IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1754/12/13/25, 1769/12/13/26

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

28th April 2026

Before:

The Honourable Mrs Justice Bacon
John Davies
James Wolffe KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Zenobē Energy Limited

Applicant

And

Gas and Electricity Markets Authority

Respondent

A P P E A R AN C E S

Nicholas Gibson KC on behalf of Zenobē Energy Limited (Instructed by Norton Rose Fulbright)

Joseph Barrett KC, Rupert Paines and Barney McCay on behalf of The Gas and Electricity Markets Authority

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Tuesday, 28th April 2026

(10.30 am)

MRS JUSTICE BACON: Good morning, everyone. Some of you are joining us livestream on our website, so I'll start with the usual warning.

An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Yes, Mr Gibson.

MR GIBSON: Good morning. As you know, my name is Mr Gibson. I appear for the applicant, Zenobē, and on my right Mr Barrett KC, Mr Paines and Mr McCay appear for the Respondent, GEMA. I understand you are working electronically, which is always commendable. Hopefully you received a supplementary authorities bundle.

MRS JUSTICE BACON: We did.

MR GIBSON: And a supplementary bundle of factual material yesterday, which is labelled F.

THE JUDGE: Let me just check that. Supplementary bundle of factual material.

MR GIBSON: That came I think about 6.30 last night.

MRS JUSTICE BACON: Is that labelled something -- is that Bundle F?

MR GIBSON: That's correct.

MRS JUSTICE BACON: All right. I think most people have it. I just need to get it in the right folder? Do you need to refer to that in the next two minutes.

MR GIBSON: No, I don't anticipate needing to do that. Most of the material I think is actually material my learned friends wish to rely upon.

The structure of my submissions will broadly follow the structure of my written submissions save that I propose to take very briefly a bit earlier the points in relation to grounds 5 and ground 6, the ultra vires ground and ground in relation to rule 98A.

I think they more naturally follow after I have dealt with the public resources question and the question of whether there is a scheme decision. Then I can deal with all the section 10P issues consecutively one after another, 2025 decision, 2026 decision and relief. Then I will address you on the other issues in relation to relief.

So, I will just recap what the order will be.

MRS JUSTICE BACON: Yes.

MR GIBSON: The first topic I will address is whether LDES cap and floor support is given directly or indirectly from public resources. That's sections D1 and F1 of my written submissions.

The second topic is whether the 2025 decision constituted a decision to make a scheme. That's sections D2 and F2 of my written submissions.

The third topic is ground 5, whether GEMA had power at the time of the 2025 decision to establish LDES scheme. That's section D4 of my written submissions.

Topic 4 is ground 6, whether GEMA properly complied with the procedural requirements asserted by Section 71 of the Act into the rules of rule 98A. That's section D5 of my written submissions.

The fifth topic is whether section 10P can or does preclude Zenobē from challenging the 2025 decision, section D6 of my written submissions.

The sixth topic is whether section 10P precludes Zenobē from challenging the 2026 decision and that's section F3 of my written submissions.

Then turning to relief, as I say, I will start with the issues on relief as a seventh topic, in relation to section 10P, whether that has any bearing on relief.

Then the eighth topic will be the other relief questions.

MRS JUSTICE BACON: Just before you launch into that, the temperature of the courtroom. Is it me or is it somewhat chilly?

MR GIBSON: I am okay but I am happy for other people ...

MRS JUSTICE BACON: Thank you. Up a degree or two, please. Thank you.

MR GIBSON: Just in terms of timings, we obviously received the President's message of Friday telling us to try to do everything within two days. I have then been frantically trying to cut back and achieve that. My learned friend quite reasonably asked when I intend to stop so he can start and how much time I need for reply. What I would most like, but I am obviously very much in the hands of the Tribunal, is if I could have the whole of the day today, as I am the claimant opening and presenting material. My learned friend then has the whole day up to the normal time finishing and then if the Tribunal would be willing to sit early or late to accommodate me having half an hour tomorrow in order to do my reply in that slot. I don't know whether that's even a possibility, but I thought I would ask.

MRS JUSTICE BACON: Let me just check. We could sit either early or late. We will just confer over lunch to work out which will be best, but basically you just want an extra half hour in the day tomorrow.

MR GIBSON: So we each have a full day to present our case and I have an extra half hour.

MRS JUSTICE BACON: Is Mr Barrett happy with that?

MR BARRETT: Of course, my Lord. I can't be absolutely sure but I think I ought to be finished in reasonable time tomorrow to fit everything, including the reply, within the day. I think that ought to be feasible. If we run over, I would be very grateful if you could sit later.

MRS JUSTICE BACON: Are you suggesting you would try to finish by 4?

MR BARRETT: I would try to finish by 4.

MRS JUSTICE BACON: In that case unless we come back otherwise, let's say if you are able to finish around 4 then Mr Gibson will have half an hour, and if takes a little bit more than that, then it doesn't matter. We can probably go over a little bit.

MR GIBSON: I am grateful.

So the first topic, whether the cap and floor support is given directly or indirectly from public resources. I should clear one preliminary matter before I go to the substance, and that's the question about whether the Tribunal should determine this question in any event. We say the CAT clearly can and should determine this question come what may.

There are two points. Firstly, GEMA rightly concedes that there is little or no current domestic authority on the point and we say that's precisely the reason why the CAT should take this opportunity to provide guidance to the community as a whole as to how the law on this fundamental aspect of the regime is going to be interpreted as a matter of UK law.

The second point that GEMA raised is that they say that the CAT should not make a decision on what constitutes a subsidy because it is a case where the challenge is to a subsidy scheme rather than any definite award. We say with respect that doesn't make a great deal of sense. We say the definition of a 'subsidy' is inherent in the definition of a 'scheme'. Therefore it is both necessary to determine at the time of any scheme decision whether this scheme involved giving of subsidies; and it is desirable that the CAT gives guidance on the definition of subsidies as much for cases involving individual subsidies as for cases involving subsidy schemes.

MRS JUSTICE BACON: Yes. I mean, the Tribunal is not here to give advisory opinions on issues of subsidy control if they don't arise for determination, which may be the point that's being made by GEMA. Obviously if we need to decide it, we will, but I think that we may need a little persuasion to get into intricacies of a point which is clearly the subject -- has been the subject of considerable debate in the European case law and obviously between you if it is entirely unnecessary to decide it. So I think we will just have to see where we get to on that.

MR GIBSON: Obviously it is a live issue in the case.

MRS JUSTICE BACON: Yes.

MR GIBSON: You will be hearing submissions from me and no doubt from my learned friend. We respectfully say this is not an academic issue in the sense that it has been tacked on without having any relevance. This is directly relevant and in those circumstances we would -- sorry.

MRS JUSTICE BACON: It is obviously a matter for the judgment of the Tribunal in any given case how far to get into issues which in the light of other issues in the case do or do not need to be decided.

MR GIBSON: You have my submissions on that point. I take your point of course. As to the structure of my submissions --

MR BARRETT: May I just very quickly, have the Tribunal seen the letter we sent?

MRS JUSTICE BACON: Yes, you deal with the point of whether some of this is pleaded in any event.

MR BARRETT: Indeed.

MRS JUSTICE BACON: Given that at least on Mr Gibson's case he says that we need to decide the point, we obviously need to hear both of your submissions on all of the issues, because we don't know where we are going to end up. So I think we will want to hear you both on whether this -- the way it's been put is open to us to decide. Your point is that you don't think it is open to us to decide at least on one of the basis it's been put. I think we will need to hear you both on that. As I have just said, we will have to see in due course whether or not we need to get into that point.

MR BARRETT: Of course. I just wanted to record, my Lady, that we have made that objection.

MRS JUSTICE BACON: We have seen it. We note it.

MR BARRETT: Thank you.

MRS JUSTICE BACON: Hopefully Mr Gibson will address us on that point.

MR GIBSON: I was hoping to address at the end because by then you will have seen all the points you have dealt with and it will make it easier and quicker to deal with it that way.

I will lead first with the law and then the facts relevant to the first issue and then make some short submissions by reference to the three alternative bases on which we say the test is satisfied. In relation to the law, I am going to deal with four topics. First, the definition of subsidy as a matter of domestic law; second, the similarities with EU law on the transfer of public resources; third, whether EU state aid law should be followed in this jurisdiction; and, fourth, some points specifically on contingent transfers of public resources.

Turning first to the definition of subsidy under domestic law, I don't know whether you need to turn it up, but if you would like to turn up section 2, it is in bundle D, tab 8, page 103. I think you are probably all quite familiar with it. Do you have that?

So you see that the definition of subsidy is financial assistance which has four cumulative limbs, and as noted in my skeleton, paragraph 23, it is only the first part of that first limb A that's actually in dispute, the public resources question. There is no dispute in relation to the other part of limb A, whether it is by public authority or any other part of the definition of subsidy.

One also sees if you look at the particulars of section 2 the definition of subsidy is expressed in broad terms as is apparent from at least the following five features of the statutory working.

First, as to section 2(1), limb (a) is satisfied if financial assistance is given directly or indirectly: alternative possibilities.

Secondly, as to section 2(2), the definition of financial assistance itself provides a non-exhaustive list of what the term would include.

Thirdly, and relatedly, if you look down that list (a) to (e), one sees the list of examples, which also illustrates the breadth of the term.

Fourthly, it is of particular relevance for our purposes the list includes both (a), direct or actual transfer of funds - of which Parliament gives non-exhaustive examples of grants or loans - and (b), a contingent transfer of funds - of which Parliament gives the non-exhaustive example of guarantees.

Fifthly, and turning to sections 2(3) to 2(4) of the Act, it is also of particular relevance to note the definition of what constitutes being given from public resources is also to be understood broadly. It may be helpful, if you are not already familiar with them, just to cast your eye over those provisions.

One sees that for assistance to be given from public resources the resources need not belong to the public authority. On the contrary, it is sufficient the public authority's involvement in the decision to give assistance is such that in substance the decision is that of the public authority. There are a non-exhaustive list of factors relevant to public authority involvement including control exercised by the public authority and the relationship between the person and the public authority.

MRS JUSTICE BACON: Yes.

MR GIBSON: If one just moves ahead a bit in the statute to page 106 of the bundle, you'll see section 6(1). I just flag that so that one can see that, for the purposes of this Act, public authority means a person who exercises the functions of a public nature. So, the Act is applying a functional rather than a formal approach to determine whether a given person is acting as a public authority.

That's all I wanted to say about domestic law, which is relatively undeveloped. I would now like to turn to EU law on the transfer of public resource, or transfer of state resources, as it is described. One sees -- I will not turn it up, because you are obviously very familiar, but obviously, as to Art 107(1) TFEU, the actual wording of the

provision reads in relevant part:

"Any aid granted by a Member State or through state resources in any form whatsoever".

Which is obviously a different formulation from the one that has been employed under limb A.

However, if one looks at the test that's been evolved in the EU case law, it is materially identical to the test that appears in the UK law. The significance of that I will come on to later.

At the moment I would like to turn to the DOBELES case, Grand Chamber judgment, which appears at D65, page 1939. In particular, if you turn to page 1944, which is paragraph 15, this is just describing the nature of the relevant financial assistance in this case, and in particular it refers to Latvian law imposing an obligation to purchase hydroelectric energy at twice the average electricity sale price.

Paragraph 16: it confirms that post accession, which was 1st May 2004 for Latvia, the 2005 law maintained that purchase obligation.

Paragraph 17 refers to the fact that 2005 law provided for a recovery mechanism, namely that the price of that purchase obligation shall be borne by all electricity end customers in Latvia.

If one then turns to page 1946, one sees paragraphs 30 to 32. The Grand Chamber there explains that the first question referred concerns the first condition under the test of state aid, i.e., the 'through state resources' test. They outline the different components of that test.

I can skip to paragraphs 34 to 38, which concerns the first criterion, i.e., the public resources condition, and concludes at paragraph 38 on page 1949 that:

"The relevant criterion by which to identify whether the public resources condition is satisfied is whether the funds are financed by a levy or other compulsory surcharges

under national legislation and managed and apportioned in accordance with that legislation they do then constitute state resources."

In the next paragraph, paragraph 39, Grand Chamber confirms that the first criterion is not the only criterion for identifying state resources. Rather the fact that the sums constantly remain under public control and therefore available to the competent national authorities is sufficient for them to be categorised as state resources.

The Grand Chamber then goes on to paragraph 40 to apply the first criterion in the circumstances of that case and states:

"The additional cost represented by the purchase by the approved distribution undertaking of electricity generated from renewable energy sources at a price corresponding to twice the average electricity sale price is financed, under the Latvian legislation concerned, by a compulsory surcharge borne by all end-users in proportion to their consumption."

In paragraph 41 they apply the second criterion in relation to the DOBELES case, namely:

"The funds resulting from that surcharge are collected, managed and apportioned by a company wholly owned by the member state concerned and cannot be spent for purposes other than those provided for by law, namely offsetting the additional cost mentioned in the preceding paragraph."

MRS JUSTICE BACON: So there are two cumulative factors then. One is there is a compulsory surcharge and, secondly, that the funds resulting be from that surcharge are collected, managed and apportioned by a wholly owned -- a company that is wholly owned by the Member State and not by a third party.

MR GIBSON: That is correct, but just to be clear those are alternative criteria.

MRS JUSTICE BACON: Yes. So both of those are present in this case.

MR GIBSON: In this case, yes, and in the DOBELES case, both are present. But the

crucial thing the Grand Chamber was resolving - a point that had been debated and you will see in subsequent cases it was also discussed - is whether those criteria were alternative or cumulative.

MRS JUSTICE BACON: I see.

MR GIBSON: They decisively found --

MRS JUSTICE BACON: It is not necessary you say to have both, but in this case --

MR GIBSON: Precisely, as in this case, we do have both. But the Grand Chamber makes it clear that you only need one. They deal with that in paragraph 39. It is not the only one. It is sufficient just to have one of them.

Neither criterion was new, of course. The significance, as I say, was the fact that it put beyond doubt the second criterion was independent rather than cumulative with the first.

Before leaving that judgment, I will take to you one final point. I just turn forward a bit to page 1961, paragraph 125. It is dealing with a different question, but it is helpful to flag one point, because it may be relevant when you come to look at later matters.

"The existence of state aid depends, not on the body responsible for its payment under national law, but on the state origin of the funds from which the aid concerned is drawn. It is, in particular, irrelevant in that regard whether the person entrusted with granting the advantage in question has public or private status or enjoys statutory autonomy under national law."

While I was in the judgment, I wanted to flag that.

The next case I would like to take you to is the Covestro judgment and particularly to focus on the application of the first criterion in the context of Covestro, the compulsory surcharge criterion. If you would like to turn up that judgment. We erroneously included a résumé version in the main authorities bundle and obviously that is not much use when you are trying to read the detail of it. In the supplementary bundle you

should have received yesterday afternoon, the last tab at page 223 is the Covestro General Court judgment. Can I take you to the General Court judgment because it deals with the reasoning and later it is endorsed by the Court of Justice, as I shall show you.

So, at page 229, the General Court refers to the EEG judgment (which is the judgment relied on by GEMA in its skeleton at paragraphs 100 to 104) and notes that the EEG case concerned a support scheme for producers of electricity from renewable resources funded by a surcharge on electricity suppliers to final customers in proportion to the quantities sold. The Court of Justice in the EEG case had ruled out the use of state resources on two bases, the first of which concerns us here. That's that:

"The amounts generated by the measure could not be treated in the same way as a levy, since the measure in question did not oblige the operators concerned to pass on those costs to the final customers."

Paragraph 94 refers to the Achema case, but I am going to take you to that case specifically in a moment so I don't think we need to deal with that.

Paragraph 95 the General Court identifies two criteria, the two criteria are parafiscal charge and state control. This was before the Grand Chamber in *DOBELES* confirmed this, but they correctly said that these are two factors which together form an alternative - a slightly odd formulation, but it was taken to mean that they saw those two criteria as separate and alternative, which was subsequently confirmed in *DOBELES*.

In paragraph 113 and following the General Court comes on to consider the first criterion -- this is on page 232 -- namely, the existence of a compulsory charge.

Paragraph 114 the General Court notes:

"The positions of the parties diverge as to whether the surcharge at issue was

compulsorily passed on to the 'end user' as stated in the contested decision… and therefore as to the identification the persons ultimately liable for payment of the surcharge at issue."

Paragraph 115 sets out the Commission's position, that the end user includes the network users, namely the large consumers of electricity directly connected to the network, and the electricity suppliers, which are required to pay the surcharge since they conclude contracts with the network operators to purchase electricity (for themselves as large consumers or for their customers as suppliers) and therefore are 'end users' of the service of 'network use'".

I am going to come on to explain the significance of that but that was what the Commission said. By contrast the applicant and Germany included in the concept of end user only end users of electricity, i.e., the final consumers, and not the electricity suppliers themselves. They said because the surcharge was only levied on network users, it is not compulsorily passed on to all the end users of electricity.

The General Court then goes on to summarise what it thinks the question for it to determine is. Paragraph 117:

"It is therefore necessary to identify the persons ultimately liable for payment of the surcharge at issue and determine whether the surcharge is compulsory for them."

Effectively who are the relevant end users in any particular case?

Can I ask you to read paragraphs 118 to 119 in full, because they are particularly important? Let me know when you are ready for me to go on (Pause.)

MRS JUSTICE BACON: Yes.

MR GIBSON: So you will see they are drawing a very deliberate distinction in working out whether the compulsory charge was levied on the end users: they are distinguishing between cases where the relevant service is a network service, in which case the relevant end user is a network end user; and cases where the relevant

services are consumer-facing services, for example, the provision of electricity, supply of electricity, in which case the relevant end user is the actual final consumer.

If it's helpful -- I will not turn it up for reasons of time -- if it is helpful for you to understand more about the specific facts of the case, you may find it helpful to look at the opinion of Advocate General Medina in that case, because she does provide a lot more detail about the state aid scheme and unfortunately this version, while it's more complete than the résumé, it is still an abridged version, so the facts are cut off.

I have given you the reference to that --

MRS JUSTICE BACON: But your point is that paragraph 119 says that the question about whether there's pass-on to the end customers was irrelevant because at the very least the network -- the suppliers were liable for payment of the surcharge and that was sufficient. Is that your point?

MR GIBSON: Yes. The reason it was sufficient is because this is a network service. If it is a network service, you ask yourself "Who are the network end users?" Answer: It includes suppliers. It also includes business like the huge industrial consumers who have a direct network connection because they are connected to the network and therefore are network users in that case. But that is sort of beside the point. The question being debated was whether the electricity suppliers were the relevant end users or whether one has to look to see whether or not they passed on their charges to their final consumers.

MRS JUSTICE BACON: Yes. Your point is that all that you have to show in this case is that the suppliers who were the direct users were liable for payment.

MR GIBSON: Yes. I have to show you that the relevant service is a network service to make good on the fact they are the relevant end user.

MRS JUSTICE BACON: Yes.

MR GIBSON: As I say, AG Medina's opinion, I have given you the references in my

skeleton, but if you want to look it up, it is at tab 66 of the authorities bundle, page 1964. In the opening paragraphs of her opinion, she explains in a lot more detail the significance of those different categories, but I will not take up time with that now unless you are assisted by me explaining that in more detail.

I can just quickly take you to the Court of Justice's judgment to see that they endorse the approach taken by the General Court.

If you turn up the judgment at tab 67, page 1985.

MRS JUSTICE BACON: Is that in the main authorities bundle?

MR GIBSON: Yes. Sorry. I apologise. The judgment also sets out the facts, paragraphs 12 to 19, and part of the arguments but I will not take you to those. I will just focus in on the relevant provision in relation to this particular point.

On page 2011 you see at paragraph 174 it comes on to the argument as to whether the General Court erred in identifying the relevant end users as being network users.

Paragraph 175 refers to those paragraphs you have just read and notes that:

"The General Court found that the only relationship which mattered was the one between network operators and network users because the surcharge is collected not for the consumption of electricity but for the use of the network and the persons ultimately liable for payment of the surcharge were the network users, i.e., the suppliers themselves and directly connected end users and not other end users, i.e., final consumers."

Interestingly the court did not treat this as raising an error of legal principle, it just simply deals with it as one of appraisal of fact and therefore rejects the appeal on that basis. But if the Court of Justice had considered that the General Court's approach was legally wrong, no doubt they would have taken it as a legal point and treated it as such.

They then go on to uphold the conclusion that there was a compulsory obligation on

networking users to pay the surcharge. So what one can see in the facts of EEG, as summarised, as I showed you in the Covestro case, DOBELES and the Covestro case itself is that, in relation to this first criterion (compulsory charge), EU state law distinguishes between three scenarios, depending on, first, the relevant service to which the aid applied and, secondly, the way in which the recovery mechanism operated. In the DOBELES case, the relevant service was the sale and purchase of hydroelectric energy. One sees that in the Advocate General's opinion at paragraph 3 and the Court of Justice's judgment at paragraphs 15 to 16.

The second point is that the recovery mechanism was a compulsory surcharge levied on all electricity end customers, i.e., the end users of the relevant service of electricity supplier: see paragraphs 15 to 16 of the Court of Justice judgment.

On that basis they concluded that it did constitute state aid. That is paragraph 43 at page 1950.

So that's one possible scenario: where you have the end user is the final consumer of electricity because the service is the provision of electricity, supply of electricity, and if, as in the DOBELES case, the compulsory charge is levied on that end user, it is state aid. That's the first scenario.

I just note in passing that this is also true of the Vent De Colere! case which appears at tab 55, page 1746 and following of the bundle and the FVE Holysov -- I am probably massacring the Czech there -- at tab 62, pages 1900 and following. Those cases fall into that same scenario.

The second scenario is essentially the same as the DOBELES case except the final part of the puzzle, the passing on the surcharge to the final consumer is not compulsory. Therefore it is not state aid.

Let me take you through that slowly. The relevant service in the EEG case was the sale and purchase of EEG electricity, which is electricity from renewable energy and

mine gas - that's in paragraph 2 of the Court of Justice judgment, which appears at tab 59, page 1841. For which the network operators either had to pay a fixed tariff price or a market premium if the plants sold to third parties directly - again, that appears in the third paragraph of the Court of Justice judgment quoting the General Court; that's page 1841. The costs of which were then passed on upstream by DSOs to TSOs, that's Distribution System Operators to Transmission System Operators, different levels of the supply chain, and then the recovery mechanism entitled the Transmission System Operators to require suppliers, i.e., not the final consumers, to pay the relevant surcharge. The suppliers were not obliged to, but they are not prevented from passing on and did, in fact, pass on in practice to final consumers. That was found not to be state aid and this is what my learned friend relies on, because in that case the chain of compulsory obligations was broken as between the electricity supplier and the final consumers.

In that case that was significant, because the end user -- because the service was provision of electricity, the end user was therefore the final consumer. Under EU state aid law that break, that break in causation -- I will call it that, that's not quite how they looked at it, you can borrow the analogy there – meant that it did not constitute state aid. So you can contrast, DOBELES, which involved the same service as EEG, but, as to the recovery mechanism, the obligation in DOBELES went right to the final consumer, but in EEG it ended one step before that. That's the crucial distinction featured between those two scenarios.

The third scenario, the Covestro case is similar, if you like, in terms of the chain of obligations but the distinction between Covestro and EEG is that the service is not a consumer service for the consumption of electricity, as we've seen. It's the service -- it's a network service and therefore the relevant end user is the electricity supplier or network-connected end users. I am conscious there is a lot of concepts

there and I apologise if it is sort of a blur, but those I think set out quite clearly the three alternative scenarios. As I come on to develop, we say our case clearly falls in the Covestro scenario and therefore the EEG scenario is nothing to the point.

MR WOLFFE: This will come on to tell us how this slots into the statutory structure under the 2022 Act?

MR GIBSON: It will. When I come on to talk about similarities between EU law and UK law, and I will pick up on that, but my essential point is that the test that's been chosen under UK law was 'given directly or indirectly from public resources', which is very similar to the test under EU case law (such as the Vent De Colere! case) interpreting Article 107(1), where the EU courts have found that the test should be 'granted directly or indirectly from state resources'. As you can see, those two tests are materially identical.

So I say that -- I will come on to develop that point in a moment. You are absolutely right, though. That's a crucial one.

MR WOLFFE: Yes.

MR GIBSON: Before I get to that I would like to deal with the second criterion, the control criterion, and I would like to take you to the Achema case. I will take you first of all to Advocate General Wahl, and if you would turn up tab 58, page 1822 and in particular if you turn forward to page 1826, you will see he deals -- he turns to the issue of state resources. At paragraph 25 he describes the concept of public control and at paragraphs 26 to 27 he explains how in the circumstances of that case the criterion was satisfied.

Could I just ask you to read paragraphs 24 to 27, but really 26 to 27 are the crucial ones? (Pause.)

MRS JUSTICE BACON: Yes.

MR GIBSON: When I come on to look at the facts of this case, and in particular my

submissions on public control, I'll come to paragraph 27 and the different factors that he enumerates there and show how they closely map on to the facts of our case to show how control is made out in our case as well. For the moment if I could take you to the Court of Justice judgment at tab 60, page 1857, and in particular to paragraphs 56 to 62, starting at page 1867, going over the page to 1868. Would you just like to read those paragraphs to yourself? They continue the description the Advocate General has given --

MRS JUSTICE BACON: Starting at which paragraph?

MR GIBSON: Starting at paragraph 56 and going to 62, if you would, President. (Pause.)

MRS JUSTICE BACON: Yes.

MR GIBSON: There is then, I think, discussion about the first criterion, which I think we can skip over, because I have dealt with that sufficiently.

Paragraph 66 the court summarises the features of the regime which are salient to the second public control criterion. If you would just like to read that to yourselves as well.

MRS JUSTICE BACON: Yes.

MR GIBSON: In the following paragraph the court concludes:

"Consequently In such circumstances PIS monies must be regarded as remaining under public control."

So that's an example of facts providing an example of how public control was satisfied.

I just pause here to note, picking up on the point that you, Mr Wolffe, sir, just made, we looked earlier at the fact that Parliament has made express provision in sections 2(3) to section 2(4) that, in order to meet the public resources test, it is sufficient for public authority's involvement in the decision to give financial assistance is in substance a decision of the public authority because of the public authority's involvement. That includes reference to the authority's control over the resources. So

I would say that's another connecting factor between the language that Parliament chose to express itself in in preparing the Act we are looking at today and these instances in the EU case law how the relevant -- the analogous criteria have been applied.

Turning, then, to the question whether EU state aid law should be taken into account. We submit that the correct approach, if I may not seem too obsequious, is the approach set out by the President in the recent New Lottery Company case, at paragraphs 67 and following. I don't need to turn it up, I just want to highlight what the three criteria are, but if you want to turn it up the first one appears at bundle D, tab 48, page 1423. That's paragraph 67, where essentially you, President, decided -- you looked at whether the Subsidy Control Act provision had an equivalent in EU state aid law. In that case it was the commercial market operator and the market economy operator principles. There is obviously -- that's another example where the EU state aid law concept is obviously influenced, if not to say directly informed UK law. So that is the first question, whether there is an equivalent.

Paragraph 72, page 1425, broadly I am summarising, but you say: if so, look at whether -- the second consideration is whether the Subsidy Control Act and/or DBT guidance suggest that Parliament intended the Subsidy Control Act to take a narrower or different approach from the approach under the equivalent provisions of EU law.

Then the next paragraph, 73:

"If not, whether there is nevertheless some obvious reason to depart from the approach taken under EU law."

I would commend that test, that three-part test, and applying it to the considerations of this case, we say there are very strong reasons to follow the case law that I've just described to you under EU law. Those are as follows.

First, as I've explained, the test as to whether financial assistance is given directly or

indirectly from public resources under limb A is directly equivalent to that developed in EU case law. I have already explained that. We have also seen the question of control has a direct parallel in section 2(3) and 2(4). So I say, taken together, there's a very strong presumption that the public resources test under our law is intended to be broadly equivalent to, analogous to the state resources test under EU law.

The second question is whether there's anything to suggest Parliament intended the Subsidy Control Act to take a narrower approach, and we say no, on the contrary. The fact is that Parliament has adopted wording which reflects precisely the wording in the EU case law, and in particular identifies the test in that case law. So they have not gone to the wording of the state aid Treaty provision -- of Article 107. They have looked at the case law and picked a particular point in its development and gone there, which strongly suggests to me they were encouraging you to look at the actual case law itself, how it was developed.

In this context it is important to note the UK is not required to adopt this wording as a result of the wording in the Trade and Cooperation Agreement. It may be helpful to turn up -- I will just give you the reference, because I am conscious of the time, but Article 363(1)(b)(i) at tab 14 of the authorities bundle, page 281. In that definition under the Trade and Cooperation Agreement the equivalent to limb A is 'financial assistance which arises from the resources of the parties'.

The reason I emphasise that is because sometimes there is a suggestion that the Trade and Cooperation Agreement was inspired by other subsidies legislation, and that may be true in some instances but here you have a UK Parliament given that wording from the Trade and Cooperation Agreement and deciding to adopt wording that directly follows the wording from EU state aid law instead. Not that there is something wrong with that. I am not saying there is necessarily a distinction but it is strongly indicative of what Parliament's intention was.

Sorry, sir.

MR WOLFFE: I just have one question about that, which is that the statutory wording is giving directly or indirectly from public resources by a public authority, and the question I have is whether the inclusion of two separate elements in that, namely from public resources by a public authority in any sense narrows the scope of from state resources.

MR GIBSON: It is an excellent question. It's my fault for having taken things too quickly. If I go back or if you go back with the leisure that you don't have to read the judgments, each of the times they introduce the primary resources concept, they identify the fact there are two parts. The two parts are expressed -- the part we have been looking at, the public resources limb, is expressed in very similar terms. The other part is not exactly the same, it is concerned with imputability. (I think I had originally planned to touch on that later in my submissions, but I can't remember whether it still is; it is probably lying on the cutting room floor having been cut out at some point.)

There are two components to the test under EU state aid law as well. I have not focused on the second one because it is not in dispute, i.e., the 'by a public authority' limb, but there is an analogy there too. So if anything it quite rightly raises is a further point in favour of actually the similarities in Parliament's intention in that regard.

Parliament made a conscious choice to use the wording which most closely reflects the position under EU case law rather than using the TCA definition, as it could have done. I have already given you the examples of similarities between the wording that comes up and is apparent from the cases.

Further, given the fact that the President in The New Lottery case specifically referred to the DBT guidance -- it's relevant to note that the passage quoted by my learned friend in his skeleton at paragraph 95, paragraph 15.6 of the DBT guidance, and that's

tab 74 of the authorities bundle, page 2507, closely reflects the position under EU law. That guidance refers first -- states first that the provision of public resources were not situations where under regulation money flows directly between private entities without coming under the control of the public authority. That's the PreussenElektra case, which, as the President will be very familiar with -- it was a key case in the development of EU state aid law. I have not given that case as one of the three scenarios to deal with here, because that case is even further removed from the facts of this case. The three scenarios I have given you are ones where you are dealing with a charge being passed down. It is a question of where the relevant end user is. The PreussenElektra case was where there was an obligation imposed on a private company and there was no opportunity for them to fund -- there was no funding mechanism for them to recover it. It was suggested that, by a State making one private party pay another private party, that was sufficient state control. One can see there is an argument for that. Indeed, Advocate General Jacobs, whilst ultimately deciding against the appellant, he did concede that there were strong reasons for taking that broader approach, but said "No, we should stick with the narrow one".

That's a different case altogether from the one we are dealing with here, but that's the first principle that is referred to in the DBT guidance.

The next sentence continues:

"This is because a transfer of resources will not constitute public resource unless it results in a corresponding charge to government expenditure ..."

That obviously reflects the case law we have looked at under the first criterion, the Covestro case law and EEG and DOBELES, and most of the cases look at the charge criterion. The subsidy surcharge criterion is referred to in that second sentence of the guidance. The third sentence of the guidance continues:

"However, a transfer of public resources may exist where resources paid for by private

bodies transfer through a public authority or other body that is influenced or controlled by a public authority."

Of course, this reflects the line of case law we have just looked at, the second criterion, and I looked at particularly Achema and obviously maps on to section 2(3) and 2(4) of the Act.

So, on the second criterion, there is a strong reason for thinking that Parliament intended to follow EU state law or was consciously using those principles and the guidance does not give any cause to doubt that. On the contrary, it supports it.

MRS JUSTICE BACON: Is there anything in the guidance about the first of the two alternative limbs you have been referring to, namely the destination of the surcharge and which end users are affected by it?

MR GIBSON: I didn't spot it. I don't think that's been developed.

MR BARRETT: No, there is not, my Lady.

MR GIBSON: Thank you. I am grateful.

I took to you this paragraph, because, as my learned friend says, this does seem to be the most pertinent paragraph. My point is that the second sentence does refer to a 'corresponding charge', albeit without elaborating on the destination of the end user and what have you.

MRS JUSTICE BACON: Uh-huh.

MR GIBSON: Thirdly, we say there is no obvious reason to depart from the approach taken in the cases I cited in my written submissions, in particular Achema and Covestro. Those cases are all soundly reasoned. So we say that applying the test -- well, the formulation that the EU President identified in the New Lottery Commission case in respect of the market common operator principle, we say the same would apply here to the public resources criteria and the criteria that that comprises. That's all I want to say on that topic.

The fourth topic on the law was to deal with contingent transfer of public resources. I am conscious of the time. What time would you like to take a break for the transcribers?

MRS JUSTICE BACON: I think we would normally take a break at about 11.45.

MR GIBSON: I will definitely finish this topic and see how much I can get into the facts by that time as well.

I should also briefly address the topic of contingent transfers of public resources in a little more detail. We say that GEMA is wrong to frame the test under limb A as requiring Zenobē to show -- and this is at skeleton 93(3) -- Zenobē had to show that it is more likely than not that floor payments or non de minimis floor payments will be made. We say that that framing elides two separate matters, the test and the burden of proof. The test is set down by section 2 of the Act. Zenobē must show that the financial assistance to be provided through the LDES cap and floor support is given directly or indirectly from public resources. The financial assistance includes an actual and/or a contingent transfer of funds.

Zenobē must therefore show on the balance of probabilities that the LDES cap and floor support involves an actual or a contingent transfer of funds. That does not mean that Zenobē must show that the transfer of funds is more likely than not to happen, only that it is more likely than not that the scheme allows for the possibility of the transfer in particular circumstances. In brief the question of the --

MRS JUSTICE BACON: Can you just repeat the last sentence. Show on a balance of probabilities.

MR GIBSON: Zenobē must show on the balance of probabilities that LDES cap and floor support involves an actual or contingent transfer of funds. That does not mean that we must show that the transfer is more likely than not to happen, only that it is more likely than not that the scheme allows for that possibility.

MRS JUSTICE BACON: That's not a balance of probability point, is it? It is just a question of legal appraisal of the scheme.

MR GIBSON: It is the contingency point. Sorry. Maybe I am compressing my submission too much. The fact that there is a contingency does not mean the contingency has to be probable. That's essentially my point.

MR WOLFFE: Yes. I mean you could hold that a guarantee had been granted in circumstances where the guarantee is never likely, in fact, to be called on.

MR GIBSON: Indeed, sir. That's precisely my point. If on the balance of probabilities you have proven that there was a guarantee given and met the question of the burden of proof, the question of the likelihood of that eventuating is a separate question.

MR WOLFFE: Yes, but it is not a burden of proof point. It was simply that there is a guarantee as a matter of law. Equally here if someone looks at the scheme and asks whether what it provides for is a contingent --

MR GIBSON: Maybe I have expressed myself in an infelicitous way, but you have my point which is, for a contingent transfer of funds, what degree of likelihood do you have to show in order to make good on taking that alternative option under the statute?

So we say, on the basis of the natural and ordinary meaning under domestic law and by reference to analogous principles of EU law, the relevant test of contingency is simply that it refers to something that may occur. It connotes possibility, not probability.

As to EU law, it is perhaps convenient just to turn up briefly the text written by the President on this topic, which appears at tab 76 of the authorities bundle, page 2608, and in particular two passages. On page 2624, paragraph 2.33. That is a blast from the past.

MRS JUSTICE BACON: I am surprised people are still citing this. It is ten years old.

MR GIBSON: These particular principles are still good as far as I'm concerned.

Paragraph 2.33 says a contingent advantage is one which may or may not ultimately be called upon. There is no need to establish it on the basis of probability.

Paragraph 2.105, which is on page 2656 is a reference to the France Telecom case, where the mere offer of the loan was regarded as sufficient potential burden on state resources.

So we therefore submit that taking the natural --

MRS JUSTICE BACON: France Telecom is at page which?

MR GIBSON: Page 2656, paragraph 2.105.

MRS JUSTICE BACON: Yes.

MR GIBSON: So we say, therefore, based on the ordinary, natural meaning of the word 'contingent' as a matter of English understood as the word has been used in the statute, and confirmed by the way the analogous principles have been applied under EU law - we say the relevant test to be applied is whether there is a real, serious or concrete as opposed to a fanciful risk that financial assistance may impose a burden on public resources. So that's the threshold you have to meet to be able to show that a contingent event is sufficient to show the engagement of public resources. Is it more than fanciful that it is a contingent event that may occur? That's, of course, the same test as the CAT and other civil courts routinely apply in considering other future possibility in the context of strike outs and the like.

That's what I wanted to say on the law.

MRS JUSTICE BACON: It is not that there is a real rather than a fanciful risk of burden on public resources. You do have to show a binary question whether there is an impact on public resources directly or indirectly. Your point is that one of the ways of showing a direct or indirect commitment of public resources is to show that there is some form of guarantee or back-up through the contingent loan. That is not a risk of a burden on public resources in that sense. It is not that the state resources condition

has to be shown to be potentially satisfied. It is that that is a burden on state resources under the case law because there is that guarantee which may be called upon.

MR GIBSON: Yes. That's what I meant to say. If it wasn't the way it was perceived, then obviously I am grateful to you for clarifying it. The test is clear. One way of satisfying the test is to show -- it is not watering down the test. It's a way of showing it.

MRS JUSTICE BACON: A way of showing it.

MR GIBSON: Contingent transfer. If you ask yourself what constitutes sufficient likelihood for it to be a relevant contingent transfer, we do say --

MRS JUSTICE BACON: A more than fanciful risk that the guarantee or loan should be called upon.

MR GIBSON: I think, in fact, just looking at my notes, the EEG case, tab 57, page 1819 at paragraph 119 does make reference to -- it says:

"It is necessary to establish a reduction in the state budget or a sufficiently concrete economic risk of burdens on that budget."

MRS JUSTICE BACON: Yes.

MR GIBSON: The same dictum applies in the Court of Justice case in that case at paragraph 60.

That's all I want to say on the law. In summary, we have seen the way UK domestic law operates. It has close analogies to the EU state aid law that I have looked at. You can either go direct or if you go indirect, there are two criteria. For those reasons we invite you to look very closely -- I will not use the word adopt, because it's not appropriate in these circumstances. I invite you to follow and abide by EU state aid on this topic, and one sees in relation to contingency, which is obviously important in this case, that's the threshold one needs to meet.

So to the facts I am going to start looking at the financial assistance provided under

the scheme and then I will look at how the funding mechanism will operate and the services to which the scheme relates which are obviously very key questions to be asked in light of the law I have looked at. I will briefly discuss examples of other subsidy schemes which have been referred to the Subsidy Advice Unit and which are closely analogous to the LDES scheme in terms of the funding mechanisms they employ. We say that's also relevant for your consideration of this particular case.

MR WOLFFE: Why?

MR GIBSON: Because they are closely analogous and in those circumstances they were referred as subsidies.

MR WOLFFE: Presumably you are not going to be taking us through the details of those schemes for an analysis of -- you know, a separate analysis of them. Is it more than a jury point that they have been --

MR GIBSON: It is a bit harsh to call it a jury point, with respect. The point is that the relevant bodies in the energy sector, particularly the Secretary of State that we are dealing with in this particular case, have made references with schemes that have materially identical facets and there was never any question that those should be referred. I do submit that's actually quite a telling point, not a jury point. It is a comparison of the facts and a different outcome taken in this case. One has to ask one's self whether that is actually correct.

MR WOLFFE: I suppose the point I am making is he may have been wrong without applying the same analysis that you were asking us to apply to this scheme. How far can we really take that?

MR GIBSON: I accept that. I don't propose to dwell on it very long. Perhaps I can just give you references and then you can consider whether you find it helpful or not.

MRS JUSTICE BACON: I think that would be helpful because the question is how much time is directed to that particular part of your argument. We do need to get on.

MR GIBSON: I will deal not in great detail but I do say, and I accept your point. But you will note that Ofgem seek to rely on what has happened with the Interconnector Cap & Floor. The fact is that Ofgem are marking their own homework in pointing to the fact that they did something similar before. It tells you absolutely nothing about whether that was correct. So, there is a goose and gander point here. But I do think that it is significant that not just once, but multiple schemes with the same criteria as in this case have all been referred as subsidies, and the Subsidy Advice Unit, the expert in this area never once said "Why did you refer this to us? This is not relevant".

MR WOLFFE: Perhaps you can give us the references.

MR GIBSON: I will give you the references when I get to that.

First of all, the financial assistance to be provided under the scheme. It's been described in various sources. I won't take you to each one. I'll just give you the references and the relevant bits, because I think it could take quite a long time if I go through it. For example, in the E bundle, tab 3, page 3829, Mr Shanks' Parliamentary statement in October 2024 describes a cap and floor mechanism as an established way to provide support and enable investment decisions to be made by project developers. It does this by providing revenue protection via the revenue floor, which is set at a low level.

Then the Ofgem press release, which accompanied the publication of the documents comprising the 2025 decision, and that's at tab 1 of bundle E, page 1378, further explains how an LDES cap and floor scheme will operate to provide financial assistance to recipients. They said:

"Cap and floor is a regulatory mechanism to be used to support LDES projects.

Floor. This is the minimum revenue provided to the project. If the public revenue falls below the floor consumers pay the LDES operator the difference up to the floor level.

Being awarded cap and floor means that the project is underwritten to provide financial

protection on the downside. It ensures the project minimum income to recover their investment."

If one then turns up the financial framework decision, which is one of the four documents comprising what we call the 2025 decision -- I know there is a difference of opinion as to how to describe these things. I will come back to look at this in more detail in a moment. For now I would just like to flag part of the decision. I am looking in bundle B. It appears in both bundle B and E. I apologise for any confusion that has arisen from that. Bundle B, tab 5, page 177, paragraph 2.1 it says:

"What we consulted on. We consulted on whether competition should be used to the set cap and floor levels for LDES projects. We proposed that competition could offer flexibility, accommodate diverse technologies and deliver better consumer value."

Ultimately after consultation, one skips forward to page 181 and page 220, they decided, in fact, that every project will receive an administrative regime by default, so not a competition based regime but an administrative one, i.e., one set by the regulator, including paragraph 2.20(c):

"Target rates return of the cap and floor. These rates of return will be set administratively by Ofgem."

I am just flagging that so that when we come on to look at control we can see the degree of control by part of the authorities in this process. That's what we briefly highlight in terms of the way the mechanism works in this case.

Looking at the funding mechanism for the provision of that financial assistance, GEMA has decided, and this is, in fact, in the financial framework decision if you skip forward a bit to page 212, paragraph 8.7, GEMA has decided as part of its 2025 decision that BSUoS charges would be used to fund payments if LDES project revenues fell below the floor.

I am going to explain what the significance of that is, but it was a decision to use

a particular form of charging recovery, namely the BSUoS charging route. BSUoS stands for Balancing Services Use of System charges. It is a relatively short passage. If you read the whole of that section 8. (Inaudible) I am not sure whether that's because I have given a bad reference.

MRS JUSTICE BACON: That's page?

MR GIBSON: 211. Just two pages. Cap and floor payments and charging mechanism. If you could read that, and then I can highlight a few points. (Pause.)

If everyone is ready, I will make just four short points. Sorry. I don't want to rush.

MRS JUSTICE BACON: Yes.

MR GIBSON: The first point you will see that, as part of the consultation preceding the 2025 decision, GEMA was considering two types of network charges as the means of funding cap and floor payments and receipts. At 8.1:

"We confirm the network charge will be used to fund payments when project revenues fall below the cap or exceed the cap."

The second point is that GEMA's preferred mechanism was BSUoS charges, which align better with the balancing and flexibility role of LDES Technologies. That's telling you what the actual service is that LDES are providing. They were providing balancing and flexibility services, and I will come on to explain that in more detail by reference to the evidence of Mr Hutcheson in a moment. They are not transmission assets.

Thirdly, any floor payment will be made directly by NESO, that is the National Energy System Operator. It was made clear that NESO would act as the central intermediary for managing payment flows. NESO would collect BSUoS charges from suppliers and distribution floor payments for projects when needed. Paragraph 8.3.

Fourthly, GEMA identified two situations which would result in a time lag between, one, the need for NESO to make a floor payment in line with the timings under the LDES regime, and two, receipt of the source charges in line with the timing under

relevant BSUoS charging period. These two situations are as follows.

The first -- and this is paragraph 8.3 -- is where there is a difference between, firstly, the amounts due under the LDES scheme, which will be based on outcomes from the LDES' regime's assessment period, on the one hand, and two, the actual payment flows which will follow the annual BSUoS charging periods to support predictability. There is a risk of one not being aligned with the other and there being a shortfall to make up while you are waiting for the BSUoS charges to come in.

The second scenario is where the actual cap or floor payments diverge from forecasts which could result in "under recovery of BSUoS charges" which would need to be "reconciled in future charging periods" at paragraph 8.4. So two ways in which you might have a scenario where the immediate source of the funds can't be BSUoS charges but has to come from somewhere else in order to make a floor payment if called upon to do it when there is not sufficient resource charges approved at that point in time. Those are two time lag scenarios.

MRS JUSTICE BACON: It is not I think right to say that in these paragraphs there was an identification of a time lag. That's your extrapolation from what is said in these paragraphs. So there is no mention of a time lag here. All that it said is that in paragraph 8.3 is amounts due will be based on outcomes and actual payment flows will follow the charging periods, the BSUoS charging periods, for example. It's not said that there may be a time lag. That's your inference.

MR GIBSON: I don't think it is an unreasonable inference but I agree the words "time lag" don't appear there. There is reference to the possibility of under recovery. That is the real point. Whether we call it a time lag or not, what I am trying to get to is the fact that there may be a financial shortfall, which is what under recovery means, and that is said in terms, and there will be a need to reconcile that in future. So I do submit that paragraph 8.4 is even clearer in making clear that there will be -- there is a risk

there is a financial gap that needs to be plugged later on. It is a question of what you do in the interim. That is the point I am trying to make. I apologise if my use of the word "time lag" perhaps confused the issue.

MR WOLFFE: The final sentence of 8.4 tells us:

"There may be a reconciliation in future charging periods ensuring the scheme remains cost neutral over time."

It is the over time point that you are emphasising, that there may be a period during which there's a difference between the two.

MR GIBSON: Yes, a difference and the question is: how is that funded? The question of how that is funded is obviously directly relevant to the question of public resources, as I will come on to explain.

So in his evidence Mr Hutcheson builds on what was said in that financial framework decision and explains how the Secretary of State has made provision for such situations by providing NESO with a working capital loan facility.

So if you just turn up Mr Hutcheson's statement at tab 11 of bundle B, at page 477, paragraphs 98(a) to (d), he essentially reiterates --

MRS JUSTICE BACON: It is bundle?

MR GIBSON: Bundle B, tab 11, page 477.

MRS JUSTICE BACON: 477.

MR GIBSON: Apologies. Then at paragraph 98(a) to (d) he essentially reiterates points made in section 8 to the financial framework decision, including at paragraph 98(c) and (d) by repeating what we have just seen about the two situations in which NESO may need funds to bridge a shortfall or under recovery. Referring to what he had said earlier in his statement:

"I have addressed NESO's financial position in paragraph 21 above. Any under or over recovery would be reconciled in a future charging period."

So Mr Hutcheson is quite rightly linking this scenario of potential shortfall with what he had said at paragraph 21.

If we turn back to page 454 in his witness statement, paragraph 21, Mr Hutcheson says this:

"I am informed by Ofgem colleagues familiar with NESO's charging and cash management arrangements that HM Government provides NESO with a working capital facility to manage within-year timing differences between amounts recovered through BSUoS and NESO's within-year cash outflows."

So Mr Hutcheson has put it, may I say, much more clearly than I managed to. I hope you see the point I was trying to make with my clumsy use of the words "time lag".

"I am further informed that the facility is sized by reference to expected cashflow volatility and risk, and that NESO recovers a small annual fee through BSUoS in respect of the provision of that facility."

As I say he correctly rightly identified that link between that working capital facility mentioned in paragraph 21 and its use to recover any shortfalls and the need to allow for reconciliation in future, which he deals with at paragraph 98.

Relatedly, if one skips forward again, and I apologise for the jumping about, to paragraph 133(d) on page 489, where he explains that the proposed reconciliation process – i.e., the process that involves that working capital facility – would enable NESO to make payments of cap and floor support to projects “in advance of” collecting BSUoS charges. So we say GEMA's evidence itself is very clear as to there being financial shortfall in certain periods. The fact that the working capital facility is used to smooth that out to allow you to achieve a net neutral effect over time in the immediate term using the working capital facility to bridge the gap whilst there is that shortfall and that, as I said, in paragraph 133(d), he says in terms:

"Would enable NESO to make payments in projects in advance of collecting BSUoS

charges."

He continues by explaining that: whilst they had not finally decided whether LDES cap and floor charges should be separately itemised through BSUoS, the current working assumption is that those charges would be incorporated into the overall BSUoS charging figure; but, in either case, the net amounts will be recovered or returned through the source in accordance the BSUoS methodology and reconciliation arrangements.

So he quite rightly accepts that, whichever way GEMA goes on that point, the BSUoS methodology and reconciliation arrangements, including this working capital facility provided by the Secretary of State, will apply.

I will just touch upon very briefly what else we know about the working capital facility. Mr Hutcheson explained -- I will just deal with this point and then perhaps we can stop for the transcriber. Mr Hutcheson explained that NESO's working capital facility is sized by reference to expected cashflow, volatility and risk. We can see just how much volatility and risk was expected if we look at the documents relating to NESO's predecessor, which is the best publicly available information that was available to us. If you turn up -- it is referred to in Mr Palmer -- Mr Palmer's third statement, paragraph 32. That's tab 10 of bundle B, page 408. He refers to this. Then if you turn to the meeting note -- contemporaneous documents always being very helpful -- the work group involved in the administration of NESO's predecessor, that appears in the E bundle at tab 2, page 2325 to 2326.

From the title of that document one sees that the meeting concerned a code modification proposal, that's what CMP stands for, CMP420, specifically concerned with the BSUoS revenue recovery and creation of a BSUoS fund. On the first page in the second paragraph under the heading "Timeline" the GEMA representative mentioned:

"Ofgem has requested HM Government consider increasing the ESO's Working Capital Facility in the transition to the FSO" -- that became the NESO -- "of balancing charges ... Ofgem expects to have a position within Q1, 2024."

Over the page, the fourth full paragraph starting "A work group member highlighted".

"The work group member highlighted the dependencies of this modification on several factors including the move to the FSO and what the BSUoS working capital facility could be."

The second sentence reads -- this is the BSUoS working capital facility specifically:

"If the future Working Capital Facility is higher than the current value of £300m then this could mitigate the need for an additional risk management method such as that of BSUoS fund."

So you are looking specifically at capital available for BSUoS charges bridging that gap.

We see that this was not just a peripheral possibility, it's a £300m possibility. I don't diminish the fact they are dealing with very large sums of money. However, as a result of how much is going on, there's a possibility of a material shortfall - of a £300 million gap to be bridged.

Mr Hutcheson also referred to the BSUoS methodology, which forms part of the CUSC, the Connection and Use of System Code. I will not take you there in the time, but in case you want to look at how this all works, Mr Palmer refers to it at paragraph 229 of his first witness statement at bundle B, tab 9, page 350. Don't turn it up but if you want to look at it in due course in the supplementary bundle, we realise that the exhibit had only put one page of the BSUoS charge methodology so we have included the full BSUoS methodology in the additional bundle, bundle F, tab 12, pages 166 to 177.

In essence BSUoS charges are forecast three months ahead of time and set at a fixed

price and for a period of 12 months and those 12 months run from 1st April to 31st March each year.

Now next I am going to look at the NESO briefly but I will do that after the break, if that's convenient?

MRS JUSTICE BACON: Yes. Very good. So we will take five minutes.

(Short break)

MR GIBSON: I wanted to turn to the NESO itself and look at what we understand about its constitution and relationships with other public actors. The NESO framework document appears in the E bundle at tab 1, pages 2153 and following. The whole document probably bears close reading but obviously in the time available I am just going to select a few passages to highlight.

MR WOLFFE: Can you give us the reference again?

MR GIBSON: Forgive me. It is Bundle E, tab 1, pages 2153 and following. If we just go to what I hope is 2161, paragraph 1.1 -- that doesn't seem quite right, but maybe. 2161, paragraph 1.1 just briefly sets out what this framework document has been agreed between DESNZ and NESO in accordance with HM Treasury's handbook managing public money.

"NESO is the company that has been designated by the Secretary of State as the Independent System Operator and Planner pursuant to Section 162 of the Energy Act 2023."

If one then moves forward to paragraph 4, page 2164 to page 2165, under the heading "Functions, duties and objectives", I don't suggest you read that now, but it would be useful at some point to see that NESO has been assigned various public functions in the energy sector in accordance with statutory responsibility.

MRS JUSTICE BACON: Sorry. Which paragraph?

MR GIBSON: Paragraphs 4.1 to 4.7, so section 4 of the document, under the heading

"Functions, duties and objectives".

Skipping ahead to page 2174 and over the page, this is section 15, which deals with the NESO's Chief Executive and outlines her or his responsibilities, including at 15.4: "Should ensure that NESO operates in accordance with the agreed governance controls set out in HM Treasury's MPM" - that's Managing Public Money, as we will touch on in a moment - "handbook."

Paragraph 15.6:

To account to Parliament "…on NESO's stewardship of public funds."

Then at section 21 on page 2182, you may find it helpful to read those paragraphs, only two of them, at some point. That just maps on to the discussion we had about the working capital facility of £300 million. So the possibility was provided for in this document and we've seen that actually that is what happened. That's confirmed by Mr Hutcheson's witness statement at paragraph 21 as well. This is, of course, one source of public funds over which NESO has stewardship.

Then I think I can skip that point. So that gives you a very whistle-stop flavour of the NESO. As I said, the whole document is probably worth looking at, but we don't have time to go into the detail of it now.

I will now turn to the services to which the LDES scheme relates. The evidence of both parties clearly shows that energy storage installations, including LDES installations provide an important network service or services. I have given you the reference to the evidence in paragraph 45 of my skeleton, but I will just turn up Mr Hutcheson's witness statement again to illustrate the point. Paragraphs 14 and following, that's bundle B, tab 11, page 452, he deals with the background to the LDES scheme and he explains the following points. Over the page on page 453 at paragraph 16 he explains:

"Energy balancing is necessary to ensure there is enough electricity to meet demand

and that the grid is running efficiently and at the lowest cost for consumers. The ability to shift demand and supply to achieve energy balancing is known as energy system flexibility."

So these are particular services that are important to the management, stability and flexibility of the network. As I said in my skeleton, I highlight there's no dispute between the parties on this point. The evidence of both of them is clear that energy storage is key to provide these core network services.

At paragraph 17 he goes on to explain NESO imposes network charges on users of electricity network. That is the relevant users, to cover the cost of maintaining and operating the network. Two such charges are the BSUoS and NESO charges.

Again confirming what Mr Palmer said in his first statement, paragraphs 53 to 56. They are agreed that the relevant BSUoS charges are network charges imposed on network users.

At paragraph 18 he goes on:

"The BSUoS charges are levied on electricity suppliers to recover the cost that NESO incurs in balancing the electricity transmission system."

That confirms again Mr Palmer's evidence 53 to 56.

Over the page, paragraph 20, he explains that the tariffs are determined by a methodology contained in the CUSC being, the code, which is the contractual framework connecting and using the electricity framework. "The code is administered and updated by Ofgem."

So there's a link to Ofgem's significance in the process:

"Under their licences, users of the electricity network are required to sign the Code and pay BSUoS and TNUoS charges as appropriate."

So the users of the electricity network, so the network end users are required to pay these charges. So the evidence is clear. Relevant service is the network service. The

relevant users of the service are the network users and those network users are required to pay the BSUoS charges. The three important criteria for the Covestro scenario are made out in this case.

Then you can see at paragraph 21 the point I looked at earlier about working capital.

Continuing on, though, paragraph 24, he says under the heading "Clean power and long duration, flexibility and LDES."

He goes on to explain:

"Long duration, flexible technologies are able to provide a reliable source of electricity for managing daily and seasonal demand peaks and longer periods without recharge, long duration technologies provide flexibility, and help to alleviate constraints on the grid. They are an important part of delivering a cost-effective, low carbon energy system."

So again further confirmation that the relevant service here, the energy storage facilities provide is a network service, in particular providing flexibility and alleviating constraints.

At paragraph 25 he specifically says:

"LDES is a type of long duration flexible asset."

So in short we say there can be no doubt the relevant service in this case for the purpose of considering whether the scheme imposes a compulsory charge on end users of that service is a network service or services provided by LDES installations.

I'm moving on to the next topic. I'm not going to take it in any great detail after the discussion earlier about referred subsidy schemes. I will make a few points by way of introduction. I will give you the references to the relevant materials should you find it helpful to look at them and then tell you what I invite you to take from that reading when you have a moment.

So it is not disputed that DESNZ and BEIS before it has referred numerous support

schemes in the energy sector to the Subsidy Advice Unit on the basis that they constitute a subsidy scheme. Mr Palmer has provided evidence about the features of those schemes in his first statement at paragraphs 66 to 79 and 286 to 294 - that's bundle B, tab 9, 309 to 313 and 366 to 369 - and in his third statement at paragraphs 33 to 34- - that's bundle B, tab 10, pages 408 to 409. That evidence has not been contradicted by GEMA's witnesses, but what is interesting to note is that the witness for DESNZ, the government department responsible for making the referrals to the Subsidy Advice Unit, has not commented at all on this topic, despite the relevant witness having been a deputy director for the department since October 2016 during the period when all of these referrals were made.

The relevant referrals that we rely on, or three examples of them -- as I said we will not turn then up now -- the CFD scheme, one example of the CFD scheme, there are three in the bundle, but one from February 2023 is at E, tab 1, page 1745. As I said, there is other examples of the CFD scheme referrals too. One example of the capacity market referral is the report of 5th April 2024. That's E1, 1777. One example of the Carbon Capture Usage and Storage schemes, the CCUS schemes, including the dispatchable power agreement, the DPA business model scheme, that appears at Bundle E, tab 2, page 3617.

What you will find if you have a moment to look at those is that the schemes which have been properly referred to the Subsidy Advice Unit as subsidy schemes have the following features. 1. Each scheme involves a service which provides a network benefit, i.e., a network service. 2. All of the schemes involved the imposition of a compulsory levy on the end users of the relevant network service, i.e., electricity suppliers. 3. All of the schemes involve public control throughout the process.

Then just two observations on what one sees from how the SAU go about their task. We see that the SAU’s review of the schemes is quick and efficient, looking at matters

with rigour but taking things at quite a high level, recognising that this matter needs to be assessed in a pragmatic way. They do, however, helpfully highlight the importance of certain particular features that the person making the referral could have done better, including, for example, occasionally assessing potential impacts on other market participants and whether the benefits of the scheme outweigh the negative effects on competition and investment in the UK. Overall, the SAU process is a critical one and serves an extremely important part in the process as a whole. I will come on to develop that theme later in my submissions. That's what I want to say on the facts.

Turning to my submissions on this first issue, drawing those threads together, we say there are three reasons why the test of the public resources is met on the facts of this case. First, when a floor payment is made to LDES project using the LDES -- the Secretary of State's working capital loan facility, this will be given directly from public resources.

Secondly, NESO will recover the costs of making any floor payment by imposing a compulsory fiscal surcharge on network end users, being the relevant end users for these purposes.

Thirdly, the sums recovered through the BSUoS network charges will constantly remain under public control and/or supervision, picking up not just the EU second criterion but the UK's section 2(3) and 2(4) test of control and supervision.

So the first point. Where a floor payment to an LDES project is made using funds from the working capital facility, it is made directly from public resources. The evidence shows at least in a material number of such cases NESO will need to use the facility, or at the very least it is probable they will need to do.

So as I have just shown, HM Government provides NESO with working capital to manage within-year time differences between the amounts recovered through BSUoS and NESO's within-year cash outflows. That's how Mr Hutcheson puts it at

paragraph 21. The facility is decided by reference to the expected cash outflow and risk and, as we know from NESO's documents in relation to that working group meeting I took you to, we know that the size of the capital facility as at November 2023 was £300m and Ofgem was looking to increase its size. We say a facility of that size reflects a very sizeable expectation that these within-year timing differences can and will appear in a material number of cases.

The reconciliation process for using this facility is expressly mentioned in the context of LDES cap and floor support by Mr Hutcheson when he said that it would enable NESO to make payments of capital support to projects in advance of collecting BSUoS charges. That's paragraph 133(d), page 489, bundle B.

So we say it is GEMA's own evidence that at least in some cases the working capital facility provided by the Secretary of State, i.e., clearly a state resource, will be needed to enable NESO to make floor payments under the LDES scheme in advance of collecting resources charges. It is not invariably the case. I am not saying that, but in a material number of cases we amply satisfy the more than fanciful threshold for showing the contingency may arise.

So, that reason alone, we say, is sufficient to meet the test under section 2(1)(a) of the Act, because that expressly states that limb (a) is satisfied that either of the two alternatives is met, either financial services given directly, as you see is the case here, or is given indirectly.

MRS JUSTICE BACON: But isn't it the case, as we've seen in the documents to which you've taken us, that the working capital is ultimately financed through BSUoS, because there's this annual levy that is made. So doesn't it all recycle into the BSUoS payments?

MR GIBSON: I will come on to address you on the BSUoS payments and make good on that. I can reassure you even if that were the case, that would be fine. We say no,

looking at it strictly, there is a floor payment. The floor payment is funded by a working capital facility provided by a government minister. We say that's obviously use of public resources in order to make the floor payment. The working capital facility is funded by the Secretary of State providing a massive loan to NESO. If you like, NESO has two alternative sources of funding. It has the BSUoS charges funding and a working capital funding. When a particular floor payment comes up to be paid which source does it use? If it uses the working capital payment, we say it's a direct use of public resources, albeit that gets -- the idea is that gets washed out, but the immediate way it is paid and therefore the direct use of publishing resources is via the working capital facility. I have lost the President I think.

MRS JUSTICE BACON: No. Go on.

MR WOLFFE: Sorry. Did we not see that in addition to the BSUoS charge following the payments that go out that there was also an element that goes to fund what we might call the cost of financing?

MR GIBSON: Yes. The BSUoS charges they also use to pay the administrative costs of NESO, yes.

MR BARRETT: I think you are referring to the working capital specifically. Indeed you did see some evidence that is funded by the BSUoS charges.

MR WOLFFE: Yes, so it is not simply that the payments out and the payments in are cost neutral but the BSUoS charge also -- there was a sentence somewhere in the documents you showed us that suggests it was also covering the cost of -- in effect I read it -- right or wrongly -- I may have read it wrongly -- accompanying the financing cost.

MR GIBSON: If there is some suggestion of that, it is wrong.

MR BARRETT: The final sentence of 21.

MRS JUSTICE BACON: I am looking at page 454, Hutcheson's witness statement,

21. He deals with the working capital facility and he then says at the end:

"... the facility is sized by reference to expected cashflow volatility and risk" -- that is the point you have made -- "and that NESO recovers a small annual fee through BSUoS in respect of the provision of that facility."

There is also other reference I think in the documents along the way.

MR GIBSON: I think that's dealing with a different point. That is dealing with the funding of an administration fee for NESO. What we are talking about is where the floor payments are funded.

MRS JUSTICE BACON: But this is talking about where the working capital facility comes from. This paragraph is specifically dealing with that. So you say the floor payments are provided with working capital -- are paid through working capital if there is a time lag and this paragraph says that the working capital is financed -- that's my reading of it -- through NESO recovering a fee through BSUoS.

MR GIBSON: The provision of that facility. I don't want to debate too long, but it doesn't make a great deal of sense to my mind. In any event that is something that would be funded after the event.

MR WOLFFE: You would presumably say --

MR GIBSON: -- you haven't got the money through BSUoS, where does it come from? It comes from the loan.

MR WOLFFE: So your simple point is that this is at the point when the payment has been paid using money provided by the Secretary of State. It doesn't matter if ultimately the whole system is cost neutral you would say.

MR GIBSON: Yes.

MR WOLFFE: And Mr Barrett may or may not agree with you on that.

MR GIBSON: I am saying looking at literally -- you have a floor payment made. Where does the fund come from? Sometimes it comes from BSUoS charges, in which

case we have to look at the second part of the question. If it comes from the working capital facility the actual loan provided by the Secretary of State, that is quintessentially a loan from a public sector body. This is just to do with the source of the funding. This isn't some sort of scenario we are looking at whether or not the loan itself is the aid. That's not the suggestion. We don't need to get into CMO principles and market economy operator principles. The aid is the cap and floor support. The question is how is that aid funded -- I was using the word aid. Sorry. The subsidy. How is that subsidy funded? We say the financial assistance is clearly funded either in a material, non-fanciful number of cases by the loan or by the BSUoS charges, but the fact that it is provided in a material number of cases by the loan we say is enough to get us home. I mean, in this particular case we happily get home on three different bases, but if it mattered, I do feel quite strongly we need to subject it to the appropriate degree of forensic scrutiny on that point.

I don't think it is relevant, because it is talking about what then happens after the event, I think all that's saying is in order to reflect that the provision of this loan is a service that they are providing, they take a fee for that. That's one of the things they recover through BSUoS charges. So it would be a bit odd if they were exposing themselves by taking this massive loan on and no-one was ever paying anything for that, any consideration for the provision of that loan. So to my mind that's what the administration fee means. That all happens at the back end along with paying back the loan. It's not relevant to the pertinent issue, which is at the point of making a floor payment where does the fund come from?

MRS JUSTICE BACON: Thank you. So that's the first of your points.

MR GIBSON: That's the first of my three points.

The second point is that, if it is given indirectly -- the second alternative reason is it is given -- sorry. The costs of making any floor payment are recovered by imposing

a compulsory surcharge on network end users. As I said earlier, this a Covestro-type case, not an EEG-type case or a DOBELES-type case for that matter. The service provided by energy storage installations including LDES installations is a network service and is what GEMA's own witness, Mr Hutcheson explains.

The indirect means of funding floor payments is through BSUoS charges, i.e., compulsory network charges levied on the end users of the network service, namely electricity suppliers. Again there is no dispute between the parties on that. Since we are dealing with a network service, it is irrelevant, as the General Court of Justice said in the Covestro case, it is irrelevant that the electricity suppliers are not obliged to pass on BSUoS charges to the final customers.

The same is true of the CFD scheme, the capacity market and other subsidy schemes referred to the SAU, which Mr Palmer details in his evidence. They are all examples of compulsory network charges levied on end users of a network service. They have all been referred to the Subsidy Advice Unit and to the European Commission before that. We will say no more about that.

I am just going to address a few points that were made by my learned friend in his skeleton just to clear them out of the way.

First, it is irrelevant there is no actual or immediate payment. It is apparent from the wording of section 2 that it would be wrong to suggest, as GEMA does at paragraph 92, that the award of LDES cap and floor support does not meet the public resources test because there is no immediate payment, i.e., we are allowing for a possibility of a floor payment at some point in the future if the price drops below the floor.

I have shown that section 2 is framed in much broader terms and expressly includes both actual or contingent transfers, and I have also shown that the position is the same under EU law. For what it is worth, the same is true of the CFD scheme.

Secondly, it is sufficient there is a non-fanciful risk of a floor payment being made. As to contingent transfers, I have explained why it would be wrong to argue, as GEMA does, at paragraph 93.3, that we have to show it is more likely than not a floor payment would be made. The relevant test we submit is a non-fanciful risk, and that is a test that is supported by the plain language of the word contingent and by the EU case law on an analogous point.

The presence of this risk is not even in dispute in this case. Indeed, that is the very point of the cap and floor support scheme. It provides much more than a possibility of a floor payment being made. The scheme provides a concrete reassurance that it will be made and it does that under the licence. NESO will make a top up floor payment. I have shown you the explanations of how the cap and floor scheme works. It is underwritten. That's the level of confidence you can have that it will happen if the eventuality arises. It is way beyond even probability. If a floor payment is required it will be made, that's why people have the confidence to invest. Again the same is true of the CFD scheme.

It is irrelevant that a floor payment may never be made. This is not actually a point that's been properly pleaded in GEMA's case. It chose not to dispute our pleaded case that the grant of cap and floor support itself constitutes financial assistance and meets limb B (advantage). So whenever we saw in paragraphs 91 and 93 of GEMA's skeleton they argue that it is possible that no floor payment will ever be made under the LDES scheme, that actually doesn't go to any pleaded issue in dispute. Even if it had been properly pleaded as part of the case, we say it would take GEMA nowhere because, as already explained, the non-fanciful risk threshold is clearly met on the face of GEMA's own public statement and therefore it is irrelevant whether or not even a single floor payment is made in practice. That's not the way the incentive works. The incentive is the fact that if it happened, we would underwrite it. That's where the

confidence to invest is generated.

It doesn't make any difference either if the cap and floor scheme only ever results in payments to the consumers or to NESO where the soft cap is exceeded. It is entirely irrelevant. We are looking at the purpose of the scheme and it is the fact that the floor payment is contingent, as I say, on that very low threshold about a very high probability and that's enough.

The reference to *Max Recycle* we say does not assist either. That's a reference made in GEMA's skeleton, paragraph 90. I will not turn it up in the time. I think I have addressed that both in the reamended reply and in my skeleton. The short point is that the CAT in that case was dealing with a very specific situation, namely where the giver of the subsidy was the same person as the person to whom the subsidy was conferred; and it was that particular situation that the CAT was analysing when it made its observations.

In any event, we say there is no necessary inconsistency with the CAT's observations about the need for a 'subtraction' and what we have been considering -- everything said about the test here. The CAT did not say that the subtraction from public resources had to be either immediate or certain. It just simply said that is the function of the way it works. We say there is no necessary inconsistency and it would be reading a lot into what was said by the President in very different circumstances. He was not turning his mind to that at all. We say it is clear, based on the statutory language read in light of the EU law to the extent you are minded to accept my submission that you should, we say it is clear that we satisfied the test of contingency.

I then want to turn on to the third alternative reason why the public resources test is met in this case, i.e., the relevant sums are constantly under public control or supervision. If you just briefly turn back up the Advocate General Wahl's opinion in paragraph 27, bundle D, tab 58, page 1826. I am going to take you briefly through the

second to sixth sentences of paragraph 27 where he identifies the relevant factors and illustrate why they are made out in this case as well. So that is bundle D, tab 58, page 1826, paragraph 27. Give me a nod when you are ready.

MRS JUSTICE BACON: This was the Achema case.

MR GIBSON: That is correct. As to the second sentence of what he says: "It is the public authorities, i.e., GEMA with the benefit of expert input from NESO which identify the LDES projects which are to benefit from LDES cap and floor support."

His third sentence:

"It is also a public body that determines the amount to be charged for electricity consumers for the PIS services."

We say it is the same authority (GEMA, again with the benefit of expert input from NESO) which determines the level of the floor and indeed the cap under the LDES cap and floor scheme using an administrative approach, as we looked earlier.

Further, it is the same public authority, GEMA, which sets and enforces the licence conditions both: one, for electricity suppliers, including the obligation to comply with the code, including the obligation to pay BSUoS charges; and, two, for NESO, including the obligation to maintain and operate the code. It is also the same public authority who considers and approves or rejects material modifications to the code. So there is a strong connecting factor to the role that GEMA plays in overseeing the whole process.

Fourth sentence of the Achema opinion:

"Once collected by the electricity network operators PIS monies are transferred to Baltpool, an entity that although set up as a private law company, is controlled by the state." And, here, the source network charges are transferred from suppliers to NESO, an entity which, though set up as a private law company, is controlled by the state, i.e., wholly owned by and accountable to the Secretary of State and indeed regulated

by GEMA."

So again multiple connecting factors to the state.

Fifth sentence:

"Baltpool manages the funds received, distributing them among PIS providers according to criteria determined by law, while retaining part of those funds to cover its administrative costs." And, here, NESO manages the funds received, distributes them to LDES projects: 1, according to criteria determined by law, by the LDES scheme designed, established and operated by GEMA pursuant to its discretionary powers; 2, subject to regulation by GEMA; and 3, in accordance with the relevant principles for managing public money."

As we saw briefly when I took you to the NESO document.

Sixth sentence: "Accordingly the entire life cycle of PIS monies is strictly regulated."

The same applies here to LDES BSUoS charges.

So on that third alternative criteria we say we have also satisfied the public resources test. Again for what it is worth the same is true of the CFD scheme and other subsidy schemes that are referred to the SAU.

Just for completeness I should note that GEMA's reference in its skeleton at paragraph 94.4 the fact that NESO performs the same role as National Grid used to perform until October 2024 is also irrelevant. As I have shown you the definition of public authority under section 6(1) of the Act applies a functional test and I have also shown it is irrelevant under EU law whether a person trusted with granting the advantages has public or private status. The functions which NESO performs and National Grid used to perform clearly are public functions, as I have touched on.

I highlighted section 4, for example, of the NESO framework document. As noted in my skeleton at paragraph 41(2), it doesn't seem to be in dispute that NESO is a public authority within the meaning of section 6(1). That's quite right, of course.

So, we say that GEMA's attempt to downplay the roles played by GEMA and NESO is unsustainable on the facts, inconsistent with the position under domestic law and inconsistent with the position under EU law.

So we say for each of those three reasons, each alone sufficient, it is clear the grant of cap and floor support meets the public resources test under limb A and therefore it does constitute a subsidy within the meaning of section 2 of the Act, because that is the only disputed aspect of the definition.

I will deal with the objections to our pleadings, as the point was picked up, and I will do so now and I will do it as quickly as possible because I don't want to deflect from what has been a packed day. The first objection is as to our reliance on the fact that the Secretary of State provides NESO with working capital facility. My learned friend quotes paragraph 104 of the amended notice of appeal in his letter. I won't turn it up, but that's bundle B, tab 1, page 228. That refers to the role and involvement of the Secretary of State three times. Moving earlier in the same pleading, you see from paragraph 8, page 6 of the same tab that we refer to and reply upon Palmer 1 in full.

I would like to turn up Palmer 1, paragraphs 45 to 52. So that's bundle B, tab 9, pages 302 to 304. Have a look at all of 45 to 52 when you have time, but particularly 47 and even more particularly 48. 48:

"DESNZ has published a NESO framework document" As I said, it is already in the evidence. It quotes paragraph 20.2:

"NESO will be wholly funded by regulated network charges. However, the Secretary of State will provide NESO with a working capital loan facility", etc.

Then in the reamended --

MRS JUSTICE BACON: Where did you say that Palmer 1 was referred to in your --

MR GIBSON: I will take to you that. It is at bundle B, tab 1, page 6.

MRS JUSTICE BACON: Okay.

MR GIBSON: It is the amended notice of appeal, and it was also in the original notice of appeal at paragraph 8, the bottom of the page:

"Zenobē refers to and relies upon Palmer 1 in full."

MRS JUSTICE BACON: Right.

MR WOLFFE: But surely Palmer 1 is evidence, not pleading.

MR GIBSON: In conjunction. I have taken these two things too quickly. I do think it is an opportunistic point, not least because -- let me take you through the evidence and you will see why I find it slightly objectionable, but we refer to the relationships and the roles and the connecting factors between NESO, GEMA and the Secretary of State in paragraph 104. We make clear we rely on all the facts that are stated in that regard, and one of those facts is clearly the working capital facility.

Then if you turn to -- well, we have seen Hutcheson 1, paragraph 21 specifically deals with the working capital facility, which I infer was responsive to what had been said in Palmer 1. Palmer 3, paragraph 32, responds regarding the working capital facility. If you turn it up, it is bundle B, tab 10, page 407. That's Palmer 3, paragraph 32. He points out that GEMA fails to acknowledge the important role played by other public authorities as the source of funds used in this process.

MRS JUSTICE BACON: Which paragraph are you looking at?

MR GIBSON: Forgive me. Palmer 3, paragraph 32. I think it is on page 407. Let me double check I have not given you a bad reference.

MRS JUSTICE BACON: Yes, got it.

MR GIBSON: "GEMA fails to acknowledge the important role played by other public authorities as the source of funds used in this process, despite my having pointed this out in my first statement."

So we say it is perfectly clear that Zenobē was relying on the relationship between Secretary of State and NESO and one significant feature of that relationship was the

provision by the Secretary of State to NESO of a facility of £300 million, which is what Mr Palmer also cross refers to. He exhibits at paragraph 32 evidence as to the size of the working capital facility. That is the document that I took you to earlier.

So it is also clear that GEMA was well aware of this argument and indeed adduced evidence on this point and therefore there doesn't appear to be any factual dispute about the existence of the working capital facility. We say there is no lack of clarity. There is no prejudice. They have not raised any objection or sought further and better particulars of the way we pleaded our case. On the contrary in their letter they asserted the point needed to be 'properly pleaded and addressed in witness evidence'. As you can see in what I have just described, that's exactly what Zenobē did. We say there is no need to amend, but in any event, even if it were thought to be helpful to clarify matters, there is absolutely no basis for refusing it in circumstances where there is no prejudice. Everyone has been perfectly clear, on the basis of the combination of the pleading and the evidence – i.e., the formulation that my learned friend quite rightly used in his letter and, in light of paragraph 8 on page 6 [of the Amended Notice of Appeal] again, we say (inaudible) correctly so – we say there is no prejudice. They knew we rely on the fact, as Mr Palmer put it, the important role played by the authorities as a source of funds used in this process. So we say there's absolutely nothing in this point whatsoever.

The second objection taken is the reliance on the fact that there is a compulsory charge to the relevant end user, i.e., electricity suppliers. With respect, this is an even worse objection. If you turn up the re-amended reply, paragraph 37, which is bundle B, tab 3, page 103, paragraph 37(1) makes the general point that GEMA has failed to and -- inaccurately and incompletely described the scheme. If you take proper consideration of the scheme as a whole and in context it involves assistance given directly or indirectly from public resources by a public authority.

So we were quite clearly always going to rely on the 'directly' limb, we say.

In particular paragraph 37(1)(a):

"GEMA's account omits reference to the fact that the award of support constitutes a revenue guarantee originating from the public sector."

- so, a reference to the fund -

"Backed by a compulsory charge to suppliers."

I fail to see how it can be said that we have not pleaded reliance on the fact that it was a compulsory charge to suppliers when those are the precise words used in the pleading of that point.

So, with the greatest of respect, we say there is no need to amend. We are very happy if the Tribunal would be assisted by us amending to clarify further, but we certainly don't think there is any prejudice that would justify their suggestion they would object to that. We say we have quite properly set out our case. We have then in skeletons set out the particularised legal submissions. It is a function of skeletons obviously to flesh out by relevance to the case law. That is what we have done. I think with the greatest respect someone has overlooked Covestro but that is not a default in my pleading.

MR BARRETT: May I just record for the transcript that I am proceeding on the basis there is no application to amend and my learned friend has not taken you to any paragraph in his notice of appeal where he says these arguments are advanced. That is the basis upon which I will be making my submissions.

MR GIBSON: I am slightly frustrated because I think this is a bad point and it is taking up a lot of my time. If we go back to the amended notice of appeal, paragraph 104 on page 28 of bundle B, we set out, as I say, in that paragraph the fact that:

"The grant of cap and floor support under the scheme and any floor payments will be given, whether directly or indirectly" -- so floor payments directly -- "from public

resources by public authority, namely GEMA and/or NESO and/or the Secretary of State. As to the relationship between the Secretary of State, DESNZ, GEMA and NESO and their respective roles and involvement ...."

We refer to specific paragraphs, but obviously that's without prejudice to the fact that we rely on the whole of Palmer, as I make clear in paragraph 8 on page 6:

"It is GEMA who will grant cap and floor support ... If any floor payment is to be made, it is the NESO -- a company wholly owned by the Secretary of State -- who will be responsible for the payment and for recovering the cost through charges which consumers pay through their energy bills."

So we say if -- I think what my learned friend is saying is it is not acceptable to rely on another part of the pleading, namely our Reply. But I think that's just wrong since a reply is part of the pleading process and specifically designed to respond to what someone has said and if necessary to clarify and elaborate. That's exactly what we have done. So I'm afraid to say that I think this is a very bad point. I also take objection to the fact that this was raised the day before the hearing in circumstances where it will be apparent from the evidence that I have taken you to in Palmer 1, Hutcheson 1 and Palmer 3, what they are saying about the working capital facility. If they wanted to say "Hang on a second, that is just in your evidence" - this is a point, a dividing line between whether a particular is sufficiently important to be in a pleading or it is a matter of fact that you put in the evidence, is obviously a vexed question - but if they had wanted to take a point we should have actually pleaded this out in our pleading, then they have could have raised that months ago in October when this was served on them. And they didn't take any objection to that. They didn't even mention it in their pleading which eventually came in on 5th December. They do deal with the point in their witness statement. So, I'm afraid this does smack of opportunism. As I say, I don't think it has any real merit whatsoever. That is what I am going to say on that

point.

Turning then to the second topic. I will make a start on that before the lunch adjournment, whether the 2025 decision constituted a decision to make a scheme. As with the first issue, in dealing with the second issue I will outline in turn, one, the law, then the facts and then make my submissions as to why the 2025 decision was indeed a decision to make a subsidy scheme.

As to the law, the Tribunal will appreciate that the phrasing of this issue derives from section 70 of the Subsidy Control Act. So I suggest we start there. If you would turn it up. it is in bundle D.

MRS JUSTICE BACON: For the avoidance of doubt what we are talking about is what GEMA refer to as the September publications. Is that right?

MR GIBSON: Exactly. I defined it first, but yes. It is a rather irritating to have this vexed question of how to describe it. The 2025 decision/the September publications and in a further recent submission 'existing powers decision' is another formulation that my learned friend --

MRS JUSTICE BACON: So we are clarifying what you are talking about, we are talking about the suite of documents that was published in September 2025.

MR GIBSON: Yes, 23rd September. Subject to one caveat I want to talk about in relation to 9th October publication of the CFFM handbook, which I will address in a moment, but that essentially is the point, yes.

Bundle D, tab 8, page 150 is where section 70 appears. Section 70(1):

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

Section 70(2), which is obviously a very important section, provides:

"Where an application for a review of a subsidy decision relates to a subsidy given under a subsidy scheme, the application must be made for a review of the decision to

make the scheme (and may not be made in respect of a decision to give a subsidy under that scheme)."

So it's not specifically -- it makes clear that if you want to challenge a scheme -- if you want to challenge a subsidy in relation to a scheme, you have to challenge the scheme. You can't wait around and challenge the subsidy. You will be too late. You will be barred by Section 70(2) from doing that if you attempt that approach.

Section 70(3). The interested party makes an application by sending a notice of appeal to the CAT in accordance with the Tribunal procedural rules.

Section 70(4):

"The notice of appeal must be sent within the period specified in relation to the decision appealed against."

Then they refer to part 5A of the relevant rules. The period of challenge is dependent on the nature of the decision to be appealed. We will come on to look at that in a moment.

Section 70(5)(a). In determining the application CAT must apply JR principles.

MRS JUSTICE BACON: There is no timing point taken if you are right about the nature of the September document.

MR GIBSON: No. Sorry. What I am doing is trying to -- I am setting out the structure, because I think it is all informative of the pertinent question which is -- one of the questions is was the 2025 decision a scheme decision within the meaning of the Act? So there's a number of indicia by reading the statutory scheme as a whole that we say points to a particular construction as when Parliament intended that the relevant subsidy decision was made and part of that puzzle is looking at the time periods that are challenged.

I will come on and elaborate it. We say that is the significance of looking at the rules re timings, not the fact that someone is taking a point about -- they have not actually

pleaded the point about delay at all. I will come on to that in moment. You remember the discussion we had at the first CMC I am sure, sir. The point is this all goes to the point about how you actually identify when the relevant decision was taken.

Some definitions at section 70(7). An 'interested party' includes a person who may be affected by the making of a subsidy scheme. And a 'subsidy decision' means a decision to give a subsidy or make a subsidy scheme. We will come on to look at what the wording "subsidy scheme" means in a moment. I think it is easier to take us through the same part of the Act rather than jumping around.

Over the page on to section 71, Parliament amends the CAT rules to insert part 5A, in particular rule 98A. Rule 98A(1) is that a section 70 application:

"... must be made ... before the end of one month beginning with the relevant date in relation to that decision."

98(2):

"The 'relevant date' ... is:

(a) In a case where a pre-action information request ... is made within one month of the transparency date, the date on which the notice under rule 98A(8) is given.

(b) In a case where a post-award referral is made in respect of the subsidy or scheme, the date on which the post-award referral report is published under section 62.

(c) In any other case, the transparency date for the subsidy or scheme."

If one looks down, you will see under rule 98(4), definition of what 'pre-action information request' means, referring to section 76. Then 'transparency date' for a scheme is:

"In a case where the application relates to a subsidy or scheme in respect of which the duty under section 33(1) or (5) does not apply",

it goes basically on the basis of the first date of actual or constructive knowledge.

"In any other case, the date on which an entry in respect of the subsidy or scheme is

made on the subsidy database in accordance with the duty under section 33(1) or (5)."

98(5) empowers the CAT to direct that a minor omission or error in the making of database entry is to be disregarded for the purposes of determining whether that database entry trigger, if I can call it that, under rule 98(4)(b) applies. There is no other provision for correcting minor omissions or errors.

It specifically describes in 98(6) what constitutes 'minor' for those purposes, i.e., no prejudicial impact on the ability to assess whether to make a PAIR.

Rule 98(7) underscores the importance of strict adherence to the procedural time limits. No extension may be provided unless the circumstances are exceptional.

So, as to that, I am going to take you very briefly to the Aramark judgment, which will be very familiar to the Tribunal, of course.

98(8). Parliament specifically imposes a procedural duty on a public authority which is crucial to the workings of this carefully drafted scheme that:

"... a public authority must give notice to the interested party that the public authority has provided information in response to a request made under section 76(1)."

Stepping back, we can see that Parliament has created a scheme which has the following features. An interested party is empowered to apply to a specialist tribunal with specific competition law experience for review of subsidy decisions – decisions which, by design, are intended to have had significant effects on market behaviours and potentially very significant impact on unsupported market participants. And, understandably, given the nature of the decisions and the consequent decisions, Parliament has set down very strict time limits for bringing such appeals. Those time limits depend:

In the first instance, save in the case of post-award referrals, on the nature of the decision appealed against, in particular whether or not there was a duty to register the scheme. If there is such a duty, the date is set by reference to the date on which

an entry is made in accordance with that duty; so, a database entry trigger. If there is not such a duty, the date is set by reference to when the party knew or ought to have known of the decision; so, a knowledge trigger.

In the second instance, on the date on which the interested party was given notice by the public authority after having made a pre-action information request.

All four of those triggers, we say, depend on receipt of information which will allow the person to ascertain whether its interests may be affected, as required under section 70(7). Three of those triggers - the database entry trigger, the notice in response to a pair trigger, and the post-order referral report trigger – are triggered by a formal event. We say Parliament must have chosen them in order to provide as much clarity as possible to the interested person as to when time had started to run to exercise this section 70 right.

The other trigger - the actual constructive knowledge trigger - is the fallback option. You will note, rather unsurprisingly, that Parliament has specified quite deliberately that trigger operates from when the interested party 'first' acquires the requisite knowledge. This is unsurprising, because it would obviously be unworkable if the interested party could reset the deadline for bringing an appeal by claiming that it acquired further knowledge. How would one know when the reset process would ever stop? The one statutory exception to that, of course, is the PAIR process, and because that is an exception to this idea that you need to have clarity as to -- all of those criteria are specifically by reference to particular events in order to give clarity, or to the first knowledge to give clarity -- the 'reset clock' process itself needs to be very tightly circumscribed so everyone knows where they stand as to whether or not the relevant clock has been reset or not. So the strictness of adherence to the requirements of the system is particularly important in order to ensure its proper functioning.

Parliament made express provision for one situation in which some latitude may be given in relation to compliance of procedural formalities with the various triggers I have just described, i.e., under rule 98A(5) in respect of the database entry trigger. No equivalent latitude was described under any of the other formal event triggers and indeed the scope and latitude which could be granted in the strict database entry triggers is circumscribed by reference to whether or not the error was said to prejudice ability to rely on the PAIR route, which only serves to underscore, we say, Parliament's concern that there should be -- everyone should be crystal clear about the rights and the deadlines which apply under the relevant procedures.

So we say it is inherent in the scheme which Parliament has created that the interested party must be very clear as to when a decision has been made and the interested party must also be very clear as to which time limit applies.

I just very briefly refer to section 72, you will see is the provision referring to the CAT's powers on application for review. I just highlight section 72(2):

"The Tribunal must either dismiss the application or grant the following forms of relief -- the following types:

Mandatory order.

A prohibiting order.

A quashing order.

A declaration.

An injunction."

I won't take you to the rest of that. I think it is uncontroversial. This is a provision obviously we will be coming on to look at later about the grant of relief under section 72(6) and 72(8) and following.

Turn to section 76, which appears on page 152. This is the provision in relation to the duty to provide pre-action information. So an interested party can make a request.

The request must state that it is being made only for the purpose of deciding whether to apply for review of a subsidy decision under section 70 on the ground that the decision does not comply with the requirement in chapter 1 or 2, part 2. Section 6(3) says that:

"Where a public authority receives such a request, it must provide such information as would enable or assist in the making of a determination as to whether the subsidy was given or the scheme was made in accordance with the requirements of chapter 1 or chapter 2."

So this process is again further confirmation that the scheme is being set up to ensure that people are clear as to whether they'd got a right to challenge and they were therefore clear as to when the decision was actually made and thereafter they must act as quickly as possible with the consequences of either not being able to pursue their case except in exceptional circumstances which, as we know, is a very high threshold, and with the further consequence if they don't challenge the scheme, they can't come along later and challenge the subsidy because section 70(2) bars that, or at least it would require them to make an application.

MRS JUSTICE BACON: I am not sure whether this was all very controversial. The question is how the September documents are to be characterised.

MR GIBSON: We say it is all informative about the question whether you can wait and see once you actually have got a clear decision in September. When I come -- I am setting out the law. Sometimes one sets out the law and makes submissions later. It is perhaps a painful process but I found it is more efficient in the overall scheme of things to approach things this way. I will come to my submissions in due course. I will try to take this as quickly as I can.

MRS JUSTICE BACON: I think it would help us to know where this is going because there is not any controversy as to the effect of these provisions and the mechanism

as you said. The parties need to be clear as to what they are challenging and they need to be clear when they are challenging it. It would be helpful to us if you got a little more quickly to the question about the characterisation of the September publications.

MR GIBSON: Shall I take you to the subsidy schemes point as well and then I can take you to the facts of the actual documents as well.

MRS JUSTICE BACON: All right.

MR GIBSON: The scheme is defined in s.10(1), and in my skeleton argument I refer to the fact that there are three different types of subsidy schemes, so any definition needs to be applicable to all of those. Parliament did not actually further define the meaning of scheme specifically. So we say that word is to be given its natural and ordinary meaning in light of the purpose and context. And we say that an organised plan or system for doing something in this context, it is obviously an organised plan or system for the giving of subsidies.

I was going to make three short points by reference to three case authorities in relation to such matters. The Max Recycle judgment is one that is relied upon by my learned friends. Rather than take you to it necessarily, I could just give you the references and you can think about those later. The Max Recycle judgment is the one in which the CAT made obiter comments, after deciding that there was no subsidy, in respect of what constitutes a scheme under the Act.

As to that question, it is paragraph 51, which is at bundle D, tab 37, page 1097. That's the provision that my learned friend relies upon, because the former President there referred to subsidy schemes involving an element of appropriate fettering, which is taken to mean by my learned friends that that means you can't have any existence of a degree of ongoing discretion if there is a scheme involved. We say that that's wrong as a matter of principle. It's not a necessary or reasonable reading of those obiter comments, which merely indicate that a scheme is one which sets a framework, an

element of appropriate fettering, giving subsequent subsidy decisions. We say it is entirely consistent with both the logic and structure of the Act and naturally the word scheme is an organised plan or system for doing something.

We say it is also consistent with the DBT guidance at bundle D, tab 74 at page 2336, paragraphs 2.32 to 2.33 which says:

"A scheme may give a public authority a substantial degree of discretion in deciding exactly which possible subsidies under the scheme should be given."

We also refer -- I will not turn it up but you can have a look at your leisure -- to the chapter by George Peretz, KC in the recent edition of Leigh Hancher's text on State Aids, paragraphs 9-173 to 9-174. That's bundle D, tab 77, page 2717.

You will see that he doubts that if and to the extent the Tribunal in the Max Recycle case in its obiter remarks was intending to suggest there should be --

MRS JUSTICE BACON: Paragraph?

MR GIBSON: Do you want the reference to George Peretz article?

MRS JUSTICE BACON: Yes. I am on page 2717. Paragraph what?

MR GIBSON: 9-173 to 9-174.

MRS JUSTICE BACON: Right.

MR GIBSON: So if and to the extent that the Tribunal in --

MRS JUSTICE BACON: So a chapter on what?

MR GIBSON: This is a chapter on the UK subsidy control regime.

MRS JUSTICE BACON: Right. Let's just read this. You want us to read both of the paragraphs?

MR GIBSON: Yes. I was trying to take the points quickly but you are, of course, very welcome to read them now.

(Pause.)

MRS JUSTICE BACON: There is a different concept to an aid scheme under EU law

and the subsidy scheme under the SCA.

MR GIBSON: On that basis he doubts whether even to the extent that Max Recycle is to be read in the obiter remarks of the President as saying that it does preclude discretion, that would be wrong, and he refers to the DBT guidance, which is consistent with our position that it is perfectly possible to have a substantial degree of discretion after a scheme is made, provided that you set -- you have made it sufficiently clear with making the decision that people can exercise their right of challenge. That was the purpose of my taking you to the -- as you say, perhaps uncontroversial elements of the scheme to set the framework for the way in which one is to interpret when a decision arises.

So the second case was the NLC judgment, which obviously you, President, will be very familiar with. Despite Parliament and the drafters of the TCA having obviously given considerable thought to how timings and limitation periods should work, it does seem that no-one had thought about the scenario which arises in this case and arose in the NLC case where the public authority just contests whether it is a subsidy and therefore even if the obligation to make a transparency registration on a database technically would arise if the public authority was wrong, they do not make one, quite rightly they don't believe it is one, and in any event there is a lacuna basically. You fill that lacuna in that case.

The reasoning for doing that at paragraph 178 was you reason that the provisions make it plain that subsidy challenges are required to proceed on a tight timetable. That's understandable because otherwise there would be uncertainty for all involved. That's paragraph 178 of your judgment, tab 48, page 1460. I just highlight that because it is in keeping with what I said earlier about the need for certainty being a key feature of this scheme.

Finally the Aramark judgment which appears at tab 49, page 1463.

MRS JUSTICE BACON: Yes. It is the exceptionality criterion.

MR GIBSON: Exactly. I will not turn it up. You are quite aware of the importance and strictness with which that criterion under the limitation periods applies, and in your judgment, sir, you expressly made the point that the provision you were looking at in relation to merger review uses exactly the same formulation as under rule 98A, in relation to subsidy control. So, what you said constitutes a fair warning to everybody under this regime as to how the CAT is likely to approach the same wording.

I see the time.

MRS JUSTICE BACON: So we will return at 2 o'clock.

MR GIBSON: Yes.

MRS JUSTICE BACON: All right. Thank you.

(1.04 pm)

(Lunch break)

(2.00 pm)

MR GIBSON: Good afternoon. I was taking you through the statutory scheme by way of introduction in relation to the question of whether the 2025 decision, made on 23 September 2025, constituted a decision to make a subsidy scheme. My purpose in doing that was to illustrate the elements of a cause of action that a prospective challenger would have to know if they wanted to advance the cause of action that the section 70 right of review was available to them.

That has five components. You have to have (i) a decision -- that's what section 70(1) says – (ii) to make a scheme -- that's the effect of section 70(7) read in light of section 10 – (iii) for the giving of subsidies -- that's section 70(7) read in light of section 2 – (iv) by which the interested party is affected -- that's section 70(1) and (7) -- and (v) that it gives rise to a breach of duty, namely something by which you are aggrieved -- section 70(1) -- and the PAIR process obviously also supports that,

because that's designed to enable someone to decide whether to review the decision on a ground it did not comply with a relevant requirement.

You also see that Parliament has imposed strict limitation periods designed to be certain and therefore fair to all concerned and that these arise in the first instance either from the formal steps that constitute trigger events or from first acquisition of actual or constructive knowledge.

You also see in section 70(2) that Parliament makes specific provision that subsidies under schemes must be challenged by challenging the scheme and not waiting for the subsidy.

Just touching very briefly on the test of knowledge, I was put in mind of the Gemalto case, which I think is also relevant, because this further confirmed, although obviously we are not dealing with a deliberate concealment case at all -- I accept that -- that was a case where they were looking at what should be the trigger when the relevant question was knowledge in the context of a limitation period. That's particularly important in light of the word 'first' in the definition, the default period, the default trigger under the provisions we looked at under rule 98A.

You will be well aware -- I know the President obviously gave the first instance judgment in Gemalto -- of what that concerned. I will not take you to it, but just to invite you to read in your own time two paragraphs of that judgment. The Gemalto judgment appears in the supplemental bundle at tab 10, page 130. Paragraph 33, page 141, describes that:

"... knowledge [did] not mean knowing for certain and beyond possibility of contradiction. It [meant] knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence."

Paragraph 53 on page 146:

"Time begins to run" -- and this obviously was specifically in a deliberate concealment case, but I say it is analogous -- "when the claimant recognises that it has a worthwhile claim ... the claimant can embark on the preliminaries to the issue of a writ ... without knowing chapter and verse about the details."

So that's referenced in my submissions.

I am going to touch now on the facts. I will deal with it chronologically. I am going to start with the technical decision document in March 2025, even though we don't accept that's actually a pleaded issue, but GEMA now appears to advance what we say is a new and unpleaded claim in these proceedings that Zenobē's claim was too late and the relevant decision to make a subsidy scheme was, in fact, the TDD, the technical decision document. That I take from GEMA's skeleton, paragraph 19.

Now, Mr Wolffe, sir, you will remember from the first CMC that this was a point the intervenors wanted to take and GEMA rightly admitted that it had not pleaded. I will not take you to the transcript, but for your reference Mr Halliday for the Secretary of State said -- the relevant transcript is at tab 6 of bundle A. The first reference is at page 154. At page 28, lines 24 to 25 Mr Halliday said:

"This was a not a point made in Ofgem's defence."

There was a discussion between you, sir, and Mr Barrett from pages 49, line 21 to 53, line 25. In particular at page 50, lines 3 to 4, you said:

"It is not a point you're making."

Mr Barrett quite rightly said:

"It is not, my Lord."

You made a ruling. This appears at bundle A, tab 8. I am just going to highlight three paragraphs of the ruling, paragraphs 33, 36 and 39. In particular, in 39 you stated one of the reasons for refusing permission was that:

"... the Secretary of State proposes to advance a line of argument which is not at issue

between the parties ... This is a position which GEMA could have taken but has chosen not to. In these circumstances I do not consider that it would be consistent with the general principles to allow an intervention which would expand the scope of the case in this way."

So we do take exception to this now having crept in through a skeleton, but in any event I will explain why it is a misconceived point anyway.

The TDD is to be found in bundle E at tab 1, page 624 and following. We accept that executive summary, which appears at page 626, asserts that it confirms the key final details of the scheme, but the suggestion that this constituted the relevant final word on the design of the framework plan for the giving of support subsidies is unsustainable we say when one looks at the document as a whole and in particular in the context of the wider decision-making process.

Further down in the executive summary on pages 626 to 627, in the last paragraph and over the page of those two pages, TDD admits that firm decisions related to the structure of further decision-making process are yet to be undertaken and will be undertaken thereafter and there will be two assessment stages, the eligibility stage and the CBA stage, which will inform the cap and floor regime award.

As I will come on to illustrate, it is that project assessment stage which is the crucial one. We say it was the decisions made in September 2025 that crystallised the ingredients necessary for a prospective appellant to bring a claim.

So we say -- I have listed various references to the further work which the TDD identified needed to be done, which we say rather gives the lie to this being a key final decision document, at paragraph 82(1) of my skeleton. That's bundle A, tab 1, page 28. I am not proposing to take you through all of those examples. I don't think that would be a productive use of our time.

Instead what I am going to do is illustrate the extent of the work still to be done on

critical issues by taking you to the two consultations which Ofgem published and 28th May and 19th June in respect of the multi-criteria assessment framework and the financial framework for the proposed scheme. As one would expect from documents that are talking about consulting, i.e., in principle decisions about frameworks, they are very redolent of the anticipated creation of a framework, namely a scheme, a plan, an organised plan for the giving of subsidies.

So I think my primary submission which I will make when I come on to make submissions is that -- I flag it now as we look at the documents -- one does need just to step back and read the documents for what they are. I say it is actually perfectly clear on the face of the documents that these are leading up to the documents published in September, which we say constitute a decision for the making of a scheme.

I did, in fact, find it surprising that GEMA's skeleton does not really even deal with these consultation documents, which may be indicative of the points I am about to make.

The project assessment framework consultation of 28th May 2025 appears in bundle E, tab 1, page 698 and following. It is entitled "Selection of LDES projects for Window 1 Cap and Floor regime". We say, as the name suggests, this is an important consultation, which explained GEMA's provisional plan for selecting which LDES projects would receive cap and floor support. So, to put it in the words of the statute, it is a document -- a decision -- leading up to a decision, not a decision yet -- this is a consultation document -- leading up to a decision as to the -- as to an organised plan or a scheme for the giving of subsidies, which we say is exactly what we are looking for here.

However, paragraph 1 is page 698. It says:

"We are consulting on the approach that Ofgem, working with the NESO, will take to

decide which LDES projects are awarded a cap and floor regime."

So we say it quite literally says "This is a consultation on the proposed plan for the giving of subsidies". Obviously, it does not say the 'subsidies' point. It says 'cap and floor support', but, as we have already established, we say that that is a subsidy.

I don't want to take you to it, but you might want to just look at the contents page, which we say is an overview of the type of decisions on which Ofgem was consulting, which reinforced the point I just made. For example, under chapter 2 there are questions like:

"What does the overall assessment process look like?

How will projects be selected?"

It is about a scheme for deciding to whom to give C&F support, which, as we say, we say is a subsidy.

MR WOLFFE: This consultation is being undertaken at a point where stage one eligibility process has already been undertaken --

MR GIBSON: Yes.

MR WOLFFE: -- but your point is that stage one simply determines eligibility. The point at which in effect a subsidy is given on your characterisation is --

MR GIBSON: (Overspeaking).

MR WOLFFE: -- at stage 2 where the project has been assessed and the decision made to actually give certain entities (inaudible).

MR GIBSON: Yes. When I get to my submissions, I will basically say that one needs to apply a defining principle by which to be able to decide at what time a decision to make a scheme for the giving of subsidies can credibly be said to have occurred. My submissions will be obviously it wasn't earlier than September, because the criteria for bringing a claim were not met before then. It obviously was in September, and it is irrelevant that there will be further detail coming further down the track, because the

whole regime that I have painstakingly taken you to, probably over-laboriously, is designed to ensure that you bring a claim at the first opportunity. It is no good to point to later discretionary matters to embellish or add further detail to the understanding of the scheme.

If you have enough to bring a claim -- that's why I drew the parallel with the Gemalto case -- if you have enough to bring a claim, you have to bring a claim. You can't say, "Oh, well, I would have liked to have found out a bit more". That just doesn't work. So thank you for clarifying.

So, March: they set out the technical decision document. The eligibility process started I think around 8th April. My learned friend will correct me if I haven't got the date correct.

MR BARRETT: That's correct.

MR GIBSON: Thank you. We have two consultations. These consultations are taken very quickly. In references I give in my skeleton the TDD refers to the fact it is going to have to take consultations. Then it takes these consultations and it makes final decisions following the consultations. So those final decisions are the crystallisation of the necessary ingredients that would allow for a claim.

MR WOLFFE: On that point -- and I don't want to take you out of order -- but your invitation to step back and ask what is happening here in the sort of overall picture might lead one to think that all of these, including the September documents, are stages in a process that is ultimately anticipated to lead to the formal promulgation of the scheme and the granting of support under the scheme, some of which is expected from quite an early stage, if I get the chronology right, to happen under the statute. So I would be interested in your response to that way of characterising.

MR GIBSON: It is critical I respond to that point. What I am going to do is take you through these documents. I will do it as briefly as I can. Maybe I will give you some

references for you to look at it, because I think the headline point is that these documents are consulting on the framework for the giving of subsidies.

I will then take you to -- go through my analysis of why September is the correct document and then I will address my learned friend's reasons why they say that's not right.

So the project assessment framework consultation, I have taken you to some examples. In the executive summary on page 702 in the first paragraph the last sentence goes:

"This consultation outlines the proposed multi-criteria assessment framework for assessing and selecting eligible projects under the ... scheme."

Leaving aside the fact that the word "scheme" happens throughout -- which I think itself is a point one must not lose sight of. It is just everywhere in the documents. Obviously I don't suggest that by saying that they concede it is a subsidy scheme. I have to prove the subsidy, but I have done that. That being so, I don't think there is any credible basis for saying this was not a scheme. It is naturally understood from the language. The relevant question is: "Is it a subsidy scheme?" Yes, it is. I have answered that. "Is it therefore a decision for the making of a scheme?" That is the bit I will be zeroing in on.

MR WOLFFE: That's I think where the question I -- (overspeaking).

MR GIBSON: Yes, exactly. That's why the purpose of my outlining the sketch of the framework was to make clear the basis on which we will test for that.

Paragraph 2 -- the second paragraph rather of the executive summary says:

"This work directly addresses the further action set out in the TDD."

That's the point that I just made. There's consultation, paragraph 1.1 on page 703:

"This consultation details Ofgem 's proposed approach to project assessment for [those] projects ..."

The final version will be published in quarter 3, 2025, as indeed it was. That's paragraph 1.13.

The financial framework consultation of 19th June 2025, which appears in bundle E, tab 1, page 744 and following, is to similar effect. I will just try and pick up some examples, but reading -- if you turn to page 765 to 766, which deals with setting the administrative floor level, you will see -- I don't want to take too much time reading, but you can just scan over it perhaps quickly.

What one sees is the language that's used. These are proposals as to what they will be doing if they make the same decisions when it's confirmed in the September publications. They set out key "minded to positions" and a series of firm proposals about how they are going to approach the thing, setting out defined parameters as to the approach for setting the administrative floor level.

This is a point that Mr Palmer addresses in his evidence, Palmer 3, paragraph 72, bundle B, tab 10, pages 418 to 419. He explains that it was based on the methodology that these documents are building up to and therefore were finalised in the September document.

"... developers would be able to calculate the expected rates of return and potential variation for their business case, which was not possible to do prior to publication of the September decision."

Going back to the financial framework consultation, under "Setting the administrative cap level", paragraphs 4.3 to 4.10 on pages 771 to 772, again I will leave you to read that in your own time, but we say those again set clear, intended actions for what they would be doing. It is to similar effect at 4.20 to 4.21 regarding the design of the soft cap. The whole of section 5, which is neatly summarised in the summary box at the top of section 5 on page 774:

"This section sets out the key capital costs under the .... regime and how they are

treated in calculating the RAV and setting C&F levels. These costs are included in CFFM to ensure the regime reflects the cost of delivering and operating LDES assets."

So these are key elements and they are setting out what they will do in relation to the elements. Also just to pick up there the express linkage between the financial framework narrative document describing what their in-principle decisions are and then the CFFM, which is the actual financial model they will use for the purposes of assessing projects. The model does no more than take the in-principle decisions and convert them into a spreadsheet format, a model format that they can actually use for assessing things.

Similarly the summary box in section 10, page 793:

"This section sets out our proposed approach to the financial model and handbook that will be used to calculate cap and floor levels for LDES project."

So I have given you a few examples, but the overriding flavour of all of that is that these were firm proposals as to what GEMA would do in undertaking its financial assessment of which of those projects should be awarded cap and floor support.

Then we will turn to the suite of documents of 23rd September 2025. I have set out already in my skeleton at paragraphs 76(1) to (4), bundle A, tab 1, page 26, each of the four documents. I have highlighted there -- and I will not take time repeating that -- what those documents show. They all show firm decisions as to what they will do, decisions as to key parameters of the design of the scheme and for the assessment of which projects should benefit from cap and floor support.

I will not repeat the references I have given in my skeleton, but I will give you some other examples, including in bundle E, tab 1, page 1250 the document at paragraph 1.2 says:

"This decision document analyses the consultation responses and establishes Ofgem's finalised approach to the project assessment framework having considered

the responses received."

Then over the page on I think it is page 1279 it says:

"We will set the key metric as: project revenue as a percentage of the project's floor level. We expect projects that fall below the minimum threshold (which will not be defined in advance) on this metric will not be offered a cap and floor regime."

Similarly the financial framework consultation response, the final decision in that respect says at paragraph 1.10 on page 1308 of bundle E that:

"[It] sets out our approach to calculating the administrative cap and floor rates of return, the process for project-financed applicants to access an actual cost of debt floor, and how projects requiring flexibility can bid using financial parameters."

These are firm decisions on key aspects of how they will decide which projects receive cap and floor support. That is precisely what the scheme for the giving of subsidies is.

Briefly on the handbook, because it is said that our reference to the handbook and the fact that it also contains significant information somehow compromises our claim. I will take this in more detail in a moment, but just to look at the actual document itself, it appears if you go to page 1351 of the financial consultation response -- I should have taken you to it a minute ago -- at paragraph 10.8, it explains the significance of the financial framework model and handbook. It says that:

"... [it] will support consistent application of the framework ... which will be published following this decision."

Then the handbook itself at paragraph 4.1 on page 1453 of bundle E states that:

"The LDES CFFM is structured to align with policy decisions made as part of the financial framework ... this handbook ... is written to align with those policy decisions ..."

The point is whilst the handbook and the model were published shortly afterwards,

they were actually designed to implement the decisions that had already been made. So yes, they contain important information. It was the crystallisation -- it was the reflection of the information in decisions that had already been made in the September 2025 decision documents.

Just briefly to complete the references to the relevant decisions, I will touch upon the 2026 decision now so it is out of the way.

On 18th February 2026 Ofgem published an open letter entitled "Establishing the Long Duration Electricity Storage Scheme under Section 26 of the Planning and Infrastructure Act 2025". It appears in bundle B, 8. I will take you to page 288. In the second paragraph they say:

"The LDES scheme reached an important milestone today. With the entry into force of section 26 of the Planning and Infrastructure Act 2025, Ofgem has been placed under a statutory duty to establish and operate a scheme for the purpose of encouraging the development and use of LDES installations. The passage of (what is now) section 26 through Parliament has progressed alongside Ofgem's development work ... Ofgem is publishing this letter to make clear what the entry into force of section 26 means for the LDES scheme going forward."

The third paragraph says:

"As this new statutory duty has been anticipated since the introduction of the ... Bill to Parliament ..., Ofgem has already completed significant development work at pace in relation to the ... scheme."

They then listed the decisions and work that had already been undertaken, including at paragraph 3 at the bottom of that page:

"In September 2025 Ofgem published ... (ii) the assessment framework for eligible parties proceeding to project assessment."

That's obviously what we describe as the 2025 decision.

Then the next page, page 289, the first full paragraph:

"Ofgem has now adopted the development work undertaken on the LDES scheme to date, including any and all decisions, supporting analysis, and publications made to date in support of that work for the purpose of discharging its statutory duty under section 26. As has always been anticipated and as required by the 2025 Act, the LDES scheme will be established and operated pursuant to section 26 of the Act."

So turning to the submissions, we maintain that the 2025 --

MRS JUSTICE BACON: So that document is indicating a forward looking plan. It will be established under section 26, not that it's already been established.

MR GIBSON: No. They adopt what they have already done. I know it is my learned friend's case they had not established anything and they established it on that date.

MRS JUSTICE BACON: I am just wondering what you are getting out of this letter.

MR GIBSON: I am taking you to it because it is the last element of the decision-making chronology that we have --

MRS JUSTICE BACON: All right.

MR GIBSON: -- in advance of making submissions on the points.

So we say one needs to approach matters on the basis of an objective assessment of the evidence. We say there is no sensible basis for denying that the final decisions in respect of the framework for deciding which LDES projects would receive cap and floor support constituted anything other than a scheme for the giving of subsidies. What GEMA said at the time of the 2025 decision literally corroborates what Zenobē is now saying.

We say that one needs to consider the rival cases as to when the relevant decision to make a scheme was taken by reference to the elements necessary to establish a cause of action as identified from the statutory scheme. That, as I said, involves whether the final decision to make a scheme for the giving of subsidies by which the

interested party is affected and which constitutes a breach of a relevant duty.

We say there is clearly no basis for the unpleaded argument that GEMA now advances that Zenobē was too late - allegedly because those elements were crystallised before September 2025 - because, first, the TDD did not even address the assessment framework, i.e., the actual plan deciding which installations should receive cap and floor support by the scheme for the giving of subsidies. So there was no scheme. So that element of the cause of action would not be present.

In any event, it is wrong to say -- I have already made that point.

The consultation documents as well were obviously too early, because whilst they were provisional decisions about the making of a scheme, it was a consultation and not the final decision and obviously could not be challenged before it was final, because it was not a decision in a legally relevant sense, and you did not know for certain which way they were going to go on particular issues.

We say it is clearly correct that our position, if you like, not too early, not too late, just right -- what one might call the Goldilocks position -- is the right one, because at the point of the 2025 decision all the elements necessary to plead out a claim were satisfied.

Firstly, there was a decision. Obviously, yes: they consulted on and then took what they describe in terms as a final decision. When you look at those documents, you will see they are described as final decisions, expressed as such.

Secondly, it was a decision to make a scheme. This was a final decision in respect of a framework, i.e., an overarching plan for the giving of subsidies to decide to which projects to give LDES cap and floor support.

Thirdly, it was for the giving of subsidies -- obviously we have already addressed the subsidy point -- we say if you are with us on that, the point is obviously satisfied too.

Fourthly,- by which an interested party is affected. Yes. It was the September decision

documents that crystallised the concerns and crystallised the matters that an interested party would have had to know in order to be sure they were properly affected.

We note that GEMA has not disputed limbs (c) and (d) of Zenobē's claim, namely that the 2025 decision constituted a selective advantage and that it posed risk of competitive harm to other market participants, including other SDES operators and Zenobē specifically. So we say that obviously was satisfied by the September decision.

MRS JUSTICE BACON: I mean, you have listed three factors so far, all of which could have been said to apply from the TDD.

MR GIBSON: No. Sorry. I started by saying they couldn't apply from TDD. The TDD did not set out a scheme. The TDD did not set out a plan for how they were going to give subsidies, which is the cornerstone of a scheme, as one sees from reading section 10 of the Act in conjunction with section 70(1) and section 70(7). The TDD was not setting out a scheme. The TDD was setting out a high level indication as to what they were going to do in terms of the use of the cap and floor mechanism. It didn't indicate the plan as how they were going to decide which projects would receive support under that scheme.

I have taken it all very quickly and I am conscious that this is a whistle-stop tour, but I would invite you to read extremely carefully both the TDD, although, as I say, it's an unpleaded point - and it seems rather odd that they are criticising us for not pleading points that were pleaded, whilst taking unpleaded points themselves - but if you read the TDD and you read the consultation and the final documents, which I have taken very quickly, you will see that it is not until the consultation documents that they are actually even proposing decisions as to what the plan for the giving of subsidies is. It is only with the final decision in September that they are actually making those final

decisions as to how to allocate the cap and floor support among different projects.

So just on a plain, natural reading of what a scheme for giving of subsidies means and a plain, normal reading of those documents, we say that that conclusion is inescapable. As I say, I appreciate that when I am taking it very quickly, it is difficult perhaps to appreciate that, but I think when you have an opportunity to read it, you will see exactly what I mean. The TDD, as I say, was not a scheme, and it is questionable that one would have been able to plead out the relevant conditions -- ingredients of the cause of action in any event because of the uncertainty about certain aspects of the limbs of definition of subsidy.

As at September all of those points were crystallised. The first point was decision. Yes. Second point was scheme. Yes. Third point was subsidies. Yes. fourth point: is the interested party affected? Yes, as I have just described. The risk of competitive harm was clear, because up until that point, as we said in our reply, up until the point when they actually made the decision in September, we were asking them to make changes or to make decisions about how they were going to implement the parameters, which could have avoided causing harm to us. At that point they did not and so, therefore, we knew that there was this potential for harm.

Fifthly, breach of duty. We say yes. I am going to come on to talk about the way my learned friend approaches the application of the subsidy control principles, because he points out that in order to criticise GEMA for not having applied the subsidy control principles, it is necessarily inherent in the Act that GEMA must have been able to apply the subsidy control principles and we accept that, but, as I will come on to explain, the next step in my learned friend's reasoning that they couldn't apply subsidy control principles is inherently flawed.

So we say, therefore, it is abundantly clear that Zenobē had to bring the claim at the first opportunity. We say it is clear from the statutory regime I have taken you through

earlier. Further, two reasons why it had to do it at the first opportunity. First, it cannot wait, because it's not in line with the time limits under the statutory scheme, which make clear that you have to act at the first opportunity and that there are very severe consequences for not doing that. And then, secondly, specifically in this subsidy control context, section 70(2) makes clear that one of those consequences is you will be barred from challenging subsidies further down the line. So the scheme is designed to get people to pull their finger out the minute they can. We say that in September 2025 we could and we did.

So turning then to my learned friend's criticisms of that analysis, paragraphs 79(1) and 81 of my learned friend's skeleton make the point that GEMA did not intend to make a scheme. We say that is irrelevant. I think I touched on it in my skeleton. The point is it wouldn't be objective and therefore it wouldn't be workable if the decision as to whether or not a prospective appellant knew whether they should be exercising their right was determined on the basis of whether the granting authority, the public authority, accepted that it was making a scheme.

This doesn't withstand really any logical scrutiny. It would make the system unworkable if it was in the subjective gift of the public authority to decide whether or not they had made a scheme. The appellants have to challenge them on things that they don't accept they have done. It can't be the answer is "We didn't mean to".

MR WOLFFE: I wonder if that's intended to be a subjective intention or whether the point that's being made -- and it is for Mr Barrett to make his argument -- but it really comes back to the point I asked you earlier, whether looking objectively at the whole course of material before us, including the fact that it is available and it's anticipated there is a duty and so on and so forth, that objectively one could take the view that there was no intention to do what the statute would require GEMA to do until the statute was in force and that everything that led up to that is simply intermediate steps. I think

that's the -- it goes to the question of whether there was a decision.

MR GIBSON: I think it is a separate but related point. You are right. Insofar as they are simply saying intention matters, clearly it doesn't. If they are saying that it is actually looking at the whole of the picture and thinking what happened, yes, I accept one has to look at the whole of the picture. One has to look at it with realism. The question is, applying what the Subsidy Control Act requires of a scheme decision, whether or not Secretary of State, GEMA, whatever, had some plan that they were going to try and start things, but then pass legislation, whatever, that only works if I will call it the actual definition of the scheme -- making -- a decision to make a scheme, that decision is not satisfied earlier. If it is, their plan is ill-conceived. So I accept one need to think about it.

MR WOLFFE: That's why I am interested in your response.

MR GIBSON: Well, my response is there is a degree of circularity in that argument. I am going to come on and address it in more detail in a moment. There is a degree of circularity in that. I say what one needs to do is look at the whole thing and at the documents themselves. If the September document is a document which provides for a plan for the giving of subsidies, a scheme for the giving of subsidies, then it is a decision to make a subsidy scheme and you have to challenge it at that point. It is no good that the person who was writing it rather wishes that they hadn't done that. If that's what they've done, that's what they've done, and, as I said, there's a degree of circularity and bootstraps in --

MRS JUSTICE BACON: What if a document says, "We are going to bring in a scheme in the future under a particular statute, but we cannot just leave it until then to take all the decisions, because it will be too late, so we have to make some interim decisions as to what we will do when we bring it in. So these are our decisions as to what we will do when we bring in the scheme".

MR GIBSON: If what you are saying in those interim decisions constitutes the planned decision for the making of a scheme, then you've made a decision -- you've made a scheme.

MRS JUSTICE BACON: Even if you say, "We accept we are going to bring it in under a specific statutory power which we don't yet have. Once the relevant statute is enacted, we will then make a scheme, but we have taken some interim decisions as to what that scheme is going to look like, because we can't make progress until we get some of the nuts and bolts fixed now, but we're not making a scheme now, because we are only going to make it when the statute comes in".

Now if that's the case, are you still saying that you have to challenge the interim decision as to what will be done when the statute is implemented?

MR GIBSON: The hypothesis you are advancing is just not one that's borne out by the facts. That's my answer. You actually have to look at what they actually decided. Look at the actual documents and ask yourself, "Is this a final decision that sets out a plan for how we are going to grant subsidies?" When I say subsidies, I'm obviously accepting they are not written there. We have dealt with that bit. If it is, then they have met the test. The circularity point is it becomes a sort of total bootstraps argument. If they have set out the plan for what they are going to do in sufficient detail that enables you to satisfy the relevant ingredients, then the statutory test is satisfied and you then have to challenge.

I am sorry if I am sounding a little bit incredulous, but I just think one starts from what the statute says. One does not start from what the person who is disagreeing with you says and then ask whether or not that changes what Parliament intended. Parliament intended that a prospective appellant should challenge at the point where the ingredients are met. If the ingredients are met, that's the point of challenge. As I said, we say it is clear on the face of the documents, not some hypothetical situation where

they have not made it a subsidy scheme. They have made other preparatory decisions that don't constitute sufficient crystallisation of key parameters for how they are going to award the scheme. So it is a qualitatively or fundamentally different situation from the one that actually pertains only the facts of this case.

MR WOLFFE: And you would say -- am I right -- the stage two application window opened with the issue of the September documents? Is that right?

MR GIBSON: Yes. It was the September documents that set the parameters as to how they were going to choose.

MR WOLFFE: So at that point potential applicants in advance of the statute coming into force were -- had the application window opened for applications to be made for stage two assessment. Have I got that right?

MR GIBSON: The relevant ingredient is have they made a final decision as to how they are going to go about doing things, not had they done those things, because by the end of the process they will be in a position to award the subsidies.

MR WOLFFE: Yes. It's more -- the reason I'm asking the question is it might be taken to suggest that at that point the parameters for assessment have been set, because the application window is open.

MR GIBSON: That will be in support of my argument, yes.

MR WOLFFE: Indeed. I don't think you should take my questions as necessarily hostile or the reverse.

MR GIBSON: No, no, no. I am always interested in your questions whether or not they are in my favour, but I think that would be -- yes, the point is the two go hand in hand. They set the parameters and they are then able to start the process of assessing.

MR WOLFFE: Yes.

MR GIBSON: That's what they are doing. They are engaged in the process of

deciding on the projects to which they want to give subsidies by means of cap and floor support. So that is the ingredient necessary for this point to be made.

The second point that GEMA makes in its skeleton at paragraphs 71 to 72 is that everything is subject to section 10P, which I think is the point that was being put to me just then. GEMA says, "It may be under a scheme under section 10P, so this must be the scheme". We say that only serves to highlight the dangers of allowing selective views to determine what should happen. I refer you to my skeleton, paragraphs 81 to 82 and paragraph 88. We say it is obvious the regime could not be effective, workable or fair if it was based on anything other than solely an objective assessment of the evidence.

The argument that it is contingent on section 10P is an admission that they were trying to achieve a particular outcome from the system, mainly ignoring the retroactivity problem which arises from doing something before you have power to do it. If they had wanted to have section 10P to support them, then they either had to wait until section 10P was in force before starting the assessment phase and setting the final decisions as to how they were going to conduct those particular assessments, or they could have sought to draft section 10P retroactively. Parliament didn't do that. I am going to come on to touch upon that in a moment. In those circumstances attempting to achieve a retroactive outcome through another means is simply wrong.

We also say that the attempt to rely on the 2026 decision does rather give the game away, because in GEMA's own words, as we have looked at a moment ago, the 2026 decision was a decision to adopt what they called the development work, including what we call the September 2025 decision on the assessment framework, and if you look at the decision -- we have already touched on this. If you want to go back to it, it is bundle B, tab 8, pages 288 to 289. Just to remind you, they said on the second page, 289, that the 2026 decision was made for the purpose of discharging a statutory

duty under section 26, which is what became section 10P of the Electricity Act. So that's what they are saying. This was why they took the 2026 decision, in order to satisfy that purpose.

They then describe the duty that they say under section 10P arises, a duty to establish and operate a scheme for the purpose of encouraging the development and use of LDES installations. So the 2026 decision was taken for the purposes of establishing a scheme, and they did that by adopting the 2025 decision and the previous work.

So logically the only way they could have used the 2026 decision to fulfil a duty to establish a scheme by adopting the 2025 decision is if the 2025 decision was the decision to establish the scheme. So I don't say that's straining logic to make what seems quite a common sense point to me.

So we say it is obvious the 2025 decision was a scheme on its face and obvious in terms of the logic of what they have done in the 2026 decision.

This next argument I will address is paragraph 79.3 of my learned friend's skeleton, that GEMA had not decided enough as at September 2025 in order to carry out an assessment of the gross cash equivalent criterion, which is part of the way of assessing whether or not we are dealing with a scheme of particular interest.

Schemes of particular interest are those that attract particular duties under the Act, which I will touch upon in a minute, including mandatory referral rather than voluntary referral to the Subsidy Advice Unit.

We have pleaded in our claim a breach of the requirement to make a mandatory referral, as part of which we pleaded that the conditions of the relevant regulations for particular interest regulations were satisfied, including the requirement for gross cash equivalent. There was no defence objecting to that or contesting whether that was correct, but nonetheless GEMA has taken a point now saying that they couldn't have satisfied the gross cash equivalent. We say this constitutes spurious precision,

an invitation to spurious precision on the part of the -- on GEMA's part.

One only has to look at the pragmatic approach that the Subsidy Advice Unit takes to such matters to see that one can quite easily establish whether something is of particular interest and whether the gross cash equivalent test is made out without necessarily having to have chapter and verse of all the details.

If you look -- I am only taking it for this purpose, but if you look at the Subsidy Advice Unit's decision, bundle E, tab 1, page 1854, you will see at paragraph 1.18 -- this is the Subsidy Advice Unit's feedback as to the assessment that had been provided to it.

"[It] explains that the scheme is a subsidy scheme of particular interest. This is because, while the total amount that will be awarded over the applicable period of time is hard to quantify due to the variable nature of payments under the scheme", which I think is my learned friend's point, "a significant portion of subsidies awarded in AR7 likely to exceed 25 million over the lifetime of the subsidy."

So we say that is the appropriate approach to adopt, to take, on the basis of the data that is available, a pragmatic assessment as to whether or not it is likely that that condition is satisfied. That's consistent with the purpose of the scheme requiring applicants to pull their finger out if there's a possibility they have got a claim. It is consistent with the worthwhile claim test under Gemalto and we say it is consistent with the approach of the Subsidy Advice Unit, as the expert body dealing with subsidy control does themselves. So we say there is nothing in the point that the Particular Interest Regulations could not be applied and in particular the gross cash equivalent test could not be met.

The next point my learned friend makes at 79(3) to (4) and paragraph 81, the last sentence, was that GEMA had not decided enough to assess the subsidy control principles. We say again this constitutes an example of trying to apply spurious

precision to a test that should be applied pragmatically on the basis of the available evidence.

I have included in the bundle the dicta of the Supreme Court in Mastercard v Merricks, which whilst they are looking at a very different event, the survey of the law and instances where the courts have to take a pragmatic approach -- they were looking at it specifically in the context of damages and applying the broad axe, which obviously I recognise is not relevant --

MRS JUSTICE BACON: I really can't see that that's relevant really. We are dealing with the subsidy control rules and what is the decision. I can't see how the point about broad axe and damages assessment has anything to do with this.

MR GIBSON: I am not referring to the broad axe and damages assessment. In paragraph 50 they talk about:

"[The] unavoidable quantification in order to do justice is not limited to damages."

They give instances of other instances of that test. I rely on it for no more than that. If it doesn't commend itself to you, obviously you will not find it useful.

In any event we say that looking at things the way that my learned friend does is the wrong way round. What one has to look at is if there is a subsidy decision, can you apply the principles -- you have to apply the principles as best you can. It is only if it is absolutely fundamentally impossible there would be a good argument on my learned friend's point. It is not you have to be able to apply them chapter and verse in the way my learned friend is suggesting. In any event we actually deny that it would have been impossible as at 23rd September to assess by reference to the subsidy control principle. We say it is perfectly capable of doing so.

My learned friend introduced this point in his skeleton. It was another point that had not been pleaded, but in any event I am dealing with it in a pragmatic way, which I think is the appropriate way to deal with these things.

I just note that, absent details even in the skeleton of why they say these principles aren't established, it is difficult to respond to that. So it may be something I have to deal with more fully in reply.

If you can just turn up the relevant principles in Schedule 1 of the Act, bundle D, tab 8, page 165, I will just go through each of them and explain why we say in respect of each of the relevant principles they obviously readily could be applied in particular circumstances obtaining in September 2025.

MRS JUSTICE BACON: Page reference again?

MR GIBSON: 165 in tab 8.

MRS JUSTICE BACON: Yes.

MR GIBSON: "A. [It] should pursue a specific policy objective ...

GEMA quite rightly doesn't dispute this. Obviously the LDES scheme has a particular policy objective and it has been made clear much earlier.

"B. ... proportionate ... and ... necessary ..."

So it is a key part of Zenobē's case in particular under limbs C and D the scheme presently designed has significant impacts on other market participants and therefore is disproportionate, but that doesn't mean you can't apply the test. It just means you can't satisfy it and those are fundamentally different things.

"C(1) ... designed to bring about economic change ..."

GEMA doesn't dispute that, but obviously the LDES scheme seeks to bring about economic change, i.e., encouraging investment in LDES.

"C(2) That change ... should be --

(a) conducive to achieving its specific policy objective ...

(b) something that [otherwise] would not happen ..."

Encouraging LDES investment is the achievement of the objective and GEMA and DESNZ have repeatedly pointed out that, absent LDES capital support, investors are

not investing in LDES.

So that's obviously satisfied.

Principle D: Shouldn't support costs that would be funded anyway.

As I just said, absent capital support, investors won't fund the cost of LDES installations. That's the whole point of what they're undertaking here.

Over the page to E:

"... [least] distortive means ..."

As I've already said, there's a difference between apply the test and satisfying it. We say that they would have a problem satisfying it, because they had not taken the least distortive approach. They have taken an approach that is very distortive of the interests of various other market participants, including SDES, etc..

"F. ... competition or investment ..."

GEMA does not dispute this, and we say rightly so, because that's what's established in the defence by limb D, competition investment in the UK. Although we say they wouldn't be able to satisfy it, they could apply it.

"G. ... [benefits] ... should outweigh ... negative effects ..."

Again this goes to the same point as to proportionality, least distortive and competitive harm. We say the difference is between applying the test, which obviously you could do, and satisfying it, which they may have had problems with. So in respect of the subsidy control principles they clearly as at September could have applied them, albeit they may have discovered that they needed to change the scheme design as a result, but that's not the same point.

Schedule 2, "The energy and environment principles".

"A. Aim of subsidies in relation to ..." -- so this is down further on the same page -- "energy and environment.

... [to] incentivise the beneficiary in --

delivering a secure, affordable and sustainable energy system and a well-functioning and competitive energy market."

We say they can be applied in the same way as for Schedule 1, A, C(1), C(2) and possibly F and therefore they could be applied.

"B. ... not relieve polluters from liabilities ..."

Does not seem to really arise in this situation:

"C(1) Subsidies for electricity generation adequacy ...",

defined in C(4). I don't know whether this is what GEMA is seeking to rely upon, but we say the three ingredients there are not likely to -- can be applied:

"Shall not undermine ... Article 304 ... [or]

... 311 of the Trade and Cooperation Agreement ..."

I don't understand if there were a submission based on alleged non-compliance with Arts 304 or 311, what the basis for that would be.

"(c) ... determined by means of a transparent, non-discriminatory and effective competitive process."

There may be points to take in relation to whether it would satisfy that criterion, but the application to test whether it is doing that is obviously possible, because they have just set out what that process is going to be. That's what the final decision documents in September actually do.

The remainder, C(2), D, E through to I, all pertain to particular types of schemes that aren't relevant here.

So my point is whilst my learned friend has not particularised the allegation, there is no basis whatsoever for suggesting that the September decision was too early because you couldn't apply the subsidy control principles. So that criterion is also -- that box is also ticked.

In paragraph 80 of my learned friend's skeleton they refer to the fact of discretion

ongoing as being a reason why it couldn't have been a scheme and I have already touched on that point earlier in pointing out the distinction -- well, first of all, the fact that the Max Recycle case does not actually lead to that necessary result, but even if it does, in line with the criticisms that George Peretz KC made and the DBT guidance, that actually is not a bar to -- there is no necessary tension. It is not a bar to a scheme decision having been taken.

Paragraph 84, they suggest this is not a framework for giving of subsidies but a multi-instalment individual subsidy. We say this is unsustainable on the facts. Every single document is described as being for a scheme, i.e., an overarching plan from which individual support will be given. You can only make this point if you simply ignore what the documents actually say repeatedly on their face and indeed, as I say, they say that they have now achieved by adopting that very decision through the 2026 decision.

Relatedly at paragraph 85 my learned friend says that what we are relying on is a comparison with a broad programme for multiple activities.

Again we say this is also unsustainable. There is a coherent plan for a single form of subsidy, cap and floor support, using essentially a single approach. The plan does make provision for flex when necessary to deal with project specifics and it is adaptable.

If you look at the financial framework consultation, for example, paragraph 1.14, it refers to the need to be adaptable, to:

"... accommodate diverse business models, financing structures, technologies and risk profiles."

At paragraph 10.1, page 793 of bundle E, it says:

"We propose to use broadly the same cap and floor model and accompanying handbook for all LDES projects. This builds on the structure used for interconnector

projects ... The model will be used to calculate C&F levels for projects under both the administrative and competitive cap and floor setting processes",

the point being that this scheme design recognised the differences between the types of projects that we will be dealing with and came up with a plan that cover all of them. So it definitely wasn't a broad programme for multiple activities. It was single plan designed to tolerate all eventualities using the same essential model and same essential incentive device.

Paragraph 86 of the skeleton, referring to paragraphs 28 to 32. In paragraph 28 GEMA suggests that the fact that the cap and floor financial model was published on 9th October, i.e., after 23rd September, undermines our case that the 2025 decision decided the key matters.

We say it is bizarre to make that argument, because it suggests that GEMA hasn't read its own documents that I have referred you to. Those documents refer in the instances I have given you to the fact that the model transposed the narrative decisions in the documents published in September 2025 into a spreadsheet, a model that will then allow you to apply those principles. So there is no tension between the two.

Furthermore, we did plead specifically in the first paragraph of the amended notice of appeal the decision was made ‘at the earliest’ on 23rd September 2025 specifically to allow for that flexibility, but ultimately the relevant decision was taken on 23rd September 2025 and the 9th October document was giving effect to that in sort of financial modelling terms.

In paragraph 28.1 my learned friend refers to the fact that the level --

MRS JUSTICE BACON: Which paragraph?

MR GIBSON: 28.1.

MRS JUSTICE BACON: Of his skeleton?

MR GIBSON: Yes. Sorry, madam.

MRS JUSTICE BACON: So you are going back?

MR GIBSON: Yes. So at paragraph 86 he cross-refers to paragraphs 28 to 32. So I am taking you to those points to make sure I've covered those off. I apologise for going so quickly that it had not been appreciated.

MRS JUSTICE BACON: Yes. In general I think you need to slow down.

MR GIBSON: I am conscious of the tension between getting through my material and --

MRS JUSTICE BACON: Yes. We think that two days was adequate. It doesn't mean that you fit one and a half days of submissions into a day.

MR GIBSON: I appreciate that. I wanted to address all the points my learned friend had made and ensure that you had our answer to them.

My learned friend suggested the level of storage capacity being undecided as at September 2025 means that it couldn't have been -- the relevant scheme decision was not made in September 2025. We say that that is obviously incorrect. It does not inhibit pleading, because one can take a view on the basis of the low and high assumptions in the range that they had stated even earlier, the 2.7 gigawatts and 7.7 gigawatts. From that one can make informed decisions as to whether or not you have a claim to plead, adopting the pragmatic approach set out in the Gemalto case.

Secondly, it doesn't inhibit assessment under the subsidy control principles for the same reason. Again you can make assumptions on a low and high assumption as to how the principles will be applied.

The final level of capacity is a function of how many individual projects GEMA actually selects, i.e., part of the individual subsidy decision, and if Zenobē was expected to wait to challenge at that point, it would be barred by section 70(2) of the Act.

The next point that he refers to is paragraph 28(2), the LDES licence terms. That

doesn't inhibit a prospective appellant's ability to plead either, because it is already clear that the harm is a risk of ham. You cannot wait for more facts that might give you further detail of that which might have enabled you to finesse your pleading if you can already plead, as we have shown from our amended notice of appeal, indeed from the notice of appeal as was originally drafted. We were able to plead. The proof is, if you like, in the pudding that none of these factors precluded us from doing so.

The licence terms are bound up with the specifics of individual subsidies, and again the point I have just made applies. So if we had waited for those specifics to be ironed out, we would be challenging the subsidies themselves and therefore we would no doubt have been criticised and told that we were too late, that section 70(2) barred us from bringing a claim at that point.

MRS JUSTICE BACON: So are you saying that if you had waited, you consider that you would have been time barred?

MR GIBSON: Two stages of analysis. Yes to that point, yes, but as at September 2025 could we claim? Answer: Yes, because these factors did not preclude that. Second point: if we had waited for these to be crystallised, notwithstanding that the fact we have to get on with it once we can do it, section 70(2) would have operated to say, "Well, hang on a second. You just challenged a subsidy under a scheme. You can't do that".

MRS JUSTICE BACON: If you had waited and you were not challenging subsidies, but you were challenging the final terms of the scheme, are you saying that you would have then been time barred, because your point goes to if you had actually unchallenged individual subsidies, but if your challenge had been made to the scheme as such with its final details as later worked out, are you saying that there would have been a time bar?

MR GIBSON: No. I'm saying -- no. Section 70(2) would not time bar us if on a correct

analysis no -- if no scheme decision had been made in September, and the scheme decision was instead to be made later next year, then, yes, we(inaudible) could challenge that scheme, but we would say on proper construction --

MRS JUSTICE BACON: No, I am not asking that. I am trying to work out whether a scheme decision was made. Part of your argument is that it was made because you had to bring your claim then and couldn't wait for the final details. I am just trying to follow through that reasoning. So I am not presuming that a scheme has or hasn't been made. Are you saying if you had waited for the final details to be worked out, addressing the point made by Mr Barrett, you would have been time barred if you challenge the scheme at that later stage?

MR GIBSON: I apologise for lack of clarity. What I am saying is what he is describing as final details of a scheme we say are the actual details of the subsidies -- the giving of subsidies. These points crystallise when you decide which individual project should be given subsidy support. The exact figure for capacity is a function of the decisions made as to which projects you will give support to. That's the point I'm trying to expose. The point that he's raising is a point that relates to the giving of subsidies. It's not a point that relates to the finalisation of the scheme.

MR WOLFFE: I mean, your point is that -- correct me if I am wrong. I don't want to put words in your mouth. If I understand what you are saying, you are saying once all the things that you need to have in place in order to plead a claim are in place, that, of course, begs the question that's between you, but you say that if that is so, then a decision has been made to make a subsidy scheme. Then time starts. You can claim and therefore you must claim within the timeframe. Nobody has taken a time bar point against you, but you are using that in order to --

MR GIBSON: Illustrate we have a scheme.

MR WOLFFE: -- illustrate how the whole thing --

MR GIBSON: How the statutory scheme works and expect people to act. They actually are taking a sort of sotto voce time bar point by reference to paragraph 19, pointing to the TDD now, as I have said, the unpleaded point.

MR WOLFFE: Yes. That's a different point.

MRS JUSTICE BACON: Are you saying that if you had waited to bring your challenge until the 2026 formal adoption of the work that had been carried out before then --

MR GIBSON: Of every document.

MRS JUSTICE BACON: Exactly, and if you had waited until then and you'd said, "Right. Now that we have the formal adoption of the 2025 documents under the statute we are now bringing our challenge", is it your case that at that point you would have been time barred because you could have challenged everything in September?

MR GIBSON: Yes, because the 2025 decision was the first scheme -- the first occasion on which the making of the decision in relation to the scheme was taken and therefore that's the trigger point. The fact that they then -- the fact they then readopt exactly the same document, as I said, gives the lie that it wasn't the relevant first scheme decision.

MR WOLFFE: So you would say if you are right in your interpretation of section 10P -- there's a separate argument in relation to that.

MR GIBSON: I know. If I am right, they don't even get that far.

MR WOLFFE: If you are right in your interpretation of section 10P, in a sense you don't need to challenge the February 2026 decision, because the time for challenging was September, and all that February 2026 did was adopt what had already been done, adopt a scheme that you will say had already been made.

MR GIBSON: Yes.

MR WOLFFE: Yes. Okay. That's helpful.

MR GIBSON: These are all important questions. I am sorry that I am taking things

too quickly.

Paragraph 28(3) of my learned friend's skeleton says that:

"The September publication did not decide the final assessment process ...",

but we say it's clear they made final decisions about the assessment process. That's what the documents actually say on their face. They are described as final decisions about how they will assess the projects. If GEMA is saying that in September 2025 they did not make final choices about subsidies to be awarded, that is true, but then that comes up against the section 70(2) point.

There is a suggestion at the end of that paragraph that Zenobē has somehow tried to hide the fact that GEMA retain discretion. We have not hidden anything. The references they give to the paragraphs in the Statements of Facts and Grounds correlate directly to pleaded positions in the Amended Notice of Appeal. I will just give you the references.

Statement of Facts and Grounds 68 is equivalent to Amended Notice of Appeal paragraph 71, which is B1, 19.

Statement of Facts and Grounds 75(4) is Amended Notice of Appeal section 76(4), B1, 21.

Statement of Facts and Grounds 78(1) is Amended Notice of Appeal 79(1), B1, 21.

Statement of Facts and Grounds 128 is Amended Notice of Appeal 115, B, 130.

I don't know why that point was made. That attempt to smear us has no basis whatsoever.

Paragraphs 29 to 32 all make various attempts to minimise the probative value of Mr Palmer's evidence. I will not take you to the detail, but if you just turn up Mr Palmer's first statement at your leisure, paragraphs 6 to 8, B, 9, 292, you will see his description of his experience and therefore his evidence goes to matters of primary fact as to the way in which the sector works, which clearly constitutes evidence of

facts. It is not quasi-opinion evidence or however it has been described.

In paragraph 87 of my learned friend's skeleton they question the relevance of other obviously analogous support schemes in the energy sector. I won't repeat what I have already said on that, but we maintain that they are relevant for the reasons already discussed.

So for all those reasons we say it is clear that the scheme -- the decision taken in 2025 was indeed a decision for the making of subsidies -- a scheme for the giving -- a decision as to a scheme for the giving of subsidies. That is what the documents say on their face and a careful analysis or even a cursory analysis will confirm that as being clearly the case.

I am mindful of the time. So, contrary to what I said earlier, I am actually going to skip over grounds 5 and 6 and come back to them at the end and go straight to section 10P. Thank you. My learned friend very kindly reminds me about the need for a transcriber break. You will tell me when you would like that to happen.

MRS JUSTICE BACON: Any time either now or ten minutes. It is up to you. What would you prefer?

MR GIBSON: I'm easy either way to be honest with you.

MRS JUSTICE BACON: All right. Why don't you start off your 10P argument?

MR GIBSON: Okay. So the first 10P argument is in respect of whether 10P precludes our challenge to the 2025 decision. Obviously we all know the way -- I will come on to the statute operation in more detail, but section 78 precludes -- section 78 says that if you are dealing with a subsidy or scheme introduced by primary legislation, then schedule 3 applies, not the general architecture. Schedule 3 did not include a section 70 right of action. Ergo if you aren't in the primary legislation box, then you are outside, but in relation to this first argument under section 10P there is a fundamental chronological problem, an insuperable one we say, which is that as at the time of the

decision on 23rd September 2025 the relevant legislation my learned friend seeks to rely upon -- we obviously dispute it had this effect anyway, but that's another matter -- had not even been passed into legislation, which happened on 18th September 2025, let alone entered into force as at 18th February. So we say that the section 10P point doesn't assist at all.

If we are right that the relevant decision to make a scheme was the 2025 decision, then our rights to bring a challenge to that crystallised on 23rd September and the fact that legislation entered into force which on my learned friend's hypothesis would have otherwise prevented us from bringing that challenge is nothing to the point. We say the only way you could do that is if the legislation applied retroactively.

MR WOLFFE: I am not sure -- I absolutely understand that point, but are there not two stages to the argument? Stage one is decision in February 2026, which in effect supersedes what's gone before, because it adopts what's gone before. Stage two is that that decision and the decision made under the legislation protection of 10P, and so if that is correct, if those two steps both stand up, then in effect a challenge to September 2025 is academic, whatever phrase one wants to use.

MR GIBSON: My learned friend advances that argument. I see that as a separate point that I am going to come to --

MR WOLFFE: Okay.

MR GIBSON: -- because that relates to the implications of the 2026 decision, but we say as to 2025 we say it is simply a chronological problem. The reason I want to dwell on this is because if you look at it, the effect of the argument you just outlined and my learned friend outlines is to give section 10P retroactive effect when it did not have that effect.

The test for retroactive effect is set out conveniently in supplemental bundle D, tab 8, page 73 at paragraph 28. That's the Lawrence v Financial Services Commission

Jamaica case, the UK Privy Council case:

"A statute will only be construed as having a retrospective effect if it is plain that it was intended to have that effect or, to put it another way, such a construction is unavoidable."

We say that is the test that would need to be applied if you were going to try to argue that section 10P should in effect be given retroactive effect. There is nothing in the wording of section 10P to suggest that Parliament intended to operate retroactively, let alone such a construction was unavoidable. On the contrary section 10P, as we've seen, is expressly framed as a forward-looking provision. It provides:

"The authority must as soon as reasonably practicable after ..."

MRS JUSTICE BACON: Yes. I don't think Mr Barrett is saying it has retroactive effect. So you could maybe skip over that point and come to the point he does make, which is the superseding point.

MR GIBSON: Well, I won't take you through that, but we do say that is the correct analysis. None of the cases he relies upon are analogous at all, because none of them are involved in a situation where a public authority is seeking to give retroactive effect to a piece of legislation that Parliament decided not to do that. When he wants to -- when he's reading it -- that is the net effect of what he's doing.

Now turning then to the second question about whether we can challenge the 2026 decision because Zenobē is precluded from doing so by section 10P, this goes to the point about the construction of section 10P. The last point I'm going to come to is the one you have flagged, but if I can do it in this order. I will get to it.

In the interests of time I am not going to take you through section 78 and schedule 3. All I want to say in relation to section --

MR BARRETT: I do say that's not a reply point. If my learned friend doesn't want to make submissions about those sections, it is a matter for him, but ...

MR GIBSON: Sorry. Forgive me. Thank you for that clarification. I'm going to make submissions on them. I wasn't going to take you through blow by blow what the sections are, but thank you very much. My learned friend is quite right. I will be making submissions on that. I wanted to just try to truncate those submissions mindful of the time.

I would ask you just to turn up section 10P briefly. That is at bundle D, tab 2, page 41. From that one sees Parliament ascribing provision as to what --

"The authority must, as soon as reasonably practicable after this section comes into force, establish and operate a scheme ..."

In the remainder of the section you can see that section 10P also prescribes some things which must be done but gives GEMA discretion in relation to key aspects of the design of the scheme, including the criteria for choosing which persons can apply for cap and floor support, section 10P(3)(b) read with section 10P(8), the definition of "specified" as being specified by GEMA.

Secondly, circumstances in which LDES operators will received payments from and make payments to the NESO pursuant to the cap and floor mechanism. That's section 10P(4)(a) and (b).

Third, determining LDES operators' net revenue for the purposes of applying the cap and floor mechanism under section 10P(5)(a) and (5)(b).

Fourthly, determining how costs and revenue are to be calculated for the purpose of the scheme.

One also sees section 10P(9). In addition to those discretionary matters in relation to the part of designing the scheme, i.e., matters that need to be attended to before a scheme can be established, you also have provision for the Secretary of State to amend certain features of the regime which are unrelated and separate to the design, i.e., matters that can be dealt with after the event.

So we maintain the LDES scheme has already been made, so the 2026 decision was not properly taken under the forward-looking provisions of section 10P. Further, even if the section 2026 decision had been properly taken under section 10P, we maintain that on its proper construction section 10P constitutes a legal power within the meaning provided for under Schedule 3, 4(b).

The point about section 2026 decision not having been properly taken on a proper construction of section 10P I have already set out in my skeleton argument and therefore I won't take further at this stage.

In relation to the question of whether section 10P constituted a legal power, I think it is convenient to start by reminding ourselves of what the correct approach to statutory construction is. My learned friend has included the case of R (on the application of O) v the Secretary of State for the Home Department, bundle D, tab 35, page 1042. I am sure this is very familiar to you. Paragraph 29 reads:

"The courts in conducting statutory interpretation are 'seeking to the meaning of the words which Parliament used' ... More recently Lord Nicholls of Birkenhead stated 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context'. Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in the statute and the statute as a whole may provide the relevant context."

Then they say:

"They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context ... [namely that] 'Citizens, with the assistance of their advisers,

are intended to be able to understand Parliamentary enactments so that they can regulate their conduct accordingly'."

We say that our construction is correct as to the meaning of the words "duty and power" read in a specific statutory context of the Subsidy Control Act as a whole and in light of the purpose of section 78 and Schedule 3 to the Act.

The purpose we say is clearly -- we make three points. First, and this is without prejudice to the points I made in the skeleton, which I am not going to repeat, but just to reiterate one of them, we say that our interpretation of the clause is the clear statutory intent of section 78 and Schedule 3, namely to respect the sovereignty of Parliament. That intent we say is clear from reading the statutory scheme as a whole. I just flag section 6(1)(a), which excludes from the purview of public authorities any parts of the Houses of Parliament, and from, if you look at the Trade and Cooperation Agreement, Article 3735 and other references, where they specifically carve out the Acts of Parliament and the equivalent Acts of the European Union.

So we say on our interpretation, namely that section 4(a) only applies to pure duty cases where the entire scheme has been designed and stipulated by Parliament, and it is in those cases only that Parliament intended that the Schedule 3 regime should apply whereas --

MR WOLFFE: A moment ago you were running the argument that you can have a scheme that makes subsidies with substantial elements of judgment and evaluation and discretion built into it. Are you saying that in the context of Schedule 3 and section 78 that if there are elements of judgment, evaluation and discretion, section 78 and Schedule 3 can't apply?

MR GIBSON: I will refer you to some examples of what we say the pure duty schemes are where they have set down exactly what needs to be done. Obviously there will be an administrative discretionary function. If it is clear what the scheme is and there is

no need for further design, there will need to be someone that administers it, because Parliament does not administer its own schemes.

For example, in the tax context Parliament routinely sets down very specifically what the scope of the terms for relief will be, sets it all out in a statute and then says, "HMRC, go on and implement that and make sure it is administered properly". That is a pure duty situation notwithstanding the fact it has some discretion, but that's not the type of discretion we are dealing with here. We are dealing with discretion in relation to the design of the scheme. We say in that situation the need for Parliamentary sovereignty -- consistent with protecting Parliamentary sovereignty, you are not infringing Parliamentary sovereignty if you are challenging -- if a scheme is challenged which has been designed by an administrative body or a Minister on the basis of the broad parameters or the indication that Parliament has given. That is the first point we make.

MRS JUSTICE BACON: All right. We will just take five minutes.

MR GIBSON: Yes.

(Short break)

MR GIBSON: The next point we make in relation to why we say our interpretation of Schedule 3, paragraph 4 is the right one is that it's consistent with the rest of the statutory scheme. In particular I want to take you to paragraph 9 of Schedule 3.

Paragraph 9 applies to provisions relating to voluntary referrals to subsidies in proposed primary legislation. That phrase is defined at paragraph 2(1) of the Schedule 3. That's page 170 of bundle D, tab 8, if you want to turn it up.

MRS JUSTICE BACON: Sorry. Page?

MR GIBSON: Bundle D, tab 8, page 170. Paragraph 2(1) defines "proposed primary legislation" as referring to:

"A Bill introduced in Parliament ... or

A proposal to introduce any such Bill ..."

MRS JUSTICE BACON: I am at page 170.

MR GIBSON: Forgive me. 170 of bundle D. Forgive me if I have the wrong reference there, madam.

MRS JUSTICE BACON: Paragraph 2(1).

MR GIBSON: Paragraph 2(1). There is a lot of definitions in there. If you scroll down to "Proposed primary legislation".

MRS JUSTICE BACON: I see. Okay.

MR GIBSON: The significance of that is that Schedule 3, paragraph 9 applies the provisions relating to voluntary referrals to subsidies made by proposed primary legislation. Thus in passing Schedule 3, paragraph 9, Parliament must have had in mind the possibility of a Bill which imposed a legal duty as being one which was capable of being referred to the Subsidy Advice Unit. The provisions -- because, of course, if the primary legislation conferred a legal power, then Schedule 3 wouldn't apply, so it would be subject to the normal regime.

The provisions of s.56(2) specify --

MR WOLFFE: Presumably if it's a voluntary referral power, you can refer the scheme or not as you consider appropriate?

MR GIBSON: Absolutely. I am trying to construe the scheme and work out --

MR WOLFFE: I understand that.

MR GIBSON: We can zoom in on that and say that must be a legal duty. Parliament must have considered that must be a legal duty, because otherwise it wouldn't be proposed primary legislation subject to Schedule 3. It cannot be a legal power. The logic of that may take a moment to sink in.

MR WOLFFE: If I understand the point you are making, if in the context of a provision like this, which imposes a duty and then creates, you know -- leaves the design of the

scheme to the public body, the question of voluntary referral in a sense can't arise, because the scheme is not developed in a way that would allow you to refer it. I think that's the point you are making.

MR GIBSON: You have saved me a lot of time.

MR WOLFFE: I suppose the counter would be if it's a voluntary referral process, then if it's a duty with a power attached, then you would choose not to refer.

MR GIBSON: No, the point is that Parliament intended that you could and therefore it must have been possible to do it and therefore you must have been able to satisfy the requirements if you do make voluntary referral.

What I am going to do is just hand up, because paragraph 9 makes certain amendments to sections 56 and 57 which are quite difficult to keep in your mind while you are reading paragraphs 56 and 57 at the same time. I just marked up so you can see what it does. (Handed).

Whereas a scheme of particular interest under the normal regime requires a mandatory referral, by virtue of paragraph 9 a scheme of particular interest falls into the voluntary referral box. What it doesn't do, if you look at 56(2), it doesn't change the criteria that such a request must be able to meet in order to make a voluntary referral. So Parliament was anticipating that the type of scheme it had in mind that would be subject to Schedule 3 is the type of scheme that could meet these criteria, and those criteria, if you turn up supplementary authorities bundle, tab 6, you find the relevant regulations.

These are the regulations that have been passed in respect of the first criterion under 56(2)(a), which guides you to section 34, which provides for the making of regulations about what you need to do for publication on the transparency register.

The relevant regulations are these. If you just turn to pages 30 to 31, one sees regulation 4(3)(b) through to (e) provides that such a scheme must be able to provide:

"The categories of enterprise that are eligible to receive subsidies under the scheme;
A summary of the terms and conditions for eligibility to receive subsidies under the scheme;
The basis for the calculation of subsidies under the scheme, including a summary of any conditions relating to subsidy ratios or amounts;
The budget for the scheme ..."
We say those four conditions, just by way of example, are all conditions which the bare duty that one sees under section 10P would not be in a position to satisfy. One would need to have the additional information that was tasked to GEMA in the exercise of its discretion in order to be able to provide that information, and therefore we say our interpretation is entirely consistent with what Parliament intended when one reads the rest of Schedule 3 and therefore paragraph 4 in context.
I can see you are maybe not altogether happy with what I am saying.
MR WOLFFE: No, no. I am neither happy nor unhappy. I am absorbing it with interest.
MR GIBSON: Okay.
MR WOLFFE: The question I had was whether proposed primary legislation is also subject to the transparency requirement which seemed to be implicit in you showing us the regulations. I wasn't sure what the answer to that was.
MR GIBSON: It is, but the reason why I have shown the legislation was I jumped a step and maybe I should take it more slowly. In paragraph 56(2)(a) one of the criteria that needs to be satisfied in terms of the information to be provided on the voluntary referral is the information in relation to the subsidy or subsidy scheme that will be required under section 34. Section 34 is the transparency requirement. Therefore that is why we are looking at the regulations made under it to see what information would have to be provided pursuant to that provision.

So, as I say, the bare details -- if section 10P -- so section 10P only sets out there high level details. As a proposed scheme as published by Parliament section 10P provides for certain things to be done, but leaves most of it to GEMA in the exercise of its discretion, and those bits that are left over to GEMA's discretion are the very bits that would tick those boxes. So, for example:

"Categories of enterprise that are eligible to receive subsidies under the scheme."

That's GEMA's discretion under section 10P(3)(b). So it couldn't be referred with that information until GEMA had done that.

"Summary of terms and conditions ..."

Section 10P(3)(b) again.

"The basis for the calculation of subsidies ..."

That's a combination of section 10P(4) and 10P(5).

"The budget for the scheme ..."

A combination of section 10P(4), (5) and (6).

So for those two reasons and the other reasons set out in my skeleton we maintain that reading not just the words in isolation but the words in their proper context and looking for the specific meaning Parliament attributed to them in the context of the Act as a whole and in particular Schedule 3 as a whole, we say it is clear that our interpretation is the correct one.

Alternatively, if it is not clear, we say in a position of the sort of mixed case, if you like, as opposed to a pure duty case -- in a mixed case we would say that Schedule 3 paragraph 4(b) has to apply as well. If it is unclear, then we would stand by what we said in paragraphs 174 to 176 in our skeleton about relying on the Hansard provisions.

I am just going to try to take as quickly as I can my learned friend's points on this. In his skeleton, paragraphs 53 to 55, they focus on a single word in section 10P in isolation, the word "must", but that's completely divorced from statutory context

purpose and therefore is of little assistance.

At 55 to 56 he also cites three cases regarding different statutory schemes and fundamentally different contexts, which we say do not assist in interpreting the specific meaning of these provisions in the context and purpose of this Act, as mandated by the case of O that we looked at a moment ago.

In paragraph 57 he refers to the explanatory notes in respect of the Planning and Infrastructure Act 2025. With the greatest of respect, that is of no assistance to interpreting the meaning of the Subsidy Control Act 2022.

In paragraph 57 he also refers to the -- sorry. In paragraphs 58 to 59 makes further points about the meaning of "must" and "may" but does so without regard to the full statutory context and purpose in the way that I have done.

In paragraph 60 he refers to the difference between section 26 and 27 of the Planning and Infrastructure Act, but, as I have just explained, one cannot derive any useful guidance as to the meaning of Schedule 3, paragraph 4 of the Subsidy Control Act by looking at different provisions of other Acts.

In any event, even if this were an informative exercise, which we say it is not, what is striking about that comparison is that whereas section 27 introduces section 38A of the Electricity Act and describes that as a power to establish a scheme for the giving of benefits, it is notable that section 26 introduces section 10P, but doesn't give any indication either way as to whether it is a duty or a power. So we say, if anything, it is telling that Parliament chose to distinguish between section 26 and 27 in this way, because it recognised that section 10P was a mixed case and therefore one couldn't describe it as a pure duty.

Paragraph 61 of my learned friend's skeleton and cross-referring to paragraphs 13 to 20, we say GEMA goes even further down the wrong path by referring to its own express statement in the TDD as to how section 10P was described, i.e., as a duty, in

the statements of other government ministers. We say those statements are just as irrelevant to the interpretation of what Schedule 3, paragraph 4 means and the wording of that as the explanatory notes to the Planning and Infrastructure Act.

Even if it were relevant to consider them, which we say it is not, we say that it is striking that none of them actually purports to have considered specifically what Schedule 3, paragraph 4 means or that section 10P was being passed specifically in reliance on Schedule 3, paragraph 4(a) of the Act. We say it doesn't really add much to the sum of human knowledge in any event.

It is unclear whether what GEMA is really suggesting, without having put this in evidence or pleaded it, is that the misconceived purpose of passing section 10P was specifically to rely on Schedule 3, paragraph 4(a). If that is, we would obviously be interested to hear about it and we will deal with it in reply.

Paragraph 62 pours scorn on our interpretation, but we have dealt with that.

Rather strangely GEMA only comes to analyse Schedule 3, 4(a) and (b) after having considered section 10P, which, as I said, is the wrong way round to look at it. You need to work out what Schedule 3, 4 means and then test which box section 10P fits in, not the way round, as they have done it. In any event, none of its arguments in relation to section -- paragraph 4(a) and 4(b) detract from what I have said about the correct interpretation of those words.

Paragraphs 63 and 64 of the skeleton simply assume what one must prove.

MRS JUSTICE BACON: Your point about looking at what section -- what the SCA means rather than looking at what 10P means and you say you can't construe the SCA by the later provision of 10P. I don't think that can be controversial. We need to look at what the SCA actually says, but what you are saying is there is a Parliamentary sovereignty carve-out, but only if you have a scheme for which all of the details are enacted in legislation with no discretion, but you say the definition of a scheme doesn't

require that. I mean, that might be the definition of a scheme under EU law, but you say the definition of a scheme under the SCA is much wider.

The effect of that is then you don't really have the carve-out under the SCA for schemes in general, which you say are schemes under the SCA. You would only have that carve-out if what was done was not to make a scheme as per your definition, but to actually go much further and specify all the elements of that, but your entire point is that that's not normally done with a scheme. You say a subsidy scheme as a matter of definition and the way it was conceived under the SCA was not to require all of the details to be provided, but that you would get something that was challengeable at a stage where there was considerable discretion.

So, on the one hand, you have something which you say is challengeable and, on the other hand, if it's challengeable at that stage, you say, "Oh, but you then can't rely on any Parliamentary carve-out", which means there must be a question as to the effectiveness of a Parliamentary carve-out for schemes at all on your construction. It is very difficult to see how this is intended to operate for a scheme.

MR GIBSON: One is looking at this specifically through the context of a scheme like this rather than a tax scheme. There's two points. One, the Minister in explaining the way this is intended to operate, Mr Scully in the Hansard debates to which I refer in my skeleton, very specifically does make point that -- if you turn up my skeleton, paragraph 175 on page 52:

"... the Minister explained, '... A subsidy is granted by primary legislation only if the Act itself makes provision that directly amounts to a grant of a new subsidy, or requires a grant of a new subsidy by a public authority with no room for discretion on the part of that authority. Apart from taxation that is very rare ...'"

MRS JUSTICE BACON: That's a subsidy, not a subsidy scheme.

MR GIBSON: Well, I think actually if you look at the -- I am not sure that is actually

correct when you actually look at the way the tax examples he has given play out. Those do establish schemes that are then applied to other people. In relation to the tax measures if you go to the examples of tax measures that I've given --

MRS JUSTICE BACON: Yes. Is there any indication that in this bit of Hansard Mr Scully was talking about or had in mind subsidy schemes, because it must have been intended that subsidy schemes should be within the carve-out legislation, otherwise, you know, you have a carve-out that is only half effective. It affects subsidies, but not subsidy schemes, but we know you can't -- if you have a subsidy scheme, you can't go after the subsidy itself.

MR BARRETT: My learned friend has not shown you it, but the schedule does indeed specifically state it applies to schemes.

MR GIBSON: Yes. I completely agree it applies to schemes as well. There's no doubt that's --

MRS JUSTICE BACON: My question then is how it then --

MR GIBSON: When is it ineffective.

MRS JUSTICE BACON: -- is effective for schemes.

MR GIBSON: It would be effective for a scheme that did prescribe all the criteria at the time of the scheme. I mean, the fact that a scheme need not do that does not preclude the possibility of a scheme doing that. In the tax context that is what they generally do.

MR DAVIES: Isn't there a difference between the degree of detail that the legislation sets out and whether the legislation is quite explicit about a subsidy? I mean, if the legislation said, "We will set up a scheme and provide public monies for it to subsidise car makers", then that's quite explicitly a subsidy, but it might still be quite general and not the very detailed rules that you are talking about.

MR GIBSON: In that situation, looking at paragraph 9 and the implication that this

scheme must be capable of voluntary referral to tick those boxes, that would not be one that Parliament had intended to be covered by this provision. You are asking me how does my interpretation --

MR DAVIES: Because it is explicit but it's too vague -- it is explicitly a subsidy scheme, but it is too vague about the details.

MR GIBSON: Yes. This to my mind is prescribing a scheme where Parliament designs and sets all the specifics in relation to a scheme. I accept that I am saying you don't need to have all the specifics in order for it to be a scheme, but, as I say, it doesn't preclude the possibility of Parliament prescribing for a scheme in that way. In those circumstances it's Parliament that has designed it and the sovereignty of Parliament indicates it needs to be protected. In any other situation it's not the sovereignty of Parliament that's being infringed. It's because Parliament is giving it to other people to do the --

MR WOLFFE: Parliament has still decided that there should be a scheme. I mean, I take your point that it would be a much greater intrusion on Parliamentary sovereignty if the requirements applied to the kind of scheme you are describing, but the kind of section we are dealing with there is still a provision where Parliament has decided and ordained that there shall be a scheme of certain type described in the section.

MRS JUSTICE BACON: And as a matter of practice for what subsidy scheme is Parliament going to set out itself the microscopic details of that scheme rather than leaving it to the relevant Minister, the government department to work out the fine tuning of that? It is of the nature of many subsidy schemes, maybe even most subsidy schemes, that there will be a decision on the making of a scheme and the fine details of that will be worked out. If in every case where the working out of the fine details by somebody that is not Parliament in primary legislation took the scheme outside of the carve-out, that would make the carve-out virtually ineffective for subsidy schemes.

MR GIBSON: First of all, the Minister introducing this said that this carve-out would be very rare.

MRS JUSTICE BACON: He is talking about subsidies in this section. Unless you have something which showed that he was talking about subsidy schemes -- the extract we have at 175 is not talking about schemes at all.

MR GIBSON: It applies equally to schemes if you look at the examples of schemes I have given in paragraph 172, which are three examples of schemes where Parliament has set things down very specifically, but all in the tax context.

MRS JUSTICE BACON: Yes. I am not saying that there can't be, but in the case of most normal subsidy schemes you are not at all likely to get the fine details of that set out in primary legislation. It wouldn't be practical.

MR GIBSON: Exactly. In those circumstances it is going to be very rare in most subsidy schemes, but in a tax context there will be --

MRS JUSTICE BACON: The problem is there is an intended carve-out where the subsidy is granted pursuant to a duty in legislation. So Parliament says "you must". It is not a "you may". "You must adopt this scheme, but I am going to leave it to you, Ofgem", in this case, "to work out the details of that". Ofgem doesn't have an option there. If Parliament says "you must", it has to do it. Yet you are saying in that case, "We can decide no, that's not permissible", and completely ignore the Parliamentary sovereignty carve-out in the SCA.

MR GIBSON: I am not suggesting you completely ignore it. I'm suggesting you construe it in light of its intended meaning in the full context. Paragraph 9, as I pointed out, clearly conceives that it should apply to schemes that are sufficiently detailed to apply for voluntary referral. I don't want to keep repeating myself. Those are my submissions. I thought they were compelling, but I can see they are not landing very well at all.

Anyway I think I should probably move on.

MR WOLFFE: As you know, Mr Gibson, you shouldn't read too much into --

MR GIBSON: I am not reading too much, but me repeating my points again and again is not necessarily the most productive --

MR WOLFFE: We are keen to make sure we have your submissions on the points.

MR GIBSON: Yes.

MR WOLFFE: I am afraid I do have one follow-up --

MR GIBSON: By all means.

MR WOLFFE: -- which is if one is thinking with the subsidy control principles and in particular the ones that you had focused on that are -- as the ones that you would say and those you represent would say might not be met in this case if they were tested, and the question that is formulating in my mind is whether Parliament has in effect foreclosed those, because it has decided that there will be a scheme of the character that's set out in section 10P and whether that has any bearing on how we approach -- whether it helps to illustrate the approach to the interpretation of Schedule 3.

MR GIBSON: Well, you see, if Schedule 3 applies because it is a legal duty case, then the strict requirement under sections 12 and 13 to apply the subsidy control principles does not apply.

MR WOLFFE: Falls away, yes.

MR GIBSON: But one of the things I have not taken you to under section 56(2)(d) and (e) is that, on a voluntary referral, it has to be capable of being assessed against subsidy control principles as well. So I think Parliament did intend that their legislation could still be assessed against those principles, albeit on a voluntary basis in advance on referral. Does that answer the point you are making?

MR WOLFFE: I mean, of course, that's proposed legislation and the idea is proposed

legislation can be sent to the unit with a view to assessing the subsidy control principles.

MR GIBSON: Yes.

MR WOLFFE: It is quite a different thing to say once legislation has been enacted which directs a public body that it has to introduce a scheme of a certain sort that you then are going to second guess potentially judgement that Parliament has made by testing the scheme against the subsidy control principles. That is the question in my mind. I am not suggesting there is not an answer to it.

MR GIBSON: It is an interesting question. I think again my answer is the same. If I am wrong and this scheme falls, obviously, within Schedule 3 and one cannot test it against the principles, but if I am right, then Parliament would have taken account of that, but the actual detailed design of it, i.e., the bits that need to be assessed, don't fall within Parliament's purview. They allocate that to someone else to do. In those circumstances it is not offending Parliament's decision making, because Parliament has made a conscious choice that it doesn't want to prescribe those details. I am sorry. Each answer seems to come back to the same point.

MRS JUSTICE BACON: Yes. All right.

MR GIBSON: Just to wrap up as quickly as I can on the remainder of the points my learned friend makes in relation to the interpretation of section 10P, paragraph 69 purports to show that the explanatory notes to the Subsidy Control Act support its position. I just repeat that the primary source for interpretation is the words of the statute, and I would say that those words are clearly in our favour and therefore the explanatory note would not trump that. Even if the explanatory note did say something different from my case, which we say it doesn't, it would not trump it. Sorry. We say it doesn't say anything different. If you read what's said there, they are the words -- what's written in the relevant explanatory notes, they say that it doesn't

apply -- sorry -- it only applies when you make a scheme 'on its face'. That making a scheme on its face point is consistent with what I say. So did section 10P make a scheme as in the completion of a scheme on its face? No. It told you what to achieve. What section 10P does is it directs Ofgem or GEMA to make the scheme. So, therefore, the explanatory notes are saying essentially the relevant 4(a) situation, the duty, applies where Parliament has made a scheme on its face. We say that's precisely what section 10P doesn't do. It provides for a duty for someone else to make the scheme. So we say that explanatory notes don't actually advance my learned friend's position. In fact, they are consistent with ours.

MR WOLFFE: 10P goes a little further, because it says in terms that the scheme must provide for the cap and the floor.

MR GIBSON: Oh, yes, in terms of the parameters as to what you have to do in making it. But (A) 10P doesn't make the scheme itself; it is incontrovertible it is telling someone else to make it. And (B), whilst it does provide some parameters, it then provides even more discretion to GEMA in relation to the design. Those considerations, I say, make it a mixed case and for all the reasons I have said make it a 4(b) case.

Section 70 of the skeleton refers to the DBT guidance. I would just repeat that this sort of interpretative guidance doesn't trump the primary source of the words of the statute and in any event it doesn't contradict our position. The guidance there refers to the possibility of an administrative discretion. That's a section 10P(9) type of discretion, a discretion that's exercised after the scheme has been made or designed and, as one often sees in relation to any form of scheme, there will be -- Parliament, as I said earlier, doesn't administer its own schemes. Someone else administers them. Therefore, there will always be some discretion. If that were the answer, it would mean there were never any schemes that fell in 4(b). The question is are

there -- is there discretion in relation to matters of design, i.e., discretion like under section 10P(3), (4), (5), (6) and (8) and not section 10P(9).

My learned friend's skeleton paragraph 71, GEMA takes issue with our reliance on the Hansard extract. I have explained in my skeleton why we say that it's permissible to do so in the circumstances of this case.

For all those reasons we maintain the 2026 decision was not properly taken under section 10P on a proper construction of section 10P, given its forward-looking intent.

In any event, section 10P constitutes a legal power for the purposes of Schedule 3, paragraph 4 and therefore does not operate to bar a challenge under section 70 of the Subsidy Control Act.

Turning then to the last bit of the section 10P puzzle, the suggestion that the effect of the 2026 decision taken by virtue of section 10P operates to render our claim otiose, academic, of no legal effect, etc.

We say that, first of all, that if I am right on my analysis of section 10P, this further argument doesn't take GEMA anywhere. But, even if I am wrong about my analysis of section 10P, GEMA is still wrong -- and I am not going to go through all the points I've made in my skeleton. I'm going to just pick up on the two authorities that my learned friend relies upon now -- three authorities that were not previously relied upon.

The first of those is the Shrewsbury & Atcham Borough Council case.

MRS JUSTICE BACON: Which paragraph of GEMA's skeleton are you looking at?

MR GIBSON: Sorry. I was just about to give you that. So it's GEMA's paragraph 74(1) to (4). So they rely on the Shrewsbury & Atcham case. We say it is obviously distinguishable. In summary, in Shrewsbury there is no equivalent attempt to have legislation operate retroactively. There's no equivalent to the subsidy decision which crystallised in this case in September 2025. It is no part of our case that we are seeking to challenge any development work undertaken by GEMA. Our challenge is

to the 2025 decision specifically, and if we are right about that, then this case doesn't take us anywhere. If we are wrong about that, it doesn't add anything.

The debate in Shrewsbury was about a proposed change in the law. They were actually trying to challenge a change in the law. Zenobē's complaint is not about the law being changed. Zenobē's complaint is about an act taken unlawfully *before* the law was changed, and GEMA has not provided any authority either here or elsewhere to justify sidestepping the chronological problem I started with in dealing with section 10P.

If you just turn up the actual authority, which is in D, tab 27, page 792, paragraphs 9 and 10.

MR WOLFFE: Sorry. Could you give me the page numbers again?

MR GIBSON: Of course. D, tab 27, page 792.

MR WOLFFE: Thank you.

MR GIBSON: Paragraphs 9 and 10. A policy decision was taken to promote new legislation. The reasons for promoting new legislation are set out in paragraph 9, that under the existing legislation:

"There is no method of local authorities instigating change or for regular checks that the structure and boundaries of local government are fit for purpose",

and it had been:

"... clearly stated that the 'Electoral Commission would not be asked to conduct any wholesale review of local government'."

I just note in contrast GEMA has never explained the reasons for promoting new legislation in this case despite asserting its existing powers were already sufficient for the purpose.

It was made clear that the proposals could not be implemented unless and until the legislation was passed. By contrast, we say on our case, and if we're right about -- this

is my point -- if we are right about the 2025 decision, which ex hypothesi is the only sensible way to approach this, then GEMA has made or established another scheme before section 10P was passed. That's the central problem GEMA faces. This case doesn't really help either way. If they are right on the 2025 decision point, then we don't need to look at this case. If we are right, this case doesn't assist.

The timings and the relevant dates are set out in paragraphs 11 and 14 to 16. The point one takes from that is that the relevant decision was taken on 5th December after the Act had entered into force, but the point is that the challenges that were being undertaken – if one looks down to paragraphs 17 to 18 on page 794 – were in respect of an eligibility decision in March 2007 and a minded to decision in July 2007.

Zenobē has only ever sought to challenge the final decisions, what were expressly described as final decisions in respect of the assessment framework. We did not challenge the consultation documents. We certainly didn't challenge the eligibility decision to the extent that that phrase actually has a read-across between the two cases, which is not really clear, given the lack of real analogy between the two. In this case, it was only at the hearing that the appellants applied to amend the challenge to the December final decision.

Then if you look to the provisions my learned friend relies upon specifically on page 7 -- that's not the right reference. Paragraphs 31 to 35. I don't actually --

MRS JUSTICE BACON: They are in GEMA's skeleton argument so we could pick it up from there.

MR GIBSON: Thank you. You are absolutely right.

MRS JUSTICE BACON: Paragraph 74(3).

MR GIBSON: That's correct. Thank you. One sees there that Carnwath, LJ rightly describes the need to identify a substantive event and ultimately the relevant target of challenge in judicial review is that substantive event. In this case we are challenging

the 2025 decision as a substantive event.

Now GEMA challenges that, but, as I say, once one has determined that one way or the other, the case is determined without actually having to go on to look at this. We say that if we are right, then the 2025 decision is a substantive event and what we are doing is entirely in line with what Carnwath, LJ suggested. So we say that it is readily distinguishable on the facts, because the claimants in this case were seeking to challenge and, as I say, they were seeking to challenge the law specifically. It's a completely different situation.

Secondly, to the extent one tries to draw an analogy one can see it doesn't really assist or it's irrelevant, because the prior question about whether it is a scheme decision is determinative.

The Stratton case, which is at D, 34, page 1004, this too is obviously distinguishable. This is a case concerning a planning decision, and in the period between permission to proceed and the claim being granted and the substantive hearing of it, the interested party to the claim made a separate application for planning permission to the defendant:

In paragraph 20:

"Despite the implicit threat of a legal challenge to the Second Permission by the Claimant, no challenge [was ever actually] commenced ..."

Crucially at paragraph 23:

"The Defendant has conceded both of the substantive grounds of claim" to the First Permission.

In the judgment of the judge he had been right to do so.

Paragraphs 87 to 89 which are D, 34, 1024, the paragraphs on which my learned friend relies, if you would just like to read those. (Pause.)

MRS JUSTICE BACON: Those are extracted at page 31 of the skeleton argument.

MR GIBSON: Oh, those are extracted.

MRS JUSTICE BACON: What's said is even if there is a first decision, which is a proper decision, once the second decision has superseded the first decision, there's no worthwhile purpose served by the court quashing the first decision because it has been overtaken by events.

MR GIBSON: Paragraph 89 says:

"The Defendant has openly admitted its error" in relation to the First Permission. "The Second Permission has superseded the First Permission and it stands unchallenged." Well, those are three differences to our case: one, the defendant has done anything but openly admit or even tacitly admit or even do anything like admit its error. It says there is no error. And, two, it has adopted -- not superseded -- it has adopted the decision, errors and all. Finally, three, to the extent it is relevant at all, we have challenged the 2026 decision. So in those three respects the lis in respect of the 2025 decision remains live.

I would just highlight there that the relevant test is the test in Hidenda, which is quoting the test in Salem, the Supreme Court or perhaps it was the House of Lords -- I forget now -- highest authority, which says a case is academic if there is no longer a lis to be decided. There is still a lis to be decided in respect of the 2025 decision, because my learned friend's clients have not admitted any error in that respect. It has not been superseded. It has been proactively adopted, which the very opposite of superseding, and in any event its subsequent decision also stands challenged.

Finally, the Zoolife decision, paragraph 75 of my learned friend's skeleton. I will not take you through the facts, and it is notable my learned friend does not seek to rely on them, but that is a classic case, the case being academic. A challenge was made to an inspector of an aquarium. Before the inspection took place she was replaced, so there was no longer any issue in relation to which the decision had been challenged.

The claimants nonetheless sought to get an advisory ruling from the court because they thought she might be appointed again in future in relation to other aquaria. The court said, "No, we are not having any of that". What they were actually considering was -- they said "Clearly there is no longer a lis to be decided", taking the same ex parte Salem case I referred to as well.

The only significance of this is that it points out you can still decide a case even if it were technically academic, which we say our case is clearly not, but even if you wanted to see our case as academic, we say there is a clear and exceptional reason to deal with our case anyway, not least the fact that we challenge the 2026 decision as well, but the 2025 decision should still be challenged, because this is a unique case. There is not a single authority that my learned friend has relied upon where the effect of what they are doing is to give retroactive effect to section 10P. That is the effect of what is going on. They have moved the decisional goalposts in order to achieve that outcome in spite of the fact that they took a decision before the relevant provision was in force.

MR WOLFFE: Can I just clarify the point you are making? Is the point you are making even if we were to take the view that, however one frames it, the case has become academic as a result of a combination of the 2026 decision and the statute, you would say that this is one of those -- like in the public law context sometimes courts will determine appeals that have become academic. Do you say we are in that territory?

MR GIBSON: Yes. The reasons why, for example -- the reason given in Salem -- two reasons why you -- sorry. You see that in paragraph 36. Do you want to turn it up? I don't know if my learned friend quoted it in his skeleton. It is around page 760 in the D bundle. The reasons why you might go on to consider a case on the exceptionality grounds are where there are likely to be a large number of similar cases. We say that is indeed the case here. The points on the question of what a subsidy means and the

public resources limb and what a decision to make a scheme is are cases which are likely to be relevant to a very large number of other market participants in other markets for the purposes of the subsidy control regime, and also the scope of Schedule 3, 4(a) versus (b), those are also questions that are likely to be wider developments, and the facts of the present case are not so peculiar as to render the judgment of no wider application. On the contrary, we say they are particular facts that are actually likely to be of significant relevance to other cases.

As I said, we don't even get there, because on none of the authorities my learned friend relies upon is there any proper analogy to be drawn with the facts of our case. I have set out the reasons for the cases that were already relied upon in my written submissions and I have explained that -- the three cases that were new in my learned friend's skeleton.

For all those reasons we maintain that the challenge to the 2025 decision is clearly not academic and remains very much alive. There is a lis to be decided and in any event there are exceptional reasons for determining this case and granting relief. We say that applies to the 2025 decision and in any event the 2026 decision still needs to be considered.

The last topic in relation to relief is the question of whether we should be refused relief in relation to the 2025 decision or the 2026 decision because of harm to others or good administration. I shall briefly address you on the scope of your powers in this jurisdiction in England and Wales before turning to consider the facts and GEMA's submissions on this point.

We've seen when we looked at section 72 the Act provides for kinds of relief which the CAT may order, including (b) a prohibiting order, (c) a quashing order and (d) a declaration. That's three of the five. Section 72(6) provides the CAT must apply the same principles as in judicial review. My learned friend makes the sensible point that

as a general matter judicial review remedies are discretionary. We have set out, we say, two reasons why if the CAT upholds our case GEMA has erred, CAT should grant the remedies sought.

First, we say that where a breach of law is established, the ordinary position is that a remedy should be granted. A court should proceed cautiously in exercising its discretion to refuse to make an order and should take care to ensure it does so only when that course is clearly justified. That is the Imam case, paragraph 43, at bundle D, tab 40, page 1243.

Secondly, the Tribunal must also have regard to the requirement that the remedies available on a review of subsidy decision are effective. I have quoted in my skeleton reference to Bennion, the need to take into account the UK's treaty obligations and the fact that TCA Article 372(1)(a) and (c) refers to the need for effective remedies.

Further and importantly, and we say this is a prior matter which I will deal with first, we do maintain that Parliament has specifically mandated what the consequences which follow in the event that a public authority breached its duty to make a mandatory referral to the Subsidy Advice Unit should be, namely that the scheme that should have been referred is prohibited. Section 31(1)(a) of the Act.

I am not going to repeat the points I have made in my skeleton on that, but invite you to read them and we maintain them.

Instead, I shall address GEMA's reasons for contesting this, although I would reiterate the point made in the skeleton that GEMA did not plead any defence to this part of Zenobē's case and admitted it did not submit a mandatory referral. Again this is, if you like, an unpleaded point again.

MR BARRETT: I am trying not to rise. In the notice of appeal this is not pleaded as part of his relief. It is part of his pleading with substantive breach, that's why there is no reply from us. I will sit back down. I am sorry.

MR GIBSON: Paragraph 126(1) of their skeleton. GEMA suggests Zenobē is conflating breach with relief. We disagree. The breach is established by the failure to comply with the duty under section 52(1)(a). The consequences of that breach as are specifically mandated by Parliament under section 31(1)(a), which are that the scheme is prohibited. So that's why we pleaded it at that point, because that does proscribe the relevant outcome.

At paragraph 126(2), GEMA suggests that "very clear words" would be needed to "oust the CAT's remedial jurisdiction". We would just say that our interpretation does not involve ousting or fundamentally reversing section 72(6). With respect, that assumes the answer to the question that needs to be answered: it proceeds from the false premise that our interpretation involves giving priority to one provision over another. What one needs to do is seek a harmonious interpretation to understand what Parliament intended by reference to the two provisions. There is nothing necessarily contradictory in the fact that Parliament generally prescribed the judicial review orders, but then among those judicial review orders, which you will remember includes a prohibiting order, they specified that this consequence should follow in that particular eventuality.

In that light I don't fully understand the submission made at paragraph 126(3) where they say prohibition does not map on to any of the remedial categories available to the Tribunal under section 72(2). A prohibiting order is one of the kinds of relief that was very specifically provided for under section 72(2)(b). So we say the harmonious interpretation that we proposed is actually the correct one. Parliament said "These are your suite of options generally. In this particular case make sure you do the prohibiting option". You can read the statute perfectly sensibly on that basis and that's clearly what it is seeking to do.

At paragraph 126(4) GEMA says there is no logical policy basis for treating breach of

a mandatory referral duty differently from other duties. With respect, we disagree. Apart from the fact that's what Parliament has prescribed. So one doesn't need to look behind Parliament's words. But there's also a perfectly logical basis for that. Parliament has made specific provision in section 52(1) because the kind of schemes requiring mandatory referral are those which are schemes of particular interest. They are of particular interest because they are either very large in monetary terms or they concern a sensitive sector or they concern restructuring.

One sees that from the particular interest regulations -- I will make sure I have the references right. Bundle B, tab 9, 177 to 178. So, in those circumstances, it's clear that you would expect people to adhere fully to an obligation that affects sectors which are of particular interest because they are likely to have a particularly pernicious impact if they are not properly implemented in those sectors.

As the Subsidy Advice Unit puts it, "Subsidies granted in a sensitive sector have a greater potential to be distortive, even at lower monetary values".

That's the Subsidy Advice Unit's report of 5th April 2024 on the Capacity Market scheme at paragraph 1.12, B, tab 1, 1776. That's one reason why it makes perfect sense.

The second point is the importance of the role which Parliament has assigned to the Subsidy Advice Unit as the body responsible for reviewing those schemes. As is apparent from the TCA Article 371(1), B, 14, 297, the obligation on the UK to establish such a body specifically because one needs to have an independent and impartial overview. To meet that obligation Parliament has mandated - as part of the same statutory scheme, under section 68(1) - the establishment by the CMA of the Subsidy Advice Unit. DBT in its guidance notes the importance of the role that the Subsidy Advice Unit plays, with the guidance at paragraph 41, D74, 234(9), which refers to the Subsidy Advice Unit providing an additional layer of transparency for schemes of

particular interest. They may highlight examples of best practice.

So I say reading over the scheme as a whole, which one must do in accordance with the guidance in O, it is perfectly clearly that section 31(1) does what it says on the tin. It prescribes an outcome in the case of a breach of mandatory referral duty.

Paragraph 126(5), GEMA says that the -- the point of section 31(1) is obvious. We agree that it obviously works in the way we describe it. GEMA's analysis is obscure because the effect of what they are saying seems to mean that Section 31(2) doesn't come out --

MR WOLFFE: Sorry. Can I just ask you one question?

MR GIBSON: Yes, of course.

MR WOLFFE: Do you say that this argument in relation to prohibition of schemes that have not been referred trumps section 72(9) of the Subsidy Control Act?

MR GIBSON: Yes.

MR WOLFFE: You say even though section 72(9) tells us that 2A, 2B and section 31 of the Senior Courts Act impose obligations to refuse remedies in certain circumstances, you say that those in the case of the non-referral have been simply overridden by implication?

MR GIBSON: Yes. Two reasons. It's hard to see how section 31(2A) situation would arise in circumstances where it is as clear-cut as that. Also that's what Parliament has said. In a situation where you have not made a mandatory referral, a scheme is prohibited.

MR WOLFFE: So you say that overrides all the provisions in relation to remedy that we find in section 72.

MR GIBSON: It is mandating a particular remedy. It is working within the scheme remedy, the one that's described in this particular case for the reasons I have just outlined.

MR WOLFFE: Okay.

MR GIBSON: As I say, we find the interpretation under paragraph 126(5) obscure. If my learned friend elaborates on it, then I will be able to give our position in reply. So bearing in mind those principles we therefore respectfully maintain, at least in respect of mandatory referral duty breach, Parliament has mandated the approach the Tribunal should take to that.

Secondly, even if you disagree with that interpretation, the ordinary position should apply in this case. The ordinary position set out in the case law that I referred to in my skeleton that I touched on earlier, which is that you should generally grant relief in cases where you found an unlawful action.

Mindful of the time I am probably going to have to rely on what we say in our written skeleton argument in relation to relief. My learned friend largely takes issue with points that we have answered in the skeleton argument.

The sole point that they raise that's additional is in relation to one part of the evidence that we rely upon in relation to the harm that would eventuate to SDES market participants including my client. They point to the LCP Delta analysis and make criticism now of the significance of that.

We have been asking them to engage on that for many, many months both before this litigation and after. We say it is telling that no-one actually engaged with that, even when we asked for further information through the procedure after they provided their evidence in March, they declined to do that. So we think it is an inappropriate time at which to adduce this sort of evidence through submissions, but in any event the criticism is misplaced. LCP Delta is a bankable consultant, as it is referred to, used by developers and off-takers, the people in the sector who decide whether to invest in SDES. It is the LCP Delta analysis which shows the consequences for consumers if support for SDES causes substantial harm to SDES developers.

The LCP Delta analysis is one part of Zenobē's case on harm and we have been clear and it is clear on its face that the analysis was prepared in April 2025 on the basis of the assumptions that were pertinent to the high level understanding of the way the regime worked at that time. We say it is illustrative of the scale of consumer consequences if GEMA gets its design choices wrong.

Whilst the design choices in September 2025 are, of course, different -- that's obviously a point we actually positively plead in our favour in terms of why accepting the 2025 decision is the pertinent decision. It remains our case that the current design choices are bad, because they do not protect unsupported SDES from the harm caused by support for LDES and therefore the type of harm that the LCP Delta analysis describes is the type of harm this type of scale of harm one might see in this situation as well.

We also point out that there are a number of other points of evidence that support our case as to the harm that may eventuate if you do not quash the 2025 decision. If you are with us on everything and decide the 2025 decision is erroneous but you nonetheless decide not to quash that decision, then the consequences are set out in Zenobē's evidence. I am just going to give you the references.

Palmer 1, paragraphs 298 to 301 sets out the conclusions from the LCP Delta analysis and we maintain that analysis is fair and accurate. They also rely on the Baringa analysis. That's explained in Palmer 1, paragraph 302, bundle B, tab 9, 371 to 372. The Baringa analysis itself is at bundle E, tab 1, page 1610. Again Baringa is another bankable consultancy widely respected for its analysis in the investment community in this sector.

On the bases of those analyses Mr Palmer goes on to provide some confidential figures as to the scale of impact on Zenobē as illustrative of the type of impact on SDES businesses generally. I will not turn it up, but it is bundle B, tab 9, page 372,

Palmer 1, paragraph 303.

Palmer also explains why those impacts should be expected if supported LDES cannibalises SDES's income stream from the markets they operate in. It is because -- and I am probably not going to do justice to it, so you probably will want to read Palmer 1, paragraphs 170 to 205, bundle B, tab 9, 335 to 344 -- Zenobē has explained the significance of loss revenues on its business model, because it relies on revenue stacking in multiple markets. That's how it can achieve the investment certainty for investors to come in and in particular it is how it achieves the floors and tolls, which he describes more fully, which are critical to how a BESS business operates.

If, as the Baringa analysis finds, and the Modo analysis my learned friend relies on, which I will come on to describe in a moment -- if LDES cannibalises their income streams, SDES operators will cease to build out. It is not just that it will make less money, which is what my learned friend suggests. They will cease to build out. That is what the analysis suggests.

If you go to the --

MR BARRETT: I am sorry. I am conscious of the time. We haven't heard any submissions from on vires, which is one of the substantive grounds. I am just worried as to how --

MRS JUSTICE BACON: Yes.

MR GIBSON: I am going to take vires quite quickly to be honest with you. I want to finish this one point on the Modo analysis and just give you some references. I think that's all I need to do to complete my submissions on relief.

The Modo analysis that GEMA relies upon is at bundle E, tab 3, I have said page 1572. That must be wrong. That might be the other referencing. I can find the reference and find that to you perhaps tomorrow. GEMA has adduced this evidence and says that the Modo analysis does not reach the same conclusions as the analysis that we

rely on in Baringa and LCP Delta, and therefore casts doubt on our conclusions. There is some criticism of us not having included the Modo analysis in our exhibit but that's because it was published after we filed our claim, published on 30th October, eight days after we filed our claim. In any event --

MRS JUSTICE BACON: This is the Modo Energy article?

MR GIBSON: Yes. I think it is about 4216. I have found another reference which looks more credible. 4216. If that picks up the right --

MRS JUSTICE BACON: It says "Will the LDES cap and floor scheme harm merchant BESS returns?" Is that right?

MR GIBSON: Yes. It has "Modo" written on it, 4216.

MRS JUSTICE BACON: Joe Bush?

MR GIBSON: The last paragraph on that page should read:

"In our modelling overbuild of BESS resulting from 7.7 GW of additional LDES capacity could reduce revenues by as much as 9%, but we expect reduced merchant buildout as a more likely outcome."

That's the point that I was making that it is not that they were going to make less money. They just won't build. That is going to have a huge impact on the achievement of the clean power 2030 objectives.

It also goes on in that article two pages on to say in our modelling we expect there to be reduced daily spreads by an average of 6% due to cannibalisation.

"This impact peaks at 11% in early 2030s as new LDES capacity comes online before demand picks up."

So that confirms the essential problem which Zenobē has identified, i.e., the cannibalisation point and confirms the impact is in the time period by 2030 that Zenobē has flagged as well.

I should also say that Modo is looking at a much longer time horizon. You will see in

some of the graphs they are looking to 2054 or thereabouts. So that's why their averages have come down, because they are seeing long-term impacts, but we are concerned with the immediate term impact on SDES, which is going to be hugely deleterious to the achievement of clean power 2030 objectives.

Anyway I just in summary say given the consistent messaging from at least three bankable trusted consultancies, LCP Delta, Baringa and Modo, plus Mr Palmer's own analysis, including, for example, at Palmer 3, paragraph 151, the reference to potential impact of £400 million loss of SDES devex, we say it is clear there is a serious issue of harm. My learned friend has not looked at that side of the ledger at all. He just invites you to look at one side of the ledger and make a decision, which is ironic, given the whole purpose of our litigation is to get Ofgem to do its job and look at both sides of the ledger on the basis of information from the entire market. We say that's exactly why this is a wrong approach.

One reason for GEMA's insouciance appears to be NESO's analysis that grid connections are heavily oversubscribed. That's paragraph 42 of GEMA's skeleton. That rests on a fundamental misunderstanding of the position. Mr Palmer explains the problem of grid connections leading to -- the grid queue needing to be weeded out to get rid of zombie projects that are blocking access to viable projects in Palmer 3, paragraphs 129 to 147, B, 10, 437 to 441. The effect of the LDES decision is just to make it more likely that gate one projects which were being weeded out would be able to jump the queue by acquiring preferred designation status.

So we say it is completely misconceived. You can't rely on the grid connection queue as being a reason to say, "Oh, well, there is lots of people, so it won't matter". The point is whoever gets to the front of the queue still needs to be able to have a viable business proposition and if the undermining of their revenue stacking business model inhibits them from getting the optimisers and the offtakers, as described in Mr Palmer's

witness statement, from actually investing in their business, then their business will fall apart. So it doesn't matter how many people you have in the queue, if everyone who gets to the front of the queue can't operate their business model, because of the cannibalisation problem. That is the problem that hasn't been addressed.

That's what I wanted to say on relief. I will just very briefly say a few comments in relation to ultra vires. I have two points I want to make. One is that we seem to be as ships passing in the night. We are saying they didn't have power to make a decision. They are saying, "We had power to undertake development work". We are not disputing they had power to undertake development work. It seems to me, and I said in my skeleton, this stands or falls on the question of whether or not they were making a scheme decision, so it goes back to that second topic we covered. If we are right --

MR WOLFFE: Apart from anything else, if there is not a subsidy decision, this Tribunal has no jurisdiction anyway.

MR GIBSON: Yes. It is an interesting question. Yes. The notion that it is an abuse to run the ultra vires point, which is what my learned friend suggests, is the second point that I wanted to take issue with. The cases my learned friend relies upon for that are all cases involving the O'Reilly v Mackman type scenario, i.e., where someone is bringing a private action relying on a much longer private limitation period to get round the limitation period under public law when it's a public law decision.

There are two points in response to that. One, we brought our claim within one month. There is no question of getting round the JR period. Two, this is a public law jurisdiction. So it's not -- I think the analogy is poorly drawn.

As to the question of whether or not it is appropriate to raise ultra vires in this context, we just note that the DBT guidance, paragraph 13.15 at bundle D, 74, 2493, which says:

"One of the ways you might review a decision is, for example, whether it was made

within the authority's powers."

So we have done, unsurprisingly, that which is allowed for under judicial review in a judicial review jurisdiction and that is the sum total of that point. I don't think I need to say anything more on that.

In relation to rule 98A, given the time, I think I will allow my written submissions to stand, save that we disagree that the statutory regime doesn't allow for the review of a breach of rule 98A. We say the relevant cause of action is the cause of action under section 70(1) and once you have established the cause of action, then it is open to you to bring a judicial review challenge on traditional judicial review grounds, one of which is procedural impropriety or failure to follow proper procedure. We say it would be a very odd outcome for the CAT to be precluded from policing breach of rule 98A – and we also say its ability to do so is clearly in the statutory scheme. The rule 98A provisions interact with section 33 and section 62. It is clear that Parliament intended it all to operate together. That would be a key part of the procedure. We say that GEMA's very narrow interpretation would mean that effectively CAT couldn't regulate a critical part of its own procedure in relation to time limits, because you couldn't challenge a breach of the duty in that respect, which would be a very odd outcome.

Our essential point on this is that the regime, as I have discussed, is extremely strict and carefully calibrated, because one needs to have certainty as to whether or not this resetting of the clock mechanism works properly or not, and in those circumstances one needs to have really clear formality in compliance with the formal requirements.

I have taken you to the words in rule 98A which refers to the need to give ‘notice’, which is a very formal word to use. I would also refer you to the Trade and Cooperation Act, which actually uses the word "certified". I will dig out the -- that's Article 373(3)(b)(iv).

So in those circumstances it is clear this was intended to be, both (a) because of the

actual scheme as a whole this is an important mechanism and (b) because of the words used, you need to have a formal step taken properly. It is not good enough to do as they did, which is to give us some answers, but then say "This is not a section 76 situation". The appropriate approach to take is to give a duly formal response in reply that says, "This is a response under section 76(1)", so that everyone knows where they stand. We would then know that there is not going to be any funny business about challenging whether or not the PAIR process was effective. If they want to object to the subsequent decision, they would say, "This is without prejudice to any arguments we may wish to take about whether or not this is indeed a subsidy decision".

It is obviously open to them not to do that, but then if they choose not to do so, then their case stands or falls on whether it was a subsidy decision. We say it is a natural corollary: if they are wrong, if their gamble doesn't pay off, they are wrong on this ground as well.

I apologise for slightly overrunning. Thank you for your patience in listening to my submissions.

MRS JUSTICE BACON: Thank you very much.

MR GIBSON: I will just turn my back just to check. I don't have anything further unless I can assist further with any questions.

MRS JUSTICE BACON: Thank you very much. What about starting at 10.00 tomorrow? Is that all right with everybody?

MR BARRETT: Fine with me.

MRS JUSTICE BACON: Let me just check with the Tribunal staff. All right. Well, just to make sure we get through everything and that there is enough time for the reply, I think we should start at 10 o'clock tomorrow.

MR BARRETT: May I mention just a couple of matters about tomorrow? I would like

to make sure you are content. In terms of the order of issues I intend to deal with things in a different order to my learned friend.

MRS JUSTICE BACON: Yes. We are content for you to do so. You'll have prepared your notes on the basis of the issues of the order of your submissions. We didn't want to prescribe a particular running order for the issues to be addressed by both of you.

MR GIBSON: I certainly have no objection to my learned friend taking his own course.

MR BARRETT: The second thing I want to mention is it will be my learned junior Mr Paines who will address you on a number of points. I don't know if you want me to give you a note of those now or we can just pick it up in the morning, but if would be convenient, I could tell you what he will address rather than --

MRS JUSTICE BACON: Yes. Why don't you just let us know which issues he is going to deal with? We are always very happy to hear junior counsel in this court.

MR BARRETT: Yes. I will do that in the morning, if that's convenient.

MRS JUSTICE BACON: All right.

(4.35 pm)

(Hearing adjourned until 10.00 am

on Wednesday, 29th April 2026)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?