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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1577/12/13/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

27 July 2023

Before:

SIR MARCUS SMITH
(President)
PROFESSOR DAVID ULPH, CBE
LORD YOUNG, KC

Sitting as a Tribunal in England and Wales

BETWEEN

THE DURHAM COMPANY LIMITED
(trading as MAX RECYCLE)

Applicant

-and-

DURHAM COUNTY COUNCIL

Respondent

Heard on 3 and 4 July 2023

JUDGMENT

APPEARANCES

Michael Bowsher, KC and Ligia Osepciu (instructed by Tilly, Bailey & Irvine LLP) appeared on behalf of the Applicant.

Aidan Robertson, KC and Richard Howell (instructed by DWF Law LLP) appeared on behalf of the Respondent.

CONTENTS

A. THE SUBSIDY CONTROL ACT 2022: AN OVERVIEW

1. This is the first application for the review of a subsidy decision under section 70 of the Subsidy Control Act 2022. It is, therefore, appropriate to set out the broad outlines of the regime under the 2022 Act before proceeding to the facts of this particular application.

2. Section 12 of the 2022 Act provides that:

> "(1) A public authority –
>
> (a) must consider the subsidy control principles before deciding to give a subsidy, and
>
> (b) must not give the subsidy unless it is of the view that the subsidy is consistent with those principles.
>
> (2) In subsection (1) "subsidy" does not include a subsidy given under a subsidy scheme.
>
> (3) A public authority –
>
> (a) must consider the subsidy control principles before making a subsidy scheme, and
>
> (b) must not make the scheme unless it is of the view that the subsidies provided for by the scheme will be consistent with those principles."

3. Section 70 of the 2022 Act provides for the review of subsidy decisions. Section 70(1) states:

> "An interested party who is aggrieved by the making of a subsidy decision may apply to the Competition Appeal Tribunal for a review of the decision."

Section 70(2) deals with the review of subsidy schemes, and provides:

> "Where an application for a review of a subsidy decision relates to a subsidy given under a subsidy scheme, the application must be made for a review of the decision to make the subsidy scheme (and may not be made in respect of a decision to give a subsidy under that scheme)."

4. The review is conducted according to the same principles as would be applied (in the case of proceedings in England and Wales or Northern Ireland) by the High Court in determining proceedings on judicial review.[1]

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[1] Section 70(5)(a) of the 2022 Act.

5. A "subsidy decision" means a decision to give a subsidy or make a subsidy scheme.[2] Unpacking this further:

(1) A "subsidy" is defined in section 2 as follows.

> "(1) In this Act, "subsidy" means financial assistance which –
>
> (a) is given, directly or indirectly, from public resources by a public authority,
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> (b) confers an economic advantage on one or more enterprises,
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> (c) is specific, that is, is such that it benefits one or more enterprises over one or more other enterprises with respect to the production of goods or the provision of services, and
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> (d) has, or is capable of having, an effect on –
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> (i) competition or investment within the United Kingdom,
>
> (ii) trade between the United Kingdom and a country or territory outside the United Kingdom, or
>
> (iii) investment as between the United Kingdom and a country or territory outside the United Kingdom.
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> (2) For the purposes of this Act, the means by which financial assistance may be given include –
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> (a) a direct transfer of funds (such as grants or loans);
>
> (b) a contingent transfer of funds (such as guarantees);
>
> (c) the foregoing of revenue that is otherwise due;
>
> (d) the provision of goods or services;
>
> (e) the purchase of goods or services.
>
> (3) Financial assistance given from the person's resources by a person who is not a public authority is to be treated for the purposes of subsection (1)(a) as financial assistance given from public resources by a public authority if the involvement of a public authority in the decision to give financial assistance is such that the decision is, in substance, the decision of the public authority.

[2] Section 70(7) of the 2022 Act: see under "subsidy decision".

(4) For the purposes of subsection (3), the factors which may be taken into account when considering the involvement of a public authority in the decision of a person to give financial assistance include, in particular, factors relating to –

(a) the control exercised over that person by that public authority, or

(b) the relationship between that person and that public authority.

(5) For the purposes of this Act, financial assistance is to be treated as given to an enterprise if the enterprise has an enforceable right to the financial assistance.

(6) For further provisions relevant to the interpretation of this section, see –

(a) section 3 (financial assistance which confers an economic advantage);

(b) section 4 (financial assistance which is specific);

(c) section 5 (modification for air carriers);

(d) section 6 (meaning of "public authority");

(e) sections 7 and 8 (meaning of "enterprise")."

It will be necessary to refer to a number of these definitions in due course. For present purposes, however, it is only necessary to consider the meanings of "public authority" and "enterprise".

(2) "Public authority" means "a person who exercises functions of a public nature".[3] There are various carve-outs from this definition which are not material for present purposes.[4]

(3) "Enterprise" is defined disjunctively as either:

(i) A person who is engaged in an economic activity that entails offering goods or services on a market, to the extent that the person is engaged in such an activity,[5] or

[3] Section 6(1) of the 2022 Act. Emphasis added.
[4] Thus, either House of Parliament, the Scottish Parliament, Senedd Cymru and the Northern Ireland Assembly are all excluded.
[5] Section 7(1)(a) of the 2022 Act. Emphasis added.

(ii) A group of persons under common ownership or common control which is engaged in an economic activity that entails offering goods or services on a market, to the extent that the group is engaged in such an activity.[6]

"Person" includes "a body corporate, a partnership and an unincorporated association".[7]

(4) "Subsidy schemes" are defined in section 10 of the 2022 Act and mean "a scheme made by a public authority providing for the giving of subsidies under the scheme".[8] Section 10 further evolves this definition: for present purposes, it is sufficient to note that a subsidy scheme is a scheme under which subsidies are given.

(5) The nature of a "decision" is not defined in the 2022 Act.

B. THE FACTS IN THE PRESENT CASE

(1) The Council

6. The Respondent, Durham County Council (the "Council"), is the unitary authority for the non-metropolitan county of Durham ("County Durham").[9] The Council is the sole "Waste Collection Authority" and sole "Waste Disposal Authority" for County Durham.[10]

(2) The Council's powers and duties as Waste Collection Authority

7. As Waste Collection Authority for County Durham, the Council has various duties in relation to waste, namely:

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[6] Section 7(1)(b) of the 2022 Act. "Common control" is further defined in section 8 of the 2022 Act. Emphasis added.
[7] Section 7(4) of the 2022 Act. Emphasis added.
[8] Section 10(1) of the 2022 Act.
[9] Agreed Statement of Facts/[1].
[10] Agreed Statement of Facts/[3].

(1) *The household waste collection duty.* The Council is under a duty (pursuant to section 45(1)(a) of the Environmental Protection Act 1990) to arrange for the collection of household waste in County Durham. The Council may not charge for the collection of household waste, save in certain limited circumstances.[11]

(2) *The commercial waste collection duty.* The Council is under a duty to arrange for the collection of commercial waste if requested by the occupier of premises in its area to collect any commercial waste from the premises.[12] Subject to exceptions, the Council must recover a reasonable charge for this service.[13]

(3) *The industrial waste collection power.* The Council has a power[14] to arrange for the collection of industrial waste if requested by the occupier of premises in its area to collect any industrial waste from the premises.[15] Subject to exceptions, the Council must recover a reasonable charge for this service.[16]

8. The Council may elect to perform these matters itself or outsource them to a third party.[17]

(3) The Council's powers and duties as Waste Disposal Authority

9. The Council, as Waste Disposal Authority, has a duty to arrange for the disposal of all household and commercial waste collected by it.[18]

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[11] Agreed Statement of Facts/[4] and [5]. The obligation not to charge arises out of section 45(3) of the 1990 Act. The term "household waste" is defined by section 75 of the 1990 Act and regulations made under that section.
[12] Agreed Statement of Facts/[6]. The relevant statutory provision is section 45(1)(b) of the 1990 Act. The term "commercial waste" is defined by section 75 of the 1990 Act and regulations made under that section.
[13] Agreed Statement of Facts/[8]. The relevant statutory provision is section 45(4) of the 1990 Act.
[14] We suspect that some form of correlative duty will also arise, if only in relation to the exercise of this power, but we were not addressed on this.
[15] Agreed Statement of Facts/[7]. The relevant statutory provision is section 45(2) of the 1990 Act. The term "industrial waste" is defined by section 75 of the 1990 Act and regulations made under that section.
[16] Agreed Statement of Facts/[8]. The relevant statutory provision is section 45(4) of the 1990 Act.
[17] Agreed Statement of Facts/[9].
[18] Agreed Statement of Facts/[10]. The relevant statutory provision is section 51(1)(a) of the 1990 Act.

10. The Council also has a duty to arrange for places to be provided at which persons resident in its area may deposit their household waste and for the disposal of waste so deposited.[19] These arrangements may – but need not – permit the deposit of commercial and industrial waste.[20]

(4) The manner in which the Council carries out its functions

11. The Council does not collect any type of waste outside County Durham.[21]

12. The Council does not exercise its power to collect industrial waste, and so the question of its disposal does not actually arise.[22]

13. So far as the collection and disposal of household and commercial waste is concerned:

    (1) The Council performs the function of the collection of household and commercial waste itself and does not outsource this function.[23] The Council uses the same 88 vehicles and the same employees to collect all household waste and the majority (78%) of commercial waste collected by it.[24] As described above, the Council is generally not entitled to charge for the former service, but is obliged to charge for the latter. The 22% of commercial waste not collected in this way is collected by the Council using multi-purpose vehicles that are also used for other functions (which do not involve the collection of household waste).[25]

    (2) The disposal of waste so collected is not done by the Council itself. These functions are carried out by third parties, and the Council pays for these services on a per tonne basis.[26] More specifically:

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[19] Agreed Statement of Facts/[11]. The relevant statutory provision is section 51(1)(b) of the 1990 Act.
[20] Agreed Statement of Facts/[11]. The relevant statutory provision is section 51(3) of the 1990 Act.
[21] Agreed Statement of Facts/[15].
[22] Agreed Statement of Facts/[12].
[23] Agreed Statement of Facts/[12].
[24] Agreed Statement of Facts/[17].
[25] Agreed Statement of Facts/[20].
[26] Agreed Statement of Facts/[25].

(i) The vast majority of both household and commercial waste collected by the Council is taken to four waste transfer stations.[27] The waste is "bulked-up" together without differentiation as to its origin as household/commercial waste and split into two categories – "residual" and "recycling".[28]

(ii) The bulked-up waste is transferred from the waste transfer stations to various premises for disposal. These premises are operated by third parties, including Suez UK Ltd (for residual waste) and Biffa (for recycling).[29]

(iii) The third parties operating these disposal facilities charge the Council for their services, pursuant to contracts between them and the Council. These contracts do not differentiate between household and commercial waste.[30]

(iv) Additionally, the Council operates 13 household waste recycling centres within County Durham, where residents of County Durham may deposit household waste free of charge. Commercial waste may be deposited at one such facility (which service is charged for, by weight). All of these waste recycling centres are outsourced by the Council to a third party (HW Martin Waste Ltd).[31]

(5) The manner in which the Council charges for services

14. In the manner described (and subject to the qualifications articulated), the Council may only charge for the collection (and, incidentally, disposal) of commercial waste. As stated, the same vehicles are used to collect both

[27] Agreed Statement of Facts/[21].
[28] Agreed Statement of Facts/[22].
[29] Agreed Statement of Facts/[23].
[30] Agreed Statement of Facts/[24].
[31] Agreed Statement of Facts/[26].

household and commercial waste. These vehicles are not equipped with weighing equipment.[32]

15. In these circumstances, the Council charges for its commercial waste collection services as follows:

    (1) It seeks to recover the actual cost of employing staff that deal with only commercial waste.[33]

    (2) It seeks to recover proportions of the actual cost of costs common to household and commercial waste (namely, staff, disposal costs and overheads)[34] in accordance with a "formula" based upon an approximation of the total commercial waste as a proportion of the total (household plus commercial) waste.[35]

    (3) Charges are set to individual businesses "based on bin size and number of lifts". Charges are not set by reference to the weight of the refuse collected and are charged annually.[36] The level of commercial charges is set annually by the Council and was last done on 31 March 2023.[37]

(6) Terminology

16. It is clear from the foregoing that waste collection services and waste disposal services are somewhat linked. In this Judgment, save where the contrary is stated or the context otherwise requires, we will generally refer to both collection and disposal as "waste collection" or "waste collection services".

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[32] Agreed Statement of Facts/[18].
[33] Agreed Statement of Facts/[31(a)].
[34] Agreed Statement of Facts/[31(b), (c) and (d)].
[35] Agreed Statement of Facts/[34].
[36] Agreed Statement of Facts/[35] to [36].
[37] Agreed Statement of Facts/[36].

C. THE SUBSIDY DECISION ALLEGED, AND THE ISSUES ARISING

(1) The Applicant

17. The Applicant, the Durham Company Limited, trades under the name "Max Recycle", which is the name we shall use to refer to the Applicant. Max Recycle are a provider of waste collection services in North East England, North West England, Southern Lakes and Southern Scotland. They are active in County Durham and compete with the Council in regard to the services provided by the Council as described in paragraph 13(1) above.

(2) The contentions between the parties

18. Max Recycle contend that a subsidy decision was made on 31 March 2023[38] and that, contrary to their duties under section 12 of the 2022 Act, the Council failed to consider the subsidy control principles before making that decision.

19. The Council, for their part, accept that if a subsidy decision was made on 31 March 2023, then they did not consider the subsidy control principles. However, the Council contend that there was no subsidy decision on 31 March 2023. Rather, the Council made what would have been a decision to put in place a subsidy scheme, had that decision been made when the 2022 Act was in force. As it was, that decision to make (what is now) a subsidy scheme was made before the entry into force of the 2022 Act and is not caught by the provisions of the 2022 Act for that reason. More specifically, the Council contend that the decision to put the scheme in place was made on 18 March 2020.[39]

20. We shall, for the sake of clarity, refer to the decision of 31 March 2023 as the "2023 Subsidy Decision" and the decision of 18 March 2020 as the "2020 Scheme Decision". Naturally, in using these terms, we are not saying anything about the outcome: Max Recycle contend that the 2020 Scheme Decision was

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[38] An alternative case was advanced as to when the subsidy decision was made. We do not need to consider that alternative case, for reasons given later on in the Judgment. Accordingly, we will not consider further the alternative case, which raises no new issues.

[39] Strictly, this was the Council's alternative case. Our description of the issues between the parties is, however, a rational one based on how the points logically arise and how they were presented orally.

not a subsidy scheme within the meaning of the 2022 Act (even if the Act applied), and the Council deny that the 2023 Subsidy Decision was a subsidy decision at all.[40]

(3) Issues arising

21. At a case management conference on 17 February 2023, directions for the hearing of this application were made. Consistently with the important need for reviews of subsidy decisions to be conducted quickly and with a light touch (and with costs commensurate to these objectives), a final hearing was set for 3 and 4 July 2023.[41] It was directed that the hearing be confined to three issues:[42]

    (1) Whether the decision under review was capable in law of amounting to a "decision" within the meaning of section 70 of the 2022 Act.

    (2) Whether the decision under review constituted a "subsidy" within the meaning of section 70 of the 2022 Act.

    (3) Whether the subsidy control principles, to which section 12 of the 2022 Act refers, were satisfied.

22. The third issue only arose contingently, namely if there was indeed a "subsidy decision" within the meaning of section 70 of the 2022 Act. Because the Council accepted that they did not consider the subsidy control principles,[43] this issue ultimately did not arise, even contingently. The submissions before us turned on whether there was a "subsidy decision".

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[40] The Council also, to be clear, deny that the 2020 Scheme Decision was a scheme. This depends on the meaning of "subsidy", to which we will come. However, we do not need to deal with this contention separately: it is sufficiently dealt with in our consideration of the other points that were live before us.
[41] Paragraph 6 of the Order of the President dated 17 February 2023.
[42] Paragraph 4(a) of the Order of the President dated 17 February 2023.
[43] See paragraph 19 above.

(4) The nature of the subsidy alleged; and our approach

(a) The nature of the subsidy alleged

23. Max Recycle contended that the Council was subsidising as between its household waste and commercial waste collection operations. The essence of the point was that the Council were permitting the household waste collection operation to subsidise their commercial waste collection operation, thereby permitting the Council to charge individual businesses at less than the rate that they would or could have charged had they run the commercial waste collection operation as an altogether separate, self-standing and independent operation.[44]

24. The point was one of economies of scale. The costs of the household waste and commercial waste collection operations involved, because of the way the Council provided its waste collection services, common costs[45] which, when shared, would result in efficiencies within the Council's operations and so costs savings; additionally, there would be an ability in the Council to negotiate lower rates with third party providers (particularly on the waste disposal side) because the Council had (because of the elision of household waste and commercial waste collection services) more business to sell into the market, resulting in financial economies of scale. Max Recycle contended that these costs savings were reflected in the prices charged to the individual businesses whose commercial waste was collected by the Council, and that the market was thereby distorted. In short, the prices of small and medium sized commercial enterprises operating in the market (like, but not limited to, Max Recycle) would thereby be undercut.

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[44] It is important to bear in mind that "subsidy" is both a term in the 2022 Act and an economist's term of art. Here, we are summarising the case advanced by Max Recycle, and do not consider it necessary to differentiate between different classifications of subsidy. This could be said to be a case of cross-subsidy or direct subsidy or both: we do not consider that anything should turn on the precise labels used.

[45] For instance, the costs of the 88 vehicles used, and the employees operating them: see paragraph 13(1) above. Of course, assessing precisely what these savings might be was not a matter on which we heard very much evidence, and rightly so.

(b) Our approach to questions of fact

25. There was a great deal of factual contention and controversy before us. We are very grateful to the parties for the care with which they compiled the Agreed Statement of Facts.[46] This has enabled us to side-step the contention and the controversy. Clearly, it would be inappropriate, on an application to be conducted in accordance with the principles that would apply on judicial review, to enter into, still less seek to resolve, unnecessary factual controversy. Although we appreciate that the Council have much to say about the appropriateness of their charging structures, we consider the detail of these pricing structures to be nothing to the point. Whilst we are quite prepared to assume, for the sake of argument and for the present, that these charging structures indeed appropriately allocate costs as between the household waste and commercial waste collection operations, we do not consider it tenable to suggest (and we stress that the Council did not seek to suggest) that it charged its commercial waste customers the full economic cost of that service on a standalone basis. Indeed, we consider that such an approach would very likely be questionable on other public law grounds, since the Council would in effect be charging more than the true economic cost of the service it was providing.[47]

26. Accordingly, we consider that we must approach the questions before us on the basis that a net advantage flowed from the Council's household waste collection operation to its commercial waste collection operation, to the benefit of the latter.[48] We consider that it is correct to say that the advantage flowed in this direction, for these reasons:[49]

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[46] This was directed by the Tribunal: see paragraph 5(a) of the Order of the President dated 17 February 2023.

[47] *R (on the application of Attfield) v. Barnet London Borough Council*, [2013] EWHC 2089 (Admin). In this case, the charges for a parking scheme operated by Barnet LBC generated a surplus, that is monies in excess of those needed to operate the parking scheme. The Administrative Court held that it was a general principle of administrative law that a public body had to exercise a statutory power for the purpose for which the power was conferred by Parliament, and not for any unauthorised purpose. In this case, generating a surplus to be used for purposes other than the parking scheme had not been authorised by Parliament and was unlawful, irrespective of the public interest in generating the surplus.

[48] Clearly, benefits will have accrued to all, but because the household waste collection services were much larger than the commercial waste collection services, the greater benefit would have accrued to the latter, because of the relatively larger size of the former. It is for this reason that we use the term "net".

[49] We are striving, because "subsidy" has a legal as well as an economic meaning, to avoid the use of the term "subsidy", save where necessary.

(1) The Council were obliged – as we have described – to arrange for the provision of a household waste collection service, for which they were not entitled to charge. The Council's choice was whether they contracted that service out to a third party or carried the service on themselves. As we have seen, the Council elected to do the latter.

(2) Either way, this service would have to be paid for out of revenue derived from sources other than the producers of household waste (i.e. the consumers of this service). In choosing to provide the service for the collection of household waste internally, the Council created an opportunity to use the vehicles and human resources so engaged for other purposes – like the collection of commercial waste, thereby benefiting from economies of scale and avoiding paying any excess profit margin to an external provider.

(3) As we have described, the commercial waste so collected formed a small proportion of the household waste collected. It seems to us quite clear that the net advantages or benefits generated by a large refuse collection operation can only have flowed in the direction of the commercial waste collection operation because (i) that operation was the smaller of the two and (ii) the decision to operate the household waste collection operation internally rendered it possible for the Council to operate and maintain a large fleet of vehicles.[50]

(5) Structure of this Judgment

27. We consider first whether this is a "subsidy" within the meaning of the 2022 Act. Thereafter, we consider whether there was a "decision" within the meaning of the 2022 Act.

[50] That, of course, is not to say that there was no benefit to the household waste collection services.

D. SUBSIDY

(1) Financial assistance given by a public authority to an enterprise

28. A subsidy, within the meaning of the 2022 Act, must involve financial assistance given by a public authority so as to confer an economic advantage on one or more enterprises. This is the clear – unequivocal – meaning of sections 2(1)(a) and (b) of the 2022 Act, which we have set out in paragraph 5 above. There must, in short, be a conferral of an economic advantage by a public authority to an enterprise.

29. In this case, it was common ground that the Council were the "public authority" giving the subsidy. Much more controversial was the identity of the "enterprise" on whom the subsidy was conferred. All parties accepted that the Council comprise a single person; and that there was no distinct or discrete other person within the persona of the Council that could also be described as a person. None of the Council's waste collection or waste disposal services were provided through a service company or other subordinate entity, owned or controlled by the Council.

30. In short, it was not possible for Max Recycle to identify any person, other than the Council itself, implicated in the provision of waste collection or waste disposal services. As a result, the giver of the subsidy was the same person as the person on whom the subsidy was conferred.

31. The question is whether this constellation of facts is sufficient in law to amount to a "subsidy" within the meaning of section 2 of the 2022 Act. We are in no doubt that it is not:

    (1) Both a "public authority" and an "enterprise" are defined as persons.[51] The very essence of a subsidy, as defined in the 2022 Act, is that the subsidy conferred moves from (or, to use the statutory wording, is "given by") one person (the public authority) to another person (the

[51] See paragraphs 5(2) and 5(3) above.

enterprise). It is a very unlikely reading for one person to subsidise themselves.[52] The very notion is illogical since it involves (by definition) taking away with one hand in order to give with the other. In other words, the advantage does not involve subsidisation, because the "economic benefit" simply circulates within one entity.

(2) We consider, therefore, that the natural reading of the definitions of "public authority" and "enterprise" mean that when a person has been designated a "public authority" that person cannot also be an enterprise in relation to the advantage under consideration. Matters may very well be different if the public authority is part of a group of persons under common ownership or common control.[53] We expressly do not deal with that case, which does not arise on the present facts.

(3) The language of the 2022 Act, whilst not conclusive, supports the conclusion we have reached:

(i) A subsidy necessarily involves "financial assistance", which is variously defined in section 2(2)(a) to (e) of the 2022 Act. The relevant provisions are set out in paragraph 5(1) above, but the clear implication is a subtraction from one person's assets (the public authority's) combined with an addition to another person's assets (the enterprise). It is difficult to imagine a transfer or a foregoing of revenue or the provision or purchase of goods or services without two persons being involved.

(ii) Section 2(5) of the 2022 Act – again, set out in paragraph 5(1) above – provides that "financial assistance is to be treated as given to an enterprise if the enterprise has an enforceable right

[52] The wording of section 2 is very clear. By section 2(1)(a) of the 2022 Act, a subsidy must be "given…from public resources by a public authority". That necessarily implies a subtraction from public resources, which cannot arise where the "subsidy" simply moves around within the same person.

[53] We were referred to the Statutory Guidance in respect of the 2022 Act, which makes the point that "[s]ome persons may be considered both public authorities and enterprises with respect of different functions." It is difficult to see how this works within the statutory wording, unless a separate personality can be clearly identified.

to the financial assistance".[54] An enforceable right can only arise between two distinct persons.

32. Our construction is supported by two other aspects which point clearly to this construction of the term "subsidy". The first aspect is the fact that the 2022 Act very deliberately eschews reference to "undertakings", preferring as its "unit of account" the "person". We consider this aspect in the next section. The second aspect is that this analysis is entirely consistent with an economic understanding of how public bodies fit into a market economy such as that of the United Kingdom. Because this economic understanding actually explains a good deal of the thinking behind the 2022 Act, we deal with it at the end of this Judgment. We stress, however, that even without either of these two aspects we would have reached the conclusion here stated in any event.

(2) No use of the term "undertaking"

33. Neither party suggested that the European Union ("EU") law on State aid could be anything other than of persuasive effect when construing the provisions of the 2022 Act. We agree. In this case, the differences between EU law and the law of the United Kingdom are instructive. Article 107 of the Treaty on the Functioning of the European Union ("TFEU") contains a general provision prohibiting State aid where the "unit of account" is the "undertaking" ("…distorts or threatens to distort competition by favouring certain undertakings…").

34. As is well-known, the term "undertaking" conveys a very particular meaning in EU law. In Case C-41/80, *Höfner and Elser v. Macroton GmbH*,[55] the Court of Justice of the EU ("CJEU") stated that "the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed". "Economic" activity is broadly conceived as "any activity consisting in offering goods or services on a given market".[56]

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[54] Emphasis added.
[55] EU:C:1991:161 at [21].
[56] Case C-180/98, etc, *Pavlov*, EU:C:2000:428 at [75].

35. As was noted by the Tribunal in *Sainsbury's Supermarkets Ltd v. Mastercard Inc*,[57] "[a]n undertaking therefore designates an economic unit, rather than an entity characterised by having legal personality." In *Hydrotherm Gerätebau GmbH v. Compact de Dott Ing Mario Andreoli & C Sas* (Case C-170/83), [1984] ECR 2999 at [11], the CJEU stated that "[i]n competition law, the term "undertaking" must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question, even if in law that economic unit consists of several persons, natural or legal".

36. One consequence of this is that, as Whish and Bailey note,[58] the same legal entity may be acting as an undertaking when it carries on one activity but not when it is carrying on another. A "functional approach" must be adopted when determining whether an entity, when engaged in a particular activity, is doing so as an undertaking for the purpose of the competition rules.

37. A functional approach might very well oblige the Tribunal to parse the internal operations of the Council, and to seek to draw distinctions between the activities of the Council as a "public authority" and the activities of the Council as an "enterprise".[59] Such distinctions are likely to be both fine and subjective, and (potentially, at least) dangerously arbitrary. For instance, the Council could easily be said to be acting as an enterprise when negotiating terms for the disposal of its waste (household and commercial), yet that role (both in terms of its necessity and in terms of the Council's commercial position) is informed by the fact that the Council must procure the collection of household waste and cannot charge for it, in which regard the Council is much more clearly acting as a public authority. Yet the process by which the Council provides and obtains these services is seamless, and a distinction between "public authority" and "enterprise" activities correspondingly difficult. Such distinctions play no role

[57] [2016] CAT 11 at [356]. The discussion of what constitutes an undertaking at [351] to [360] generally is helpful and one that we adopt.
[58] Whish and Bailey, *Competition Law*, 10th ed. (2021) at 86. The 8th ed. (published in 2015) was cited with approval in *Sainsbury's* at [360].
[59] See, for example, the approach of the French-speaking Court of First Instance of Brussels (Civil Section) in *ABSL Go4circles v. Brussels-Capital Region and Bruxelles-Propert*, (2018), where precisely this approach was adopted.

in the 2022 Act which clearly eschews the "functional" approach so far as the distinction between a "public authority" and an "enterprise" is concerned.

(3) Other materials relevant to construction

38. We were referred to various other materials as aids to the interpretation of the 2022 Act. None specifically considered the question arising here, although it is fair to say that some passages relied upon by Mr Bowsher, KC (who appeared for Max Recycle) did suggest a "functional" approach. We have considered these: none are particularly persuasive, and they are certainly not persuasive enough to overcome the very clear view we have reached regarding the meaning of "subsidy" in the 2022 Act.

39. Our conclusion is that, on the true construction of the 2022 Act, a subsidy must move between persons, and that a "subsidy" moving within a single person is no such thing and falls outside the statutory definition of "subsidy" contained in the 2022 Act. From this, it follows that the arguments advanced by both sides, which were in part based on a "functional" approach, are premised on a distinction which we do not consider arises. For these reasons, we do not need to consider them any further in this section, although they do arise (albeit incidentally) in the next section.

(4) Not a subsidy for other reasons

40. Even if we are wrong in our conclusion just expressed, we consider that no subsidy within the meaning of the 2022 Act arises on the facts of the present case for these additional and alternative reasons.

41. Assuming we are wrong, then a "public authority" (the Council) must have given a subsidy conferring an economic advantage on an "enterprise". The "enterprise", according to Max Recycle, was the Council's commercial waste collection operation.[60] Again, according to Max Recycle, the financial

[60] See paragraph 45(b) of the Amended Notice of Appeal.

advantage given by the Council to the Council's commercial waste collection operation was the provision of services to that enterprise at below market cost.[61]

42. Even assuming Max Recycle is correct in this regard (and we stress that for the reasons we have given we consider that assumption to be both unwarranted and wrong), we proceed to apply the statutory test of whether a subsidy arises:

(1) It is something of a stretch, but we can see that something (we will come to the question of whether it is "financial assistance") is given indirectly from the public resources of a public authority by the advantage conferred which we have described in paragraph 24 above. We therefore consider the requirement in section 2(1)(a) of the 2022 Act to be satisfied.

(2) However, it is very difficult to see what "economic advantage" is conferred on the "enterprise" as we have defined it. At most, the "economic advantage" is the ability to charge less to the consumers of the service provided by the "enterprise", that is those using the Council's commercial waste collection services. But that economic advantage only arises if the "enterprise" charges less than the full economic cost of the commercial waste collection service calculated on a standalone basis. If the "enterprise" does so reduce its charges, the economic benefit is sustained by the consumer and not the "enterprise". Only if the "enterprise" charges the full amount will it be obtaining an economic advantage. But, if it does so, then the very mischief that Max Recycle is alleging arguably vanishes, because there no advantage is conferred.

(3) The truth of the matter is that Max Recycle has misconstrued what is actually going on within the Council. What is going on is an attempt to apportion common costs across two different but related services. Those services have been organised by the Council with due regard to efficiency and with a view to achieving economies of scale, as we have described. Where, as in the present case, those benefits are passed on to

[61] Paragraphs 45(c) and (d) of the Amended Notice of Appeal.

customers, that would normally be viewed as the outcome of a properly functioning market.

(4) Max Recycle's analysis requires that these benefits are removed from the assessment of the Council's charges, so that commercial customers are charged on a higher hypothetical cost basis. On this approach, the Council's commercial customers are to be denied the benefit of the Council's actual cost savings. It is a point that we return to again below: it bears emphasising that if the Council did elect to significantly overcharge or undercharge the consumers of waste collection services, it would open itself to challenge under public law principles. Overcharging would be to breach the duty only to raise revenue for a proper purpose; and raising a surplus would not be a proper purpose.[62] Undercharging would involve not recovering a reasonable charge for the service in breach of the duty imposed under the Environment Protection Act 1990.

(5) The consequence of Max Recycle's analysis is that commercial waste customers would be charged more by the Council while the household waste service would accrue all the benefits of the arrangement, which might be said to be a "subsidy" going the other way. Max Recycle suggested that higher commercial waste charges might be in the interests of "ratepayers", presumably on the basis that their council tax bills would thereby be reduced. Even if such an arrangement avoided legal challenge by commercial customers on the basis outlined above, we do not accept that there would be an inevitable benefit for the household waste side of the operation in this situation. At present, it is likely that both household waste services and commercial waste services both benefit from the arrangement, albeit in differing degrees.

(6) The Council cannot actually "cross-subsidise" (to use the term in its non-statutory sense) in the way that a private firm can. Subject to the

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[62] See *R (on the application of Attfield) v Barnet London Borough Council* [2013] EWHC 2089 (Admin) considered in fn 47 above.

constraints of the Chapter II prohibition, a private undertaking operating in the market may cross-subsidise. The Council cannot do so because of the public law constraints that it is subject to. In short:

(i) The Council cannot charge the consumers of household waste collection services.[63] The Council must charge the consumers of commercial waste collection services.[64]

(ii) It would be improper for the Council consciously either to overcharge or to undercharge the consumers of commercial waste collection services. Undercharging would involve not recovering a reasonable charge for the service, in breach of statutory duty. Overcharging would be to breach the duty only to raise revenue for a proper purpose; and raising a surplus would not be a proper purpose.[65]

(iii) Of course, the Council will have a considerable margin of appreciation in determining how to apportion these costs: see *R (on the application of Western Riverside Waste Authority) v. Wandsworth BC*,[66] where the Administrative Court made clear that the setting of charges was a matter for the authority, subject to review on reasonableness grounds by the court on a judicial review.

(7) Moreover, we are concerned not to trespass unduly into an assessment on a judicial review of what may very well not be an economic activity at all. Section 7(2) of the 2022 Act provides that "an activity is not to be regarded as an economic activity if or to the extent that it is carried out for a purpose that is not economic". This is necessary to deal with the case where a person's activity may involve providing goods and services on a market but where the purpose of the activity is not economic. To

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[63] See paragraph 7(1) above.
[64] See paragraph 7(2) above.
[65] See *R (on the application of Attfield) v. Barnet London Borough Council*, [2013] EWHC 2089 (Admin), considered in fn 47 above.
[66] [2005] EWHC 536 (Admin).

> determine what the purpose of the Council's commercial waste collection operation was in providing services to commercial customers, we are thrown back to the functional approach which we have identified in paragraph 37 above as presenting certain difficulties. However, on the agreed facts in this case, we do not have any difficulty in agreeing with the Council that the commercial waste collection service was not engaged in economic activity. The commercial waste collection service is based on a statutory duty to collect, or arrange for the collection of, commercial waste within its area, which is a statutory duty primarily driven by environmental and public health concerns, rather than an economic purpose. Further, unlike a private operator, the Council cannot refuse to collect (or arrange for collection) as long as the customer is willing to meet the reasonable charge levied by the Council. Nor can the Council's commercial waste operation extend beyond the geographical scope of its responsibilities: the Council is responsible for County Durham, and not beyond.

43. Finally, we should say that we do not consider – for exactly the same reasons – this to be a case where "financial assistance…is given". Financial assistance is not being given: common costs are being apportioned.

44. We conclude, for these reasons also, that no "subsidy" within the meaning of section 2 of the 2022 Act arises in this case.

(5) Conclusion on "subsidy"

45. This is not a case where a "subsidy" within the meaning of section 2 of the 2022 Act arises. It follows that, for this reason alone, the application made by Max Recycle must be dismissed.

E. DECISION

(1) The parties' contentions

46. The Council contended that:

(1) The decision (i.e. the 2020 Scheme Decision) whereby (amongst other things) the approach to charging for commercial waste management services was determined was a "multi-year" or even temporally indefinite decision which was reviewed annually as to rates to be charged alone. Everything else was "pre-decided" by the 2020 Scheme Decision.

(2) Accordingly, applying the terms of the 2022 Act (which, of course, was not in force at the time of the 2020 Scheme Decision) this was a "subsidy scheme" within the meaning of sections 10, 12(2) and 70(2) of the 2022 Act. It was, in short, using the language of section 10(1), "a scheme made by a public authority providing for the giving of subsidies under the scheme".

(3) The consequence of this analysis was that the 2020 Scheme Decision was a subsidy scheme not subject to the 2022 Act[67] and that the 2023 Subsidy Decision was exempt from the subsidy control requirements because it was "a subsidy given on or after the day on which this section comes into force, under a subsidy scheme made before that day".[68]

47. By contrast, Max Recycle contended that there had been a series of subsidy decisions, some of which pre-dated the coming into force of the 2022 Act, and some of which (notably the 2023 Subsidy Decision) were subject to the 2022 Act. There was no subsidy scheme at all and, in particular, the 2020 Scheme Decision was no such thing: it was simply a decision to make a subsidy.

(2) Analysis

48. We have, of course, already determined that this is not a case of a subsidy at all. However, we were addressed at length on the question of whether there was a "decision" within the meaning of the 2022 Act in this case, and it is appropriate that we deal with the point.

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[67] See section 48(1)(a) of the 2022 Act.
[68] Section 48(1)(a) of the 2022 Act.

49. We are in no doubt that this is not a case of a scheme at all. Rather, the Council has made a series of decisions, culminating in the 2023 Subsidy Decision, which are "decisions" within the meaning of the 2022 Act. As to this:

(1) Decisions can be detailed and long – considering all manner of factors and facts – or (in the case of "repeat" decisions, where matters have previously been considered, and the circumstances not materially changed) short and (on the face of it) bereft of analysis and consideration. Such short, "repeat", decisions are entirely appropriate in circumstances where the original, detailed, analysis still pertains. Provided that the repeat decision does not adopt unquestioningly the prior decision but considers whether the prior decision continues appropriately to apply, there is nothing wrong with such an approach. Indeed, it is both efficient and appropriate.

(2) That, we consider, was the case with the 2020 Scheme Decision, and the later decisions that followed, including in particular the 2023 Subsidy Decision relied upon by Max Recycle. The 2020 Scheme Decision, to the extent it can be fully understood,[69] did no more than consider carefully how the household waste and commercial waste collected by the Council – as we have described – might appropriately be charged for. To this extent, of course, the Council was charting a course for future years, and it would be surprising if the users of (and payer of) its services would not have expected a degree of charging consistency over time.

[69] A claim to privilege (both legal advice and litigation privilege) was advanced in relation to parts of various documents, including in relation to the 2020 Scheme Decision and the 2023 Subsidy Decision. Obviously, a properly founded claim to privilege must absolutely be respected and – despite the misgivings we express below – that is our approach here. However, we must also be conscious that we are not reading the entirety of the 2020 Scheme Decision and that potentially material parts have been excised. Privilege in the excised parts of the 2023 Subsidy Decision were subsequently "waived" by Mr Robertson, KC (who appeared for the Council). We must express our concern. The passages over which "privilege" was claimed in the 2023 Subsidy Decision could not, in our judgement, reasonably be said to attract any form of legal professional privilege: (i) the excisions were in relation to integral parts of the document, and not "severable" parts; (ii) the dominant purpose of the document was not to give advice, but to record a decision and its reasons; and (iii) no lawyer was involved at all in order either to give advice or receive information from others in order to be able to give advice. Although we have not seen the excised parts of the 2020 Scheme Decision, we consider exactly the same points apply. We can understand why – having seen the unredacted portions of the 2023 Subsidy Decision – the Council might be reluctant to disclose such matters on tactical grounds. But that is precisely where claims to privilege need to be closely examined, and we consider that in regard to claims of privilege the Council's conduct fell well short of the candour that courts rightly expect of public authorities.

But there is nothing in the 2020 Scheme Decision to suggest that the Council was in any way binding itself to follow the 2020 Scheme Decision in future years (although, of course, it may have been prudent to be consistent) – and we consider that such an approach (with all the implications of "fettering" that it has) would have to be closely justified.

(3) Although the 2020 Scheme Decision expressly noted that there ought to be an annual review of rates,[70] we see nothing in the 2020 Scheme Decision that sought to fetter later consideration of the appropriateness of the approach more generally. That, as we have noted, was the right approach.

(4) Accordingly, there was nothing to prevent the entirety of the Council's approach to be reviewed, year-on-year, in order to test for its continued appropriateness. We do not consider that such a review would need extensive documentation if there had been no material change of circumstance, but we do consider that the Council would have acted improperly if it had simply, blindly, ratified the earlier consideration. We are in no doubt that it did not do so, but the inevitable consequence of this finding is that what we have here are a series of (admittedly, related) decisions, not a scheme followed by a series of decisions made under that scheme. Accordingly, we consider that the 2023 Subsidy Decision was a decision, consciously re-visiting and affirming the approach in prior years, and deciding to continue that approach for the coming year.

50. We therefore reject the contention that there was a "scheme" in this case, and we find that the 2023 Subsidy Decision was a "decision" within the meaning of the 2022 Act.

51. Subsidy schemes, in our judgement, involve an element of appropriate "fettering". Take, for example, a subsidy that is intended to be made available to multiple applicants. Rather than take a series of subsidy decisions that might

[70] See, for instance, paragraph 10 of the 2020 Scheme Decision.

(absent an "umbrella" regulating their consistency of approach) run the risk of inconsistency or even arbitrariness, a subsidy scheme provides a means of setting out, in advance, the binding criteria by which a subsidy will or may be granted. There is, in such cases, an appropriate degree of fettering or (more aptly) controlling of discretion in order better to further predictability and consistency in the grant of subsidies. We do not go so far as to say that a single subsidy decision, taken annually, can never come under the "umbrella" of a subsidy scheme so regarded. But single decisions taken over time are taken in this way for a reason: as times change, so too do the justifications for a decision. Had the Council laid down – without the ability to revisit – its charging structure (not rates) for years' in advance, that would, in our judgement, represent something of an imprudent way of proceeding. It is certainly not the way the Council proceeded in this case.

F. DISPOSITION AND FINAL COMMENTS

(1) Disposition

52. It follows that whilst Max Recycle succeed on the issue of whether there was a "decision" within the meaning of the 2022 Act, they fail on the issue of whether there was a "subsidy" at all. Since Max Recycle needed to succeed on both point, it follows that the application must be rejected, and we so order. We should be grateful if the parties could draw up an order reflecting this outcome.

(2) Consequential matters

53. We anticipate that one consequential matter likely to arise is the question of costs. We hope and anticipate that this is a matter that can either be agreed or else be determined on the papers. In order to assist the parties, the following represent our provisional views on the question of costs:

    (1) Although the Council is clearly the winner in terms of overall outcome, there were two clear and distinct issues before the Tribunal, namely the

question of whether there had been a "subsidy" and whether there had been a "decision".[71]

(2) If anything, the second issue ("Was there a "decision"?") – occupied more time than the first ("Was there a "subsidy"?") and took up more space in the written submissions. In respect of each issue, there was a clear and distinct winner: Max Recycle won on the question of "decision", and the Council won on the question of "subsidy".

(3) Moreover, we should note that whilst the Council of course articulated the point which was principally successful before us, namely the question of "unit of account",[72] most of the Council's submissions were directed to an argument that did not find especial favour with us, namely that taking a "functional approach" appropriate where the "unit of account" was the undertaking, the Council's functions were "public" and not "economic". Although we were of course assisted by this,[73] the Council ought to recognise when coming to the question of costs that these submissions were not directly on point.

(4) For these reasons, this is a case where an issues-based costs order is appropriate, displacing the usual "costs follow the event" rule. Our provisional view is that it would be unjust to Max Recycle to disregard their success on the "decision" issue.

(5) Issues-based costs orders involve a notional awarding of costs in respect of the successful issues, together with a setting-off of the outcomes of these assessments to produce a net figure. In this case – and, again, we would be pleased to hear submissions on the papers – it seems to us that the two issues ought to have generated equal costs. If anything, the "decision" issue, on which Max Recycle won, took up more time; but

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[71] It may be that the parties would want to address us on the fact that Max Recycle's case changed in this regard – admittedly because of the Council's disclosure. We want to be absolutely clear that we have no desire to shut out points of this sort. This paragraph is intended to assist the parties in providing short and targeted submissions on costs and their incidence.
[72] See paragraphs 28*ff* above.
[73] See paragraphs 40*ff* above.

we recognise that ultimately the Council won because the application has been rejected.

(6) Whilst a detailed assessment of certain costs on either side might be required, it may be that on an issues-based approach costs could on a summary basis be netted-off to 100%, such that the appropriate order would be no order as to costs. Such a course would save the additional costs of a detailed assessment.

54. If the parties wish to address us on costs, or any other consequential matters, then we would be grateful if they could agree a timetable for the filing and exchange of written submissions.

(3) Consistency with economic analysis

55. In an essay that seeks to understand why – if free markets are the *ne plus ultra* in terms of resource allocation and efficiency – market economies have firms at all, Ronald Coase said this:[74]

> "It is convenient if, in searching for a definition of a firm, we first consider the economic system as it is normally treated by the economist. Let us consider the description of the economic system given by Sir Arthur Salter. "The normal economic system works itself. For its current operation it is under no central control, it needs no central survey. Over the whole range of human activity and human need, supply is adjusted to demand, and production to consumption, by a process that is automatic, elastic and responsive." An economist thinks of the economic system as being co-ordinated by the price mechanism, and society becomes not an organisation but an organism. The economic system "works itself". This does not mean that there is no planning by individuals. These exercise foresight and choose between alternatives. This is necessarily so if there is to be order in the system. But this theory assumes that the direction of resources is dependent directly on the price mechanism. Indeed, it is often considered to be an objection to economic planning that it merely tries to do what is already done by the price mechanism. Sir Arthur Salter's description, however, gives a very incomplete picture of our economic system. Within a firm, the description does not fit at all. For instance, in economic theory we find that the allocation of factors of production between different uses is determined by the price mechanism. The price of factor A becomes higher in X than in Y. As a result, A moves from Y to X until the difference between the prices in X and Y, except in so far as it compensates for other differential advantages, disappears. Yet, in the real world we find that there are many areas where this does not apply. If a workman moves from department Y to

[74] Coase, *The Firm, the Market and the Law*. University of Chicago Press. Paperback ed (1990), 34-35.

> department X, he does not go because of a change in relative prices, but because he is ordered to do so. Those who object to economic planning on the grounds that the problem is solved by price movements can be answered by pointing out that there is planning within our economic system which is quite different from the individual planning mentioned above and which is akin to what is normally called economic planning. The example given above is typical of a large sphere in our modern economic system. Of course, this fact has not been ignored by economists. Marshall introduces organisation as a fourth factor of production; JB Clark gives the co-ordinating function to the entrepreneur; Knight introduces managers who co-ordinate. As DH Robertson points out, we find "islands of conscious power in this ocean of unconscious co-operation like lumps of butter coagulating in a pail of buttermilk". But in view of the fact that it is usually argued that co-ordination will be done by the price mechanism, why is such organisation necessary? Why are there these "islands of conscious power"? Outside the firm, price movements direct production, which is co-ordinated through a series of exchange transactions on the market. Within a firm these market transactions are eliminated, and in place of the complicated market structure with exchange transactions is substituted the entrepreneur co-ordinator, who directs production. It is clear that these are alternative methods of co-ordinating production. Yet, having regard to the fact that, if production is regulated by price movements, production could be carried on without any organisation at all, well might we ask, Why is there any organisation?"

56. Coase goes on to explain why the firm is important as a feature of markets operating according to different criteria. The importance of the firm can be illustrated in many ways:

(1) Any project that requires long term planning, investment and development is likely to be beyond the individual. Of course, the individual can buy-in expertise – but that implies a very rich individual or a form of finance for ventures that is utterly unreal.

(2) The ability to pay someone for their labour and then to be able to direct them in what may well be an uneconomic or fruitless direction is extremely valuable.

(3) The limited liability that many firms benefit from – it all depends on the legal nature of the firm – is commercially hugely valuable as the risk of the joint stock company in the 17th century underlines. The insolvency shield that incorporation provides to those behind the company is a critical driver of enterprise.

57. A public authority, such as that defined in the 2022 Act, might be said to be a "special case" to be differentiated from the "special case" that is the firm. As we have seen, public authorities are required to operate according to constraints and rules that are very different from those that inform (i) the market in which firms or undertakings operate or (ii) commercial firms or undertakings. In this way, different values are respected and embedded in a market economy. Warren J, in *R (on the application of the Durham Company (trading as Max Recycle)) v. HMRC*,[75] was very conscious of the "special regimes" within which the Council operated, including as to waste management, and was careful not to import unthinkingly "free market" analyses or purely commercial criteria. The 2022 Act, with its clear approach as to what is a "public authority" takes an exactly similar, and economically sophisticated, approach.

58. This Judgment is unanimous.

Sir Marcus Smith President	Professor David Ulph, CBE	Lord Young, KC

Charles Dhanowa OBE, KC (Hon)
Registrar

Date: 27 July 2023

[75] [2016] UKUT 417 (TCC).