

# UK SUBSIDY CONTROL LAW: SHAPING NEW LAW

*After Max Recycle, where is the wriggle room for public bodies that combine public and market activities within the same legal entity to argue that no subsidy arises?*

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# MAX RECYCLE

- *The Durham Co (t/a Max Recycle) v Durham CC* [2023] CAT 50, [2023] PTSR 2128.
- Sir Marcus Smith (Chair), Lord Young, Prof David Ulph CBE.
- Application 03.02.23, hearing 3-4.07.23, judgment 27.07.23.
- Robertson and Howell [2024] ECLR 47 *The first subsidy control challenge in the Competition Appeal Tribunal*.
- CAT held that no subsidy had been given by Durham County Council.
- The Council thus succeeded in its argument that the decision was not as a subsidy within the meaning of the 2022 Act. Application dismissed.
- CAT's reasons on this point at [28]-[39].

# *MAX RECYCLE*

- Max Recycle contended that the Council was cross-subsidising its commercial waste collection operations using its household waste collection operations.
- This alleged cross-subsidy permitted the Council to charge individual businesses at less than the rate that they would or could have charged had they run the commercial waste collection operation as a separate, self-standing and independent operation.
- The Tribunal noted that it was not possible for Max Recycle to identify any person, other than the Council itself, involved in the provision of waste collection or waste disposal services.
- As a result, the giver of the alleged subsidy – the Council – was the same person as the person on whom the alleged subsidy was conferred – the Council.

# *MAX RECYCLE*

- Accordingly, the Tribunal held there was no “subsidy” within the meaning of section 2 of the 2022 Act:
  - the advantage did not involve subsidisation, because the “economic benefit” simply circulated within one entity i.e. the Council;
  - the natural reading of the 2022 Act’s definitions of “public authority” and “enterprise” meant that when a person has been designated a “public authority” that person cannot also be an enterprise in relation to the advantage under consideration; and
  - the language of the 2022 Act supported the Tribunal’s conclusion. The Tribunal noted that there is no use in the 2022 Act of the term “undertaking” used in State aid law under Articles 107-108 TFEU, and so there was a clear difference between the EU and UK regimes.
- Reasoning not yet examined in subsequent CAT decisions.

# WRIGGLE ROOM?

- When is the CAT's reasoning of practical application?
- This is a judgment of a strong CAT which included a judge of the High Court and a judge of the Court of Session. This is akin to an English Divisional Court and so unlikely to be departed from at Tribunal, High Court or Court of Session (Outer House) level.
- DBT Statutory Guidance para 15.20:
  - “Some public authorities may act as both ‘public authorities’ and ‘enterprises’ in respect of different functions. In such a case, and where a public authority gives financial assistance and has the same legal personality as the entity receiving it (that is, there is no separate body carrying out the economic activity, such as a limited company that is owned or controlled by the public authority), a subsidy may not be present on the basis that the economic benefit simply circulates within one entity.”

# WRIGGLE ROOM?

- There should therefore – as a matter of legal analysis – be no reticence about giving effect to the CAT’s reasoning.
- In practice, there appears a discernible reluctance to do so as it is taken to mark a departure from the previous EU State aid approach.
- Hence the reference in the question to ‘wriggle room’.
- Others have referred to it as a ‘get out of jail free card’.
- In practice, seems to be deployed reactively.
- E.g. particularly useful where an authority is in receipt of unallocated funding (for whatever reason) and then has to exercise a discretion at a later date as to where to deploy that funding within the same authority / legal entity.

# WRIGGLE ROOM?

- Limits?
- Authority required to use funding through a separate legal entity?
- If so, the logic of *Max Recycle* does not apply.
- Statutory Guidance para 15.21:
  - “local authorities in England and Wales carrying out economic activity should have regard to section 95 of the Local Government Act 2003, which generally requires that where a local authority is authorised (by the Secretary of State or the Senedd) to carry on a part of their ordinary functions for a commercial purpose, any commercial activities should be exercised through a company within the meaning of Part 5 of the Local Government and Housing Act 1989.”
- Position in Scotland / Northern Ireland?