COMMUNITY R4C Ltd

-and-

THE CONTRACT BETWEEN:

(1) UBB WASTE (GLOUCESTERSHIRE) LIMITED

(2) GLOUCESTERSHIRE COUNTY COUNCIL

Preliminary Reasoned Complaint to the CMA

Chapter I Prohibition (CA98)
Chapter II Prohibition (CA98)

21 March 2017

Duncan Sinclair
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81 Chancery Lane
London WC2A 1DD
Barrister for the Complainant

I. Introduction

1. This complaint (preliminary reasoned complaint[1]) relates to a long term, *de facto* 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, and key details of which have only recently been publicly disclosed) 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 ('the Contract').

2. The competition law issues under the Competition Act 1998[2] raised relate to a sector ripe for consideration by the CMA[3]. While the background to the Contract is complicated (and indeed the contract is lengthy), the legal (competition law) issues result from a standard application of accepted principles to the facts. There is a *de facto*, long term, exclusive contract which without objective justification will foreclose competition[4]. The effects are significant, not only on price and innovation (this is widely

[1] It is 'preliminary' not in the sense of being incomplete or subject to revision, but rather in the hope that the complainant (and related interested parties) will be able to engage with the CMA to further articulate their case, expand on and if necessary provide the evidence available (key aspects of which have been distilled in this complaint, though this is not comprehensive in coverage), and further emphasise the real consumer harm at stake.

[2] Although the focus is on the Competition Act 1998 ('CA98') Chapter I and Chapter II prohibitions Articles 101 and 102 TFEU are potentially engaged in parallel. Whilst the local nature of the markets may *prima facie* suggest that for the product/service in question there may not be an *effect on trade between member states* in fact the OJEU procurement notice attracted bids from outside the UK – indeed UBB's majority (50.5%) parent company is itself owned by a Spanish Company (the ultimate parent company); in light of this we would submit that Articles 101 and 102 TFEU likely do apply in parallel and the references to the UK provisions in this complaint can be read as including the equivalent EU provisions.

[3] We submit by way of formal investigation under the CA98 in order to establish a legal precedent (potentially by way of commitments if offered rather than a formal finding of infringement). A market study may be an alternative, though this would be unlikely to provide the same level of legal certainty and in light of the OFT's 2006 paper looks rather like a repetition; a market investigation would be more onerous but should not be pursued where the CA98 is sufficient/applies.

[4] In Case C-203/96, *Chemische Afvalstoffen Dusseldorp* the Court of Justice held by way of preliminary ruling that adoption of a national plan requiring disposal of inter alia oil filters by incinerators to which it had

recognised as a sector with rapid and ongoing innovation), but also 'externalities': impact on the environment.

3. The sector, at the time nascent/undergoing significant change (and which continues to evolve) was examined in detail by the OFT in 2006 in its paper **More competition, less waste - Public procurement and competition in the municipal waste management sector** (May 2006 OFT841). 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]

granted exclusive rights was contrary to Articles [102] and [106]. Whilst that involved a national scheme with a particularly clear effect on trade between Member States, an equivalent analysis in principle applies here: an exclusive contract awarded by GCC in the relevant market likewise distorts competition (it creates/enhances dominance and leads to its abuse) contrary to the Chapter II prohibition.

[5] Equivalent observations have been made in recent EU papers relating to procurement and competition in this sector (references can be provided), by the Public Accounts Committee and by Defra (some of the latter statements

4. Those observations continue to apply[5], 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 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'[7].

5. A dramatic and important change since the OFT report a decade ago is the establishment (again originally by EU law - Article 4 of the revised Waste Framework (Directive 2008/98/EC)) of a waste hierarchy and a corresponding legal obligation to seek a solution for disposal/treatment etc of waste higher up the hierarchy. So, whilst landfill remains the *worst* solution (at the bottom of the hierarchy), there are further tiers of methods of waste disposal (with recycling near the top). A clear description of this hierarchy can be found in the Defra paper on handling waste under the waste hierarchy published in 2011 and which can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69403/pb13530-waste-hierarchy-guidance.pdf

6. In short the previous, near-binary "landfill vs non-landfill" distinction made in 2006 has become significantly more complex. Not all methods of waste disposal (or reduction) other than landfill are environmentally equivalent, nor are they direct substitutes for each other[8]. Avoiding landfill is *only* the first step in the right direction, and the legal hierarchy reflects this. Further, not only does the legal framework[9] applying to waste disposal authorities and others reflect this, but so too have decision of competition authorities in defining economic markets. As elaborated below, the economic markets have over time been increasingly defined narrowly for competition law purposes, as narrow as (for instance) distinguishing markets for "disposal of non-hazardous household waste by incineration" from I&C waste disposal on the one hand and from "other

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are referred to in this complaint). It is submitted that the fact the Contract subject to this complaint can nonetheless be struck points to the need for direct action by the CMA to give effect to the consistent and numerous pubic exhortations (including by its predecessor the OFT).

[6] EfW encompasses a certain range of technologies involving generation of energy from incineration.

[7] This term is discussed below.

[8] This is the case from both a Demand and Supply side perspective – a point which we would be happy to discuss/expand upon.

[9] In the UK, primarily as set out in the Waste (England and Wales) Regulations 2011.

treatment methods (including recycling)" on the other. And, indeed, waste disposal (as opposed to collection) can be regional/local in geographic scope.

7. The issues are of broad public interest. Recently (in 2014) the Public Accounts Committee undertook a review of three waste PFI projects funded by Defra (this particular project was not considered), and concluded that[10]:

> "The Department's support of PFI to build waste management infrastructure may result in long term contracts that are too inflexible for a sector where technology is continually evolving and the amount of waste produced can be hard to predict. The Department's approach incentivises the use of PFI to construct waste management assets over other options for reducing the amount of waste sent to landfill. (..). PFI contracts typically last 25-30 years and may be inappropriate for the waste sector where technology is continually evolving and the amount of waste that will be produced in the future can be hard to predict. (..)
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> Recommendation: The Department should consider including other forms of support to help local authorities to manage their waste in ways that are flexible enough to deal with changes in technology and waste levels to ensure local authorities are not locked into projects that provide more capacity than is required and are very expensive."

8. It would of course be going too far to say that the PAC's (and others – e.g. HM Treasury's) concerns over value for money generally, or in this sector in particular over long term lock-ins (exclusive supply), and preventing the evolution and use of new technologies mean that every PFI contract (whether for waste or in other sectors) giving rise to similar policy concerns is *contrary to competition law*. Many – indeed the majority – of PFIs will be unimpeachable and/or go no further than objectively justified/defensible under the Chapter I exemption criteria (assuming of course the arrangements even engage the rules and are not automatically exempted[11]). But, for the reasons outlined below, in context of the relevant market(s) of this

[10] Public Accounts Committee Report: Defra: funding allocation and oversight of three PFI waste projects - 17th September 2014 https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/report-pfi-waste-projects-defra/

[11] For instance, a PFI in a large product market may only involve parties with a small market share and so be *de minimis*, without any 'restriction' (e.g. 'exclusivity' becomes a restriction by effect over a certain market share, otherwise it will just be an agreement to purchase a certain amount); and the VBE will apply to many restrictions up to 30% market share.

case and the precise terms of the Contract, one has an example where competition law does bite.

9. If the OFT paper referred to above on more competition, less waste had been written today by the CMA, one would expect not only a clear exhortation to ensure the ability of new entrants to compete and different technologies to evolve, but a detailed description of the range of technologies in the market and their place in the waste hierarchy (which correlates in broad terms with market definitions). In this complaint we set out why (both in terms of legal analysis and for reasons of case prioritisation) this is an opportunity for the CMA to reinforce the statements made by the OFT. Just as it was (with respect) entirely appropriate to exhort certain behaviours in 2006 during the early stages of developments in this market, faced with breach not just of those exhortations but (we submit) the CA98 as in the Contract, it should be a CMA priority to take action now.

10. The competition issues envisaged by the OFT over a decade ago, namely:

    (1) the foreclosure of competitors/alternative technologies[12] and
    (2) the (concomitant) distortion/prevention of technological innovation

    are the core of this complaint. Specifically, at issue is whether an undertaking (which is dominant) offering one technology (in this instance, incineration in an EfW plant) can lawfully foreclose competitors in the manner seen in the Contract.

II. The core features/elements of the CA98 breaches described in this complaint.

11. Market definition is set out below. As (we submit) the issues arise out of the behaviour of a dominant[13] undertaking reflected in a contract, the analysis could proceed under either or both

[12] For the purposes of this complaint, incineration/EfW is alternatively said to have excluded competitors from the market. An alternative formulation is that dominance in one market has been leveraged by a party in a dominant position in that market so as to prevent the development of alternative technologies in related markets higher up the waste hierarchy. To the extent the terminology varies between the two and throughout this complaint, this simply reflects the fact that whether properly examined either way, the behaviour infringes the CA98.

[13] In our submission the market share in the relevant market leads to a presumption of dominance under accepted principles on the part of UBB. While the presumption over 50% is rebuttable we see no obvious rebuttal in this instance, and further as – in parallel/the alternative – the case is equally valid under Chapter

the prohibitions in Chapter I and Chapter II of the CA98. In principle the result would be the same: unlawful foreclosure (without objective justification under Chapter II, and not meeting the exemption criteria – in particular, no benefit to consumers and the terms not being the least restrictive necessary – under Chapter I).

12. In this preliminary reasoned complaint the behaviour (reflected in Contract terms) is analysed in large part using Chapter II/abuse of dominance terminology (including absence of 'objective justification'), though with a number of cross-references to Chapter I (and Article 101 TFEU). After an initial outline of the relevant terms of the contract, we touch on the key differences between Chapters I and II as relevant to this case and why this complaint is largely framed as an abuse of dominance case.

13. The key terms/aspects of the Contract that cumulatively amount to an abuse of dominance are enumerated below. Whilst a largely unredacted copy of the Contract is recently available (the final document runs to some 1750 pages[14]), in its decision of 10 March 2017[15] ordering disclosure of the bulk of the contract including the 'business case' and pricing structure, the First Tier Tribunal (the 'Tribunal' and the 'Decision') on appeal from the Information Commissioner, set out in its detailed reasons much of the key background to, terms of, and to some extent effect of the Contract. For ease of reference we will draw the CMA's attention to relevant passages in the Decision:

    (1) **Length of contract.** The contract term is 25 years[16]. We appreciate this is not unusual for a PFI-type contract (based on long-term financing models) and in itself will not give rise to competition concerns (the duration is, for the avoidance of doubt, not therefore an aspect of the contract that we would criticise *independently* of other features). However, in a contract of such length

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I, the issue is not necessarily conclusive. At this stage, therefore, we treat the issue *relatively* lightly in terms of analysis but remain at your disposition to further clarify/explain our analysis.

[14] In fact much of it relates to design specification and similar project details of no direct relevance to this complaint.

[15] Appeal EA/2015/254-6, appended to this preliminary complaint.

[16] Decision, paragraph 17.

and in particular where there is/will be a party in a dominant position, the special responsibility on a dominant undertaking requires close scrutiny.

(2) **Exclusivity.** 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%[17] of the relevant market.

(3) As matter of context it is important to note that the contract includes a minimum usage provision - in the terms of the contract a 'Base Tonnage'[18] - subject to a 'guarantee'[19]. Before the ICA Tribunal this 'take or pay' mechanism was described as follows:

> "58. […] Further, it is said that the structure of the Contract, by requiring the Council to pay for a certain amount of waste to be incinerated (the so-called "take or pay" arrangement) may have tied the Council in to supplying a quantity of waste which is not viable in future and may have the negative

[17] The 'take or pay' terms relate to 108mt of a total capacity of 190mt; amounts of 'residual waste' from households (ie not I&C waste) was estimated at the relevant time at c. 150mt (108/150 = 72%) or in total (including I&C residual waste) near the facility capacity of 190mt. Requirements to supply at *80% or more* are defined as *exclusive* agreements under the Vertical Agreements Block Exemption; whether by pure happenstance or deliberate decision the 108mt figure falls (narrowly) below this. For the reasons set out above, however, this is not the end of the matter.

[18] Decision, para 18; see also para 62 and arguments in the final sentence (apparently accepted in broad terms by the Tribunal at 65) that "base tonnages" are "at the heart of the Contract and which are highy relevant to value for money and the potential issue of discouraging recycling [inserted comment: aka foreclosing alternative technologies], to termination provisions…"

[19] See again Decision, para 18.

environmental effect of discouraging recycling: this was a point made forcefully by Councillor Lunnon in the course of her evidence"

[emphasis added. At 59 the Tribunal then refers to significant public interest going to disclosure arising from "those considerations" – in short, it apparently accepts the above characterisation]

(4) While there is a *suggestion* of foreclosure of alternatives ('discouraging recycling') or indeed of exclusivity should the amount 'tied-in' in future become unviable (ie. so as include more than all available Contract waste), we note that for competition law purposes a true *minimum requirement* that *does not equate to exclusivity* is given as an example of a potentially necessary/justified requirement to ensure economies of scale – see EU Commission Guidelines on Vertical Restraints at (201): "In the case of a hold-up problem and even more so in the case of economies of scale in distribution, quantity forcing on the supplier, such as minimum supply requirements, could well be a less restrictive alternative." In Chapter II terms, a minimum requirement not amounting to exclusivity may for similar reasons be 'objectively justified' to ensure investment.

(5) In the circumstances, we do not therefore advance an argument in this preliminary complaint that the take-or-pay terms are unlawful in and of themselves (though we leave open the possibility that if the amounts – which do change over time, as indeed may the market – *in future* amount to exclusivity, then this clause may in itself be unlawful). Rather, the existence of the take-or-pay arrangement is assumed for current purposes to be objectively justified/necessary to ensure investment (the initial "Base Tonnage" being 108mt, against a capacity of the facility of 190mt and a total relevant market size of well over 108mt). It is however crucial to be aware of the take-or-pay clause in considering other terms of the contract which determine how waste beyond the "Base Tonnage" is affected.

(6) **Price structure which forecloses the remainder of the market** beyond the Base Tonnage. The Contract prices after the take-or-pay will be below ATC[20] (and certainly below market prices[21]). One can see this most clearly by reference to Schedule 4 to the Contract, where the pricing between the first tranche (Base Tonnage equates - at least initially - to "Base Price Band One" at 108mt) and the second tranche is stark:

"Base Price per Tonne for Base Price Band one	means **£146.36** (Indexed) per tonne
Base Price per Tonne for Base Price Band two	means **£15** (Indexed) per tonne

(7) The *effect* is that UBB is not only guaranteed a return for a minimum guaranteed amount (and 108mt is large part of the market, though not itself likely to be considered *de facto* exclusivity) which (along with a significant capital contribution from GCC) is *prima facie* sufficient (and for current purposes we assume this) to justify any up-front investment. But then, having benefitted from the combination of up-front payments (to the tune of £30m, as revised upwards in 2015, by way of capital contribution) and high costs for a guaranteed minimum/take or pay, the contract provides for below market pricing.

[20] If, as we suspect, this is correct, then a *predatory pricing* analysis could be considered as well as the core case advance in this complaint.

[21] Work is underway on robust benchmarks/examples of existing rates and other pricing issues, with indications being that current market prices available are in the range c£69-c£121 per metric tonne. The pricing aspects of the Contract are somewhat complicated, though it is not by any means apparent these complications will affect the core case set out in this complaint. Pricing will be treated in more detail in alerting the GCC Auditor to value for money concerns and this will be provided to the CMA, if necessary with accompanying submissions. The 'complications' include the following: under the Contract GCC will pay a **£30m** capital contribution up front; against that, under the Contract, GCC will benefit from electricity generated and supplied (this of course does not 'answer' the unjustified foreclosure nor affect the fact that the 'take or pay' prices are much higher than other 'tranches'). Prices will also change over time, but the features outlined as at commencement will continue: pricing will be high for the first tranche and significantly lower for other tranches.

(8) To price a 'minimum requirement' **at approximately 10 times** the price of the next tranche (put another way, to *discount prices by a factor of 10* after the guaranteed volume of supply) will evidently have an effect beyond the 'minimum requirement'. The structure can be seen to be the inverse of the position observed in the OFT's *Napp Pharmaceutical* case, but on proper consideration one observes a very similar 'logic': the low prices (here beyond the 'Base Tonnage', in *Napp Pharmaceutical* in bidding for contracts in the smaller but more competitive Hospital segment in order to leverage market position and foreclose the remainder of the market through discounting) are found exactly where there is/would otherwise be greater competitive pressure (and competition is thereby foreclosed). In short, the **pricing structure combines with the assured 'base tonnage'** to ensure *de facto* exclusivity (now and during the life of the contract).

(9) **Punitive termination terms** have been put in place that exacerbate/guarantee exclusivity[22] regardless of developments over time (this is thus part and parcel of the core focus of this complaint on exclusivity as an exacerbating/aggravating factor and as such would fall under Section 18(2)(B) of the CA98). In addition/alternatively it could be said that the termination costs amount to terms falling within s.18(2)(d) of the CA98 in that UBB has made the conclusion of contracts subject to acceptance by GCC of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

(10) Specifically as to termination:

[22] As set out above, termination costs can be analysed as part of the exclusivity abuse or independently. Our primary submission is that they *exacerbate/aggravate* the effects of the (abusive/unlawful) exclusivity. For even a 'classic' exclusive supply clause may in practice have a lower (though still anticompetitive) effect if the contract could be terminated with normal contractual remedies (e.g. 'fair'/non-punitive liquidated damages) and with a duty to mitigate loss on the part of the counterparty. In such a case, a decision *might* be made in the event of a new, significantly better technological solution to terminate the contract if there is a net benefit (taking into account moderate termination costs). The effect of the extremely high termination costs in the Contract can only be (and in 2015 was *on the evidence* in fact) to enhance exclusivity/further cement the 'lock in'.

- Despite delays in obtaining planning permission which mean that work on the plant is still at a very early stage, GCC evidence to the information commissioner in 2016 (at a time when no work had begun) – evidence repeated before the Tribunal on appeal - was that it would cost GCC some **£100m to terminate** the contract (to put this in context, a contract valued at c£500m over 25 years). That was put to the information commissioner in evidence *by reference to the Contract terms*[23].

- Whilst we, like the Tribunal, have been unable to pinpoint how this figure was arrived at[24], the 'incredulity' expressed by the Information Commissioner is understandable, as is the comment of the Tribunal that there would be "public outcry" if GCC had paid £100m for nothing[25] (instead of 'renegotiating'[26] the contract in 2015).

- For the purposes of a competition analysis, it is submitted that this is *prima facie* a clear attempt to further prevent, through contract terms, the viability of alternatives entering the market – to enhance the *de facto* exclusivity - in the event of a change in the factual situation (which was foreseeable and indeed foreseen in the event of planning delay as

[23] This is referred to a number of times in the Decision – see for instance paragraph 26 and 27, where the Tribunal explains [27] that "Mr Mawdsley [for the Council] referred us to the relevant contractual provisions in Schedules 17 and 27 and sought to explain how such a high figure had been arrived at [rest of sentence redacted] […] Without being in a position to follow the intricacies of the contractual provisions or the transactions with the banks we are bound to accept his evidence about this."

[24] See the Information Commission Appeal Tribunal.

[25] Paragraph 69 of the Decision.

[26] This is put in inverted commas as it is difficult to see how, in agreeing to pay a capital contribution of £30m (ie. £17m more than initially agreed), GCC had *any* negotiating power given the alternative of exiting the contract at a cost of £100m and the 'public outcry' the Tribunal (with which respectfully agree) envisages would have arisen.

one of 3 main 'sensitivities[27]; equally, it is common knowledge that this sector is subject to rapid technological development).

- Indeed, as the Tribunal recognises, when (due to planning delay) by 2015 there was a call (ultimately by some Councillors having the support of a significant number of constituents) to terminate the contract (as it had to be renegotiated due to delay[28]), the termination costs driven by the Contract had the (deliberate or at least entirely foreseeable) effect of foreclosing this proposal:

  "26. […] The Council's officers advised that it would cost up to £100m to cancel the Contract and this was relied on at the [Extraordinary Meeting of the Council] by those in favour of continuing with the project".

  In short, we rely on GCC's own (consistently repeated) evidence to legal tribunals (and in internal Council meetings) that the figure of £100m was a realistic assessment essentially derived from the terms of the contract[29]. And, while agreeing to increase the capital payment from £13m to £30m under the Contract under the revised project plan in 2015, it was *the termination costs* of £100m which were used by (Councillors within) the GCC in favour of continuing with the project[30].

[27] Annex 4 to the contract sets out 3 key "sensitivies" put to the GCC - planning delay is listed as one of the 3 key issues; this is reflected in a large number of contemporary documents and unsurprisingly so given the extensive opposition to the project.

[28] Decision, para 25.

[29] For instance, any repeated procurement costs would of course be minimal in comparison and go no significant way towards costs of £100m; and as other technologies were either available or could be made available as the Council knew (new plant could be constructed *before* the large and complex Contract project would be finished), it would have been quite disingenuous to suggest that these are *costs of termination*, rather than (as at 2015) costs of delay which would arise due to the planning issue in any event.

[30] The Tribunal notes at paragraph 26 that some Councillors expressed frustration at the lack of clarity and that the vote was close (27 votes to 24). The Tribunal later comments (final sentence, paragraph 27) that "…it seems to us that the fact that the Contract contained provisions that could have had such

Chapter I prohibition, Chapter II prohibition (or both)?

14. The decision whether to pursue an investigation under either or both Chapters I and II is of course a matter for the CMA. The most obvious differences appear to us to be:

(1) Under Chapter II, dominance is of course first required to be established on the part of UBB in the relevant market. Under Chapter I, a market share of greater than 30% (by either GCC or UBB) would be sufficient to lead to the Verticals Block Exemption being inapplicable.

(2) Under Chapter I, the *focus* of the investigation is typically on the agreement and so on both parties to an agreement (rather than only UBB as we would anticipate under Chapter II). One might expect both parties in practise to defend the contract under Chapter II (though this involves some speculation), but aside from the obvious[31] problems from a competition perspective, there may be elements of the behaviour of GCC which the CMA would seek to comment on in some form given their position as the primary contractor in the market (this might be seen to increase the precedent value of any final decision to other waste disposal authorities in the UK).

(3) Related to the above, however, whether GCC is acting as an 'undertaking' would need to be considered if a Chapter I investigation was pursued (as this impacts the position of GCC in terms of liability to penalties, private actions for damages etc – that UBB is an undertaking is we submit not in issue

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consequences for the Council in 2015 is inevitably an important consideration when considering the public interest balance in this case". We would suggest that the existence of such provisions is also important to the competition analysis: having what appear to be *excessive* termination costs/ a contract structure that leads to such a result as GCC have explained in legal proceedings is key to ensuring 'lock in' to an exclusive long term contract. Indeed, the evidence as described by the Tribunal *strongly suggests* (it did not need to make any conclusion on this point and we do not suggest it did make a final determination) that in 2015 those terms (likely to cause 'public outcry' if the Council had paid £100m – paragraph 69) did prevent any proper consideration of alternatives. We would further say that the same continues to apply; such terms cannot be lawful under competition law in the context of this Contract.

[31] The CMA will of course be aware of the EU Commission Guidelines on Vertical

otherwise/under Chapter II). At Annex 1 preliminary legal analysis is set out on this point.

(4) It is only right to recognise that the application of Chapter II can be 'controversial'[32]. On the other hand, that a long term *de facto* exclusive contract will be anticompetitive unless its terms are objectively justified (which may be assessed by reference to a 'counterfactual'[33]), with the key issue being 'foreclosure' is the subject of recent precedent[34], as well as being contrary to Chapter I above even a 30% market share – as is recognised in the EU Guidance on Vertical Restraints, in particular at [195]:

> "(195) It is not only the market position of the buyer on the upstream and downstream market that is important but also the extent to and the duration for which he applies an exclusive supply obligation. The higher the tied supply share, and the longer the duration of the exclusive supply, the more significant the foreclosure is likely to be. Exclusive supply agreements shorter than five years entered into by non-dominant companies usually require a balancing of pro- and anti-competitive effects, while <u>agreements lasting longer than five years are for most types of investments not considered necessary</u> to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh the foreclosure effect of such long-term exclusive supply agreements. "

(5) Finally, as flagged above, while a straightforward foreclosure/exclusivity case can be made under either Chapter I or II, the Chapter II prohibition (and case

[32] R.Whish *Competition Law*: "Many of the most controversial competition law decisions of the Commission have been taken under Article 102" (p.174 7th ed)

[33] As the terms criticised in this complaint are relatively straightforward (with the exception of pricing, though the *key* elements of this are clear), there may be no need for a 'counterfactual' analysis. However, if the case evolves (for instance due to arguments as to the 'objective justification' of terms), then we would be open to assist with considering one or more revenue-neutral counterfactuals which would not lead to the foreclosure seen in the Contract.

[34] *National Grid v Gas and Electricity Markets Authority* [2010] EWCA Civ 114; [2010] U.K.C.L.R. 386.

law under it) is more flexible in terms of how the abuse(s) could be characterised (notably, predatory pricing *may* be considered as regards the pricing structure; s.18(2)(d) of the CA98 may apply to the contract termination terms).

15. We would invite the CMA to therefore consider initially commencing an investigation under *both* Chapters I and II.

III. The Complainant

16. The complainant is Community R4C ('CR4C'). CR4C is a community-led initiative to provide economic, social and environmental benefits for Gloucestershire by treating the County's waste as a valuable resource rather than burning or burying it. CR4C plans to support the development of an R4C advanced mechanical biological heat treatment (MBHT) plant via Revolution R4C (see below) – which uses magnets, air currents, water and infra-red light – to sort more than 90 per cent of processed waste from municipal black bin bags into recyclates or waste that can be converted into bio-based fuel pellets.

17. CR4C is supported by a wide range of individuals and other organisations. It is a Community Benefit Society (ie not for profit) organisation. Revolution R4C ('RR4C') is one of the businesses that it will work with. The relationship is governed by a commercial contract in which CR4C will provide services and be paid for when RR4C able to do so. RR4C is a commercial organisation which been established to fund, build, own and operate the R4C recycling plant, and it will do this in a way that delivers long term and lasting benefit to the environment and local taxpayers. It will operate commercially, and once profitable can pay fees to Community R4C, repay investors and continue to support the work of CR4C.

18. The vision is for a 'community defined, commercially delivered' model for sustainable business that can deliver long term benefits to the community. So Revolution R4C is a customer of services provided by CR4C, and part of the vibrant circular economy in Gloucestershire that CR4C seeks to create.

19. We would also note that CR4C (and indeed opposition to the Contract) is backed by a large and diverse number of individuals and organisations.

20. In terms of the market: as will be clear from the description of MBHT above, CR4C believes that the amount of waste which can be 'economically recycled' is much higher than GCC using the EfW plant under the Contract will achieve (see Defra's definition of 'residual waste' below, cited under prioritisation criteria). It proposes a solution that would be able to meet the needs in Gloucestershire to treat residual waste, alone or with other policies and technologies.

21. The CR4C envisaged plant operates at the interface in the waste hierarchy between "other treatment" (which would include EfW – assuming it meets energy generation targets, failing which it – like many of the 'EfW' plants operating in the UK currently, it will be treated as waste 'disposal' – at the lowest rung of the waste hierarchy) and "recycling" (which it aims to hugely increase via MBHT sorting of waste). CR4C firmly supports the approach to market definition (see below) which distinguishes the two. The Contract would effectively put the County in a state of stasis for over 25 years – and in their view this may be expressed *either* as 'foreclosing the market for treatment of residual waste' or (equally validly) 'foreclosing, by ensuring exclusivity of EfW treatment, development of the recycling market'.

IV. Market Definition

22. While not necessarily binding on future cases or in different geographic areas, there are a number of decisions (in particular of the EU Commission, so of special relevance under s.60 of the Competition Act 1989) which set out a fairly consistent approach (which has evolved towards narrower markets over time[35] towards the legal 'waste hierarchy' set

[35] For example, in 2007, and so before both the establishment of a waste hierarchy and the increasing deployment of a range of technologies, the Commission held (in Case No. COMP/M.4576 – *AVR/Van Gansewinkel*) "Non-hazardous waste is either incinerated or land-filled. According to the Parties, the incineration of non-hazardous waste is a market separate from the market for landfill of non-hazardous waste. This has been confirmed by the market investigation." The absence of any mention of other waste treatments, recovery or recycling and the focus on the binary *landfill vs incineration* split as a market definition naturally could (did) not survive for long.

out in EU legislation) in the waste sector. In this preliminary complaint reliance is largely placed on these precedents, with further references to the particular nature of the geographic market as approached by GCC itself in this case.

Product/service markets

23. Unsurprisingly, waste *collection* has long been held to be distinct from waste *disposal or treatment*. The Contract concerns waste disposal/treatment.

24. Waste disposal of *non-hazardous waste* is dealt with differently from both demand and supply side perspectives from hazardous waste. Non hazardous waste then began to be split along lines similar to the waste hierarchy set out in EU legislation. For instance, in 2010, in Case No COMP/M.5901 - *MONTAGU/ GIP/ GREENSTAR* the Commission held:

> "Relevant product market
>
> 20. The Commission has previously considered that the market for non-hazardous waste disposal can be further segmented into disposal by way of landfill, incineration and waste treatment alternatives (such as recycling and composting)."

25. In that decision, the concentration was assessed on the basis of the narrowest product market that might be relevant on the facts – "MRF" (materials recovery facility) within the broader 'waste treatment alternatives' segment. This (though not conclusive) indicates that the Commission considered there could be separate markets for the various forms of 'waste treatment alternatives', such that (for instance) other forms mentioned (at paragraph 21), might also be separate product markets, namely:

    (1) Biological treatment
    (2) Thermal treatment (including EFW); and
    (3) Hybrid treatments (mechanical/biological).

26. That decision was taken just as the waste hierarchy (ie the Directive obligations) was in the course of being implemented nationally. It is therefore unsurprising that there was no explicit reference to it, and so (for instance) 'recycling' is included within rather than separated from the other methods of waste treatment listed ('other recovery' is the waste hierarchy terminology).

27. The Commission's recent Guidelines on State aid for environmental protection and energy 2014-2020 refer to the need to target any State aid so as not to jeopardise the waste hierarchy (specifically at paragraph 118 for instance). And the distinction between recycling on the one hand and 'other recovery' on the other is now used uniformly in not only DEFRA documents, but also in the waste strategies of waste disposal authorities (including GCC's own strategy).

GCC's own approach indicates narrow product market(s) with a county-wide geographic scope

28. The precise relevant market indicated from competition authority decisions is, it is submitted, supported by GCC's own approach in assessing the market and in procuring waste disposal services (as the ultimately responsible body for waste disposal). It uses narrow product markets along the lines of the waste hierarchy, and on a county-wide level.

29. For instance, in the GCC waste core strategy[36] it can be seen that it assesses the needs of Gloucestershire in isolation, and by reference to the waste hierarchy. This document, which preceded (by a few months) the award of the Contract, also reflects that it distinguishes disposal from 'other recovery' methods (and both of those are distinguished from recycling). In terms of residual waste, for example, the Executive Summary puts the issue as follows (at E.18):

[36] http://www.gloucestershire.gov.uk/media/14056/adopted_wcs_211112-53886.pdf

> "Currently there is no residual waste recovery capacity in place for municipal waste. Although the WCS will run for 15 years from adoption (to 2027), the WDA is looking to procure capacity from 2015 for a period of 25 years. The WDA currently estimate that provision needs to be made for between 112,000 – 170,000 tpa by 2040 of residual municipal waste (waste that cannot reasonably be recycled or composted). This tonnage is likely to require either one large strategic site of about 5 hectares or 2-3 smaller sites of about 2 hectares each. The WCS will only make provision for a maximum of 145,000 for the recovery of MSW during the WCS period. "

This 'issue' is referred to later in the document too:

> "2.53 Importantly there are no recovery facilities in Gloucestershire dealing with residual MSW and C&I waste. Whilst planning permission for a small-scale gasification plant at Moreton Valence has been granted it is not currently operational. It is due to this lack of facilities that most of Gloucestershire's waste is currently sent to landfill (see below). New recovery facilities for residual waste are therefore required within the plan period. "

30. In short, here one has the expressed view of the 'customer' as to both the product and geographic market. This approach is then, naturally reflected in its approach to the procurement that led to the Contract. The defined need related to treatment of residual waste – not recycling, not disposal - (in which category of options it includes EfW, MBT and related processes) in Gloucestershire[37].

31. As the terminology can be confusing, it is here helpful to refer to Defra's definition of 'residual waste' (domestic waste not going to landfill – the core type of waste treated under the Contract) which notes that what may currently be uneconomic to recycle could be economic tomorrow:

> "**Residual waste**
>
> Residual waste is mixed waste that cannot be usefully reused or recycled. It may contain materials that could theoretically be recycled, if they were perfectly separated and clean, but these materials are currently too contaminated for recycling to be economically or practically feasible. It may also be that there is

[37] Despite at various points being invited to consider facilities in neighbouring counties, GCC focussed on in-County facilities entirely, citing (in the planning dispute for instance) the need to take into account public statement of ministers of the need to treat waste at a local level.

currently no market for the material or it is uneconomic to take to market. An alternative way of describing residual waste is 'mixed waste which **at that point in time** would otherwise go to landfill'.

32. In short, the definition used by Defra *accommodates* the fact that the amount of waste which may be recycled (ie. dealt with higher up the waste hierarchy – but requiring different methods/technology and so in a separate economic market from both Demand and Supply side perspectives) will likely change with technological advances over time. As DEFRA says in the same paper:

> "At the more local level the risk that energy from waste can compete with, not complement, recycling does exist. However, it is an avoidable risk if contracts, plants and processes are flexible enough to adapt to changes in waste arisings and composition. Waste infrastructure has a long lifetime and care needs to be taken at the start to ensure systems can adapt to potential long term change and drive waste up the hierarchy, not constrain it."

33. The reference to EfW 'competing with' rather than complementing recycling is, it is submitted, not intended to infer a single relevant market (ie under a competition/economic analysis and which would encompass two levels of the waste hierarchy) but instead that the risk highlighted is (as is apparent from the referred need to accommodate change) that once EfW is 'chosen'/operational, it risks preventing the very technological advances that might otherwise have led to greater ability to recycle. So the description of the two products as 'complementary' is accurate.

34. For the purposes of this preliminary complaint, the following putative market(s) are therefore proposed:

    (1) The Primary Relevant Market: the market for treatment of 'residual waste' in Gloucestershire (in respect of which the Contract envisages a single *exclusive* supplier using EfW, foreclosing that market from competitors);

(2) A secondary (complementary) market which is distorted by the Contract: the market for recycling of waste in Gloucestershire (a market not expressly subject to the Contract, but which is directly affected: in choosing a 25 year exclusive treatment technology – EfW – for residual waste, there is foreclosure of technologies which would divert waste to recycling).

35. We would be happy to explore the issue of market definition further, noting only that for the purposes of this preliminary complaint, all indications are that there are narrow markets in which UBB will be have a very high share (and other markets – recycling for instance – that are also affected by the contract). Clearly, any assessment of dominance will require assessment beyond market share, but on the putative definitions above, UBB would have close to 100% of the market and there appears nothing (for instance easy entry) to counteract this. Nor (to anticipate another issue) is this a 'bidding market' in which bids are sufficiently regular (or meet other relevant criteria[38]) such as to 'negate' dominance/market power.

V. Case Prioritisation issues

36. This section provides brief commentson case prioritisation issues as relevant to this matter. The main headings in the CMA's published criteria are used as a structure, and other statements made by both the CMA and other relevant bodies (e.g. the NAO) have been used to inform our comments and are on occasion referred to.

Impact/effect on consumer welfare

37. This contract has a direct adverse impact in both financial and environmental terms on the residents of Gloucestershire for over 25 years[39] (as the largest contract ever entered

[38] Klemperer's paper for the CC on bidding markets expresses a justified skepticism in respect of arguments that it is sufficient to simply point to the existence of a tender process.

[39] The Contract is for 25 years supply once operational (not before 2019); but the competition effects such as foreclosure of cleaner/better alternatives are present; they may indeed be said to have started with Contract signature in early 2013, to have continued through the proposal in 2015 to terminate the Contract (which at that point, due to foreseeable delay, had to be renegotiated in part, resulting in a substantially

into), but it is also reflective of developments across the United Kingdom (*judicial notice* was indeed taken of the 'controversial' nature of PFI arrangements on inter alia value for money terms by the Tribunal). The impact of foreclosing technologies higher up the waste hierarchy is also both local and potentially national.

38. A competition investigation has the potential to have a positive impact on the UK waste disposal sector (for both public and private parties) as a precedent – clearly these are key markets which are fundamental to the UK economy (various metrics may be used to assess the overall scale of the sector, and reference may be made to Defra's 2016 Digest of Waste and Resource Statistics[40]). It is notable that (for instance) household waste alone in the UK is assessed at c.27 million tonnes per annum. A precedent which made clear the limits of exclusivity arrangements, and the illegality of punitive termination fees in the event of a change in circumstances will clear the way for the dynamic development of the market and technologies envisaged (and publicly so by the OFT, the EU Commission, DEFRA and the PAC) in waste policy.

Strategic Significance

39. This section deals with issues close to those involving consumer welfare.

40. At a general level, we note the excellent progress made by the CMA in dealing with the previous backlog of cases, but also that in 2016 the NAO exhorted the CMA to increase its pipeline of cases, and statements by CMA officials as to its intention to do the same. We would suggest that this CA98 case is worthy of proper consideration (this may be by initial informal engagement with the Complainant and the parties to the Contract, followed by a decision as to formal investigation).

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higher up front capital contribution), and the full effects of the Contract have only recently become clearer to affected parties (constituents, competitors, District Councils etc) since recent disclosure of some of the (previously redacted) key terms of the Contract.

[40] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/567502/Digest_waste_resource_2016_rev4.pdf

41. Importantly, this complaint concerns a market in which the legal and policy direction aims to improve how waste is treated (notably, moving up the waste hierarchy). The CMA is not (of course) asked to opine on/decide whether EfW was the 'right' technology for Gloucestershire, but it is asked to make clear that a dominant undertaking cannot lawfully foreclose the market(s) as the Contract would do if allowed to stand. Competition can then play out effectively. This is particularly important in a market which is undergoing rapid technological change (the types of technology already available are significant, and whilst not part of this preliminary reasoned complaint we would be happy to provide details/ a technical briefing to CMA staff on this).

42. A competition law precedent against foreclosure as achieved by the UBB contract would be an important one in this sector. For the existing market/legal dynamics are at odds with both the legal waste hierarchy and the policy intention. The below is framed in terms of the relevant market in this case, though it will apply more broadly (in particular in *any* sector with important and rapid technological innovation):

    (1) The waste hierarchy (necessarily) is not absolute, but limited by reference to what is 'economically feasible' (necessarily, at the time of assessment). This creates a tension in a market with recognised fast-paced technological change.

    (2) In particular, as Defra notes, infrastructure will typically have a long lifetime (EfW - due to high Capex - more than any other technologies. There is obviously an incentive on the owners/operators (and financiers) of such infrastructure (again, in particular incinerator-based technologies) to seek long term contracts (this does not however justify *exclusive* contracts).

    (3) Under the public procurement rules, the tests upon which a contract must be awarded, whatever the process chosen, is *either* lowest price *or* most economically advantageous tender. In order to be safe from legal challenge, these are applied/assessed as at the date of contract award/ down-selection. The procurement rules really *cannot readily accommodate* technological innovation which is envisaged as likely but is not part of the bids put to it; in

particular this is so if the innovation will generally be specific to choice of infrastructure. Awards *must* be made based on assessments made at the 'snapshot in time' of contract award (or, in the event of the Competitive Dialogue procedure as in this case at an earlier stage of down-selection).

(4) Where (as in waste disposal) the procurement determines a certain *infrastructure type* that has an impact on opportunities to innovate (an incinerator will not be able to deploy, for instance, regular improvements in biological waste treatment – these may be readily deployed by an MBT[41] plant), and an exclusive supply arrangement involving a dominant supplier is particularly problematic.

43. In short, a precedent in this case (be it infringement decision or ideally – as quicker and sufficient – binding commitments) would be of enormous value and strategic significance.

44. As regards the reference to private enforcement in the CMA prioritisation criteria (at 3.5), this is presumably *primarily* aimed at increasing private actions for damages ('piggy back' claims), or resolution of commercial disputes *between parties to an agreement*. In most other cases, the information gathering powers of the CMA and its expertise in (for instance) defining the relevant market (crucial in the absence of a very recent authority in the precise market at issue) suggest that a CMA investigation is both preferable and in the right circumstances an effective use of public resources.

45. By way of further comment: CR4C is a Community Benefit Society with limited resources. It is true that various interested parties have in fact pursued legal challenges (a planning challenge which was successful but overturned on appeal, and vigorously pursuing information disclosure resulting in the recent Tribunal Decision). But in these cases there was no other (let alone better – ie likely to be more effective) option. It is submitted that

[41] Mechanical Biological Treatment. In principle this leads to increased recycling compared to (for instance) EfW and so leads to treatment higher up the hierarchy.

a potential competitor (and in particular a not-for-profit organisation) that is foreclosed from the market (not simply forced out having at least made some profit which could be deployed in a legal case) cannot be expected by the CMA to engage in up-front costs of litigation in order to establish a precedent for the general good of consumers. Whilst greater disclosure may ultimately be obtained, CR4C will not have the information gathering powers available to the CMA before commencing a claim (for instance, the basis for £100m termination costs – which even the Tribunal could not fathom and had to accept evidence put to it (part of which reasoning remains redacted and so unavailable to the Complainant).

46. A private court action would be a last resort and while it cannot be excluded, we submit this is not a case where the CMA could properly say that private enforcement is a better alternative to taking action itself (with R4Cs full and ongoing support).

Risks and resources

47. There are good reasons to think that there is a likelihood of a successful outcome should the CMA commence an investigation. Whilst the contract and context is complex, the legal and economic issues are not controversial.

48. This is of course for the CMA to decide, but in terms of resources we would only remark that there may also be a range of *successful* outcomes, some of which would require lower resources (and time) than an investigation taken to ultimate conclusion. It will certainly be in the interests of both UBB and GCC to conclude the matter expeditiously. If (as one might anticipate) their own legal and economic analysis shows (to put it at a low level) a "significant legal risk", then Commitments (to terminate the contract before engaging in what will ultimately be large sunk costs[42]) are likely. And the CMA analysis and the terms of such commitments will be a helpful precedent.

[42] Costs which as of now can only be relatively low compared to the situation on completion of construction (a process taking c.3 years).

49. If, instead, UBB and GCC (assuming they remain aligned in their views) seek to contest what might be said to be a relatively 'straightforward'/'classic' competition law analysis and take all the risks involved in doing so, then the complainant and a large number of interested parties would be able to assist the CMA on an ongoing basis.

VI. The Complainant

50. The complainant is Community R4C ('CR4C'). CR4C is a community-led initiative to provide economic, social and environmental benefits for Gloucestershire by treating the County's waste as a valuable resource rather than burning or burying it. CR4C plans to support the development of an R4C advanced mechanical biological heat treatment (MBHT) plant – which uses magnets, air currents, water and infra-red light – to sort more than 90 per cent of processed waste from municipal black bin bags into recyclates or waste that can be converted into bio-based fuel pellets[43].

51. CR4C is supported by a wide range of individuals and other organisations. It is a Community Benefit Society (ie not for profit) organisation.

52. In terms of the market: as will be clear from the description of MBHT above, CR4C believes that – to adopt Defra's definition of 'residual waste' set out above – the amount of waste which can be 'economically recycled' is much higher than GCC using the EfW plant under the Contract will achieve. It proposes a solution that would be able to meet the needs in Gloucestershire to treat residual waste, alone or with other policies and technologies.

53. The R4C envisaged plant operates at the interface in the waste hierarchy between "other treatment" (which would include EfW – assuming it meets energy generation targets, failing which it – like many of the 'EfW' plants operating in the UK currently, it

[43] This is only possible if the Contract does not foreclose the market. For the avoidance of doubt, CR4C is not a 'failed bidder' in the procurement process – it had not been set up at that time. Further, it is an example of just how quickly technology affects this sector that it is now confident it can offer a solution not only better than the Contract solution, but more advanced than those advanced in the tender process.

will be treated as waste 'disposal' – at the lowest rung of the waste hierarchy) and "recycling" (which it aims to hugely increase via MBHT sorting of waste). CR4C firmly supports the approach to market definition (see below) which distinguishes the two. The Contract would effectively put the County in a state of stasis for over 25 years – and in their view this may be expressed *either* as 'foreclosing the market for treatment of residual waste' or (equally validly) 'foreclosing, by ensuring exclusivity of EfW treatment, development of the recycling market'.

VII Concluding remarks

54. This preliminary complaint focuses on what we see as the key issues for initial consideration by the CMA. It is hoped that this complaint will be sufficient to enable further engagement.

55. This Complaint is supplied at this stage with only one further document – the decision of the Tribunal on information disclosure which contains helpful background information and information on key aspects of the contract. We remain at your disposal to provide further information, analysis (legal or factual) or documentation; our suggestion would nonetheless be to have an initial meeting to discuss this matter and agree any next steps on our part.

Duncan Sinclair, Barrister.
21 March 2017.
(Instructed by the Environmental Law Foundation on behalf of the complainant)

Annex 1

The concept of an 'undertaking'

1. A detailed analysis of the concept of an 'undertaking' was set out by the OFT in its guidance on the application of competition law to public bodies (OFT 1389 referred to hereafter as the 'guidance').

2. The role of the guidance, as described in the accompanying Q&As, indicates considerations that are particularly pertinent given the increased involvement of private companies in the provision of services:

> *"Opening up markets for public services forms an important element of the Government's core policy agenda around sustainable economic growth, localism and the 'Big Society'. Such government policies point to the increased involvement of private and voluntary sector companies in 'public service' markets, and an increased focus on ensuring that public services are delivered efficiently and provide value for money for users and taxpayers."*

3. In our submission the private sector/waste disposal authority interface falls squarely within the opening up of public services (the Contract provides, we note, for the possibility of services to the commercial market alongside obligations to GCC). However, as we believe is apparent from the OFT's and other analyses of the case law at the domestic level and the Court of Justice, the area faces some legal uncertainty – a tension, or 'dilemma' (to use the language of AG Maduro in *FENIN*[44]) – which is deserving of further attention by the CMA by way of consideration of individual facts in order to achieve greater clarity (while this may only be necessary under a Chapter I

[44] See paragraph 27 of the Opinion.

analysis, we would flag it as a further point going to potential precedent value in this case).

4. There are a number of issues arising when considering the definition of 'undertaking' by reference to *FENIN*. These are not limited to but include the following: (i) the court in that case declined to consider key arguments on appeal for procedural reasons[45] (ii) there are discrepancies between that and other decisions of the same court, as well as between the decision of the CCAT in *BetterCare* on the one hand and *FENIN* on the other[46] and (iii) it is recognised – as indeed the OFT does in its general guidance on public bodies, and as AG Maduro did in *FENIN* - that each case is highly fact-specific.

5. As regards the first issue – this was the failure to consider what has been described as the 'thorny issue' of whether the analysis would differ if there was *any* provision of services for payment by the healthcare authority. We agree with the authors of *Faull & Nikpay* (2nd Ed.) that it is more likely than not that it would (see the analysis at paragraph 3.33 and the accompanying footnotes in particular footnote 36). This would be consistent with the OFT's position at paragraph 2.21 that the case law has not given a clear definition of what will be 'social', and activity must be purely social (so, implicitly, any element of commerciality may suffice). So the 'gainshare' provisions in the event of supply to commercial parties in the Contract would in principle suffice to treat the GCC as an undertaking.

6. If our submission is accepted, ie that actual provision (even on a limited basis) of a service for payment will tend to suggest that the activity is not *purely* social, then the following further question arises: is it *only* in the instances of actual payment that there will be an activity of an 'undertaking' (see *Faull & Nikpay*, above). It is submitted that this cannot be the test for identifying the activity in respect of which a body is an undertaking, both for reasons of legal certainty, and because this analysis does not

[45] This led to the failure to deal with what has been described as the "thorny issue" of whether if there was *any* provision of services for payment by the healthcare authority that would change the analysis Faull & Nikpay.

[46] We refer to the OFT's Guidance on public bodies and Competition Law OFT 1389, footnote 34 for an example of the OFT's recognition of this conflict.

accurately identify the scope of commercial (or potentially commercial) activity: once an undertaking is participating in a market, it is an 'undertaking' in respect of that market (it is functioning in such market) regardless of whether it provides some (even the vast majority) of services or goods for free. Put another way, the position of the body in question must be decided on a functional (i.e. market-wide or "economic activity") basis rather than on the basis of individual transactions (a granular transactional basis).

7. In our submission the case law enables this analysis to be extended, on a case by case basis, from the actual carrying out of commercial activity (by reference to whether there is payment, however minor), to include scenarios in which the activity is an 'economic' one – and this may include scenarios where it may *potentially* be carried out commercially, but on the facts is not.

8. In Case C-41/90 *Höfner and Esler v Macroton* the Court of Justice was asked whether the German law prohibiting private recruitment agencies and giving a monopoly in employment recruitment to a public social security agency (the Bundesanstalt für Arbeit) contravened certain provisions of EU law. The Court first needed to determine whether the Bundesanstalt was acting as an undertaking when it offered *employment procurement services*. The Court concluded that it was: employment procurement is an economic activity. This was so even though it was not carried out on that basis on the facts before the court.

9. The judgment in *Ambulanz Glöckner*[47] offers a further illustration of the use of the criterion of a potential for commercial activity by the Court: health organisations providing services on the market for emergency and ambulance services were held to be undertakings, because 'such activities have not always been, and are not necessarily, carried on by such organisations or by public authorities'.

10. The second and third points may be considered together: in our submission the difference in treatment of particular situations by the courts arises for the very reason

[47] Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

that each case is fact-specific. The limits of the precedent value of any particular case is indeed referred to in the OFT's guidance (see paragraph 2.6 for example).

11. The above analysis highlights that there is ample support in Court of Justice case law for analysis, on a case by case basis, taking into account the nature of the market under consideration. The judgment in *BetterCare* is still cited in leading texts after *FENIN*, as is AG Maduro's reference in his Opinion in *FENIN* to the *BetterCare* decision as "particularly noteworthy" (see for example Bellamy & Child, 6th Ed at 2.009, which cites *BetterCare* and the AG Opinion in *FENIN* in relation to the point that the economic/state activity distinction "is not always readily apparent").

12. The inference, which we submit is correct, is that the judgment in *BetterCare* has not been entirely supplanted by *FENIN*. Indeed, this is necessarily the case once it is accepted that the issue of whether a body is engaging in activities as an undertaking is highly fact specific: while there may be some instances where an activity is intrinsically commercial (this, in essence, is the approach in *Ambulanz Glöckner* and other cases) such that one Member State cannot avoid the application of competition law in respect of the activity by providing for a legal monopoly.

13. In light of the above, if the CMA accepts the premises of our analysis, there is scope for (and it may be considered a strategic need for) clarificatory precedent – be it by way of final decision or otherwise – regarding the CMA's approach to the issue in the context of waste disposal.

14. It is submitted that the approach taken by the CCAT in *BetterCare* best supports the aim of the competition rules, as described in the Opinion of Advocate General Jacobs in *Cisal*: 'the underlying question is whether that entity is in a position to generate the effects which the competition rules seek to prevent'[48]. The general purpose of the rules – to protect the 'fabric' of competition as a process – would tend to suggest that a WDA

[48] Case C-218/00 *Cisal* [2002] ECR I-691, at paragraph 71.

ought to be caught by the competition rules. It is perhaps only of historical interest that the OFT recognized this in a press release just after the *BetterCare* judgment (and hence before *FENIN*):

> "with more public services being provided by the market, the disciplines of the market, including competition law, should apply. The OFT's role is to make markets work well for consumers and this includes markets that involve public services."