

**FORM FOR THE SUBMISSION OF COMPLAINTS CONCERNING ALLEGED
UNLAWFUL STATE AID OR MISUSE OF AID**

The mandatory fields are marked with a star (*).

1. Information regarding the complainant

REDACTED FROM WEBSITE VERSION

2. I am submitting the complaint on behalf of somebody (a person or a firm)

Yes* ~~**No***~~

If yes, please also provide the following information

Name of the person/firm you represent*: Community R4C Ltd

Registration nr. of the entity: (FCA) 7282

Address line 1: The Exchange

Address line 2: Brick Row,

Town/City: Stroud

County/State/Province: Gloucestershire

Postcode: GL5 5LE

Country: UK

Telephone 1:

Telephone 2:

E-mail address:

Fax:

Please attach proof that the representative is authorized to act on behalf of this person/firm.

**I am a Director of Community R4C Ltd. Please see email footer and registration details at the
FCA : <https://mutuals.fca.org.uk/Search/Society/8270>**

3. Please select one of the following options, describing your identity*

a) Competitor of the beneficiary or beneficiaries

b) Trade association representing the interests of competitors

c) Non-governmental organisation

d) Trade union

e) EU citizen

f) Other, please specify

Community Benefit Society, owned by and representing citizens in Gloucestershire and throughout the UK/EU. The Society's Objects include establishing circular economy principles locally through improved behaviours and a recycling centre – this effectively means we are a competitor of the beneficiary and also representatives of many local citizens and taxpayers

Please explain why and to what extent the alleged State aid affects your competitive position / the competitive position of the person/firm you represent. Provide as much concrete evidence as possible.

Please be aware that, by virtue of Article 20(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, only interested parties within the meaning of Article 1(h) of that Regulation may submit formal complaints. Therefore, in the absence of a demonstration that you are an interested party, the present form will not be registered as a complaint, and the information provided therein will be kept as general market information.

This complaint relates to a long term, exclusive contract in the waste disposal sector. Specifically the focus of the complaint is on a major contract (entered into in 2013, subsequently renegotiated in 2015/6) for the treatment of residual waste between Gloucestershire County Council ('GCC') and its 'Public Private Partnership' contractor, Urbaser Balfour Beatty (UBB waste Gloucestershire Limited 'UBB') to design, build, finance and operate an energy from waste (EfW) facility at Javelin Park, near Gloucester.

In summary, our complaint is that the contract, already deeply flawed and anti-competitive, was renegotiated in 2016 in breach of procurement law and without competitive tender, and therefore represents illegal state aid.

The waste treatment sector in the UK, at the time nascent/undergoing significant change (and which continues to evolve) was examined in detail by the UK office of Fair Trading (OFT) in 2006 in its paper "More competition, less waste - Public procurement and competition in the municipal waste management sector" (May 2006 OFT841¹). That paper represents a snapshot in time, in particular the move away from landfill as a means of waste disposal (a requirement of the EU Landfill Directive), but it contained a number of prescient observations, including:

(1) "In the waste management sector, competition is about the intensity of rivalry between bidders to provide both a quality service and a fair price, and about openness to new entrants. As the treatment sector grows it is vital that LAs avoid the pitfalls associated with over dependency on a limited number of suppliers." [executive summary, emphasis added] and

(2) "1.12 It should be noted that the different waste treatments are not wholly substitutable for each other and indeed some are complementary. Therefore, a LAs waste solution could encompass more than one treatment technology, although there is likely to be one main technology that is used." [emphasis added]

Those observations continue to apply, and are pertinent to this complaint. There was also a recognition in 2006 that incineration and Energy from Waste ('EfW'6) was at that time most

¹ https://webarchive.nationalarchives.gov.uk/20140403001736/http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft841.pdf

known/used as an alternative to landfill in the UK, although other technologies are mentioned (as noted by the OFT at the time, not necessarily as substitutable, but as complementary/alternative products). Those other technologies are (unsurprisingly) now more common and compete with/complement EfW in the treatment of 'residual waste'.

The complainant Community R4C was precisely established to provide an alternative way of treating waste, consistent with circular economy, low carbon principles, and to do this in Gloucestershire, UK. It has access to patented technology and plant. It was formed in July 2015 (incorporated Feb 2016). See the attached community Share Offer Document for more background which also provides information on the circular economy principles to reduce the amount of residual waste, and preferred residual waste sorting and processing technology.

Community R4C planned to build a world class integrated "circular economy" waste avoidance and treatment solution in Gloucestershire, England. This would incorporate an automated recycling and waste treatment plant called R4C using patented mechanical, heat and biological treatment technology. When details of the 2013 contract came to light (in January 2017, more on this below) we noticed terms which created an unfair competitive landscape which severely impeded our ability to fund this plant. We had received LOI's from firms based in the UK, Sweden and Poland, examples attached. All withdrew their interest when it became clear that the terms of the GCC/UBB contract, which provided for a guaranteed high priced minimum quantity of waste from the County Council, with much lower prices for third party and additional waste. This meant that pricing of any competitive waste treatment in the County including from ourselves would have to be much below market rates.

We recognised that the 2013 UBB contract provided a long term, anti-competitive environment and this needed to be challenged if we were to continue with our objects. At that stage, early in 2017, we only knew the terms of the 2013 contract, this had already been replaced by a 2016 contract which we now know has a similar anti-competitive pricing structure, but with a much higher price for the guaranteed minimum quantity of waste payments from the County Council. More detail on this can be found in our complaint to the Competitions and Markets Authority (CMA) (see below) which was written prior to knowledge of the new 2016 contract (more on the facts below).

We then initiated two formal actions (March 2017). A complaint to the CMA – which has not yet been prioritised by the CMA, see attached correspondence with the CMA. Secondly a complaint under the UK Audit Act 2014 to the County's auditor, Grant Thornton. This objection is still being investigated and the accounts for the County for the last four years have had a qualification on value for money grounds for this contract. A key cause of the delay has been the County's refusal to allow details of the 2016 contract to be made public, spending £100k's of state money unsuccessfully appealing two ruling under Freedom of Information Legislation. The Details of the 2016 contract were finally released in December 2018. They showed that the County Council and UBB had negotiated in secret an increase in contract value of £163m, 36%, without competitive tender (see Question 6a below for more details) and we immediately filed a challenge under procurement law. We have now received a judgement on two preliminary issues. (see judgement attached)

The judgement includes a finding in our favour - that it was not until December 2018 that facts that clearly indicated a breach in procurement law, but did not necessarily prove this, became evident to us.

Our procurement challenge is deliberately modest in its damages claim (£350,000 on a contract

worth £613m). This is because our challenge was launched in the public interest, not to increase the burden on the local authority and local people.

We seek the contract to be ruled invalid and for illegal payments made by the Council to be returned for the public purse. This would then allow Community R4C and other operators in Gloucestershire to offer alternative, better value and more environmentally friendly waste treatment in Gloucestershire.

All court submissions and rulings mentioned above are annexed to this complaint.

If the contract is not overturned, we see no realistic prospect of competitive waste treatment options – or waste reduction – until the end of the contract in 25 + years. Note that the contract includes a perverse incentive for the Council to send recyclable material for incineration by UBB’s plant (which would cost the Council a maximum of £16.54 per tonne thanks to the contract) rather than pay recycling credits to the Waste Collection Authority to recycle and preserve resources (. These recycling credits currently cost the County Council (WDA) £63.40 per tonne, paid to the WCA

To explain this perverse incentive in the contract to incinerate recyclable material: The contract includes a guaranteed minimum quantity and payment. This is based on the cost for the first 108,000 tonnes per annum, which is £189.33/tonne - £20.5m per annum. If residual waste tonnage available from the County does not reach this level because of improvements in waste reduction and other measures higher on the waste hierarchy, then burning of recyclable material in the incinerator is effectively free to the County. Any waste above this minimum quantity is charged at just £16.54 per tonne, far below the market price. There is a clear incentive to the County Council to send more waste and bring down the average cost per tonne. The County Council is the “Waste Disposal Authority” (WDA) in a two-tier authority structure with each district council acting as the “Waste Collection Authority” (WCA). The WDA is obliged to pay the WCA for waste collected and then recycled. The payment for this is currently £63.40 per tonne in Gloucestershire. It is thus far cheaper for the WCA to send recyclable waste for incineration than to pay the district council, the WCA, recycling credits. The County Council will be under financial pressures in the future and it is very likely that it will use this as a reason to reduce costs and remove the recycling credit. This clearly acts against the requirements of the waste hierarchy and UK and European law to promote a circular economy.

Community R4C has suffered in that our plans to build a plant operational by 2020 have been indefinitely delayed. We have lost prospective investors, evidence of their interest in the form of LOI’s has been included, evidence for reasons for withdrawal can be supplied on request. We have had to invest heavily in a legal process, rather than our core purpose, which is to develop community engaged, viable circular economy practices which are world leading and can serve as an example for others across Europe.

4. Please select one of the following two options*

Yes, you may reveal my identity

~~No, you may not reveal my identity~~

If not, please specify the reasons:

Confidentiality: If you do not wish your identity or certain documents or information to be disclosed, please indicate this clearly, identify the confidential parts of any documents and give your reasons. In the absence of any indication about confidentiality of your identity or certain documents or information, those elements will be treated as non-confidential and may be shared with the Member State allegedly granting the State aid. The information contained in points **5 and 6** cannot be designated as confidential.

5. Information regarding the Member State granting the aid*

Please be aware: the information provided under this point is regarded as non-confidential.

a) Country: the United Kingdom

b) If known, specify which institution or body granted the alleged unlawful State aid:

Central government: /

Region (please specify): Gloucestershire County Council (GCC), Gloucestershire, UK

Other (please specify): /

6. Information regarding the alleged aid measure*

Please be aware: the information provided under this point is regarded as non-confidential.

a) Please provide a description of the alleged aid, and indicate in what form it was granted (loans, grants, guarantees, tax incentives or exemptions etc.).

In February 2013 pursuant to a public tender, GCC entered into a £450.5m contract for waste treatment solutions with UBB. The contract, a form of Public Private Partnership, provided for UBB to fund, build, own and operate an incinerator at Javelin Park in Gloucestershire to treat Gloucestershire's residual waste and waste from commercial, industrial and other third parties up to a maximum capacity of 190,000 tonnes per annum. The contract was for 25 years, with a possible extension of a further 5 years. GCC would pay UBB through a three-tier banded gate fee. Band 1 was the primary band and carried a relatively high gate fee of £146.36 per tonne for 108,000 tonnes per annum (tpa), at a cost of £15,806,880, index-linked for 25 years. This was the Unitary Charge, GCC was committed via the contract to pay this amount even if the waste tonnage for the year was less than 108,000. Band 2 was the cost that the Council would pay on the balance of its residual waste (i.e. anything above 108,000 tpa). It carried a very low gate fee of just £15 per tonne, considerably less than the "recycling credit" the County Council is obliged to pay District Council's for diverting waste from disposal through recycling initiatives. Band 3 was for third party waste and set at a below-market price of £43.17 per tonne. The contract had very punitive termination costs, estimated by GCC to be between £60m - £100m. Details of this contract were kept secret until a ruling by the First Tier Tribunal forced their disclosure on 10th March 2017.

The Council assumed a planning risk of 12 months and so the Long-Stop Date was set for 2 years beyond the date of signing. All did not go to plan. In March 2013, the council's own Planning Committee refused planning permission, the contractor (UBB) appealed, the Secretary of State called in the decision, there was a lengthy Planning Inquiry and finally in January 2015 the Secretary of State overturned the local decision and granted planning permission. This decision was challenged in the courts by Stroud District Council, a local Waste Disposal Authority, the challenge failed and planning was finally secured by August 2015, well past the Long-Stop date in the contract, making it no longer valid.

The contract was renegotiated in secret without competitive tender between GCC and UBB and signed in January 2016 and its value increased by £163m, 36%, from £450m to £613m. The Gate Fees increased to £189.33 for Tier 1, £16.54 for Tier 2 and £62.92 for Tier 3. The 2016 contract became public on 20th December 2018 following a ruling by the Information Commissioner's Office. As explained below in the analysis of the advantages granted to the beneficiary, the 2016 contract was awarded / renegotiated bilaterally by the parties in breach of public procurement rules – which in principle require re-submitting the contract for tender when its value increased by more than 10%, *inter alia*.

The aid measures identified in the 2013 and 2016 contract are the following:

- A 25 year contract for the treatment of residual waste collected by the County Council worth £613 million.

The duration of the contract in itself is particularly advantageous to UBB. As underlined by the UK Competition Markets Authority in its analysis of Local Authority Waste Contracts (November 2017) *“The closer you are to the point of competition the more you might expect to pay the market rate which, if the market is competitive, will reflect efficient costs. This is in line with the 2006 report [of the Office of Fair Trade] which found that the longer the contract, the greater the risk of deterring other firms from bidding because the incumbent supplier has a more established position and detailed knowledge of costs. Longer contracts also allowed local authorities less flexibility to adapt to falling costs or changing technology. Contracts should be of a length to enable suppliers to recover any sunk costs but no longer. The 2006 report suggested that five years would be appropriate given typical asset lives, a finding that is not changed by our more recent analysis.”*²

- Minimum contractual guaranteed payments worth about £20.5 million pa and growing

This minimum payment is based on a cost of £189.33 per tonne for 108,000 tonnes per annum. At the time that the contract was agreed, the median gate fee for EfW treatment according to the 2016 WRAP Gate Fee report was £86 per tonne³. For 108,000 tonnes this equates to an annual cost of £9,288,000, less than half the contract value. Even at the very top of the range of prices identified by WRAP, at £131 a tonne, the total cost for 108,000 tonnes would be £14,148,000, over £6m less than the contract value. Community R4C's own research in 2017 found plenty of spare capacity at EfW plants locally within a price range of £55 - £107 per tonne.⁴

- Capital grants towards the cost of build worth at least £38 million

² CMA's analysis of Local Authority Waste Contracts (November 2017), para.8, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/657858/local-authority-waste-contracts-cma-analysis.pdf

³ https://wrap.org.uk/system/files/private/Gate%20Fees%20Summary%20Report%202016_0.pdf

⁴ Community R4C Report into Javelin Park Incinerator Contract, 2017
<https://communityr4c.com/more-info/document-archive>

- Land for the building of the plant provided on below market terms
- Security over the land owned by the County Council provided for third party funders of the plant build
- Contractual benefits to the beneficiaries such as a subsidised price for the treatment of third party waste, including from associated companies
- Payments made by GCC to UBB towards a planning appeal lodged by the beneficiary against the unanimous decision of the Council's planning committee to reject planning approval
- Payments for legal fees and other advisers in order to keep the contract secret, so impeding challenge

b) For what purpose was the alleged aid given (if known)?

- To build, own and operate an Energy from Waste plant (waste incinerator) for the treatment of residual waste collected by the Council and third parties
- To provide forward committed pricing for electricity supply to the County Council
- To part pay capital for the construction of the plant

c) What is the amount of the alleged aid (if known)? If you do not have the exact figure, please provide an estimate and as much justifying evidence as possible.

Value of contract £613 million, in an annual contract signed in January 2016. Total build time c 3 years. Contract term 25 years plus extension possible. Value of other benefits and aid as detailed above not known exactly however approx. values: Capital contributions: £38m Land £15m Payments made by GCC to UBB towards their costs of appeal: £1m. Payments to third parties to the benefit of contract secrecy £1m

d) Who is the beneficiary? Please give as much information as possible, including a description of the main activities of the beneficiary/firm(s) concerned.

- UBB Waste Gloucestershire Ltd (also Holdings co and intermediate co with similar names) Owns and operates the plant under contract to the County Council
- Urbaser (Waste operations, JV lead)
- Balfour Beatty (Civil engineer, JV partner)
- Babcock Wilcox Volund (Incinerator plant)
- Banks: UK Green Investment Bank (now Macquarie); Sumitomo Mitsui Banking Corporation Europe Ltd

e) To your knowledge, when was the alleged aid granted?

.By contractual agreement signed in January 2016. Further aid may well have been provided in associated transaction prior to and after this date. The contract terms extend until 2040 and beyond, significant payments have already been made.

f) Please select one of the following options:

- √ According to my knowledge, the State aid was not notified to the Commission.

- According to my knowledge, the State aid was notified, but it was granted before the decision of the Commission. If known, please indicate the notification reference number or indicate when the aid was notified.

- According to my knowledge, the State aid was notified and approved by the Commission, but its implementation did not respect the applicable conditions. If known, please indicate the notification reference number or indicate when the aid was notified and approved.

- According to my knowledge, the State aid was granted under a block exemption regulation, but its implementation did not respect the applicable conditions.

7. Grounds of complaint*

Please note that, for a measure to qualify as State aid under Article 107(1) TFEU, the alleged aid has to be granted by a Member State or through State resources, it has to distort or threaten to distort competition by favouring certain undertakings or the production of certain goods, and affect trade between Member States.

- a) Please explain to what extent public resources are involved (if known) and, if the measure was not adopted by a public authority (but for instance by a public undertaking), please explain why, in your view, it is imputable to public authorities of a Member State.

Gloucestershire County Council (GCC) is a public authority in the UK.

In 2009, GCC organised a public procurement procedure for selecting new waste treatment investments for Gloucestershire County. In 2013 UBB was awarded a contract worth £450m.

In January 2016, the arrangement between GCC and UBB was renegotiated secretly and a new contract worth £613m was signed i.e. an increase in value of £163m, 36% more expensive. In addition to operating aid in the form of higher-than-average contractual payments for waste treatment, the contract includes other associated benefits, including capital contributions from GCC's budget, access to land at lower-than-market rates and secrecy of the contractual arrangement whereas those should in principle be published. Judge Shanks ruled at the First Tier Tribunal Appeal No: EA/2015/0254-6 on 10th March 2017, that in accordance with the Environmental Information Regulation 2004⁵ the contract should be made available to the public. However the details of the 2016 contract were not made public until December 2018.

The aid measures in the 2016 contract involve State resources and are under the control of the State. Indeed, all the financial arrangements and advantages to UBB in the 2016 contract have been committed to by GCC. In particular:

⁵ <https://www.legislation.gov.uk/uksi/2004/3391/contents/made>

- The contractual payments for waste treatment are paid out of GCC's budget. In England, a County Council is designated as the Waste Disposal Authority under Section 30, 2a of the Environmental Protection Act 1990⁶. According to the council's Budget Books⁷, expenditure on Landfill and other Disposal Contracts increased from £15,836k gross in 2018/19 to £24,332 gross in 2019/20, after the EfW incinerator plant started operating. This is an increase of £8,496k, over 50%. Gross expenditure in 2020/21 is budgeted at £28,737, an increase of £12,901k although this reduces to £22,049k once income from electricity is taken into account. However, this is still an increase of £6,213k, 40%, on 2018/19 costs.
- The decision to enter into a long-term agreement, that reduces the cost of financing of the project for the undertaking, is a decision of GCC.
- GCC subsidises cost of land and puts GCC's own land at the disposal of UBB, which results from decisions of GCC and reduces revenues that GCC could have perceived from renting its land to UBB at market value.
- Contractual third party waste price substantially below the GCC price and other locally available options – subsidised by the GCC commitment – allows UBB an economic advantage to secure additional third party income
- Arrangements by GCC to keep the contract secret whereas it should in principle be public, which also grants an advantage to UBB, also results from GCC's actions and decisions. Also, GCC exposed legal and consultancy costs to this end, thus spending State resources.

The fact that some measures, such as keeping the 2016 contract secret, may have been undertaken by individual representatives of the County Council is irrelevant since they did not act in their individual capacity but as representatives of the Council; any alleged fraud by these individuals should not affect the assessment that the aid measures are imputable to GCC. In any case, frauds are alleged only in relation to keeping the contract secret so that there cannot be any doubt that all other measures involve State resources and are imputable to GCC.

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b) Please explain why, in your opinion, the alleged State aid is selective (i.e. favours certain commercial undertakings or the production of certain goods).

- As opposed to the 2013 contract, the 2016 contract was awarded to UBB in secret without any competitive process. UBB was already the recipient of the 2013 contract. As a result of the absence of tender in 2016, no other parties had an opportunity to bid.
- As shown in the particular of claims before the High Court in annex, the award of the 2016 contract without any public tender, whereas the rise in value of the contract exceeds 10% of the contract value in 2013, breaches UK public procurement laws.
- The new (2016) contract is worth £163m (36%) more than the previous 2013 contract that it replaced. Bidders in 2013 bid on the assumption there would not be an opportunity to

⁶ <https://www.legislation.gov.uk/ukpga/1990/43/section/30>

⁷ <https://www.gloucestershire.gov.uk/council-and-democracy/performance-and-spending/budget-and-medium-term-financial-strategy/>

significantly increase prices in the future. The 2009 OJEU notice for the 2013 contract tender is attached. There was no OJEU notice or tender process for the 2016 contract.

- The 2016 contract provides 25-year contractual commitments which favour UBB in the local market, to the detriment of other potential suppliers of waste treatment processes. For example the price paid by GCC to UBB is £189.33 per tonne of waste (tier one) compared to the price for third parties of £62.92 per tonne. This gives the UBB incinerator an unfair advantage in the market to the detriment of alternatives, including that proposed by Community R4C.

c) Please explain how, in your opinion, the alleged State aid provides an economic advantage for the beneficiary or beneficiaries.

Absence of service of general economic interest

The 2016 contract was awarded to UBB without a public tender.

As shown in the particular of claims before the High Court in annex, this award breached UK public procurement laws. This is because the value of the 2016 exceeds by more than 10% (indeed by 36%) the value of the previous contract awarded to UBB in 2013 pursuant to a public tender. The rise in value of the contract in 2016 should have given rise to a new public procurement procedure for the award and thus could not be decided privately between GCC and UBB.

Severability of the 2013 contract and the 2016 contract

The cost and termination clauses of the 2013 contract were analysed for Community R4C in their complaint to the auditors submitted in early 2017. This report is attached “report by Steve Burnett”. On P12 he analyses the cost of termination and quotes:

The contract defines the compensation that would be due to one party if the other party either voluntarily terminates the agreement or stands in default such that termination is triggered. If GCC were ever to consider a voluntary termination it naturally would be liable to UBB for substantial sums of money. Schedule 17 of the contract defines the compensation to include:

- repayment of the bank loans and subordinated loans outstanding at the time of termination +*
- all breakage costs for hedging instruments for fixing interest rates and currency exchange rates +*
- fair market value for share capital of the project company (UBB Gloucestershire Ltd.) +*
- any redundancy costs arising +*
- other sundry contingent liabilities*

The 2016 contract has similar termination clauses.

Advantages to UBB

Given that no tender was organised for the 2016 contract in breach of public procurement laws, one should assess each measure under the contract. It appears that each and all arrangements grant advantages to UBB.

- Contractual payments for waste treatment substantially higher than the market average. The latest available figures from WRAP⁸ show that the market average for EfW waste treatment was £89 in 2019 compared to the GCC committed price of £189.33 (first 108,000 tonnes pa)
- Long term contractual commitment which reduces the cost of financing and, according to the CMA, increase “the risk of deterring other firms from bidding because the incumbent supplier has a more established position and detailed knowledge of costs”⁹
- Subsidised land and the use of GCC owned land as security reduces the cost of borrowing
- Committed forward pricing on electricity reduces risk to the beneficiary
- Contractual third party waste price substantially below the GCC price and other locally available options – subsidised by the GCC commitment – allows UBB an economic advantage to secure additional third party income
- Secrecy by GCC reduces the risk of challenge to the contract

Absence of fair economic return for GCC

Contrary to the contract between DWTEL and Dublin City Council for the construction of a waste to energy plant in Poolberg, Ireland¹⁰, the 2016 contract between UBB and GCC does not provide a fair return for GCC.

In March 2017 myself and other members of the public submitted a formal complaint concerning this contract on Value for Money grounds to the County Council under the UK Audit Act 2014. This complaint was supported by extensive evidence demonstrating why the contract did not offer value for money compared to other locally available alternatives or compared to the status quo. Under the Act this complaint has been examined by the County’s auditor Grant Thornton (GT). Their work on this complaint is unresolved. Under the Act they have quasi judicial responsibilities and are required to act independently of their role as a consultant and auditor to the County. The complaint was based on figures then in the public domain from the 2013 contract, but details of the 2016 contract were requested. GCC (the County Council) refused to share details of the 2016 contract. GT have historically stated that the new 2016 contract was not material to their determination on Value for Money ground. We have strongly disputed this assertion and sent formal letters detailing why we consider this to be an abrogation of their duties under the Act. These letters are attached. GT determination of Value for Money of this contract remains outstanding and the Council accounts for 2016/17, 17/18, 18/19 and 19/20 have been audited with a qualification on Value for Money grounds.

We have recently been informed that following the recent High Court ruling GT are minded to revise their provisional views and accept that the 2016 contract is material to a determination on value for money and possible breaches of procurement law. We have not yet seen this revised view.

⁸ <https://www.wrap.org.uk/sites/files/wrap/WRAP%20gate%20fees%20report%202019.pdf>

⁹ CMA’s analysis of Local Authority Waste Contracts (November 2017), para.8, ibid

¹⁰ Commission decision of 7 May 2014 on SA.36591 Alleged aid to Waste to Energy facility in Ireland, para. 50 ff

We consider that it is appropriate for us to submit this complaint without further delay. It is assumed that Grant Thornton would be willing to assist in the investigation of this complaint.

d) Please explain why, in your view, the alleged State aid distorts or threatens to distort competition.

This is set out in the attached document “preliminary reasoned complaint to the CMA” (UK Competitions and Markets Authority, March 2017). The document was written with knowledge of the previous 2013 contract only. The 2013 contract was similar in structure but contained less advantageous terms, and a total contract value of £450 million. The 2013 contract was awarded after a competitive tender process. The 2016 contract was awarded in secret without any competitive tender process. The 2016 contract is for £613 million, a £163m (36%) increase in value. This is a substantial change which is not foreseen in the 2013 contract. This award of considerably more advantageous terms absent of any competitive tender process further distorts competition. No other businesses were able to bid for this new contract, and now that the contract has been awarded this distorts the market in Gloucestershire and surroundings in ways that are detailed in the complaint to CMA and follow-up letter of 10 October 2017 (both attached).

In particular:

- The length of the contract (25 years) allow UBB to strengthen a dominant position and better knowledge of cost structure that can deter competition;
- UBB is *de facto* granted exclusivity on the market. Incineration at the plant in question will *de facto* be the only technology for treatment of residual waste in Gloucestershire for decades to come due to terms (deliberately or otherwise designed) that foreclose the segment (the relevant economic market(s)) of the waste disposal market for residual waste from competition. The exclusivity is not an express term in the contract but a clearly foreseeable result/effect of elements in the contract which go beyond what is necessary/objectively justified, in particular, both pricing structure and excessive termination costs which sit atop a ‘take or pay’ term which covers over half but not 80% of the relevant market.
- The *de facto* exclusivity arrangement will mean that no other provider of residual waste treatment services will be able to compete with UBB for decades to come. This will stifle innovation in the treatment of residual waste, as it will disincentivise any potential providers of residual waste management services which could treat residual waste in a more environmentally-friendly or technologically-advanced manner.
- Further, as a result of the Agreement, UBB is already able to use the effective subsidy from GCC to offer waste processing services to other waste collectors at well below market rates. This means that waste from a wide area is being directed to the UBB facility and away from actual or potential competitors.

Competition may also be distorted by the aid measures. Failure from GCC to conduct a competitive tender and to publish a notice in the OJEU prior to awarding the 2016 contract deprived waste treatment operators in other member states from bidding for the contract. Moreover, the contractual arrangements between GCC and UBB guarantee UBB with higher-than-market rate revenues for the waste treated, reduce its fixed costs through the subsidised use of GCC’s land and guarantee long-term revenues for the plant, which are advantages that UBB’s competitors do not receive. On the input market, the realization of the project might eventually put the beneficiary in a favourable

position when bidding for future waste management contracts in the area.

Note that the complaint to the CMA was submitted when only the details of the 2013 contract were known. The revised 2016 contract distorts competition further by not only reinforcing the terms detailed above, but also in that the contract itself was awarded without competitive tender. Had the County Council gone out to tender in 2016 it would have based its tender documentation on the revised waste treatment strategic plans that the County Council had devised for this purpose. In 2014 the County Council conducted an exercise through a sub-committee, the Residual Waste Working Group, to define the parameters for a future waste contract procurement if the 2013 contract should fail. In the event the 2013 contract did fail, however there was no new procurement exercise. The failure to conduct a fair competitive tender meant that other businesses such as ourselves were not able to propose competitive solutions to these revised parameters. The revised parameters included proper consideration of issues such as the waste hierarchy and efforts to reduce waste.

Community R4C (or rather its predecessors) made a presentation to this RWWG and their proposal would have been a good fit to the revised parameters that emerged from this group. This presentation makes it clear that new technologies and waste treatment systems existed which would much better serve the County Council's needs, while also reducing costs. (presentation attached)

e) Please explain why, in your view, the alleged aid affects trade between Member States.

Even though waste should preferably be treated locally, it is traded amongst Member States. (e.g. case 730/79, Philip Morris, Ree., 1980, p. 2671, point 11). Waste from Gloucestershire County could thus be treated in the Republic of Ireland or in France for example. Moreover, joint-venture partners Urbaser and Balfour Beatty each operate worldwide including in several member states. According to the plant's website: "*Urbaser Ltd.'s parent company, Urbaser S.A.U, is based in Spain and has extensive experience in the provision of environmental services both nationally and internationally. It is the third largest environmental services provider in Europe, providing high profile waste treatment, waste and recycling collection, street cleansing, and grounds maintenance services in cities including Barcelona, Madrid, Paris, Porto, and London*"; "*Balfour Beatty is a leading international infrastructure group.*"¹¹ Aid to Urbaser and Balfour Beatty through their joint-venture is thus able to reinforce their competitive position and enable them to offer their services and infrastructure in other member states at a lower cost. The aid may thus have an impact on trade between the member states.¹²

Subcontractors are based in different member states. The largest of these is Volund, Babcock & Wilcox Renewable a Danish firm. Not all sub-contractors are known to the complainant.

8. Compatibility of the aid

Please indicate the reasons why in your view the alleged aid is not compatible with the internal market.

¹¹ <https://www.ubbgloucestershire.co.uk/about-us>

¹² See e.g. recent Commission's opening decision of 6 February 2020 on aid to Renewi in Wallonia, SA.43147, para. 126

Since the 2016 contract and other advantages to UBB are financing and facilitated the construction of a waste treatment plant, their compatibility with the internal market shall be assessed under the Guidelines on State aid for environmental protection and energy (EEAG), in particular section 3.5.2. on aid to waste management.

Non-compliance with the waste hierarchy

It is established in the EEAG (para. 118 and 156) as well as in case law (C-594/18P *Austria v. Commission*, para. 44-45 and 100) that an aid measure cannot be found compatible with the internal market when it violates EU environmental law and particularly in this instance, the Waste Framework Directive and the waste hierarchy contained therein. The waste hierarchy consists of (a) prevention, (b) preparing for re-use, (c) recycling, (d) other recovery, for instance energy recovery, and (e) disposal. Paragraph 118 EEAG states that “*State aid for energy from renewable sources using waste, including waste heat, as input fuel can make a positive contribution to environmental protection, provided that it does not circumvent that principle.*”

UBB plant collects waste from GCC and processes it to energy – that is sold to GCC and other customers. This process qualifies as energy recovery under the waste hierarchy; it should thus only come after recycling solutions. By not opening a tender procedure in 2016 to increase the amount of investment into waste treatment facilities for Gloucestershire county, in breach of public procurement laws (see relevant documentation in annexes), GCC failed to give a contract opportunity to alternative waste treatment facilities that could prepare waste for re-use or recycle it. The granting authorities therefore breached the waste hierarchy principle and for that sole reason, the aid cannot be found compatible with the internal market.

GCC claims that the incinerator burns residual waste, which cannot be recycled. A recent WRAP report states: “*The large amount of avoidable residual waste and avoidable residual plastic waste generated by household sources each year suggests there remains substantial opportunity for increased recycling...Of total residual waste from household sources in England in 2017, an estimated 53% could be categorised as readily recyclable, 27% as potentially recyclable, 12% as potentially substitutable and 8% as difficult to either recycle or substitute.*”¹³ In other words, most of what is currently burnt could be recycled. In addition, data from DEFRA shows that councils with the highest incineration rate have the lowest recycling rate.¹⁴

Furthermore, paragraph 156 EEAG provides that “*Member States are required to establish waste management plans and should respect this hierarchy and design state aid measures that are coherent with implementation of these plans.*” Gloucestershire’s Joint Municipal Waste Management Strategy 2007-2020¹⁵ aims to “protect the environment by improving our waste management services at affordable financial cost.” “The main objectives are based upon a hierarchy of preferred approaches, focusing on waste prevention and reduction, recycling and composting more, and treating the remaining waste in a more sustainable way.” This strategy is not being

¹³ <https://wrap.org.uk/sites/files/wrap/National%20household%20waste%20composition%202017.pdf>

¹⁴ DEFRA, Local Authority Collected Waste Statistics: Local Authority Data, 11 December 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766014/LA_a_nd_Regional_Spreadsheet_201718_rev2.xlsx.

¹⁵ <https://www.gloucestershirerecycles.com/media/11218/jmwms-55580.pdf>

achieved through the council's contract with UBB. For instance, evidence shows that waste incineration and recycling compete for the same resources¹⁶ and this is certainly the case with the UBB contract where the tiered gate fee at Band 2 makes burning cheaper than recycling.

The aid is also incompatible with the market on other grounds.

Non-compliance with paragraph 158 EEAG

Paragraph 158 EEAG provides that “*The Commission will consider aid for waste management to serve an objective of common interest in accordance with the principles of waste management set out above if the following cumulative conditions are met:*

- (a) *the investment is aimed at reducing waste generated by other undertakings and does not extend to waste generated by the beneficiary of the aid;*
- (b) *the aid does not indirectly relieve the polluters from a burden that should be borne by them under Union or national law, such a burden should be considered a normal company cost for the polluters;*
- (c) *the investment goes beyond the state of the art, i.e. prevention, re-use, recycling or recovery or uses conventional technologies in an innovative manner notably to move towards the creation of a circular economy using waste as a resource;*
- (d) *the materials treated would otherwise be disposed of, or be treated in a less environmentally friendly manner; and*
- (e) *the investment does not merely increase demand for the materials to be recycled without increasing collection of those materials.”*

Whereas criterion (b) appears to be met, there are doubts as to the compatibility of the aid measures with criteria (a) (c), (d) and (e).

Criterion (a) “**reducing waste generated by other undertakings and does not extend to waste generated by the beneficiary of the aid**”

The structure of the contract encourages GCC to supply a minimum amount of waste (108,000

¹⁶ DEFRA, Resources and Waste Strategy: Monitoring Progress, 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907029/resources-and-waste-strategy-monitoring-progress.pdf; WRAP, Commercial and Industrial Waste in Wales, 2020, http://www.wrapcymru.org.uk/sites/files/wrap/Composition%20analysis%20of%20Commercial%20and%20Industrial%20waste%20in%20Wales_0.pdf.

tonnes pa) and makes additional waste cheaper to incinerate than to recycle. So material that could be recycled is instead wasted. This is described elsewhere in this complaint. The net effect is to fail to encourage the reduction of waste by other undertakings.

Secondly the low third party cost for incineration of waste, and the spare capacity in the plant encourages more waste generated by the beneficiary. Urbasser (the parent Company of the key beneficiary) has now established a commercial waste collection service offering discounted waste treatment. (see attached website and news release). They can market a service offering low cost, unsorted waste collection which is then incinerated. This discourages recycling and encourages incineration. A recent study found that business waste typically contains 75% of recyclable material¹⁷

Criterion (c): “the investment goes beyond the state of the art”

The state of the art in the waste and resources sector requires moving away from linear waste management to a circular economy. In the words of the UK’s Climate Change Committee “Achieving significant emissions reduction in the waste sector requires a step-change towards a circular economy, moving away from landfill and incineration (and the associated methane and fossil CO₂ emissions) and towards a reduction in waste arisings and collection of separated valuable resources for re-use and recycling”¹⁸ This aligns clearly with, for instance, Community R4C’s ambitions¹⁹, with their proposals providing state of the art technology to prevent loss of resources, maximise reuse and recycling and minimise carbon emissions. The contract with UBB on the other hand achieves precisely the opposite, locking the County Council into a 25-year contract for old carbon-intensive technology which prevents innovation in waste and resource management. Incinerators release approximate one tonne of carbon dioxide equivalent for each tonne of waste burnt, and about half of this derives from fossil fuels²⁰.

Criterion (d): “the materials would otherwise be disposed of, or treated in a less environmentally friendly manner”

UBB’s waste treatment solution is incineration of waste. Incineration releases significantly more CO₂ for every kWh exported to the electricity grid than the conventional use of fossil fuels, with the incineration of plastics being worse than coal. EfW incineration accounted for 13% of the 57 million tonnes of power sector emissions in 2019, while generating only 2.4% of the UK’s electricity and a mere 0.2% of the UK’s heat supply.²¹ Incineration is at the bottom of the waste hierarchy and is one of the worst environmental solutions for waste treatment.

¹⁷ <https://www.wrapcymru.org.uk/reports/composition-analysis-commercial-and-industrial-waste-wales>

¹⁸ Committee on Climate Change, Reducing UK emissions: Progress Report to Parliament, June 2020, <https://www.theccc.org.uk/publication/reducing-uk-emissions-2020-progress-report-to-parliament/>.

¹⁹ <https://communityr4c.com/about/the-project>

²⁰ Committee on Climate Change, Reducing UK emissions: Progress Report to Parliament, June 2020, <https://www.theccc.org.uk/publication/reducing-uk-emissions-2020-progress-report-to-parliament/>.

²¹ For the 13% carbon emissions share of the power sector, see Committee on Climate Change, Reducing UK Emissions: Progress Report to Parliament, June 2020, <https://www.theccc.org.uk/publication/reducing-uk-emissions-2020-progress-report-to-parliament/>. The other figures—2.4% of the power sector electricity supply and 0.2% of the heat supply—are based on the 7.7 TWh electricity and 1.4 TWh heat supply generation figures in Tolvik Consulting, UK Energy from Waste Statistics; 2019, May 2020, <https://www.tolvik.com/wp->

Should Community R4C have had the chance to bid for a tender for the award of the 2016 contract, it would have demonstrated that the waste that is collected by UBB plant could be treated in a much more environmentally friendly manner. This is because:

- The majority of waste in Gloucestershire residual bins is recyclable. A suitable sorting technology, such as the MBHT process preferred by Community R4C and described in their share offer document would recycle and reuse the majority of this material. A bi-product of this process is 90% biomass fuel pellets which can be used in place of coal and biomass in power and heat plants. This fuel has been shown to meet the requirement of end of waste criteria so can also be treated as ‘non waste’. This process would thus treat at least 90% of the material in the residual waste bins which would otherwise go to incineration (recovery, at 20% efficiency) higher up the waste hierarchy, either removing entirely from the waste stream or being categorised as recycling. The carbon footprint of this process is substantially better than incineration. Independent analysis of this using the WRATE assessment shows that process would reduce CO₂ footprint by at least 540kg for every tonne of waste treated by Community R4C rather than incineration. Detailed technical analysis can be provided. Recycling is undoubtedly more environmentally friendly than producing energy from waste as UBB plant does. This is clear from scientific evidence and is acknowledged in the waste hierarchy, which is legally binding; for instance every tonne of glass that is recycled saves an estimated 0.2–0.7 tonnes of CO₂e, in part by obviating the need for virgin materials. The CO₂e savings are somewhat higher for every tonne of recycled steel (0.5–1.8 tonnes CO₂e), dense plastic (0.6–1.8 tonnes CO₂e), waste electric and electronic equipment, or WEEE (1.3–1.5 tonnes CO₂e), and textiles (1.8–8.0 tonnes CO₂e), and significantly higher for every tonne of aluminium (9–12 tonnes CO₂e)²²
- Community R4C project aims at recycling waste materials for a proportion of up to 92%, which is considerably higher than the recycling rate of UBB plant. The technical advantages of the approach favoured by Community R4C, that is using a process called MBHT, (Mechanical, Biological and Heat Treatment) was presented to Gloucestershire County Council Residual Waste Working Group in 2014. This presentation is attached.
- Other plants in or around the Gloucestershire area, or in other locations collecting the same sort of waste, treat it in a more environmentally friendly manner than UBB plant does

Criterion (e): “the investment does not merely increase demand for the materials...”

The contract requires that a minimum quantity of waste is sent to the Energy from Waste plant and

[content/uploads/2020/05/Tolvik-UK-EfW-Statistics-2019-Report-June-2020.pdf](https://www.ofgem.gov.uk/system/uploads/2020/05/Tolvik-UK-EfW-Statistics-2019-Report-June-2020.pdf). The heat supply value of 760 TWh is based on Ofgem, Decarbonisation of heat, 2016, https://www.ofgem.gov.uk/system/uploads/2016/11/ofgem_future_insights_programme_-_the_decarbonisation_of_heat.pdf. The value of 324 TWh of electricity supplied in the UK is based on BEIS, Fuel used in electricity generation and electricity supplied, 2020, <https://www.gov.uk/government/statistics/electricity-section-5-energy-trends>.

²² Eunomia, The Potential Contribution of Waste Management to a Low Carbon Economy, 2015,

<http://www.eunomia.co.uk/wp-content/uploads/2015/11/Technical-Appendices-EN-1.pdf>.

the County Council must pay for this. This waste must have a minimum calorific value in order to fuel the plant. This places a 25 year obligation on the County Council to burn “waste” as a fuel which places a demand on material which could otherwise be recycled and put to use within a circular economy model. UBB are known to source commercial waste with high proportions of paper, card and plastic in order that this can be burnt in the incinerator.

9. Information on alleged infringement of other rules of European Union law and on other procedures

a) If known, please indicate what other rules of European Union law you think have been infringed by the granting of the alleged aid. Please be aware that this does not imply necessarily that those potential infringements will be dealt with within the State aid investigation.

As mentioned under box 8 above, the investment aid measures to UBB waste-to-energy plant have been granted in breach of the Waste Framework Directive and of the waste hierarchy contained therein. Non-compliance with the Waste Framework Directive and the waste hierarchy is a cause of incompatibility of an aid measure, as provided in paragraphs 118 and 156 EEAG as well as in case law (C-594/18P *Austria v. Commission*, para. 44-45 and 100).

Since compliance of an aid for waste treatment with the Waste Framework Directive is intrinsically linked to the nature of the aid, the Commission is required to assess the infringement of the Directive directly in its state aid assessment.

b) Have you already approached the Commission's services or any other European institution concerning the same issue? *

Yes No

If yes, please attach copies of correspondence.

c) Have you already approached national authorities or national courts concerning the same issue? *

Yes ~~No~~

If yes, please indicate which authorities or courts; also, if there has already been a decision or judgement, please attach a copy (if available); if, on the contrary, the case is still pending, please indicate its reference (if available).

- There has been a complaint lodged with the Competitions and Markets Authority, UK in March 2017. This was submitted prior to details of the 2016 contract being released. The complaint response in 2017 was “not currently a priority, but will reconsider if new evidence”. Please find attached the submission follow up letters, together with the CMA’s response.
- There has been a formal complaint to the County’s external Auditor, Grant Thornton, under the 2014 Audit Act – details attached
- Two challenges under Freedom of Information laws to the Information Commissioners Office (rulings to disclose information were appealed by the County, before the County eventually released information concerning the 2016 contract in December 2018)

- High Court challenge: The Judge has reached a ruling on the preliminary issues in the case, this ruling is attached. He ruled in favour of Community R4C (CR4C) on grounds of timing, ie that CR4C had “SITA” knowledge of the facts that clearly indicated but did not necessarily prove an infringement of public procurement regulations. The judge used a legal precedent which was referred to as the SITA test, this test is that knowledge occurs when “there is a sufficiently clear and apparent factual indication of a breach of public procurement rules”. He ruled against CR4C on grounds of standing. This latter ruling is the subject of an appeal on grounds of mistakes in law. This ruling and the appeal submission are attached.

d) Please provide any other information that may be relevant for the assessment of this case.

In June 2020 Urbaser in Cheltenham, Gloucestershire, the lead partner of UBB the beneficiary of this contract, launched a commercial waste collection service under a new subsidiary ULCS. This offers discounted waste collection services for waste to be sent to the Gloucestershire Energy from Waste plant, ie the plant build using this State Aid contract from GCC. The third party waste price offered under the contract is far lower than the price paid by Gloucestershire County Council. See news release and page from web site.

10. Supporting documents

Please list any documents and evidence which are submitted in support of the complaint and add annexes if necessary

- Whenever possible, a copy of the national law or other measure which provides the legal basis for the payment of the alleged aid should be provided.
- Whenever possible, please attach any available evidence that the State aid was granted (e.g. press release, published accounts).
- If the complaint is submitted on behalf of someone else (a natural person or a firm) please attach proof that you as a representative are authorised to act.
- Where applicable, please attach copies of all previous correspondence with the European Commission or any other European or national institution concerning the same issue.
- If the issue has already been dealt with by a national court/authority, please attach a copy of the judgement/decision, if available.

24 supporting documents attached in a zip file. Document 022 provides a timeline
Document list below and attached in zip folder

Support Documents: Alleged Illegal State Aid in Contract GCC / UBB 2016. Gloucestershire, UK				
Complainant: Community R4C Ltd, Tom Jarman et al				
Parties: Gloucestershire County Council, Gloucestershire UK				
UBB Waste (Gloucestershire) Ltd A joint Venture supported by Urbaser (Madrid, Spain) and Balfour Beatty (London, UK)				
Reference	Doc Name	Date	Author	Notes
001	OJEU Notice	30/01/2009	Gloucestershire County Council	OJEU notice for earlier contract (2013 grant)
002	Gloucestershire County Council R	01/08/2014	Tom Jarman, CR4C	Presentation to GCC Residual Waste Working Group re alternatives to incine
003	Damar Group Finning	29/09/2014	Damar Finning (Caterpillar)	LOI re support for engineering wrap for R4C / Biocentre plant
004	Capital on Site LOI	25/11/2015	Capital on Site, part of Nygren Group	LOI re support for build of R4C plant
005	Smiths RR4C LOI	25/02/2016	Smith's (Gloucester) Ltd	LOI for waste supply potential JV with R4C
006	CR4C Share Offer	29/04/2016	Community R4C	Community Share offer prospectus
007	PBS LOI	12/06/2016	PBS Group (Czech Republic)	LOI for investment and JV with Community R4C from PBS Group
008	Report by Steve Burnett	01/03/2017	Stephen Burnett (expert in LA waste co	Analysis of 2013 waste contract UBB/GCC including termination costs. Includ
009	CMA Complaint	21/03/2017	Duncan Sinclair for Community R4C	Preliminary Reasoned complaint to UK Competitions and Markets Authority
010	CR4C Report	26/03/2017	TJ SO TW JS Community R4C	Objection to auditors under s27 of the Local Audit and Accountability Act 20:
011	CR4C Letter	10/10/2017	Sidley Austin LLP for Community R4C	Letter to CMA urging urgent action on complaint
012	Gloucestershires Incineration Cost	06/11/2017	TJ SO (Community R4C)	Addendum submitted to auditors Grant Thornton to complaint under Audit .
013	Letter from CMA on GCC	02/12/2017	CMA (UK Competitions and Market Aut	CMA prioritisation issues
014	Letter to Oppenheimer	19/12/2017	CMA (UK Competitions and Market Aut	Letter setting out not currently a priority
015	Particulars of claim	18/01/2019	Duncan Sinclair for Community R4C	Particulars of claim to UK High Court
016	Note on GT and GCC	22/01/2019	Duncan Sinclair for Community R4C	Note to auditors Grant Thornton re lack of appropriate action on complaint
017	CR4C v GCC Claimants note	16/03/2020	Duncan Sinclair, 39 Essex Chambers. Ba	Note before closing, what this case is about etc
018	Urbaser Launches commercial was	01/06/2020	Lets Recycle (publication)	Press article on new Urbaser commercial waste offer linked to incinerator n
019	CommunityR4C v Gloucester CC ju	17/07/2020	HHJ Russen	Judgement on standing and limitation
020	Appellant's Skeleton Argument	07/08/2020	Duncan Sinclair & Parishil Patel QC	Skeleton argument for appeal re grounds of standing of CR4C
021	Grounds of Appeal	07/08/2020	Duncan Sinclair & Parishil Patel QC	Grounds for appeal on issue of standing
022	Timeline of Key events	17/08/2020	Sue Oppenheimer, CR4C	Timeline of key events leading to award of contract to UBB
023	Facts and Figures	25/09/2020	Sue Oppenheimer, CR4C	Key facts concerning incinerator contract
024	General Waste webpage	03/11/2020	Urbaser UK	Commercial Waste Collection offer linked to incinerator now built

I hereby declare that all the information in this form and annexes is provided in good faith.

Place, date and signature of complainant”