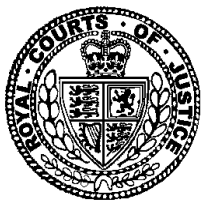

Neutral Citation Number: [2022] EWCA Civ 66

Case No: A3/2021/0249

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES, COMPETITION LIST (ChD)

His Honour Judge Keyser QC

[2020] EWHC 3200 (Ch)
Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 1 February 2022

Before :

LORD JUSTICE COULSON

LORD JUSTICE ARNOLD

and

LORD JUSTICE EDIS

- -

Between :

THE DURHAM COMPANY LIMITED — **Claiman** / **Appella**

- and -

DURHAM COUNTY COUNCIL — **Defenda** / **Respond**

- -

- -

Michael Bowsher QC and Ligia Osepciu (instructed by **Tilly Bailey & Irvine LLP**) for the **Appellant**

Aidan Robertson QC (instructed by **DWF Law LLP**) for the **Respondent**

Hearing date : 18 January 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30 on 1 February 2020 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Lord Justice Arnold:

Introduction

1.
This is an appeal by The Durham Co Ltd trading as Max Recycle ("TDC") against an order made by HHJ Keyser QC sitting as a Judge of the High Court on 25 November 2020 granting Durham County Council ("the Council") summary judgment dismissing TDC's claim for breach of Article 108(3) of the Treaty on the Functioning of the European Union ("TFEU") for the reasons given in the judge's judgment of the same date [2020] EWHC 3200 (Ch). TDC originally claimed (i) a declaration, (ii) an injunction and (iii) damages. There is no challenge by TDC to the judge's dismissal of the claim for an injunction. Since the proceedings were commenced on 22 January 2020, it is common ground that the claim for damages is unaffected by Brexit, but as I shall explain this is not true of the claim for a declaration if the claim for damages is dismissed.

Factual background

2.
TDC carries on business in the provision of commercial waste services in Northern England and Scotland, and in particular within County Durham.

3.
The Council is the waste collection authority for County Durham for the purposes of the Environmental Protection Act 1990 ("the EPA"). Section 45 of the EPA provides, so far as material, as follows:

"(1) It shall be the duty of each waste collection authority—

(a) to arrange for the collection of household waste in its area except waste—

(i) which is situated at a place which in the opinion of the authority is so isolated or inaccessible that the cost of collecting it would be unreasonably high, and

(ii) as to which the authority is satisfied that adequate arrangements for its disposal have been or can reasonably be expected to be made by a person who controls the waste;

(b) if requested by the occupier of premises in its area to collect any commercial waste from the premises, to arrange for the collection of the waste; …

…

(3) No charge shall be made for the collection of household waste except in cases prescribed in regulations made by the Secretary of State; and in any of those cases—

(a) the duty to arrange for the collection of the waste shall not arise until a person who controls the waste requests the authority to collect it; and

(b) the authority may recover a reasonable charge for the collection of the waste from the person who made the request.

(4) A person at whose request waste other than household waste is collected under this section shall be liable to pay a reasonable charge for the collection and disposal of the waste to the authority which

arranged for its collection; and it shall be the duty of that authority to recover the charge unless in the case of a charge in respect of commercial waste the authority considers it inappropriate to do so."

4.
At all times relevant to this case, the Council discharged its duty in respect of household waste by providing household waste collection services directly rather than by outsourcing them to a third party. It also provided some commercial waste collection services directly to premises in County Durham, specifically the collection of so-called "trade waste" that is disposed of in wheelie bins. The Council did not charge for its household waste collection services, except in the limited cases where a charge is permitted. It did charge for its commercial waste collection services.

5.
The Council had a single fleet of 86 waste collection vehicles and a workforce of 275 employees, which it says was the number of vehicles and staff required to provide its household waste collection services. The costs of providing those services were primarily met from the Council's general revenues, and in particular from the revenues raised by Council Tax.

6.
For the purpose of providing its commercial waste collection services, the Council used the same vehicles, personnel and other resources that were used for the provision of household waste collection services. The Council disposed of household and commercial waste together, using the same long-term disposal contracts. The Council says that, prior to the 2020/21 financial year, it did not keep separate accounts of its costs and revenues for providing household waste collection services on the one hand and commercial waste collection services on the other hand.

7.
TDC complains that the Council's charges for commercial waste collection services of a given nature, frequency and volume were lower than TDC's charges for commercial waste collection services of a similar nature, frequency and volume. It alleges that, as a result, over the course of the six years preceding the issue of the claim form it lost significant business from customers who purchased commercial waste collection services from the Council instead of from TDC.

8.
TDC contends that the Council was able to charge lower prices for its commercial waste collection services than TDC because the Council used the same infrastructure for providing those services as it did for providing its household waste collection services and thereby cross-subsidised the provision of its commercial waste collection services out of its general revenues, and in particular its revenues from Council Tax. TDC further contends that this amounted to the provision of State aid contrary to EU law.

9.
TDC accepts, however, that the Council also benefitted from a tax advantage that is attractive to some customers, which is that the Council's commercial waste collection services are exempt from VAT whereas TDC's services are subject to VAT. Prior to the commencement of these proceedings TDC brought a claim for judicial review of the lawfulness of the VAT treatment applied by Her Majesty's Revenue and Customs to local authorities carrying out commercial waste collection and disposal services. TDC contended that such services provided by local authorities were properly subject to VAT. On 19 September 2016 Warren J sitting in the Upper Tribunal (Tax and Chancery Chamber) ruled that, where a local authority made supplies of trade waste collection services to business customers in its area and did so in the performance of its duties under section 45(1)(b) of the EPA, the supplies

were “activities in which it is engaged as a public authority” within the meaning of section 41A(a) of the Value Added Tax Act 1994 and Article 13(1) of the Principal VAT Directive, and therefore were not subject to VAT: see R (on the application of The Durham Co Ltd) v Commissioners for HM Revenue and Customs[2016] UKUT 417 (TCC), [2017] STC 264. On 25 April 2018 Nugee J refused TDC permission to appeal against Warren J’s decision: [2018] UKUT 188 (TCC), [2018] BTC 517.

TDC’s complaint to the European Commission

10.
On 30 July 2018 TDC made a complaint to the European Commission alleging a breach of the State aid rules by the Council. On 24 November 2020 the Directorate General for Competition (“DG Comp”) sent TDC a letter setting out its preliminary assessment that “examination of the facts at this juncture has not led to the conclusion or doubts that there would have been cross-subsidisation between the [Council’s] household waste collection service and the commercial waste collection service”. This letter was received by TDC on 25 November 2020, but was not before the judge when he made the order under appeal, although he was informed of it when making consequential orders on 27 November 2020.

11.
TDC replied to DG Comp’s letter on 23 December 2021 making further submissions, but on 16 June 2021 DG Comp sent a further letter stating that its preliminary view was that “the available information does not provide sufficient grounds to show the existence of unlawful aid”. TDC replied to the Commission’s letter on 15 July 2021 making yet further submissions, but we were informed that there had been no further communication from DG Comp by the time of the hearing before us.

12.
As matters stand, therefore, DG Comp has twice expressed a preliminary view that there has been no breach; but it remains a theoretical possibility that the Commission could open proceedings for infringement against the United Kingdom.

The law as to State aid

13.
Articles 107 and 108 TFEU provide, so far as relevant, as follows:

“**Article 107**

(1) Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

…

Article 108

…

(2) If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct. On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known. If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

(3) The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

…"

14.
It is common ground that, in order for a case to fall within the scope of Article 107(1), four conditions must be satisfied: (1) there must be aid, in the sense of an economic advantage, granted by the State or through State resources; (2) the measure must favour certain undertakings over others in a comparable legal and factual situation (a "selective advantage" must be conferred); (3) that advantage must not be justified by the nature or general scheme (or structure) of the system; and (4) it must be liable to distort competition and to affect trade between Member States.

15.
So far as the second of these conditions is concerned, Bacon, European Union Law of State Aid (3rd ed, 2017) states (footnotes omitted except for footnote 493):

"2.113 **Favouring certain undertakings or sectors**. In order to constitute aid, a State measure must favour 'certain undertakings or the production of certain goods'. This requirement is known as the selectivity condition. It is one of the defining features of State aid, and is distinct from the requirement to demonstrate and economic advantage. Where aid is granted to an individual undertaking, it can usually be presumed to be selective. But in the case of measures that apply more broadly to multiple undertakings, the selectivity condition serves to distinguish those schemes that are regarded as State aid from measures whose differential impact is not caught by Article 107(1), in particular general measures of tax or economic policy.

2.114 **Problem areas**. Despite the number of cases which have addressed the selectivity condition, it remains the most difficult of the State aid conditions to apply in practice, and the assessment of selectivity has thus been described as 'a difficult exercise with an uncertain outcome'. The basic problem is that not every measure that can be described as producing an advantage for one or more groups of undertakings over others is regarded as selective within the meaning of Article 107(1). Rather, the case-law of the Court has distinguished two particular situations where a measure with differential effects may nevertheless escape classification as aid on the basis of a selectivity analysis: the favoured undertakings may not be comparable, properly speaking, to the non-favoured group; and the different treatment may be justified by the nature and scheme of the relevant system. To address

those issues a three stage analysis of selectivity has emerged for complex cases (particularly tax cases). First, the relevant reference system must be identified. Secondly, it must be established whether the measure is prima facie selective, in light of that reference system. The third question is whether the measure is justified by the nature of the scheme. … It should be emphasised, however, that it is not necessary to address all three stages in every case: in most cases, the prima facie selectivity of the measure will be obvious without having to look at a reference framework; and the 'nature or scheme' issue will only arise to the extent that this is advanced as a justification by the relevant Member State.

2-115 **The relevant comparison**. A measure is prima facie selective if it produces advantages exclusively for certain undertakings or certain sectors of activity. As noted above, this will normally be the case where aid is granted to a single undertaking.[493] But in less obvious cases, where the measure might otherwise be characterised as a general measure, the Court applies a test of whether the measure favours some undertakings by comparison with others that are in a 'comparable legal and factual situation', in the light of the objective pursued by the measure in question. That in turn raises the question of how comparability is to be assessed. The Court's answer is that the analysis should start by identifying the relevant reference framework, or in other words the point of reference for the comparison. …"

Footnote 493 states:

"Although some cases of measures of individual application may require a more complex assessment by reference to a relevant reference framework, such as individual tax rulings …"

16.
In Credit Suisse (Securities) Ltd v Commissioners for Her Majesty's Revenue and Customers [2019] EWHC 1922 (Ch), [2019] 5 CMLR 17 Falk J reviewed two decisions of the Grand Chamber of the Court of Justice of the European Union and concluded at [30]:

"As can be seen from this, there are a number of elements to selectivity. In particular:

a) it must be determined whether the measure favours certain undertakings (or sectors) over others;

b) those undertakings must be in a 'comparable factual and legal situation';

c) whilst a tax advantage can constitute State aid, it will not do so if it results from a general measure applicable without distinction to all economic operators;

d) the starting point is to identify the ordinary or 'normal' tax system, and then determine whether the tax measure is a derogation from that system;

e) the question whether undertakings are in a comparable factual and legal situation must be determined in the light of the objective pursued by the ordinary tax system; and

f) even if a measure is a priori selective, there will be no State aid where the Member State shows that the differentiation in treatment flows from the 'nature or general structure' of the system."

17.
It is also common ground that the final sentence of Article 108(3) is directly effective under EU law and generates an obligation on a Member State which may be relied upon by a private party before the courts of that Member State.

The law as to State liability for breach of EU law

18.
In Joined Cases C-6/90 and C-9/90 Francovich v Italian Republic [1991] ECR I-5357 the CJEU held that in certain circumstances Member States were liable to compensate persons who had suffered damage as a result of failures by States to comply with EU law. The conditions for State liability were refined in Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v Federal Republic of Germany [1996] ECR I-1029 at [51]:

" … Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties."

19.
In R (on the application of Negassi) v Secretary of State for the Home Department[2013] EWCA Civ 151, [2013] 2 CMLR 45 Maurice Kay LJ summarised at [14] the guidance as to the assessment of whether a breach is sufficiently serious given by Lord Clyde in R v Secretary of State for Transport, ex parte Factortame Ltd (No5) [2000] 1 AC 524 at 554-556:

"He identified the following as potential factors: (1) the importance of the principle which has been breached; (2) the clarity and precision of the rule breached; (3) the degree of excusability of an error of law; (4) the existence of any relevant judgment on the point; (5) whether the infringer was acting intentionally or involuntarily or whether there was a deliberate intention to infringe as opposed to an inadvertent breach; (6) the behaviour of the infringer after it has become evident that an infringement has occurred; (7) the persons affected by the breach or whether there has been a complete failure to take account of the specific situation of a defined economic group; (8) the position taken by one of the Community institutions in the matter. He added (at page 554B-D) that the application of the 'sufficiently serious' test 'comes eventually to be a matter of fact and circumstance'.

'No single factor is necessarily decisive. But one factor by itself might, particularly where there was little or nothing to put in the scales on the other side, be sufficient to justify a conclusion of liability.'"

TDC's claim

20.
TDC's claim as originally pleaded in Particulars of Claim dated 11 March 2020 was helpfully summarised by the judge at [12] as follows:

"1) The Council's provision of household waste collection services (its 'Household Waste Business') is and has been funded largely or entirely through council tax revenue.

2) The Council's Household Waste Business has been subsidising its provision of commercial waste collection services (its 'Commercial Waste Business'), in particular by giving it access to assets and personnel at a cost less than the market price. As a result, its Commercial Waste Business has gained a commercial advantage over TDC and other private companies providing similar services, because it has been able to set its charges at lower levels by reason of not being required to bear the market costs of providing the commercial waste collection services.

3) The provision of this subsidy by the Council constitutes State aid (the Council being for these purposes an emanation of the State) and is prohibited by Article 107(1) of TFEU unless it is notified to the European Commission under Article 108(3) of TFEU and is declared by the European Commission

to be compatible with the internal market: ‘The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision’ (Article 108(3)).

4) As the Council has not obtained a decision under Article 108(3) the State aid that it has provided to its Commercial Waste Business is unlawful in breach of that provision.

5) The prohibition in Article 107(1) and Article 108(3) is directly effective against local authorities, including the Council.

6) By reason of the Council's breach of the final sentence of Article 108(3), TDC has suffered and will continue to suffer loss and damage.

7) The principal relief sought in the prayer is: (a) declarations to the effect that the Council has unlawfully provided State aid to its Commercial Waste Business; (b) a ‘permanent mandatory injunction requiring the Defendant to set its price for commercial waste collection services so as to cover the costs of providing those services on a standalone basis’; (c) damages, which according to the claim form are expected to exceed £500,000.”

21.
In its Defence served on 15 May 2020 the Council averred that a breach of Article 108(3) was not actionable per se, but only if the conditions for State liability were met, including that the breach was sufficiently serious; and pointed out that TDC had neither alleged that the breach was sufficiently serious nor pleaded any facts which could be relied upon in support of such an allegation. On 20 May 2020 the Council issued an application to strike out TDC’s claim alternatively for summary judgment dismissing it.

22.
In its Reply served on 10 November 2020 TDC averred that breach of Article 108(3) was actionable as breach of statutory duty and in the alternative pleaded that the breach was sufficiently serious. On 16 November 2020 TDC issued an application for permission to amend its Particulars of Claim to introduce essentially the same allegations which came before the judge at the same time as the Council’s application for summary judgment on 18 November 2020. The proposed amendments include the insertion of new paragraph 28C, which pleads TDC’s case on sufficient seriousness in the following terms:

“Further or in the alternative, in the event that the State liability conditions apply to the Claimant’s claim for damages by virtue of either English or EU law, it is averred that the Defendant’s breach of Article 108(3) TFEU is sufficiently serious for at least the following reasons:

a. Article 108(3) TFEU supports an important rule of EU law, namely, the prohibition on State aid;

b. Article 108(3) TFEU is a clear and precise rule of EU law;

c. The Defendant’s breach of Article 108(3) TFEU has persisted long after (i) 31 July 2017, when the Claimant first alerted the Defendant to the presence of State aid by cross-subsidy in the conduct of its Commercial Waste Business, by letter from its Solicitors, Tilly Bailey & Irvine LLP, and (ii) 24 October 2018, when the Claimant drew the Defendant’s attention to the judgment of 4 May 2018 of the French-Speaking Court of First Instance of Brussels in case 2017/1957/A, holding that arrangements similar to those obtaining between the Defendant’s Household and Commercial Waste Businesses amounted to State aid for the purposes of Article 107(1) TFEU;

d. In light of (c) above, the Defendant's breach of Article 108(3) TFEU has been deliberate since at least 31 July 2017; alternatively, since at least 24 October 2018;

The Defendant has persisted in its breach of Article 108(3) in flagrant disregard for the detrimental economic impacts on the Claimant of the cross-subsidy of between the Defendant's Household Waste Business and its Commercial Waste Business on Claimant. The Defendant has been aware of such impacts since 21 December 2017."

23.
It is common ground that:

i)
The Council is an emanation of the State for the purposes of Article 107(1).

ii)
The Council acted as an "undertaking" in its provision of commercial waste collection services.

iii)
The arrangements by which the Council provided commercial waste collection services were put into effect without prior compliance with the procedure in Article 108(3) if the Council was required to comply with that procedure.

iv)
Therefore, if those arrangements involved the grant of State aid within Article 107(1), the Council was in breach of the requirement imposed by the final sentence of Article 108(3).

24.
The judge rejected TDC's argument that breach of Article 108(3) is actionable as breach of statutory duty, and there is no appeal by TDC against that part of his judgment.

The test for summary judgment

25.
There is no dispute as to the test for summary judgment. The judge cited the well-known summary of the applicable principles by Lewison J in Easyair Ltd v Opal Telecom Ltd[2009] EWHC 339 (Ch) at [15] approved by this Court in AC Ward & Sons Ltd v Catlin (Five) Ltd[2009] EWCA Civ 1098, [2010] Lloyd's Rep IR 301 at [24]. In short, summary judgment can only be granted where the claim has no real prospect of success bearing in mind not only the evidence on the summary judgment application but also the evidence that can reasonably be expected to be available at trial. Nor is there any dispute that the judge was correct to apply the same test to the allowability of TDC's amendment to the Particulars of Claim.

TDC's procedural objection

26.
Before the judge the Council contended that: (i) TDC had no real prospect of establishing that the matters complained of involved the grant of State aid contrary to Article 107(1) because the selectivity condition was not satisfied; alternatively (ii) TDC had no real prospect of success in its claim for damages because the breach of Article 108(3) complained of was not sufficiently serious; and in any event (iii) TDC had no real prospect of success in its claims for injunctive and declaratory relief.

27.
TDC raised a procedural objection to the Council's first contention on the ground that the Council had not given at least 14 days' notice of this contention as required by CPR rule 24.4(3)(b) read together with Practice Direction 24 paragraph 2(3), but had raised it for the first time in its skeleton argument exchanged on 16 November 2020. The Council's responses to this objection were that (i) it was only on 10 November 2020 that TDC had properly pleaded its case, and (ii) in any event its argument on selectivity was one of law which was properly raised in its skeleton argument. The judge could have ruled upon this dispute at an early stage of the hearing, but instead he reserved his decision until he delivered judgment on the substantive applications. Accordingly, he heard argument on the Council's first contention.

28.
In his judgment the judge held that the Council was indeed in breach of the requirement to give 14 days' notice of the contention. He went on at [24(4)]:

"The best argument in favour of permitting the Council to rely on the selectivity criterion argument at this application is that, despite his protests, [counsel for TDC] addressed it substantively in his oral submissions. However, in the exercise my discretion I shall not allow the Council to rely on this ground in support of its application. Counsel in [counsel for TDC]'s position is on the horns of a dilemma, because he will be understandably reluctant to assume that the judge will rule out the applicant's argument in limine. The fact that he therefore adopts a belt-and-braces approach ought not to count definitively against his primary submission. In the present case, there is substantial litigation in the context of a long-running dispute between the parties. Wherever the merits might lie, the selectivity criterion argument involves a difficult and disputed question of law that goes to the fundamental basis of the claim. To give notice of the point almost six months after the application was filed and only two days before the hearing, with the result that it was first addressed by TDC in a very short supplemental skeleton argument on the day before the hearing, is a substantial unfairness to TDC. There is no good reason why the Council could not have raised the point much earlier and I shall not permit it to do so now."

29.
He added at [25]:

"Despite my ruling, the argument that I heard on the selectivity criterion is not redundant. I shall have cause to refer to it in the context of the primary basis on which [Counsel for the Council] put the Council's application, that TDC has no real prospect of establishing a right to claim damages from the Council."

The judge's reasoning with respect to TDC's claim for damages

30.
In the light of his decision on TDC's procedural objection to the Council's first contention, the judge considered the Council's second contention on the assumption that the arrangements complained of by TDC fell within Article 107(1), and therefore TDC would establish the breach of Article 108(3) which it alleged. Having noted at [55] counsel for TDC's submission that great caution was needed given that the application was being heard before disclosure had been given and thus TDC's ability to advance a case on seriousness of the breach was limited by its lack of access to the internal workings and deliberations of the Council, he proceeded to consider the eight Negassi factors.

31.

So far as factor (1) was concerned, the judge held at [56] that the fact that the State aid rules were important and Member States had no discretion with respect to compliance was “a significant factor but it is not necessarily determinative of the question of seriousness”.

32.
The judge considered factors (2) to (5) together. He began by observing:

“57. There is no direct evidence to indicate that the Council either deliberately flouted the State aid rules or acted without regard to those rules, not caring whether its conduct infringed them. [Counsel for TDC] submitted that such an inference could be drawn from either or both of two things: first, the Council's persistence in the conduct complained of after TDC had expressly alleged breach of the State aid rules in correspondence; second, the clarity and precision of the State aid rules. I do not consider that these matters justify the inference that the breach of the State aid rules (assuming there to have been a breach) was anything other than unintentional. …

58. The important question concerns the ostensible merit, not the fact, of the TDC’s complaint. In one sense, the State aid rules are clear and easy to state. However, their application in differing contexts and circumstances can be far from plain and obvious. That is one reason why there is much litigation about them. It is also a reason why Article 108 provides a mechanism by which it can be determined whether aid offends against Article 107(1). There is no case-law of the CJEU or of the courts of England and Wales that establishes that arrangements such as those made by the Council constitute unlawful State aid. No Community institution has taken a position on the matter (cf. factor (8) in Negassi), and the Commission has not even stated a preliminary opinion since the matter was referred to it. The clarity and precision of the basic principle therefore has limited force in the present case.”

33.
The judge then turned to consider the strength of the Council’s argument that there was no breach of Article 107(1) because the selectivity condition was not satisfied. He explained his reason for undertaking this exercise even though he was not going to determine the point at [59]:

“If the argument is plainly weak, or even obviously wrong, a breach of the State aid rules by the Council may well be more likely to be considered inexcusable, perhaps even wilful, and thus to be sufficiently serious. On the other hand, if the argument is plausible and might be advanced reasonably and in good faith, a breach might be less likely to be considered serious. As Negassi shows, this is not a consideration that need await the final determination of whether the Council’s actions were lawful.”

34.
Having cited from Bacon and Credit Suisse, the judge recorded at [62]:

“The Council says that its factual and legal positions are not comparable to those of TDC and that any differential treatment is justified by the general nature and structure of the scheme in section 45 of EPA 1990, under which the Council operates. [Counsel for the Council] referred me to two decisions in this connection …”

35.
It is not necessary for the purposes of the appeal to refer to the first decision relied upon by the Council since it did not concern waste collection services. The second decision was Warren J’s judgment in R (TDC) v HMRC cited above. As the judge recorded at [64]:

“[Counsel for the Council] submitted that the fact that the Council and TDC are not in comparable legal and factual positions is shown by section 45 of EPA 1990 and by Warren J’s judgment …”

36.
Having considered Warren J's judgment in some detail, the judge reasoned as follows:

"66. [Counsel for TDC] submitted that Warren J's decision was irrelevant to the present case, because it concerned the question whether, in providing commercial waste collection, the Council is engaged in activities as a public authority, not the question whether it acts as an undertaking for the purpose of the State aid rules. Certainly, the decision is not directly on point and does not decide the issues arising in these proceedings. However, its relevance lies in its analysis of the particular legal regime under which local authorities provide commercial waste collection services and the distinction between the positions of local authorities and commercial undertakings.

67. [Counsel for TDC] submits that the Council has admitted in its defence that its operations constitute it an 'undertaking', and by reference to comments in Bacon he says that aid that confers advantage solely on a single undertaking will necessarily meet the selectivity criterion. The point may be arguable, but I think that the contrary is also arguable and that [counsel for TDC]'s case is overstated. … The important point made by the Council is that it does not provide its commercial waste collection services on a commercial basis but under a specific regime for environmental protection, which is directed to the public benefit not to the economic advantage of local authorities, and that as such its factual and legal situation is not comparable to that of TDC. That point seems to me to be at the least strongly arguable. Indeed, I should be inclined to accept it, although I am not deciding the question.

68. For present purposes, what is important is that, even if the Council is wrong, the position it has taken it not so obviously lacking in merit that its conduct can be considered to amount to a wilful breach of the State aid rules or to be inexcusable."

37.
As for the remaining factors, the judge's assessment at [69] was as follows:

"The sixth factor in Negassi does not advance matters. The Council has persisted in its conduct, despite complaints by [TDC]. But it has never become 'evident' that its conduct is a breach of the State aid rules. I have mentioned that neither the Commission nor any other EU institution has taken a position on the matter; this is the eighth factor. The seventh factor does not seem to me to have significant weight in the circumstances. The Council knows of the effect complained of by TDC. Wilful flouting of the State aid rules would in those circumstances be the more serious. If, however, the Council believes that it is not acting unlawfully, there is no good reason why, simply to avoid commercial damage to TDC, it should increase its charges to its commercial customers."

38.
The judge concluded:

"70. Having considered the factors, I conclude that TDC's case on the second State Liability Condition is at best merely arguable but that it carries no conviction and has no realistic, as opposed to merely fanciful, prospect of success. It ought not, therefore, to be permitted to proceed.

71. I have borne in mind [counsel for TDC]'s reminder that 'the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case' (principle (vi) in EasyAir). I am not persuaded that this presents a sufficient reason for refusing

summary judgment in this case. First, a party that brings a claim is obliged to be able to set out the matters on which it relies to ground the claim and to verify those matters with a statement of truth. This requirement is not negated or diluted by the obvious fact that the balance of the evidence for and against the matters relied on in the claimant's pleaded case may appear different at trial, after disclosure and exchange and examination of witness evidence, from the way it appeared at an early stage. It seems to me that TDC has not set out any plausible grounds for establishing State liability against the Council and is not in a position to do so. Related to this, secondly, I agree with [counsel for the Council] that TDC's position is not properly to be viewed as a case of awaiting evidence that will establish the matters on which it currently relies but is in the nature of a fishing expedition, hoping that something will turn up that will enable it to advance a case on the second State Liability Condition that it cannot advance at present. Even on that basis, thirdly, I do not consider that reasonable grounds exist for supposing that anything of assistance to TDC would turn up."

The judge's reasoning with respect to TDC's claim for a declaration

39.
The judge held at [75] that, if the claim for damages was dismissed, its claim for a declaration would be "of no more than historic interest" since the EU rules on State aid would cease to apply to the UK on 31 December 2020 and the Government had announced its intention to follow the WTO subsidy rules instead. Given that a declaration would be "academic", there was no real prospect that it would be granted.

Grounds of appeal

40.
TDC appeals on three grounds. Ground 1 is that the judge erred in law in finding that TDC had no real prospect of showing that any breach of Article 108(3) that may be established in this case could be sufficiently serious so as to sound in damages. Ground 2 is that the judge's reliance upon the Council's selectivity argument as part of his reasoning on sufficient seriousness was procedurally unfair. Ground 3 is that the judge erred in finding that declaratory relief as to the past position under Article 107(1) would serve no useful purpose.

Ground 2

41.
Logically ground 2 comes first. TDC's argument is simple. The judge ruled that it would be substantially unfair to TDC for the Council to be permitted to rely upon its argument with respect to the selectivity condition as a ground for summary judgment given the Council's failure to give the required 14 days' notice of the point. There is no challenge to that conclusion by the Council by way of a respondent's notice. TDC submits that it must follow that it was unfair for the judge to permit the Council to rely upon the very same argument as part of its case with respect to sufficient seriousness. In other words, TDC says that the judge was inconsistent in his treatment of this question.

42.
Although this appears at first blush to be a powerful argument, I do not accept it. In my judgment there is no inconsistency in the two positions adopted by the judge. As I have explained, the essence of the judge's procedural ruling was that it would be unfair for the Council to be permitted to rely, without having given due notice, upon its argument that the selectivity condition was not satisfied as a ground for contending that TDC had no real prospect of establishing that there was a breach of Article 107(1), and hence of Article 108(3), and therefore the entire claim should be dismissed for that

reason. When he came to consider the Council's argument that TDC had no real prospect of success in its claim for damages, the judge rightly assumed that TDC would establish the breach of Article 108(3) which it alleged. The question then was whether TDC had a real prospect of success in showing that the breach was sufficiently serious to justify an award of Francovich damages. In that context it was perfectly legitimate for him, for the reason he explained at [59], to consider the apparent strength or weakness of the Council's argument without determining it. That is particularly so since the Council primarily relied in support of its argument upon Warren J's judgment in the VAT case. Counsel for TDC accepted that he was not taken by surprise by the reliance upon Warren J's judgment, which not only was well known to TDC and formed a key part of the background to the present case, but also was referred to in TDC's own evidence on the summary judgment application. Thus I consider that there was no unfairness to TDC in the judge proceeding in the way that he did.

Ground 1

43.
TDC contends that the judge made two errors of law when considering the question whether the Council's breach of Article 108(3), assuming that the breach was established, was sufficiently serious to attract an award of Francovich damages.

44.
Before turning to consider the alleged errors of law, it is worth putting them in context. The judge noted at [72] that no case had been brought to his attention where Francovich damages had been awarded for breach of the State aid rules. Before this Court counsel for TDC accepted that, so far as he was aware, there had been no case in any of the 28 countries which are or have been EU Member States since Francovich was decided over 30 years ago in which such a claim had succeeded. It is manifest that the reason for this complete absence of precedent is that, as the judge observed, although the State aid rules are clear and easy to state, their application can be far from plain and obvious. Thus it will be a rare case in which a breach is sufficiently serious to merit an award of Francovich damages.

45.
First, TDC contends that the judge erred in holding that the importance of the State aid rules was not determinative of the question of seriousness. In oral argument counsel for TDC went so far as to submit that the issue was a black-or-white one: a breach was inevitably sufficiently serious. He cited no authority which supports this submission. The best he was able to do was to rely upon the CJEU's statement in Case C-5/94R v Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland) Ltd[1997] QB 139 at [28], in the context of a refusal to issue an export licence in breach of Article 34 of the EEC Treaty that, "where … the member state … was not called on to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish a sufficiently serious breach". As the judge noted, however, the Court said "may be", not "is". In my judgment TDC's contention is both contrary to authority, namely Factortame and Negassi, and plainly wrong for the reasons I have given in the preceding paragraph.

46.
Secondly, TDC contends that the judge erred in concluding that the breach could not be sufficiently serious because the Council had raised some reasonable arguments in relation to the application of the selectivity condition. I would observe that this contention involves a mischaracterisation of the judge's reasoning: he did not hold that the breach could not be sufficiently serious merely because the

Council had raised some reasonable arguments in relation to the selectivity condition. Thus he also took into account, in particular, his assessment that TDC had no real prospect of establishing that the Council had intentionally or recklessly broken the law and the absence of any support for TDC's complaint from any Community institution. I accept, however, that this was a significant element in the judge's overall assessment. TDC submits that deliberate action causing damage to others is sufficiently serious if there was reasonable doubt as to the lawfulness of that action. Again counsel for TDC cited no authority which supports this submission. In my judgment it is again both contrary to authority, namely Factortame and Negassi, and plainly wrong.

47.
In oral argument counsel for TDC advanced two further submissions in support of ground 1 which were not foreshadowed in TDC's skeleton argument for the appeal. First, although he did not maintain TDC's allegation that the Council had deliberately broken the rules on State aid, he repeated the submission rejected by the judge that the Council had acted without regard to those rules, not caring whether its conduct infringed them i.e. recklessly. I agree with the judge, however, that nothing pleaded by TDC in paragraph 28C of its draft Amended Particulars of Claim raises a real prospect of such a finding being made. As the judge rightly held, this failure on the part of TDC cannot be excused by the absence of disclosure. The burden lies on TDC to prove that the Council was reckless, not on the Council to disprove it. The Council would only be required to give disclosure on this issue if TDC pleaded a case of recklessness with a real prospect of success; but TDC has not done so. It follows that, as the judge rightly concluded, the seriousness of the Council's assumed breach of Article 108(3) must be assessed on the footing that it was unintentional. This is hardly surprising: the Council would not be the first State emanation to have made an error of judgment as to the applicability of the State aid rules. Furthermore, it is a matter of record that the Council already had the benefit of Warren J's decision in the VAT case when TDC first raised its complaint in the letter of 31 July 2017 pleaded in paragraph 28C.

48.
Secondly, counsel for TDC repeated the submission rejected by the judge that Warren J's judgment did not support the Council's argument on selectivity. He argued that it was obvious that the selectivity condition was satisfied because the Council supplied its commercial waste collection services as an "undertaking" in competition with private sector operators such as TDC.

49.
Warren J's analysis was helpfully summarised, and endorsed, by Nugee J when refusing permission to appeal as follows:

"13. I … think that Warren J was entirely right and that there is no real prospect of challenging the analysis he adopted which is that if local authorities are operating under section 45, then that is a special legal regime which is applicable to them in their capacity as public authorities exercising public duties and which is different from the legal regime which applies to private sector businesses such as the claimant even though, from the point of view of the consumer, the services provided may be indistinguishable. That is because, as Warren J sets out, the section 45 power is hedged around by a number of constraints.

14. The ones he identified were that, firstly, a local authority is obliged to make an arrangement in relation to any commercial waste from any premises within its area, an obligation which does not apply to those who are operating in the private sector; secondly, that there are constraints in the charges that can be made because section 45(4) imposes the limitation that the charge must be

reasonable, which does not apply to private sector operators; and thirdly, that there are obligations in relation to disposal under section 48; see what he says as to the flexibility available to a private operator in this regard at [41] …. [Counsel for HMRC] also relied on one other matter, the environmental obligations, which Warren J deals with at [39] of his decision."

50.
Given the special legal regime under which the Council operates, and the resulting constraints on its provision of waste collection services, I agree with the judge that it is well arguable that the Council is not in a "comparable legal and factual situation" to private sector competitors such as TDC. Counsel for TDC relied on the fact that section 45(1)(b) of the EPA empowered a local authority such as the Council to contract out the provision of commercial waste collection services to a private sector contractor, but I am not persuaded that that necessarily detracts from Warren J's analysis. Nor am I persuaded that the different context in the present case necessarily renders that analysis inapplicable.

51.
Finally, I would add that the judge's assessment as to whether the assumed breach is sufficiently serious has subsequently received support from the preliminary views expressed by DG Comp that there has in fact been no breach. This confirms that the present case is a long way from the kind of egregious, wilful, deliberate or at least manifest breach of EU law that is required for an award of Francovich damages

Ground 3

52.
TDC contends that the judge was wrong to hold that it had no real prospect of obtaining a declaration that the Council had acted in breach of the State aid rules if the claim to damages was summarily dismissed. TDC argues that a declaration would still serve a useful purpose since it would be informative for the future. In my judgment, however, the judge was clearly correct to say that a declaration would be academic given that the UK was no longer going to be bound by EU law on this subject. Again, his assessment has subsequently received support, in this case from (i) the disapplication of the EU State aid rules by the State Aid (Revocations and Amendments) (EU Exit) Regulations 2020 (SI 2020/147) and (ii) the Subsidy Control Bill which is currently before Parliament. The Bill applies a different legal regime which is intended to comply with the WTO rules and with the UK's obligations under the Trade and Cooperation Agreement with the EU, but is not intended to comply with EU law. Counsel for TDC nevertheless argued that a declaration as to the position under EU law could cast light on the position under the Bill, assuming it becomes law. In my view this is a hopeless argument. It would plainly do no such thing.

Conclusion

53.
For the reasons given above I would dismiss this appeal.

Lord Justice Edis:

54.
I agree with Lord Justice Arnold about Grounds 2 and 3. I have read the judgment of Lord Justice Coulson about Ground 2. I initially shared the concerns which he sets out, but, like him, I have been persuaded that the judge's treatment of the selectivity issue was sound. If the Council had acted as it did because it considered that its activity did not involve the grant of State aid contrary to Article

107(1) on the ground that the selectivity condition was not satisfied, the fact that this position is arguable is relevant in deciding how serious its assumed breach of the State aid rules was. I believe that there are difficulties with the way the judge approached the selectivity argument when dealing with that issue which are best dealt with under Ground 1. The judge did not expressly deal with the fact that because he was assuming that there had been a breach of State aid, he was also assuming that, though arguable, the Council's position was wrong. In assessing seriousness, I consider that it would be necessary to determine the respect or respects in which the Council was wrong, and how they came to make, and persist in, that error of law. There was no material before the judge on any of those questions and that is fundamentally why I am concerned about the summary disposal of this case.

55.
I also agree with Lord Justices Arnold and Coulson that on the present state of the evidence the prospects of TDC establishing that the assumed breach was sufficiently serious to result in an award of damages do not appear to be strong. However, with regret, I have come to the conclusion that I do not agree that the judge was right to enter judgment in favour of the Council. Given the clear and cogent views to the contrary of Lord Justice Arnold and Lord Justice Coulson, I shall try and explain briefly why this is.

56.
In my judgment it is important to see how the issue of seriousness developed in the evidence which was before the judge. Lord Justice Arnold has described the history of the way in which TDC addressed the issue in the pleadings. This resulted in the application, which was before the judge, to amend its Particulars of Claim set out at paragraph 22 above. It was that amended case which required evaluation, and it said:-

"The Defendant has persisted in its breach of Article 108(3) in flagrant disregard for the detrimental economic impacts on the Claimant of the cross-subsidy of between the Defendant's Household Waste Business and its Commercial Waste Business on Claimant. The Defendant has been aware of such impacts since 21 December 2017."

57.
The Council did not deal with the seriousness of an assumed breach in its Defence or evidence. The Defence says this:-

"21. The Defendant denies paragraph 23. A breach of Article 108(3) TFEU is not per se actionable by any person that has suffered or risks suffering loss as a result. A breach of a directly effective provision of EU law, such as the last sentence of Article 108(3) TFEU, is only actionable if three conditions are met:

(1) the rule of law infringed must be intended to confer rights on individuals;

(2) the breach must be sufficiently serious; and

(3) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

See Joined Cases C-46 & 48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029 at [51].

22. The Claimant has not made any allegation or pleaded any facts which are or could be relied upon to address the second of those conditions, namely that the breach must be sufficiently serious.

23. In the premises, the Claimant's claim for damages for breach of Article 108(3) TFEU does not disclose any cause of action and is therefore embarrassing and/or vague and/or irrelevant and liable to be struck out and/or liable to 'reverse' summary judgment in favour of the Defendant."

58.
The Council provided a witness statement in relation to its application for an order striking out the claim, or giving summary judgment in its favour. It is the statement of a solicitor, Mr. Branton, who does not explain why the Council breached the State aid rules in the way which was assumed at the hearing. He does not explain why the Council did not inform the Commission of the (assumed) grant of State aid under Article 108(3) of the TFEU. This statement was made in May 2020 and long before the service of the Reply and the application to amend the Particulars of Claim to raise an allegation as to seriousness. It is not a matter of criticism of the Council's presentation of its case to point out that it does not offer any justification of the assumed breach, because of the procedural history. It is however the case that the Council has not explained why it broke the law. Its position remains that it did not do so. The allegation that any breach which may be proved was not sufficiently serious to justify an award of damages is an alternative case, put forward as a second line of defence. It has been argued as a pure point of law, in the absence of any evidence on the point.

59.
There is, in my mind, a difficulty in assessing the seriousness of an assumed breach of the law which no-one has identified with any precision. The proposed amendment to the Particulars of Claim identifies communications to the Council which, it is said, put the Council on notice that it was acting unlawfully and says that the breach became "flagrant" because it continued after that happened. For the purposes of this exercise, it is to be assumed that the communications were right, and the Council was wrong to ignore them and that it should then have secured the provision of information by the United Kingdom to the Commission about the grant of State aid which was involved. What are the factors which give rise to that assumed conclusion? It is very hard to say, since it actually arises from a procedural failure by the Council to give 14 days' notice of its application based on the selectivity principle and is quite likely to be actually wrong.

60.
Lord Justice Arnold sets out the multifactorial test explained by Lord Justice Maurice Kay in R (oao Negassi) and another v. SSHD [2013] EWCA Civ 151 at [14] in paragraph 19 above. Of the eight factors identified the fifth is:-

"Whether the infringer was acting intentionally or involuntarily or whether there was a deliberate intention to infringe as opposed to an inadvertent breach;"

61.
The last few lines of paragraph 14 of the judgment of Lord Justice Maurice Kay's judgment are worth setting out again, in which he quotes from Lord Clyde in R. v. Secretary of State for Transport Ex. P. Factortame Ltd. (No. 5) [1999] 3 CMLR 597; [2000] 1 AC 424:-

"He added (at page 554B-D) that the application of the 'sufficiently serious' test 'comes eventually to be a matter of fact and circumstance'.

'No single factor is necessarily decisive. But one factor by itself might, particularly where there was little or nothing to put in the scales on the other side, be sufficient to justify a conclusion of liability.'"

62.

I regard the application of a test which is “a matter of fact and circumstance” as unsatisfactory where, as here, one of the relevant factors is entirely within the knowledge of a party to the proceedings who has provided no evidence and given no disclosure about it. The judge’s conclusion as to the selectivity argument is only relevant to the fifth Negassi factor if that was in fact why the Council chose to ignore the materials referred to in the amended Particulars of Claim. He assumed that they had an arguable case on that issue and that this was relevant to their conduct. He may well have been right in that assumption, but he might have been wrong. It might be observed that if the selectivity principle was in fact central to its decision making, it is surprising that it arose so late in the day in its written case.

63.
I do not agree that disclosure of documents would be a “fishing expedition”. It is extremely likely that there is documentary evidence in the possession of the Council which is relevant to the fifth Negassi factor, and there is nothing speculative about asking to see any of it which satisfies the test for disclosure, or expecting to see supportive documentation produced in evidence. Neither do I consider that the current pleadings are insufficient to trigger that exercise. There is an (assumed) act of unlawfulness sustained over a number of years causing significant financial loss to TDC. That triggers the application of the Negassi test, which requires the court to be fully informed about all relevant factors. This is especially so if the court is invited to conclude that summary judgment should be granted to one party or the other because there is only one realistically possible outcome.

64.
For these reasons I would allow the appeal and dismiss the application for summary judgment.

65.
Although I have reached the conclusion I have, I fully acknowledge the likelihood that these further procedures would result in the failure of the claim. I also accept the force of the observation that we were shown no case where damages were awarded against a member state for breach of the State aid rules. I would not bar the Council from seeking a determination of these issues in advance of the trial if it provides evidence on which they can safely and fairly be determined.

Lord Justice Coulson:

66.
I agree that, for the reasons set out by my Lord, Lord Justice Arnold, this appeal should be dismissed. That said, I should identify the two reservations which I had at the outset of the appeal, and the reasons which have led me to conclude that, on a proper analysis, they do not undermine the judge’s judgment.

67.
At [23]-[24], the judge upheld TDC’s submission that the selectivity argument was not open to the Council on procedural grounds. If the Council had intended to seek summary judgment on the basis of the argument that the selectivity criterion was not met, the judge said that it ought to have given at least 14 days’ notice of the point. They failed to do so. At [24(4)], the judge found that, not only did the selectivity argument go to “the fundamental basis of the claim”, but the absence of notice “is a substantial unfairness to TDC”. There is no appeal against the judge’s ruling in that respect. However, it is right to note that the position was not clear-cut, because not only had TDC been able to address the selectivity argument at the hearing, but there was also some force in the Council’s suggestion that some of the procedural problems could be traced back to TDC’s own failure to plead the ‘sufficiently serious’ argument at all.

68.
When the judge moved on to consider whether the breach was sufficiently serious so as to give rise to State liability in damages, the selectivity argument became an important part of his reasoning: see [59]-[68]. He said at [67] that it was at least strongly arguable that "the Council…does not provide its commercial waste collections services on a commercial basis but under a specific regime for environmental protection, which is directed for the public benefit not to the economic advantage of local authorities, and as such its contractual and legal situation is not comparable to that of TDC".

69.
It was not entirely clear to me how the selectivity argument could be simultaneously ruled out of court on procedural grounds, but then be a part of the judge's reasoning on the critical issue of 'sufficiently serious breach'. The judge does not explain how or why the procedural difficulties rule out his consideration of the selectivity argument in one context but not in another.

70.
But I have concluded that this potential inconsistency may look rather more serious than it really was. This is because the judge's conclusion at [67] was based directly on the decision of Warren J in the VAT case between the same parties (see paragraphs 9, 35 and 49 of my Lord's judgment above). On behalf of TDC, Mr Bowsher properly accepted during oral argument that he was not taken by surprise by the Council's reliance on that judgment and its conclusions. He could hardly say otherwise. The selectivity argument is central to the reasoning and result in that case, so it seems to me that the judge was bound to take it into account when considering whether the Council and TDC were in comparable positions.

71.
This brings me on to the second reservation I had. The judge's conclusion, noted above, that the legal and contractual situations of the Council and TDC were not comparable, seemed on its face to ignore the fact that, when collecting commercial waste and charging for it, both the Council and TDC were commercial undertakings providing the same service.

72.
The decision of Warren J in the VAT case explains why, on his analysis, their situations were not comparable. That may well be right. But for present purposes, it is unnecessary to go that far. What matters is the judge's conclusion at [68] to the effect that, even if Warren J had been wrong, the Council's decision to act as if their situation was not comparable with that of TDC (or any other commercial undertaking) could not possibly be regarded as egregious or blatantly wrongful. There was authority which appeared fully to support the Council's stance. So the 'sufficiently serious' test had not been made out in any event.

73.
Accordingly, I find that my nagging doubts about the judge's judgment have been assuaged. Moreover, although I accept that it is a strong thing to strike out a claimant's case at an early stage, it is important to take a step back and look at this claim in the round. As my Lord has noted, there has never been a successful Francovich claim in respect of State aid. Was this claim really going to be the first ever, when to win TDC would have had to distinguish the judgment of Warren J completely, and persuade a court that it was a reasonable and sensible solution for the Council's bin lorries to ignore the commercial waste left out on the street, and leave that waste for a second fleet of bin lorries, this time operated by TDC, to pick up instead? The answer must be a resounding 'No'.