature of statute. In
21 that situation it would be competing with other pop concert promoters in the private
22 sector. So you could see in that situation that the council, acting under its statutory
23 pop concert promotion powers, is acting as a business in competition with other
24 businesses. We can see that that --

25 **THE PRESIDENT:** Yes, but that's not the test, is it? The test in 6(1) is a person who
26 exercises functions of a public nature. Now, unless you have a very clear extraction

1 of how a public authority is operating -- in other words, you are saying you are being
2 cut out of your public responsibilities, even where there is a proxying of the public
3 authority into what we here call an enterprise, there are always going to be some
4 public responsibilities attaching. We saw it in the clearest example in the Attfield
5 case you took us to this morning.

6 So I have some difficulty, I confess, in parsing the functions that you are articulating
7 where they do not cross the line outside the public authority. Take this example: if
8 you have a situation where the council decides to contract out its waste collection
9 services to a third party in the market, and it does so at three times the normal rate,
10 well, absolutely no problem. Clearly the 2020 Act ought to bite, rightly so.

11 But if you are allocating services and organising yourself within the perimeter of the
12 public body -- and one has all these public law responsibilities in terms of purpose, in
13 terms of how will they raise money -- I struggle to see how the enterprise fits with the
14 stamping of the label of public authority, given the wording in 6(1), which is not
15 saying the regime applies to the functions of a private nature conducted by a public
16 authority; what it is saying is the public authority is a person who exercises functions
17 of a public nature.

18 That seems to me to be chiming with exactly the point that I confess I thought you
19 would make now, but you made earlier, in section 2(5). For the purposes of this Act
20 financial assistance is to be treated as given to an enterprise if the enterprise has an
21 enforceable right to the financial assistance. And of course you made the point that
22 the council can't sue itself. Well, yes, snap, but that's what happens when one
23 arranges oneself internally. So what one gets is a very clear demarcation between
24 the subsidy giver, the public authority, and the subsidy taker, the enterprise.

25 **MR ROBERTSON:** I don't disagree with any of that. The point I was making is that
26 it is possible to conceive of a situation in which legislation confers upon a public

1 authority the right to operate a business and so you have something which the
2 legislation says this is a commercial business, this is an enterprise, but it happens to
3 be owned by the council.

4 **THE PRESIDENT:** Okay, let's take a concrete example, let's take section 120 of the
5 Aviation Act where the local authorities who held ownership of airports were obliged
6 to divest themselves. It happened in Luton, it happened in Biggin Hill, where what
7 happened was the local authority that had previously been operating the airport --
8 including by way of an ownership of a lease -- had to turn itself into an arm's length
9 holder, but established an operating company which operated according to private
10 law as taking the lease.

11 Now, there, again, I have no difficulty. One has the public authority, which is the
12 public face of the lease, but the entity that is operating the airport is in this
13 terminology the enterprise. So if you have, for instance, under the terms of the lease
14 a beneficial rate where the airport operator pays less than the market rate, well
15 again, on that view the subsidy rules might come into play.

16 But that's very much the way the Act operated. It created a deliberate arm's length
17 operation. Similarly, if one has, say, a service company which the authority sets up,
18 well, maybe different questions apply. But then one has two different entities.

19 **MR ROBERTSON:** I think that is the point I was trying to make with my example,
20 I apologise --

21 **THE JUDGE:** That doesn't arise here, does it?

22 **MR ROBERTSON:** No, it doesn't.

23 **THE PRESIDENT:** We are talking about a unitary authority which is --

24 **MR ROBERTSON:** I was accepting just as a matter of principle, we were not ruling
25 out that if you are a public authority then that's never the case that a public authority
26 might not have an arm's length company operating as an enterprise. That's the only

1 point that we were making.

2 **THE PRESIDENT:** Okay.

3 **MR ROBERTSON:** In the circumstances of this case, it's perfectly obvious that we
4 are a public authority exercising public functions. There is no question of us being
5 an enterprise.

6 We were just making the point in our skeleton, not just basically saying we are not
7 saying forever and a day that could never happen, and the section 120 Aviation Act
8 example you have given sounds like an example of that, although it's not an area
9 I have ever looked at. So I think that's -- I am not, in our skeleton, when making that
10 point of principle that we couldn't rule it out, I am not thinking of any specific example
11 that's applicable to my client.

12 **THE PRESIDENT:** No.

13 **MR ROBERTSON:** It was just as a starting point for argument.

14 **THE PRESIDENT:** Well, clearly one has to consider each case in its own facts.
15 Had there been a separate entity, a separate legal entity within the authority which
16 was conducting waste collection services, and it had its own directors and its own
17 memoranda of association, operating as a separate legal entity, then we would want
18 to understand very closely how that operated, because it would seem to us that
19 prima facie you would have an organisation, the public authority, that is in control of
20 an enterprise.

21 Then one can see payments crossing the line. Now, whether what the answer in the
22 2022 Act is or is not, that would depend on the facts and we can't go there because
23 these are not those facts. But I think we did want to be clear on this case where it is
24 one entity doing everything in terms of waste collection, waste disposal, whether it is
25 commercial waste or industrial waste -- I know that is a particular feature -- or
26 household waste, all of these things are part of the internal organisation of the

1 council and there is no other entity involved unless the council chooses, pursuant to
2 its powers, to involve them by contracting with a third party in the market.

3 **MR ROBERTSON:** Yes.

4 **THE PRESIDENT:** Which it has done for disposal, but it hasn't done for collection.

5 **MR ROBERTSON:** Yes.

6 **THE PRESIDENT:** Okay. That's been very helpful, Mr Robertson.

7 **MR ROBERTSON:** I can appreciate in your position you are looking at a wider
8 picture than I am.

9 **THE PRESIDENT:** We will have to decide how the Act works. This is perhaps
10 a slightly unusual first case to have, but we don't get to choose, but we do need to
11 have a look at the wider picture.

12 **MR ROBERTSON:** Yes. I don't get to choose either.

13 **THE PRESIDENT:** You and us both, thank you.

14 **LORD YOUNG:** Mr Robertson, the President referred you to section 2(5). I wonder
15 if you could have a look at that. I just want to be clear what your position is in
16 relation to that, because you mentioned it just a few moments ago at the start.
17 Because it makes a point, it is, I think, in relation to the giving of financial assistance.
18 It is treated as given if there is an enforceable right to the financial assistance.
19 Just on the facts of this case, is there an enforceable right within the council, the
20 trade waste to the council, and what is the consequence if there isn't?

21 **MR ROBERTSON:** As I said, this is all unreal, because the council isn't giving
22 financial assistance to itself, it's just simply operating a service and then charging
23 certain users reasonable charges for having their waste collected.

24 So I am answering the point as it was raised by Mr Bowsher, but, you know, to be
25 clear, there is no issue here. On our case we are giving financial assistance to an
26 enterprise. We are not. We are a public authority discharging our public functions.

1 **LORD YOUNG:** Do you say that if you cannot see an enforceable right to whatever
2 the claimed subsidy is, that's the end of the matter? If it's a not enforceable right,
3 how can it ever be a subsidy; do you say --

4 **MR ROBERTSON:** Well, within a public authority, yes.

5 **THE PRESIDENT:** I am so sorry to interrupt yet again. Isn't that why -- I mean,
6 I thought that's why you were very helpfully differentiating between the old regime of
7 state aid under EU law and the present regime, because what we have -- what I am
8 suggesting we have -- is a very conscious abandonment of the language of the
9 undertaking.

10 **MR ROBERTSON:** Yes.

11 **THE PRESIDENT:** Which, if one looks at the translation of the civil section of the
12 first instance Brussels decision in tab 47 of authorities bundle 3, what one sees
13 there -- Mr Bowsher very helpfully took us to this -- but at page 1116, you have the
14 decision under A of Buxelles Propreté be an undertaking subject to state aid. There
15 we say a very trite reference to Höfner and Elser describing the undertakings as
16 every entity engaged in an economic activity regardless of the legal status of the
17 entity and the way in which it is financed.

18 Now, I was talking about an undertaking, one may very well have a much messier
19 line between what is a public function and what is the function of what the 2022 Act
20 calls an enterprise. There one might be in altogether more murkier waters in terms
21 of differentiating between what the undertaking that is the council is doing at any one
22 point in time. One might then have to ask yourself, well, what is the council doing
23 when it is instructing its refuse lorries to go round to pick up household as well as
24 commercial waste.

25 But what I am inviting your response on is, is this an area where we need to get to or
26 is it not? Because the Act doesn't refer to the undertaking, it refers to the person.

1 **MR ROBERTSON:** Yes. It's the latter. And this really picks up on your comments
2 yesterday in the course of argument where you referred to -- dealing with the unit of
3 account, the phrase used in the BMW and Volkswagen judgment. That's what you
4 are now concerned with, the person not the undertaking, section 7 focuses on
5 persons and it's clear that the concept of undertaking is not carried over because, if
6 you look at section 7(2) of the Act, then you will see that for the purposes of this
7 section -- so this is the definition of enterprise -- an activity is not to be regarded as
8 an economic activity if or to the extent that it is carried out for a purpose that is not
9 economic.

10 **THE PRESIDENT:** Yes, you wouldn't have that if you had the undertaking definition
11 in 7(1). Yes, I see.

12 **MR ROBERTSON:** Yes. We say that Parliament -- there is relatively little
13 assistance you can get on section 7(2) from extra statutory material that's not
14 addressed in the explanatory notes. It's not a carryover of language from the TCA.
15 This section 7(2) is an addition to what's in article 363(1)(a) of the TCA. This has
16 been inserted by Parliament to make the dividing line clear.

17 We think that it's origin -- as we have observed in paragraph 26 of our skeleton -- is
18 likely to be in the case law of the WTO. But whether we are right on obviously being
19 a local authority, we are not privy to the internal thinking of central government on
20 section 7(2). So we are in the same position, I think, as the tribunal, which is you
21 just to have apply the wording of section 7(2) in accordance with its natural meaning.

22 So that's important and it is, save, I think, leaving the language of unit of account, it
23 really does show the clear blue water between what's gone before and the change
24 that has now been instigated.

25 That brings me onto, I think, the meaning of "purpose".

26 **THE PRESIDENT:** Yes.

1 **MR ROBERTSON:** This is essentially -- it is worthwhile having a quick look at
2 an authority which I am not going to spend a lot of time on, but Peters, which is in the
3 authorities bundle at tab 29. This is, one can see from the headnote -- so that is
4 a decision of Mr Justice Ouseley. It is a dispute as to whether a local authority could
5 enter into property development with a private developer and the dispute focused on
6 whether the local authority had the power to do this under the Localism Act. In other
7 words, was it the local authority acting commercially or was it acting for public
8 purposes, namely: provision of affordable housing and employment growth?
9 The paragraph I just want to draw the tribunal's attention to is on page 649. It is
10 paragraph 116 of the judgment. This is Mr Justice Ouseley citing with approval
11 Mr Justice Warren's judgment in the VAT case. If you look at, just below letter E:
12 "A local authority has wide social responsibilities which a private sector operator
13 does not. The responsibilities which include statutory duties. Its purpose in
14 providing a particular service may be to fulfil those responsibilities. The service is
15 not in those circumstances a commercial purpose." [As read]
16 So what Mr Justice Ouseley is saying there is that you need to identify the overall
17 purpose. You can actually pick that up from paragraph 135 on page 654, at just
18 below letter C, rejecting an argument that David Wolfe KC had run on purpose under
19 the Localism Act, the question is: is the purpose for which those things are done
20 a commercial purpose:
21 "The phrase is to be read as a whole without intending the article A with any
22 emphasis which is to ...(Reading to the words)... and purposes section. In my
23 judgment, section 4(2) requires an overall view to be taken of the thing being done
24 and the overall purpose for which it is being done."
25 So you have to take a view of overall purpose and then, at 654 -- on the same page,
26 paragraph 136 -- it then goes on to say there is perhaps only another way of

1 expressing by reference to specific statutory language the dominant purpose test put
2 forward there by Nigel Giffin KC.

3 "The House of Lords used the purposes and the purpose ...(Reading to the words)...
4 indifferently if the purpose which is said to be commercial is simply an incidental or
5 ancillary purpose to the non-commercial purpose it's correctly seen as part of the
6 non-commercial purpose and not as a commercial purpose overall."

7 So that's, I think, of assistance in how you look at purpose. It's an overall view to be
8 taken of dominant purpose. It can't be salami-sliced up into commercial and
9 non-commercial purposes.

10 Our primary case is that all of the council's relevant functions are public functions.
11 I have addressed you already on the limited distinction between household and
12 commercial waste collection duties. I addressed you on that this morning. Where
13 that led Mr Bowsher yesterday was to concede, when pressed on this point by the
14 president -- this is page 21 of the transcript -- the logic of his case was really that
15 household waste collection might be an enterprise as well, an even more ambitious
16 case than his clients have advanced to date. It really does go to show the weakness
17 of what he is trying to argue. It's clearly a public function and clearly not carried out
18 for an economic purpose.

19 We do derive assistance on this from the Environment Act 2021. I took the tribunal
20 to that this morning. If you remember, it's the one which has the horrible section
21 headed "Section 45AZA". It's not in force yet, but it was the legislation passed on
22 the same parliamentary session as the subsidy Control Act. So it is
23 contemporaneous legislation and as you saw from the passages to which I took you,
24 it recognised that collecting -- household, commercial and indeed industrial waste --
25 are public functions when distinguished from collection of such waste by a person
26 acting in the course of business.

1 It draws a distinction between persons acting in the course of business, such as the
2 commercial waste collector, or by persons exercising a public function such as the
3 waste collection authority. That's a point made in the explanatory notes to the
4 Environment Act 2021 at paragraph 457. We don't need to turn it up, but it is
5 authorities tab 18, page 283.

6 We do submit that although The Act is on the statute books, it hasn't been brought
7 into force. It is an admissible part of the context for construing the public functions --
8 for construing the concept of public functions in the 2022 Act. To that end, we have
9 drawn to your attention an article by Diggory Bailey, who is in the Office of
10 Parliamentary Counsel, also one of the editors of Bennion, and that article on the
11 extent to which you can have reference to legislation which has not yet been brought
12 into force is in the authorities bundle at tab 54. The relevant passage headed "Use
13 as context", pages 1343 to 1344. So we do rely upon the Environment Act 2021 as
14 contextual support for the distinction that we draw.

15 I would also remind the tribunal that Lord Young asked Mr Bowsher yesterday where
16 the public function ended and the enterprise began on Mr Bowsher's case. In our
17 submission, he had no real answer to that. He conceded -- Mr Bowsher conceded --
18 that arranging for collection was a public function, and if he accepted if the council
19 did that by procurement it would be acting as a public authority.

20 As I showed you, the statutory function of arranging under section 45(1)(b) is either
21 discharge by procurement or in-house activity. The statutory function of charging
22 under section 45(4) again is exercisable by the council whether or not the activity of
23 collection is outsourced. It was clearly a public function in all cases.

24 Finally, on this first issue, the tribunal -- would invite the Tribunal to stand back and
25 assess the issue in the round. The council is doing something that which Parliament
26 was declared shortly before the Subsidy Control Act was passed to be a public

1 function not a business. Even if it were not a public function, you would still have to
2 look at the purpose: is it economic, or is the purpose a social, public and
3 environmental one, and what is the predominant purpose.

4 The position as before Mr Justice Warren was that section 45 didn't permit
5 commercial waste collection for commercial purpose and that activities under
6 section 45 were not being provided for a commercial purpose either. We submit
7 that's the position here.

8 The second issue is an economic advantage conferred. That's my learned friend's
9 limbs A and B2.

10 On economic advantage our short point is that when setting charges for services,
11 charging only for the costs of those actual services but not different hypothetical
12 services that are not provided is not conferring an economic advantage. Mr Bowsher
13 took you to a number of authorities yesterday, but in our submission none of those
14 called the point into any real doubt, and the most relevant authority, Chronopost, was
15 against them.

16 Now, what he did take you through was the Commission notice on the notion of state
17 aid, but we are not in state aid territory now.

18 He went to an OECD paper which was adopted after the Act was passed. I can't
19 really see where the OECD come into this. We then --

20 **THE PRESIDENT:** I am sorry to interrupt, Mr Robertson, but I think it is quite
21 important that we understand what we are talking about here, in terms of entities.
22 Because obviously when one is talking about a subsidy, it is something that is
23 conferred -- as we discussed -- from a public authority to an enterprise.

24 Ought we, just in order to test whether there is a subsidy, to assume for the sake of
25 argument that we have a public authority, namely the council, but nested within it
26 there is a separate legal entity which is the waste collection disposal services, so

1 that we have got out of the way, as it were, the point that we are arguing about
2 now -- or rather were arguing about previously -- namely, was it impossible to
3 distinguish between the various different functions of the public authority? Because
4 if we don't do that, we are really answering the second question before we give it
5 a chance to be considered.

6 **MR ROBERTSON:** I'm not quite sure I follow your Lordship's --

7 **THE PRESIDENT:** Well, what we have is a situation where the public authority is
8 organising itself in a way that the household waste collection is commingled with the
9 commercial waste collection, in a manner where the collection of that waste is done
10 in a particular way, namely essentially by number of bins tipped into the lorry, rather
11 than weight of those bins, which is the way you have chosen to do things. No doubt
12 part of the reason is because you don't have the ability to weigh the bins on the
13 lorries.

14 So you have gone for a count the number of bins rather than test their weight
15 approach when you are differentiating between what you can charge for lawfully and
16 what you can't charge for lawfully, according to the scheme under which you are
17 operating.

18 So don't we have to ask ourselves, assuming this amorphous mass of functions is
19 an enterprise, are we seeing, in the context of the council in setting things up in this
20 way, are we seeing something which is a subsidy within the meaning of section 2?

21 **MR ROBERTSON:** The first point I think I would make is that this issue about
22 weighing bins is -- and that somehow that should reflect the costs that go into waste
23 collection charges, it's not the only variable cost, or it's not the only variable when it
24 comes to determining how much you charge.

25 In particular, it's of pretty limited significance when you are trying to avoid a postcode
26 lottery. So you want to come up with a charge that is as applicable in the remote

1 areas of north-west Durham as it is down in the City of Durham, the most populous
2 area of the county.

3 In our submission, just highlighting one issue about you can't work out the weight of
4 commercial waste as against the weight of trade waste, it's a very minor component
5 to making up the whole reasonable charge. Therefore it doesn't stand as being
6 a sign of subsidy.

7 **THE PRESIDENT:** Well, no --

8 **MR ROBERTSON:** Because you are looking at the overall reasonableness of the
9 charge by reference to overall costs.

10 **THE PRESIDENT:** When you say the "charge", you are referring to the charge that
11 is made by the council to the commercial generators of waste?

12 **MR ROBERTSON:** Yes.

13 **THE PRESIDENT:** Right. The question then becomes: is that charge -- and let's
14 stick with a case where weight is material to the process because that's how
15 Mr Bowsher puts his case, so let's take the case at its highest -- you have a situation
16 where commercial waste is being charged for not so much by weight but by number
17 of bins. I appreciate that may be a small part of the way in which it's done, but
18 nevertheless --

19 **MR ROBERTSON:** If you remember Mr Sherratt's evidence -- and it is reflected in
20 this agreed statement of facts -- is that calculations are used using the WRAP tool.

21 **THE PRESIDENT:** Yes.

22 **MR ROBERTSON:** So there is that sort of complex mixture of factors which go to be
23 deployed in the WRAP tool. So that's where we are saying that taking bin weight as
24 an isolating factor -- I know that's what they want to say is a differentiating factor
25 because they weigh and we don't --

26 **THE PRESIDENT:** Yes.

1 **MR ROBERTSON:** -- but it's not the determinative factor as to the level of charges.
2 It's just one -- it's one way of doing it, the way they do it, but we do it using the
3 WRAP tool and that's how we come up with the figure which is then a charge which
4 is effectively crystallised [?] . It's a charge across the entire county.

5 So trying to identify a subsidy to ourselves -- because that's what their case is
6 about -- out of that, that somehow we are undercharging, I don't think that works.

7 **THE PRESIDENT:** You are answering the question really by saying you don't think
8 it's right and it's unprofitable to address the thesis that Mr Bowsher is articulating.
9 I wonder whether there is -- I have your points that the charging structure is more
10 sophisticated than Mr Bowsher would say, but it is right to say that Mr Bowsher is
11 putting this in the way he is by saying that you are not weighing, when you should,
12 and that is resulting in the charges to the generators of commercial waste being
13 lower than they otherwise would be.

14 **MR ROBERTSON:** I am not sure that is his case, with respect. I think his case is
15 that we should be charging more irrespective of how we come up with the calculation
16 in the first place.

17 **THE PRESIDENT:** Yes. But that can't be right --

18 **MR ROBERTSON:** No, it can't be right.

19 **THE PRESIDENT:** -- because you have to work out how you are charging in order
20 to understand whether you are over or under charging.

21 **MR ROBERTSON:** To come back to the wording of the legislation. We are talking
22 about are we conferring an economic advantage on one or more enterprises. The
23 theory of their case is that we are conferring an advantage on ourselves as an
24 enterprise and therefore they have to show that there is an economic advantage.
25 And they only come up with that as a comparison with the overall charge that we
26 make compared to what they currently charge, and saying that that doesn't enable

1 them to compete profitably.

2 Now, his argument that this is -- this economic advantage results from our failure to
3 use bin weights, the decision whether or not to use bin weights, that has to be within
4 the council's margin of discretion in determining how to make up charges. I come
5 back to the point I made earlier today, and that our discretion is exercised in a way --
6 we have been perfectly frank about the way in which we calculate costs. I have
7 shown you the breakdown of costs that we put in place and the schedules, taking
8 into account things like amortisation on vehicles and we apply a methodology
9 recommended by WRAP as part of its tool. And that's plainly within an exercise of
10 discretion by the council. So it doesn't come close to showing that that leads to the
11 conferring of an economic advantage.

12 **PROFESSOR ULPH:** Can I ask two questions of clarification? First of all, in relation
13 to this issue to do with weight. Does the weight of a bin you are collecting have any
14 bearing on the cost of actually collecting that bin or disposing of the waste, and if so,
15 how?

16 **MR ROBERTSON:** It is our submission since we don't weigh it, then we -- that's not
17 a calculation we have carried out.

18 **PROFESSOR ULPH:** Okay, let me phrase it --

19 **MR ROBERTSON:** These bins are just tipped into the back of bin lorries, taken off
20 to the waste transfer station, separated out and then dealt with as to whether they
21 are recycling materials or materials going off to heat generation --

22 **PROFESSOR ULPH:** Let me ask it in a slightly different way then. Could it
23 conceivably be relevant to the cost of collecting or disposing of the waste how much
24 a particular bin weighs?

25 **MR ROBERTSON:** It seems pretty unlikely, given that commercial waste is a very
26 small proportion of the overall waste collected. So any individual bin -- I would have

1 thought it was completely de minimis.

2 **PROFESSOR ULPH:** I can see that there is an issue about the scale of it, but would
3 it actually really matter at the end of the day whether you could or could not weigh
4 the bins? That's what I am struggling to understand.

5 **MR ROBERTSON:** Well, sir, I am struggling to understand it too. Because so far as
6 I can see bins are put into the back of bin lorries and when the round is complete, off
7 they go to the waste transfer station. So why is the particular weight of a bin -- I can
8 see why that -- I think what it is relevant to is how much they -- this is a question for
9 Mr Bowsher, how much they charge, one user as against another.

10 **PROFESSOR ULPH:** I can see once you have that weight you might use it as
11 a basis for charging. The question is does it actually matter in terms of the costs?

12 **MR ROBERTSON:** I would have thought -- if I can just answer that, our position is
13 I can't see how that matters for us as the council, because we operate a different
14 system of charging to them. We don't do it customer by customer. We have a scale
15 of charges applicable to avoid a postcode lottery and that is our public function.

16 **MR BOWSHER:** I think there is an agreed answer to your question in paragraph 25
17 of the agreed statement of facts which is the third-party disposal charges are set out
18 on a per tonne basis.

19 It is page 75 of volume 1, tab 4, of the agreed statement of facts, paragraph 25.
20 There is a lot more that hides behind that statement, but the short proposition is
21 disposal costs are weight based.

22 **MR ROBERTSON:** Sorry, could I just interject at this point and to remind that there
23 was a late application by my learned friend to amend to run a WRAP-based
24 argument which this tribunal refused.

25 **THE PRESIDENT:** Yes.

26 **MR ROBERTSON:** I think Mr Bowsher is trying to now --

1 **MR BOWSHER:** I am just answering the question (overspeaking).

2 **MR ROBERTSON:** I appreciate that. I am just pointing you out there is some
3 background to this point.

4 **THE PRESIDENT:** Yes. I am not sure that 25 takes matters any further, because
5 the point is, I think, that you charge per tonne, but you don't have the means of
6 ascertaining what the tonnage is.

7 **MR BOWSHER:** You are charged per tonne. You are charged by the disposal -- it's
8 a disposal cost. It's not you, not we or the council, it is the person to whom we
9 provide the waste are charged a disposal cost per tonne. They will know what it is
10 that they are receiving --

11 **THE PRESIDENT:** They will weigh it.

12 **MR BOWSHER:** They will know exactly. They don't do that. That is not done on a
13 hypothetical amount that is done with precision.

14 **PROFESSOR ULPH:** Presumably that is done by way of a process that takes place
15 at the disposal facility.

16 **MR BOWSHER:** Yes. (overspeaking)

17 **THE PRESIDENT:** So you have no idea what the mixture is that you are weighing?

18 **MR ROBERTSON:** I think the furthest I can take this is that the answer is I don't, but
19 the council sets its charges by reference to the WRAP tool which works on
20 estimates. But actually how this drills down to answer this precise question, I don't
21 know.

22 **THE PRESIDENT:** But the one thing that we can say is that to the extent that weight
23 features in your WRAP charging, it cannot feature with any precision, because you
24 don't weigh the refuse.

25 **MR ROBERTSON:** (overspeaking) in calculating charges, correct.

26 **THE PRESIDENT:** So the question becomes you have a series of costs which are

1 essentially common to the collection of commercial and other waste, some of which
2 you may properly charge for, some of which you may not. Household you may not
3 charge for. The commercial you may, subject to the exceptions we have been
4 discussing.

5 You have a cost which is arising in respect of both categories. You have to work out
6 how you differentiate between costs which are incurred in doing both functions
7 between the bit you can charge for and the bit you can't. And you need to make
8 sure, so far as you can, that you are not undercharging or overcharging those who
9 have to pay.

10 **MR ROBERTSON:** Yes. That's where we came with the European Commission --

11 **THE PRESIDENT:** Yes.

12 **MR ROBERTSON:** And that was the exercise that then led to --

13 **THE PRESIDENT:** Let's stick, though, because we are happily in 2023 now and we
14 are applying the 2022 Act, to how that operates in respect of the definition in
15 section 2 of subsidy. Is it your case that allocating the common costs in the way that
16 you do is conferring an economic advantage on the enterprises who are paying?
17 That is to say, the generators of commercial waste.

18 **MR ROBERTSON:** The subsidised entity is the council on my learned friend's case.

19 **THE PRESIDENT:** I am just trying to understand how this all works.

20 **MR ROBERTSON:** Does it confer --

21 **THE PRESIDENT:** If --

22 **MR ROBERTSON:** The answer is it doesn't confer an economic advantage because
23 everyone pays, according to this, the council's schedule of tariffs, and that is one
24 which has been worked out taking into account a number of factors in a way which is
25 reasonable. The fact that it is not set at the level they would like us to set it at,
26 demonstrates that they are not being -- no one is being cross-subsidised or

1 subsidised, they just paying the council's reasonable charges in the exercise of its
2 public functions. The council is not an enterprise. So the issue is -- I don't see how
3 the issue of subsidy really arises when it's not an enterprise.

4 **THE PRESIDENT:** Thank you.

5 **PROFESSOR ULPH:** Can I ask my second question?

6 **MR ROBERTSON:** I was to going to say any more for any more. I should have
7 known.

8 **PROFESSOR ULPH:** If a bin lorry has been round and collected waste, does it
9 track the number of bins it is collecting from households, and the number of bins it is
10 collecting from trade waste? Does it actually know at the end of the day how much
11 trade and household waste bins have been collected?

12 **MR ROBERTSON:** I will just take instructions from Mr Sherratt on that point.
13 The answer is yes.

14 **PROFESSOR ULPH:** Thank you, that's helpful.

15 **THE PRESIDENT:** Sorry, Mr Robertson, it's taken you rather out of your way.

16 **MR ROBERTSON:** Well, actually it's taken me directly to the one case I did want to
17 draw your to attention --

18 **THE PRESIDENT:** That's a fortuitous advantage.

19 **MR ROBERTSON:** -- which is related to issue 2, which is the Chronopost case,
20 which is the one that Mr Bowsher referred to very quickly.

21 In our submission, it assists us. As we have always said in our skeleton argument,
22 paragraphs 34 to 45, the Courts of Justice in Chronopost rejected precisely the
23 argument that Max Recycle is now running. In Chronopost actual cost recovery --

24 **THE PRESIDENT:** Could you give us a reference?

25 **MR ROBERTSON:** I do beg your pardon. It is authorities bundle, tab 41. If we pick
26 it up --

1 **PROFESSOR ULPH:** Which tab was it, is this?

2 **MR ROBERTSON:** It is tab 41.

3 **PROFESSOR ULPH:** Thank you.

4 **MR ROBERTSON:** And it is at page -- it starts at page 913. But the point that I was
5 making can be seen from the -- let's start with the Advocate General's opinion. It is
6 Advocate General Tizzano.

7 If we start at page 918, paragraph 8 of his opinion in these reports -- an Advocate
8 General's opinion has AG in front of the paragraph number -- and the complainant in
9 that case ran the argument that the Commission should disregard the group's
10 strategic interests and economies of scale when calculating the market price. The
11 Commission's response, subsequently approved by the Court itself, is at paragraphs
12 9 and 10. So the Commission rejected these arguments observing that:

13 "Nothing in the court's case law suggests that the Commission should disregard the
14 strategic considerations and synergies stemmed from the fact that the Post Office
15 and SFMI Chronopost belonged to the same group. And the fact that translation
16 takes place between an undertaking operating in a reserve market and its subsidiary
17 operating in a competitive market." [As read]

18 According to, in the Commission's view:

19 "The relevant question is whether the terms of the transaction between the Post
20 Office and SFMI Chronopost are comparable to those who did an equivalent
21 transaction between a private owned company which might very well be a monopoly
22 and its subsidiary." [As read]

23 Then we see there paragraph 10 of the Commission's arguments on the case and
24 probably best summed up just to the bottom of the quote from the Commission:

25 "France has shown that as from 1998 the remuneration paid by SFMI Chronopost for
26 the assistance covers all the costs incurred by the Post Office plus a contribution by

1 way of interest on its equity capital." [As read]

2 Paragraph 11:

3 "On those grounds, the Commission therefore concluded that the logistical and
4 commercial assistance was provided by the Post Office to its subsidy under its
5 normal business conditions and did not constitute state aid." [As read]

6 The General Court, on appeal, its approach is set out at paragraph 73 of its
7 judgment, which is set out in this report at 922. You see the quote from the General
8 Courts' judgment towards the top of 922, paragraph 73. That is then overruled by
9 the Court of Justice. You get that at page 945. The findings of the court, paragraphs
10 31 to 36:

11 "The appellants allege that the court of first instance, now the General Court, gave
12 an incorrect interpretation of the concept of normal market conditions."

13 The court of first instance said that:

14 "The Commission should have at least set the payments received by La Poste as
15 comparable to that ...(Reading to the words)... not operating in the sector." [As read]

16 Essentially the argument Max Recycle is running in this case:

17 "That assessment, which fails to take account of the fact that an undertaking such as
18 Chronopost is in a situation which is very different from that of a private undertaking
19 operating under normal condition market conditions is flawed in law. La Poste were
20 entrusted with a service of general economic interest..." [As read]

21 Paragraph 35:

22 "La Poste had to acquire or was afforded substantial infrastructures and resources,
23 the postal network, enabling it to provide the basic postal service to all users even in
24 sparsely populated areas where the tariffs could not cover the costs of providing the
25 service in question." [As read]

26 Paragraph 66:

1 "Because of the characteristics of the service which the La Poste network must be
2 able to ensure the creation and maintenance of that network are not in line with the
3 purely commercial approach.

4 "As was recorded in paragraph 22 above, the effects and others ...(Reading to the
5 words)... accepted that a network such as that available to Chronopost is clearly not
6 a market network, therefore that network would never have been created by a
7 private undertaking." [As read]

8 And the court (inaudible) sets aside the court of first instance judgment.

9 Sorry, I should go to 38:

10 "In the present case, the cost borne by La Poste in respect of the provision to its
11 subsidiary of logistical and commercial assistance can constitute such objective and
12 verifiable elements."

13 That's a reference back -- sorry, paragraph 38.

14 "In the absence of any possibility of comparing the situation of La Poste with that of a
15 private undertaking not operating in the sector, normal market conditions which are
16 necessarily hypothetical must be assessed by reference to the objective and
17 verifiable elements which are available." [As read]

18 It is essentially that case law -- those principles set out there -- which the
19 Commission then discussed with my client back in 2019 which led to the review
20 taking place, and the March 2020 decision.

21 Chronopost supports the approach taken by the council. Mr Bowsher sought to
22 distinguish Chronopost because he said no one else would have been able to build
23 the network. That was akin to a universal service requirement. He said there were
24 commercial operators here who do develop (inaudible).

25 And that is page 85 of the transcript.

26 But this attempt to distinguish Chronopost is hopeless. In that case, commercial

1 operators had built delivery networks as well which they said were appropriate
2 comparators. What he has to show is that a commercial operator would build the
3 infrastructure to collect household waste from 250,000 households each week in
4 County Durham free of charge. But he disavowed that because he said no one else
5 would obtain in the market the support he would obtain from the household business.
6 That was the very reason he invited you to find an economic advantage. But that's
7 precisely the error that the court of first instance had fallen into in Chronopost.
8 Obviously, we accept you are not bound by Chronopost, as it is a decision on the
9 state aid rules, but we do submit it would be extraordinary if the 2022 Act took any
10 stricter position and required the council to set its charges for services that are not
11 provided.
12 That's all I really wanted to say on issue 2.
13 Issue 3 is: any financial assistance specific. Mr Bowsler took this issue, which is his
14 limb C, very briefly yesterday. His first point, which marries up with paragraph 88 of
15 his skeleton, was the fact that there was one beneficiary meant that it must be
16 specific. Specific to the council. The basis for that submission appears to be an
17 assertion that specificity is the same as selectivity under EU law. There is nothing to
18 support that. And in any event see paragraph 39 of our skeleton citing Mr Justice
19 Warren, at footnote 68 of our skeleton, on their reliance on the presumption of
20 selectivity.
21 There is no distinction here between enterprises in a comparable situation. The
22 distinction in this case is between a waste collection authority and a private
23 business. They are simply not in comparable positions.
24 As to that, it is worth pointing out that His Honour Judge Keyser in the Francovich
25 claim -- although he didn't have to decide it -- would have been inclined to accept our
26 arguments that there was no state aid in that case for this reason, and that's

1 paragraph 67, and on an appeal Lord Justice Coulson made an observation to like
2 effect at paragraph 72.

3 Our respective clients are simply in very different positions. We are not in
4 comparable positions in any meaningful sense.

5 Dealing with paragraph 91 of my learned friend's skeleton, I should first of all take
6 you to section 4 dealing with financial assistance which is specific. After all, this is
7 the primary legislation the tribunal is tasked with applying. That's in tab 10,
8 page 168, and section 4: financial assistance which is specific, subsection 1:

9 "This section makes provision about determining whether financial assistance is
10 specific for the purposes of section 2(1)(c)." [As read]

11 2(1)(c), of course, is part of the definition of subsidy as financial assistance which is
12 specific, in that it benefits one or more enterprise over one or more other enterprises
13 with respect to the production of goods or the provision of services.

14 "Subsection 2(4) is not to be regarded as being specific. If the distinction in the
15 treatment of the enterprise is justified by principles inherent in the design of the
16 arrangements of which that financial assistance is part." [As read]

17 The first point to make there is that the arrangements under section 4(2) clearly
18 include the entirety of part 2 of the 1990 Act, not simply the provisions dealing with
19 commercial waste collection. So the interplay with household waste cannot be
20 ignored when considering specificity, it would be an error of law to do that. To do
21 otherwise.

22 As to the restrictions on the council's powers to set charges, these are not negligible.
23 They are not, as I explained this morning, confined just to some form of Wednesbury
24 review for rationality. I took the tribunal to Attfield. It makes clear that these include
25 purpose constraints, including that the power cannot be used for the purpose of
26 taxing and/or deliberately defraying other costs.

1 I am going to reiterate Mr Justice Warren's views that the service to be provided --
2 that the powers under section 45(4) do not enable the service to be provided on
3 a commercial basis. My learned friend simply just didn't engage with any of this.
4 He went to Western Riverside. It is clear from paragraph 57 of that judgment that
5 there was no artificial increase in the charges over the cost of provision. So it is
6 not -- Western Riverside is not authority for the proposition that the council can
7 charge for fictional costs that are not, in fact, occurred. To do that would be flatly
8 contrary to Attfield.

9 Mr Bowsher made a passing reference to the Luby case, which he cited. That's
10 quite a different case. It was concerned with a failure -- or an alleged failure -- to
11 subsidise tenants through differential rates. It's simply not on point.

12 Dealing with paragraphs 92 to 93 of his skeleton, it is wrong, we say, to suggest that
13 the council can charge a market price if that means -- that's supposed to mean that
14 the council can purposefully recover more costs than are, in fact, incurred to defray
15 other expenditure. We have already covered that with Mr Justice Warren and
16 Attfield.

17 Another point of distinction why we are not in a comparable position is that the
18 council cannot operate outside its area under its statutory powers. So we are not in
19 a comparable position to commercial recyclers, such as Biffa, BRBS(?) Suez or
20 indeed Max Recycle. Those commercial operations can choose the most profitable
21 areas in which to operate, ie those with the greatest concentration of businesses.
22 The council by contrast cannot cherry-pick. It has to provide services throughout its
23 area.

24 Again, just standing back and looking at the issues in the round, integral to the
25 scheme of 1990 Act, an Act, as its name suggests, intended to protect the
26 environment, are the features set out in our skeleton. There is no duty to outsource

1 collection or disposal. There will be an inherent efficiency to collecting household
2 and commercial waste together for the benefit of the local environment. Waste
3 disposal authorities are under a statutory duty to dispose of all controlled waste
4 collected. So it must be expected that they would do so without dividing it up
5 according to how it was classified as household or commercial.

6 There is just simply no power to charge on the basis Max Recycle claims is needed
7 to eliminate the alleged subsidy. Under this issue, any advantage, we say, is
8 non-specific. Even if Max Recycle was in a comparable position to the council, or
9 even if the facts, as we say that it wasn't, it doesn't matter, the advantage is clearly
10 justified by the inherent features of the statutory scheme.

11 That brings me to the fourth and final issue. Is the financial assistance capable of
12 having an effect on competition or investment within the UK? This is their limb D.

13 On effect on trade, Mr Bowsher said this was self-evident. This is page 77 of the
14 transcript. He proceeded on the basis that a specific financial advantage was to be
15 presumed, without more, to be capable of affecting competition.

16 I don't think he makes any point on investments. He makes the point on investment.
17 That repeats the point made in paragraph 99 of his skeleton.

18 Well, there is not any basis for reading in a presumption to the statutory language.
19 The statutory language is that the financial assistance either has or is capable of
20 having an effect on competition within the United Kingdom. So you have to show
21 either that it does or that it's capable of doing that, it can't just simply be presumed.

22 He can only point in terms of customers to some 45 customers over nearly ten years
23 of switching to the council's services. That's, we submit, hardly evidence of
24 undercutting, we don't know why they switched. They maybe didn't like the
25 contractual terms that Max Recycle require of their customers. We simply don't
26 know.

1 That is emphasising that the council has over 3,200 customers, as set out in the
2 agreed statement of facts at paragraph 14, so by comparison to the 45 that are
3 alleged, the level of movement is, on any view, de minimis and what perhaps would
4 be expected in any ordinarily functioning market.

5 So we simply said there just isn't the evidence to support his case that there either is
6 or -- that the council's prices either do or are capable of having an effect on
7 competition.

8 In paragraph 102 of his skeleton, he says in response to our argument that it may
9 well be the case that other of Max Recycle's competitors, ie not the council, but other
10 commercial waste suppliers are undercutting Max Recycle. That may be the reason
11 why people switch from them. We just simply don't know, there isn't the evidence.

12 They criticise us finally, at paragraph 102 of their skeleton, for being speculative. But
13 in our submission their case on this issue is equally speculative and the burden of
14 proof is on them. They had their opportunity to make their case on the effect on
15 trade and competition but failed to do so on the facts.

16 A final reminder that they have not even put their prices in evidence, so we simply
17 can't draw any detailed comparison.

18 Unless I can assist the tribunal further. Those are the council's submissions.

19 **THE PRESIDENT:** Any questions?

20 **PROFESSOR ULPH:** Just one question about economic advantage having
21 an effect on the market. Does it matter whether people are switching to Max
22 Recycle from the council, or does it matter whether it is people switching from any
23 other private collector to the council in terms of determining whether the council's
24 charges are having any effect on competition?

25 **MR ROBERTSON:** This is a dispute between the two parties, I would say the only
26 relevant factor is they allege that we are undercutting them and that's the effect.

1 They say that has to be presumed. As to the position of other operators, we simply
2 don't know. Would that be relevant to this assessment? It would be relevant in that
3 it's relevant to the burden of proof, ie that there is proof that there is actual effect on
4 the market. They are in a position to talk about their own customers, ex-customers.
5 But it is -- as to the position as to the impact on other commercial waste recyclers,
6 there is simply no evidence whatsoever. The nearest that there comes to being
7 evidence that is relevant to this is in paragraph 15 of Mr Sherratt's witness statement
8 which is at tab 6, page 98, where he sets out the number of trade waste customers,
9 over the last four years and it is -- roughly static in recent years.

10 All we know is that it is a relatively small proportion of overall business customers in
11 County Durham. There may be other commercial waste recyclers operating in the
12 market.

13 But to answer your specific question, there is not any evidence as to cause and
14 effect from third party commercial waste recyclers. Our main criticism is that there is
15 no evidence from the appellant either.

16 **PROFESSOR ULPH:** Thank you.

17 **THE PRESIDENT:** Thank you very much, Mr Robertson. We will rise for
18 ten minutes, but I just want to clarify one thing.

19 Mr Bowsher, just to assist you in your reply before we rise, we won't need you to
20 address us on the question of whether the 14 March 2023 decision was a decision.
21 Obviously whether it is a subsidy decision is an entirely different question.

22 **MR BOWSHER:** Yes.

23 **THE PRESIDENT:** But we won't need to hear from you on that.

24 **MR BOWSHER:** There were a couple of things I would like to check before I start.

25 **THE PRESIDENT:** We are going to rise, I think, now for a break.

26 **MR BOWSHER:** Could I have a little longer than ten minutes and start at 20 to?

1 **THE PRESIDENT:** Yes, I think we can do that, yes.

2 Very well, we will rise for 20 minutes.

3 **(3.22 pm)**

4 **(A short break)**

5 **(3.47 pm)**

6 **THE PRESIDENT:** Mr Bowsher, good afternoon.

7 **Submissions in reply by MR BOWSHER**

8 **MR BOWSHER:** I will try to track through the issues raised by my learned friend in
9 more or less the order he has covered them. I fear a couple of the points will be end
10 up being a little bit jumbled out of order.

11 Just to set a little bit of context -- it is relevant to a couple of the points -- the tribunal
12 will be well aware of the context of this case.

13 Max Recycle is not the only other private waste collection entity in Durham. As the
14 tribunal will recall, others were interested even in participating in these proceedings.
15 For what it is worth --

16 **THE PRESIDENT:** I recall the intervention.

17 **MR BOWSHER:** Yes, for what it is worth, the Hawthornes have their roots in Oxhill
18 as well. So we could have had a pleasant outing in those parts.

19 This is about -- but Max Recycle is a Durham-based SME seeking to make the most
20 of the commercial opportunities it has in Durham. As you all know, it feels very
21 strongly about the points that are made.

22 Let me start, having made the merits point, let me dive straight back into the rather
23 less, slightly more rarified area of statutory interpretation. I was going to hesitate to
24 call it arid, because it certainly isn't that, but it is -- can I pick -- again in no particular
25 order, but just to pick them up as they go, there has been that point made about
26 section 2(5) of the Subsidy Control Act which is on page 166 of the authorities

1 bundle.

2 In my submission, that is not an exclusive definition of when financial assistance is
3 given. The word "given" has its natural meaning. If you give financial assistance
4 without obligation, you have still given financial assistance. What section 2(5) adds
5 is that if you are obliged to provide financial assistance but you have not yet given it,
6 the subsidy is to be treated as having been given, even if it has not yet been given.
7 If I give assistance -- if, for whatever reason, Durham County Council just gifts an
8 enormous subsidy to someone without obligation, that is still a gift of assistance
9 which counts as a subsidy.

10 **THE PRESIDENT:** I see.

11 **MR BOWSHER:** So section 2(5) should not be taken as an exclusive definition as to
12 what is or is not assistance.

13 Moving then on to this question about whether or not cross-subsidy in the general
14 sense, described for example in the OECD document, has in some way given us
15 a clear path out of the Subsidy Control Act --

16 **THE PRESIDENT:** I am sorry, Mr Bowsher, I am interrupting you because I just
17 want to go back to your point on 2(5).

18 **MR BOWSHER:** Yes.

19 **THE PRESIDENT:** Because I am entirely sympathetic to your point that reading 2(5)
20 on its own is -- it is a fair distinction to draw between a gift that has been given in the
21 past and something which is promised in the future where you are saying 2(5)
22 operates. But if one goes back to the definition of subsidy, all subsidies, without
23 exception, as I see it, are things that are given.

24 **MR BOWSHER:** Yes.

25 **THE PRESIDENT:** So there is not actually any room for 2(5) to be, as it were,
26 illustrative or pertaining only to a certain number of cases, it must track completely to

1 the definition in 2(1)(a). That's why at the beginning of section 2(5) it says "For the
2 purposes of this Act".

3 **MR BOWSHER:** With respect, sir, I say that must be wrong. A subsidy is given --

4 **THE PRESIDENT:** Yes.

5 **MR BOWSHER:** -- if I were a public authority and I gave you something --

6 **THE PRESIDENT:** Yes.

7 **MR BOWSHER:** -- I would have given it to you for the purposes of 2(1)(a), leaving
8 aside whether or not there was that legal obligation -- let's forget 2(5) for the
9 moment -- 2(1)(a) plainly says if I give you some public resource -- if I as an authority
10 give you some public resources I have given you -- I have fulfilled 2(1)(a). Yes?

11 2(5) is effectively a deeming provision which says:

12 "I am to be treated as having given it to you if, even though I have not yet given it to
13 you, but I have executed a deed which says in a month's time I will give it to you, or if
14 such and sufficient happens I will give it to you, at that point when I have the
15 enforceable -- I have conferred upon you the enforceable right to that assistance,
16 I am to be treated as already having given it to you."

17 **THE PRESIDENT:** Yes, I see, thank you.

18 **LORD YOUNG:** I wonder if that is right because 2(5) is not a timing provision as
19 such.

20 It does not say it is to be treated as given at the point of time of the enforceable right.

21 Is it not actually a provision which is helping to understand what is meant by the
22 word "given"?

23 **MR BOWSHER:** Well --

24 **LORD YOUNG:** If you are asked to give an example. If the question in a case is:
25 has this particular subsidy -- has this particular amount of money been given or not,
26 the test is there is an enforceable right to claim it.

1 **MR BOWSHER:** With respect, I suggest that that would be an almost perverse
2 reading of the word "given", because the nature of "gift" is that it is given without
3 legal obligation. If the legislator had meant something other than given, there are
4 other words that the legislator could have used. The starting point is surely that it is
5 given.

6 It may -- it need not be just a timing point, it may be that I agree to give it to you
7 some time, but it's a contingent -- it's simply a floating right that you will get at some
8 time but without any particular timing point at all. It is simply that I agree that at
9 some point I will give it to you. I have not yet given it to you, but from the moment
10 when I have promised it, it is a gift. That might be particularly relevant, I suppose, if
11 you -- well, I don't want to take a lot of time arguing getting into this point.

12 The word I was going to use was "guarantees". We can get into a debate as to
13 whether or not that guarantee immediately gives assistance the moment you give it
14 or whether it will involves the promise to give support or assistance in the future.
15 I don't have much time and I would prefer not, if we can avoid getting into that
16 interesting accountancy debate. But at least in principle, the moment I say "if
17 something will happen, I will help you out" that is an enforceable -- first of all, an
18 enforceable obligation to do something which at the very least involves a gift in the
19 future. But for the purposes this Act also means a gift at the point I say "here is
20 a guarantee I will help you".

21 **THE PRESIDENT:** Yes, thank you.

22 **MR BOWSHER:** I suggest that's what 2(5) -- given the history of subsidy, to use
23 subsidy as a neutral, subsidy with a small 's' in industrial policy and state aid law and
24 competition policy -- that seems a likely meaning, because that, of course, has been
25 a recurring problem.

26 Going onto the section 6/section 7 issue about whether or not -- to put it bluntly --

1 cross-subsidy gets a free pass -- internal cross-subsidy gets a free pass out of the
2 Subsidy Control Act, I would suggest no. I would suggest -- I will reiterate -- it seems
3 to me, given that cross-subsidy is again one of those points which is a recurring
4 issue in subsidy control generally, it seems unlikely that such a carve-out would have
5 been given without some clearer signpost.

6 It seems to us that the statutory guidance makes clear that certainly the Secretary of
7 State didn't think that's what the legislation was doing, and to the extent that in
8 making the guidance pursuant to the Act, that was carved out, that seems to us to
9 be, we would suggest, a relevant factor.

10 Just to remind you, that is paragraph 15.14 on 341 of the bundle. Authorities
11 bundle 15.14 under the heading:

12 "What is an economic activity."

13 15.14:

14 "It is therefore not relevant whether the persons are governed by public or ordinary
15 company law, it is also not relevant whether the persons in question are privately or
16 publicly financed, nor whether it could be considered a public body or affiliated to
17 a public body." [As read]

18 So the economic activity could be attached to a public body, at least according to the
19 guidance. And the brackets explicitly say:

20 "Some persons may be considered both public authorities and enterprises with
21 respect of different functions."

22 That has to be of some interpretive value. I take my learned friend's point that you,
23 as the tribunal, are not bound to have regard to that guidance, but it must be a very
24 significant part of the interpretive framework.

25 It makes sense of the language itself.

26 6(1), there is no particular reason why the meaning of a person in 6(1) and 7(1)

1 would be different. A person can be a public authority because they exercise
2 functions of a public nature, albeit that that's not very clearly defined. It is left
3 strangely open.

4 **THE PRESIDENT:** Could it mean anyone who is subject to the judicial
5 review/administrative law jurisdiction of the courts?

6 **MR BOWSHER:** It might do. But it simply defines who can be a public authority.
7 But being of public nature does not mean that it is not economic. You can have
8 economic public functions. Many entities do. Perhaps in the 1970s many more had
9 than they do today, but historically and today there continue to be any number of
10 entities, public bodies, which have economic functions.

11 A person, going to 7(1), who is engaged and in an economic activity that entails
12 offering goods or services on a market to the extent that the person is engaged in
13 such an activity, is an enterprise and a person could -- there is nothing to say there
14 that the statutory guidance is wrong, that that person could not also be a public
15 authority if what they were doing was genuinely an economic activity.

16 As I say, perhaps there are fewer bodies now than there once were, but there are
17 still -- for example, in the defence industry there are public bodies that certainly sell
18 services actively. There are, even within local authorities, still there will be some
19 local authorities that carry out some services which might be in direct competition
20 with other, say, highway maintenance. There may be fewer direct labour
21 organisations and direct service organisations than there once were, but it is still
22 open to an authority to retain an internal service which might not have been created
23 as a company under the Localism Act but is still conducting itself in a way which is
24 economic.

25 One badge of it being economic is that it is done in a manner which is in competition
26 with outside entities. Even if contracts can be awarded or arrangements can be

1 made for services to be delivered internally without having to go through
2 procurement regulations, there will still be internal audit obligations and best value
3 obligations which will have to be looked at to consider whether or not that entity is, in
4 fact, delivering good value and delivering the service. There is a lot more that could
5 be unpacked there.

6 In my submission, if we then turn up section 45 of the EPA, I was going to use the
7 clean version which my learned friend handily passed up this morning, but wherever
8 you -- in good bookshops everywhere.

9 About six or seven pages in, you will find in his version 45 comes up at the bottom
10 left of that page there, we get the convenient text which he clearly warrants is the
11 correct text rather than the one we gave you.

12 **THE PRESIDENT:** Yes, thank you.

13 **MR BOWSHER:** Let's just try to unpick how this plays out. The waste collection
14 authority -- there can be no doubt that Durham is a public authority, so it doesn't
15 really -- for all sorts of reasons, it plainly is a public authority as a person.

16 Is there anything here which defines what is or is not an enterprise or what is an
17 economic activity? For the purposes of this discussion at the very least we know
18 that if someone makes a request to collect commercial waste under 45(1)(b), that we
19 can concede might not be an economic function. That is probably an internal
20 procurement function in satisfaction of the duty. No one else is going to be
21 providing -- doing that arrangement function. It is contingent on the request having
22 been made.

23 But again, once the arrangement is made -- sorry, once the arrangement decision
24 has been made to either do it in-house or to put it out of house, all of those people
25 are in, we would say, a comparable situation. They are all conducting an economic
26 activity. They are all in some sense competing for the council's business, and the

1 council's internal services are competing against others. It may be that they are not
2 competing in the transparent way that the public contracts regulations might
3 contemplate, but there is still an element of market tension. There is a market for
4 that service.

5 For today's purposes, we have made certain agreements and concessions about the
6 way the household waste market operates. You can see that, in fact, similar issues
7 might arise in the household waste market if, for example, a council were more
8 aggressive than, say, in the Western Riverside case where Wandsworth clearly at
9 a certain point decided that they wanted to push as much business out, you could
10 imagine that you would let a household waste contract as well. And we know, just
11 from the judicial notice of watching lorries drive around cities, you know that in some
12 cities at some times the bin lorries have not been simply the bin lorries of the
13 relevant local authority, they have been so-and-so working with the City of London,
14 or whoever it happens to be.

15 So we know that household waste -- we know that these things can happen. But we
16 don't for today's purposes need to worry about the characterisation of the household
17 waste business, all that is in issue today is the characterisation of the collection
18 business of Durham County Council for trade waste. That, we say, is clearly an
19 economic activity because it is in some sense being compared with that of other
20 entities.

21 How one defines that business, we have said, well, one obvious way of looking at
22 the matter of course is that trade waste is -- sorry, is that accounts have been
23 prepared and accounts are perhaps a somewhat backwards way of defining
24 a business, but if you are able to give accounts for a business, you have defined, in
25 a sense, the concern by saying this is the thing for which I have made the accounts.
26 Necessarily that is in an accounting sense a real thing.

1 From a functional point of view, which is perhaps more important for these purposes,
2 what is plain is that the way that Durham runs its business and is in the evidence is
3 that it picks -- it collects some, not all but some, of the commercial waste in County
4 Durham and the waste it collects is all of the type that can be collected with its
5 household waste equipment.

6 Now, it does not collect all trade waste. We know that. It is not true that just
7 because all commercial waste could be picked up by household equipment that all
8 commercial waste is picked up by household equipment, because we know that
9 there is a limit to what the household equipment can pick up.

10 Crudely, they can pick up old 1,000 -- 110-litre bin, but not anything bigger. So if you
11 have one of those very large recycling bin arrangements which might be sitting
12 outside anywhere in an urban centre, that's not something that Durham is going to
13 do, but that will be commercial waste. It will not be part of the business that Durham
14 does because it just doesn't do it. It doesn't have the capability of doing it. And it's
15 an important indicator because, of course, that is part of what we say is the
16 advantage which has been conferred by Durham as public authority on Durham as
17 a trade waste business functioning as an enterprise.

18 There may be some wrinkles -- I am not sure I really have time to unpick all of the
19 little wrinkles that were raised by my learned friend around things like schools and
20 so on and so forth. For example, if we dig into the evidence, I think we will find that,
21 for example, the schools that are referred to in evidence by my learned friend that
22 our client deals with are all private schools. But public -- and the legislative provision
23 that he refers to are all state sector schools. But, I mean, there's a number of
24 categorisation questions which don't, I think, really inform the tribunal very much
25 further.

26 **THE PRESIDENT:** Mr Bowsher, I think you can take it that we are going to want to

1 | decide this in a manner that steers clear of potential evidential controversies.

2 | **MR BOWSHER:** Exactly.

3 | **THE PRESIDENT:** It does seem to us that both parties are entitled to an answer to
4 | this question that is not enormously contentious fact dependent --

5 | **MR BOWSHER:** Yes.

6 | **THE PRESIDENT:** -- because that serves no one.

7 | **MR BOWSHER:** Exactly. I am much obliged. I will jump ahead on some of that
8 | material then.

9 | Perhaps that is just -- that is an appropriate point for me to just address, before
10 | I start getting into costs and those sorts of issues, for me to just pause briefly to talk
11 | about the status of the EU law and the guidance. I don't want to say a great deal
12 | about it because I am not sure there's a huge difference between us.

13 | We have both been reserved in the way that we have dealt with the EU law cases.
14 | I think I was just -- maybe took it quite carefully and didn't engage with it in quite the
15 | way that my learned friend did, but neither of us have said that you are bound by the
16 | decisions of the CJEU as you once were.

17 | I would say this: the Subsidy Control Act addresses the same scenarios and
18 | problems of fact and economics that EU state aid law addressed. These are not --
19 | they haven't suddenly changed overnight because we left the EU. The industrial and
20 | economic structure of the country has not suddenly changed overnight. The way
21 | economics works and the way our economics are structured by the law are as they
22 | were before, albeit with some changes going on.

23 | Insofar as the EU case law is simply working out in an intelligent fashion a means of
24 | dealing with rather complicated puzzles as to what is or is not an appropriate way of
25 | dealing with -- at the risk of using an EU law term -- equal treatment of different
26 | entities in an economic system, they are a useful indicator for the tribunal. And

1 possibly no more than that. But they certainly are persuasive.

2 The analysis of those concepts by the EU in similar cases, or in cases with relevant
3 distinctions -- and we would say in Chronopost there are important distinctions -- the
4 working through of those points are points which it is useful for the tribunal to engage
5 with and grapple with.

6 It is significant that the statutory guidance plainly -- if one reads the guidance, it is in
7 many places informed by a knowledge of the notice on the notion of state aid. One
8 could spend a bit of time parsing what is different and what isn't -- quite a lot of time
9 analysing what is different and what is not -- but they are dealing with similar
10 problems in very similar ways in the same sort of structural way.

11 Where do I end up on that? Perhaps I would simply say that EU law, for the purpose
12 of the tribunal in this field, absent any equivalent, say, section 60A of the
13 Competition Act, is probably at least as much assistance as Canadian case law is in
14 the field of collective actions, where it is a path that others have already gone down
15 which is not unlike the path that you are on, and it is useful to look at what other
16 intelligent people in a similar intellectual framework as yourself have looked at as
17 they go down that path. That is a sensible jurisprudential approach.

18 Moving on, then, to some more of the gory detail about cost and advantage and so
19 forth. I will try to deal with this in sort of 20 minutes, 25 minutes.

20 It is important to start with the proposition that nothing in Western Riverside or
21 Attfield says that reasonable charge must be cost reflective. It would be surprising if
22 it -- a reasonable charge is not cost plus or cost or whatever, it is a reasonable
23 commercial charge. Indeed, a reasonable charge might, going back to my example
24 of trade waste where the arrangement has been made by means of a public
25 procurement, the reasonable charge might be to pass on the cost of bids that had
26 been made entirely by private entities, to the authorities and those with whatever

1 cost and profit and other components in that cost have been made. That would then
2 be a reason -- we are charging you because Max Recycle or Veolia, or whatever,
3 have a contract and we are going to charge you what Veolia charge us plus, I don't
4 know, an administration -- I am going to speculate -- a fee on top to deal with the
5 costs of the internal administration costs of arrangement or whatever.

6 It would be perfectly rational if the reasonable charge were being made in respect of
7 one's own internal services, not just a charge of cost -- the running cost -- but also
8 a significant amount of surplus. We know that waste collection is a significantly
9 expensive process. The disposal charges themselves are very expensive. Disposal
10 at sites, the EFW plants and so on and so forth, involve a very considerable amount
11 of expenditure which one often enjoys looking at in public procurement contexts. If
12 one is as a local authority making a reasonable charge, inevitably part of what one
13 might be doing is preparing for modernisation of equipment.

14 It might be that a local authority wants to accumulate a surplus so as to install
15 weighing equipment or better trucks or whatever the new technology is next week
16 which I have not yet thought. We know that all of these things will be changing all
17 the time.

18 It would be making something -- making something that is a profit would probably be
19 no more appropriate than it would be would for any other non-profit making entity.
20 But profit, in a sense, is just an appropriate word. One would expect them to make
21 an appropriate surplus and there is nothing wrong in that, and the Western Riverside
22 case makes absolutely plain that there is no -- I am sure there is an upper limit of
23 absurdity, but the Western Riverside case makes plain that this is a market driven
24 charge. A reasonable charge at least in part is driven by what is market appropriate
25 and that will include earning of surplus and so on and so forth.

26 The charge should not be fixed so as to enable -- and this comes to the nub of our

1 case -- to enable collection done by the council's own services to benefit unfairly
2 from what I will simply call for a label "cross-subsidy". And those cross-subsidies
3 may arise in a number of ways. You have the agreed statement of facts. You have
4 the evidence of Mr Hawthorne about a number of points which may or may not give
5 rise to cross-subsidy.

6 The nature of this case again is not that we have accountants to go in and try to
7 unpick precisely what that might or might not be, but you know from the amended
8 statement -- from the agreed statement of facts, as I have explained, that there is
9 a delta and we say that is -- which I will come back to -- which is the support. It may
10 arise in a number of ways. It may arise in the way in which capital investment in
11 trucks and so forth is allocated between the two businesses -- my learned friend
12 says, well, look, we covered the capital, it's in the calculation.

13 Well, we don't know how it has been allocated and given the very substantial costs
14 here and given the very substantial advantages which a council will have from the
15 household waste business which we know from their figures is, say, 95 per cent of
16 their business, they will be able to secure advantages from that household waste
17 business. That is the advantage they get from their public business. And they are
18 able to use the advantage and the cost advantage they get in the capital expenditure
19 and lower their capital costs there.

20 The same may be true in disposal. They may be able to use the advantages they
21 get because they have conferred upon themselves the protected status of the
22 household business and use that as a way of getting a better disposal cost. So it
23 isn't enough just to say, well, we have allocated the disposal cost across the two
24 businesses if, in fact, the cost itself has been -- they have been able to lower that
25 cost by recourse to their household business.

26 **THE PRESIDENT:** Just so that I understand how far you are going on this, does

1 | your point run further than simply benefiting from the economies of scale? That's
2 | clearly part of it, but is there more to your points than just that?

3 | **MR BOWSHER:** Economy of scale -- it goes further in this sense. It is different --
4 | quantitatively different -- from the economy of scale that Veolia would have. Veolia
5 | would have an economy of scale because they are large in international markets.
6 | I shouldn't pick them out --

7 | **THE PRESIDENT:** Yes. But they are a large completely private entity.

8 | **MR BOWSHER:** Completely private entity, yes.

9 | **THE PRESIDENT:** Yes.

10 | **MR BOWSHER:** They are not UK owned, not UK government, anyway. We will
11 | park that thought there for a moment anyway.

12 | What you have here --

13 | **THE PRESIDENT:** Yes.

14 | **MR BOWSHER:** -- is that there is an advantage from the household waste business
15 | which Durham has which is an economy of scale.

16 | **THE PRESIDENT:** All right.

17 | **MR BOWSHER:** And they get that economy of scale because they have the ability
18 | to use their statutory power to retain that to themselves uncompeted, and secure
19 | volume discounts and so, for example -- and it's an important point because it is an
20 | important local economy, because let us take -- these contracts -- and this is referred
21 | to in the evidence -- disposal contracts will typically have a guaranteed minimum
22 | volume. The higher you can guarantee as your minimum volume, the better the
23 | discount.

24 | If you know that you are going to have so much waste in a particular geographic
25 | area within driving distance of a particular disposal location, then you know that you
26 | can offer a much higher guaranteed minimum volume --

1 **THE PRESIDENT:** Yes.

2 **MR BOWSHER:** -- and that is -- and that will substantially lower your disposal costs
3 which will be certainly over half of your overall costs.

4 Now, that will enable you secure an advantage and that is an advantage you get
5 simply from the operation of the public side, the household side of the business.

6 **THE PRESIDENT:** Okay.

7 **MR BOWSHER:** The 95/5 split, which I think I ventured rather approximately with
8 Professor Ulph this morning, demonstrates the problem there. You have 95 per cent
9 of the business. You have all of that bulk. So when you go and offer the disposal of
10 the trade waste, you are able to take advantage of a very much depressed --
11 depressed is perhaps an unfair word -- advantageous --

12 **THE PRESIDENT:** Lower than it otherwise would be.

13 **MR BOWSHER:** Highly advantageous rate.

14 **THE PRESIDENT:** Do you say that the subsidy arises by reference to the difference
15 between the price that is charged to the creators of commercial waste and the price
16 that would be charged if the commercial waste business was entirely stand-alone?

17 **MR BOWSHER:** Yes. I hesitate simply because I put it differently yesterday. I put it
18 in a -- I thought I had it written down again. Sorry, let me just -- apologies, I thought
19 I had written it down here for this afternoon.

20 Because you are charging a trade waste charge to the trade waste customers, which
21 you are able to do -- which is lower than it would otherwise be and you are able to do
22 that because your cost base is lower because of the advantage, and that is plainly
23 capable of distorting competition.

24 **THE PRESIDENT:** Yes. But just to get the measure right, you need to strip out, on
25 your case, the advantage that is derived from a lower cost base because you are
26 doing all of this household waste collection.

1 **MR BOWSHER:** Yes.

2 **THE PRESIDENT:** Okay.

3 **MR BOWSHER:** And that comes from -- and that is engaged by the legislation
4 because that is an advantage which comes from the household waste, the public
5 function side of the business. If I can put it that way.

6 **THE PRESIDENT:** Yes. But what happens if a commercial producer service
7 provider does exactly the same thing? In other words, they look to what their
8 vehicles can collect but don't differentiate between the classification under the EPA
9 of the different sorts of waste? We have seen it is actually quite a complicated line
10 to draw with schools on one side or the other.

11 Suppose they just focus on maximising the use of their vehicles so that they reduce
12 their cost base. Why, if they are reflecting that cost saving in the charges, shouldn't
13 the local authority do exactly the same thing in its charges?

14 **MR BOWSHER:** Well, because if the large -- if the commercial waste operator has
15 an economy of scale, that is a private economy of scale. Subsidy Control Act is
16 simply not engaged.

17 **THE PRESIDENT:** I see, yes.

18 **MR BOWSHER:** Whereas this is an advantage which comes from public resources,
19 as we have set out in our skeleton. The reason why it comes from public resources
20 is because the household waste business is paid for out of public revenue. It is all of
21 the household waste business, the 95 per cent, has to be paid for out of -- I call it
22 public revenue which is a rather non-technical term because we have not got into
23 whether it is council tax or X or Z, but that is what is being used. That resource pays
24 for and takes out of the budget for the trade waste business that which ought to be
25 covered as part of its budget as a trade waste business.

26 **THE PRESIDENT:** Of course, you are not going so far as saying that such

1 arrangements are inevitably out of course.

2 **MR BOWSHER:** No.

3 **THE PRESIDENT:** What you are saying is they trigger the obligation to conduct
4 a review according to the subsidy control principles.

5 **MR BOWSHER:** Indeed. I touch on it. I have the useful guidance about what is
6 and is not an interest, but there is plainly nothing wrong in the council taking an
7 entirely different sort of decision than it did in March 2023, and thinking "Gosh, we
8 have a number of interesting things we need to think about. We would like to
9 structure matters in a way which offers a subsidy to such-and-such and that is
10 something which we are going to do consistent with the subsidy control principles
11 and go through them".

12 And that would be a transparent position which we would either -- which we and
13 others interested could review or not. It would take account of the environmental
14 factors, so they would have the factors which are also nontrivial. I am not going to
15 go back over polluter pays again because I don't say that's the heart of the case.
16 The only reason why we raised it is because it is not as simple as saying low
17 charges are good.

18 Quite the contrary. It might be that you have to take proper account of what the
19 proper charge is -- just to go back to one of the points made by Professor Ulph this
20 afternoon about the cost of disposal, if you have an overfilled bin -- I mean, the
21 premise of the WRAP tools, I think there is 85-kilos in a standard bin and sometimes,
22 as we saw from the WRAP document, sometimes they are way above that.

23 If you go and take that bin to an energy from waste plant and the polluter has been
24 paid for 85-kilos of waste and in fact what is burned is 400-kilos of waste -- which is
25 not impossible when you look at the numbers -- then effectively the polluter has --
26 and that has a carbon content, then there has been a release -- not only has there

1 | been an effect on the economy, there has also been an effect on the environment
2 | which has not been paid for. That's not what this regime deals with directly, but it
3 | would be part of the consideration if you were to take a proper subsidy decision,
4 | which properly taken might be quite difficult to challenge.

5 | Sorry, I am reminded that the 95/5 actually is in the defence at paragraph 34(2).
6 | I kept on thinking it must be somewhere, but I knew it was there in the papers.

7 | **PROFESSOR ULPH:** Can I just ask one question of clarification?

8 | **MR BOWSHER:** Yes.

9 | **PROFESSOR ULPH:** Would you recognise the possibility of diseconomies of scale?

10 | So I have in mind, for example, that if you are a large business and you have to
11 | employ some specialised labour, then the wages will go up precisely because you
12 | have to hire so much labour of a specialised type.

13 | **MR BOWSHER:** It's possible.

14 | **PROFESSOR ULPH:** Okay.

15 | **MR BOWSHER:** But what I would emphasise is there is something quite specific
16 | about the economy of scale in having the guaranteed 95 per cent in one particular
17 | county, with -- I think it is identified in the evidence as two principal disposal
18 | locations. So the arrangements you can make for disposal costs are focused and
19 | that will obviously have a very important effect on your economies of scale that way.

20 | I am not going to get into weighing. Weighing is an important issue, but we have
21 | a lot to talk about on weighing and I only have 14 minutes and certainly more than
22 | 14 minutes' material on weighing.

23 | I will focus on capital costs of trucks and disposal costs. The economies of scale are
24 | agreed, it is ASF paragraph 27(29). I am sorry, ASF, I have used that statement
25 | before; agreed statement of facts. In my own head I know what I am talking about.

26 | We say there are many advantages which a normal successful competitor has, but

1 no normal competitive entity has this public sourced advantage. I should just -- and
2 it's that special advantage that needs to be taken out.

3 There is nothing about section -- there is no way of avoiding the Subsidy Act by
4 saying this is somehow inherent in the legislation. That provision does not bite here.
5 That takes us to -- and the simple answer to that is that it would only be inherent in
6 the legislation if under the EPA there was some duty to act in the way that is
7 presupposed. But the only -- the source of the advantage here is in the reasonable
8 charge. That is in 45(3)(b) of the Act, and that is simply the authority may cover
9 a reasonable charge if it -- and that's only contingent if it decides that it's going to
10 carry out the work in this way.

11 It is not inherent in the structure of the Act. It is a consequence of the way -- the
12 choices that the council has made about the way it runs its trade waste business, the
13 way it charges for it, and so that, in my submission, does not get them off the hook.

14 Chronopost is an interesting working out of these issues. We both dance around
15 whether it is or not binding. No one is suggesting Chronopost is binding. It is only
16 illustrative of -- I think for this purpose -- a set of facts, which are supportive of our
17 position in general terms that it is possible to have a cross-subsidy which needs to
18 be addressed and which is capable of distorting competition within, in those terms,
19 within the meaning of EU state aid law. We would apply the same logic across into
20 the domestic legislation.

21 We do say, though, that Chronopost is a materially different situation insofar as it is
22 concerned with what is referred to there as the logistical network which was
23 something which was required to be set up by La Poste. It was required to have that
24 thing. There was no one else who could have that.

25 And because of that, that is -- my learned friend took you to it this afternoon, I am not
26 going to take you to that passage again -- it is plain in Chronopost that it was that

1 feature that it was unique, and a unique obligation on La Poste to have that network
2 which meant that it wasn't going to be cost allowed for in the competitive comparator.
3 But we say that's not the position here. There is, in fact, no part of the collection
4 business -- household or otherwise -- which is necessarily exclusive to the council.
5 Because the council -- I have made this point half an hour ago -- the council can
6 choose to structure its operations in a range of ways, it can choose to have all the
7 household business done by others --

8 **THE PRESIDENT:** Yes.

9 **MR BOWSHER:** -- and act accordingly.

10 There is no reason to treat the capital and running costs advantages of the
11 household waste business with kid gloves in the way it was dealt with in La Poste. It
12 is simply another advantage to be costed fairly and dealt with appropriately.

13 Overall, we say that the EPA set up a competitive environment in which there was to
14 be a market for waste collection business. Whether or not whether it was truly
15 competitive in both household and other commercial sectors might turn on a number
16 of factors, including choices by the authority. But plainly the system was not
17 intended to undermine the competitive opportunities where they existed for normally
18 competitive operators. And that's all they are seeking.

19 The arrangements by which the trade waste business makes use of assets disposal
20 costs and other costs, we say, has all the attributes of cross-subsidy and therefore it
21 is incumbent upon the authority to do more than identify that it charges competing
22 charges for the business if those charges are clearly less than would have been
23 charged by a normally competitive business in a comparable situation because it can
24 rely on support from assistance from another protected part of its operation in order
25 to transfer advantages to its trade waste business.

26 That really is the headline point on the substance of the point. If I can then turn

1 | briefly to a few points on the subsidy decision. Then I think I will be there.

2 | **THE PRESIDENT:** Yes.

3 | **MR BOWSHER:** I am coming round the final bend, if that is all right.

4 | **THE PRESIDENT:** Of course.

5 | **MR BOWSHER:** We say whether one looks at the March 2020 -- I still have to look
6 | at the March 2020 decision and the March 2023 decision because my learned friend
7 | relies on March 2020 as a legacy scheme --

8 | **THE PRESIDENT:** Yes.

9 | **MR BOWSHER:** -- for limitation purposes.

10 | We say that is not a good point. In March 2020, the separation of accounts has
11 | taken place. We say it's not clear that it has been done to good effect, if I can put it
12 | that way. All that we have in terms of an assessment as to whether or not there was
13 | or was not subsidy is the assertion at page 373 of the bundle that the approach
14 | taken by the council is lawful. There is no other real assessment at that point, it's
15 | simply that they say it is lawful. That's at paragraph 31, I think I took you to that
16 | yesterday, so you may not need to pull it up again.

17 | They simply assert and agree that -- sorry, this goes back to what we were just
18 | saying about the amount of the subsidy. The council agrees that at that point we will
19 | go -- as council agrees in 27 and 29 of the agreed statement of facts, that the cost of
20 | the trade waste business as a stand-alone exceeds amounts covered by recurrent
21 | trade waste charges which cover only a contribution to those common costs of
22 | household and trade waste business. But you can't evaluate the subsidy because
23 | the material does not exist. They simply assert that there is no subsidy.

24 | Now, for them to say, well, this is a legacy scheme seems to us to be a strange
25 | analysis, because while it is plainly clear that you can have a subsidy decision which
26 | involves a decision that it isn't a subsidy -- and I think that probably does flow from

1 the Act, the way section 70 operates -- in our submission the same cannot truly be
2 said of a legacy subsidy -- of a subsidy scheme, sorry.

3 Because just the very word "scheme" involves -- we can all go and check big
4 dictionaries, but off the top of my head I am going to say a plan, a design, an
5 organisational arrangement, something deliberate involving the giving of subsidy.
6 That must be the meaning of subsidy scheme.

7 A decision that I am not giving subsidy is not a subsidy scheme, that is a distortion.
8 That does violence to the language. You can't decide I am not giving subsidy.
9 Whatever I am doing is not a subsidy but I'm going to call it a subsidy scheme. That
10 makes no sense at all.

11 If you are going to set up a subsidy scheme that involves saying "I want to do
12 something over a period with one or more beneficiaries, and it's going to be
13 a subsidy and I will have thought about the subsidy control principles and those sorts
14 of matters." It makes most sense to say "I have a scheme which is not a subsidy", in
15 my submission.

16 That makes sense of the way in which the modification principles work which I
17 won't -- we have been to this before.

18 **THE PRESIDENT:** Yes.

19 **MR BOWSHER:** But if you are going to start saying that there is a safe harbour for
20 modifying a scheme, well, you need to have something to refer back to. I say the
21 same thing about the budget, but you must have some rules. It is maybe not quite
22 the same as public procurement rules, but you must have something to go back to to
23 say, well, if I am going to amend the scheme but carry on giving on that basis, I must
24 be able to look back to the rules which apply because I must have had rules which
25 satisfied me that what I would be doing in years to come was still going to be subject
26 to subsidy control principles.

1 If all I am saying, which is what my learned friend says effectively: I can have
2 a scheme which I decide isn't a subsidy as long as what I do is fair and reasonable.
3 That is simply saying -- I mean, fair and reasonable are useful legal words, but they
4 are just simply saying, I will do something which isn't wildly unlawful. It doesn't add
5 anything.

6 In my submission, it simply doesn't make sense to say, well, this isn't a -- this is
7 a subsidy scheme decision. To be fair, until recently nor did the county think that this
8 was a subsidy scheme because you will recall that -- we haven't pulled it out
9 because of all the pre-action correspondence, but we, in the middle of last year,
10 wrote a letter asking -- sorry, 645. We wrote pointing out that the Act was about to
11 come into force, making various observations about what might happen as and when
12 the Act came into force and saying that when it did come into force we would be
13 asking for pre-action information under section 76 of the Subsidy Control Act.

14 The response we received from DWF, acting for Durham County Council, was at
15 page 650 on this, paragraph 27:

16 "In this case, section 76 of the 2022 Act when it enters into force will not be engaged
17 as the council has not given any subsidy or made any subsidy scheme." [As read]

18 **THE PRESIDENT:** Yes.

19 **MR BOWSHER:** You will recall at the CMC my learned friend told you that Durham
20 had been very carefully attending to his wise counsel throughout all these matters,
21 I recall. Not that I was there, but I think it is in the transcript. So that, in our
22 submission, is a pretty clear statement. They didn't think it was a legacy subsidy
23 scheme. Nice try, but no. It doesn't make sense and they never actually thought it
24 was either.

25 So -- sorry, I am nearly there. If I can just check that I have.

26 We say that the -- plainly the right to -- there is nothing in the March 2020 decision

1 that binds from year to year. If this were a subsidy scheme, you would have to see
2 this as being something that sort of the 2023 decision was not implementation of
3 something. It's very clear, when one reads that letter, that this is something -- yes, it
4 is done every year and there are reasons why it has to be done every year because
5 there are plainly other statutory obligations about why the council has to publish its
6 charges for clearing ants, clearing swarms of bees and providing bereavement
7 services and other important matters. But that is not the badge of a legacy scheme
8 going forward, it is a decision that is taken every year and taken afresh every year.
9 If the council wants to set up a subsidy scheme, then it would then have the
10 advantage, if it went through the right sort of machinery -- we would have to work out
11 what that is because we are all working at the Act afresh, but someone has to be the
12 first, as it were -- and they would say, this is a subsidy scheme. We have thought
13 about the subsidy control principles. This is why we are doing what we are doing.
14 We have thought about the environment. We have thought about our geographic
15 issues and so on and so forth. And if they got something wrong, someone would
16 challenge them and if they hadn't, they wouldn't. That's the way it is dealt with.
17 But fortuitous or otherwise, the March 2023 decision, as embodied in the
18 recommendation in February is so plainly the right decision to be challenging, and if
19 we are right that there is a subsidy, it is plainly the decision by which the subsidy is
20 delivered to their trade waste business.
21 I think the only point I have not dealt with is capable of distortion. The statutory test
22 is only capable of distortion which, in our submission, is a clear signal from the
23 legislator that is not -- just as it was not in EU state aid law, the court is not invited to
24 look into the actual evidence as to what the actual effects were. You may get into
25 that if you start doing a state aid analysis, but at this stage, whether there is or is not
26 state aid or subsidy, you look at is it capable of distortion and in this case plainly

1 | there is.

2 | To pick up again Professor Ulph's point, it is neither here nor there whether or not
3 | the distortion affects us or someone else. It is simply is it capable of distorting
4 | competition in the market in the United Kingdom. Plainly we say it is. If we are right
5 | and this has the pricing effect of the type described by Mr Hawthorne in his
6 | statement, then plainly there is something capable of distorting the market and that is
7 | a subsidy that infringes the Subsidy Control Act.

8 | Can I just check, because that was slightly quicker than I -- I did verge into gabbling
9 | near the end and I apologise.

10 | I am asked just to point out there that there was a point made -- it is not in evidence,
11 | about this household collection with what is on our website. I don't know if it matters.
12 | Anyway, there is more to it, but let me not take up the tribunal's time.

13 | **THE PRESIDENT:** It won't feature in our ruling.

14 | **MR BOWSHER:** Thank you. Other than that, thank you very much. I apologise for
15 | going a bit longer than I said.

16 | **THE PRESIDENT:** Not at all. Thank you all very much. We will reserve our
17 | judgment and hand something down as soon as we can. I thank you all for your very
18 | helpful submissions on this matter. Thank you very much.

19 | **MR ROBERTSON:** I would like to thank the tribunal for listing this hearing in the
20 | middle of the Prochlorperazine hearing. (inaudible).

21 | **THE PRESIDENT:** Not at all. A pleasure.

22 | **(4.49 pm)**

23 | **(The case concluded. Judgment reserved)**

24 |

25 |

26 |