**IN THE COMPETITION APPEAL TRIBUNAL**

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

29th 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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**Wednesday, 29th April 2026**

**(10.00 am)**

**MRS JUSTICE BACON:** Yes, Mr Gibson.

**MR GIBSON:** Do you have to give the warning first?

**MRS JUSTICE BACON:** Do I have to give it the second day? I do. For the second time then.

Some of you are joining us live stream on our website, so I will start with the customary 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:** I wanted to hand up some hard copies of a further referenced version of our skeleton. We will send soft copies to the court.

**MRS JUSTICE BACON:** All right. Thank you.

**MR GIBSON:** Those eagle eyed behind me realised that we had not updated it in light of the supplementary bundle.

**MRS JUSTICE BACON:** I see.

**MR GIBSON:** There are references at paragraph 44 to the Covestro General Court judgment, paragraph 45(5) to the BSUoS methodology, and at paragraph 172 to the various tax schemes to which I referred at the end of my submissions yesterday. They are all properly referenced there.

**MRS JUSTICE BACON:** Does this have new content or just new references?

**MR GIBSON:** Just new references, madam.

**MRS JUSTICE BACON:** Thank you.

**MR GIBSON:** They are marked up in light blue with strike-through where the old references were no longer relevant. Where the old references are retained, it is because there are additional documents.

**MRS JUSTICE BACON:** I see. Thank you very much.

**MR GIBSON:** Thank you, madam.

**Submissions by MR BARRETT**

**MRS JUSTICE BACON:** Yes, Mr Barrett, so you are going to give us your running order.

**MR BARRETT:** If I may, my Lady. I will deal in the following order with my points:

Some points on the factual background and context. I will then deal with section 10P, section 78 and Schedule 3 of the Subsidy Control Act.

Thirdly, I will deal with whether the section 10P decision of 18th February renders the claimant's challenge to the September publications academic.

Fourthly, whether the September publications were a decision by Ofgem to make a subsidy scheme and finally from me whether the award of a cap for arrangements under the legislative scheme constitutes financial assistance given from public resources.

My learned friend Mr Paines will deal with refusal of relief on the grounds of good administration and delay. He will deal with the claimant's arguments regarding prohibition, the suggestion that there is no remedial discretion on the part of the Tribunal, vires and the complaint in relation to the pre-action information request. I hope that's convenient.

So if I may begin, before, as it were, launching into the actual chronology there are three short points of fact that I would like to deal with at the outset. That's simply because they don't really fit terribly conveniently elsewhere.

Firstly, the Tribunal will be aware that Ofgem has substantial experience of designing, administering and delivering cap and floor schemes, having established and operated the ICF scheme for a period of 12 years. That's in the evidence of Mr Hutcheson at paragraphs 27 to 23 of his witness statements. As he explains, over that 12 year period no floor payments have been required to be made.

As he also explains in paragraph 32 of the statement, the interconnector scheme has been established and operated at all relevant times under Ofgem's existing legal powers, ie the work that has been conducted encompasses and goes significantly beyond the work that Ofgem has undertaken to date in respect of the LDES cap and floor scheme.

Secondly, very briefly indeed, just to address the claimant's reliance on what it refers to as its other subsidy schemes. We would respectfully submit that's not just a jury point, we say it is a very bad jury point for a number of reasons. The Tribunal has and can have no idea as to why any of those matters have been referred to the SAU. As the Tribunal will be aware from its own experience, very often public authorities adopt risk-based approaches. In many cases they make referrals because they regard it as a useful exercise that will assist decision-making. In some cases, there may be poor legal analysis and in each case there are different facts, we would say very different facts, and for all of those reasons, whether individually or cumulatively, we say this is a misconceived suggestion that would lead the Tribunal into error if it were to be adopted.

Even worse there is actually a further specific point that the SAU has made clear as a matter of its practice it will not opine on whether something that's referred to it is either a subsidy or a scheme. They would argue that that's not been made part of their statutory functions under the Act. So if the Tribunal casts an eye over any of these reports, you will not find the SAU stating an opinion on those matters, because

they do not do so. For those reasons we would invite you --

**MRS JUSTICE BACON:** They don't say whether it concerns a subsidy or a scheme?

**MR BARRETT:** No. They are just looking at the principles: assessment against the principles. If my Lady is interested, there's been quite a debate about that, whether that's what they ought to be doing on a correct interpretation of the statute, but that is what they are doing as of this moment.

**MRS JUSTICE BACON:** So that is your answer to Mr Gibson's point that he says well, in none of those cases do the CME say "Why are you referring these to us? It is not a subsidy".

**MR BARRETT:** If I may say so, it is a rather conclusive answer to that bad point.

Thirdly, my Lady, if I can just deal with the submissions made at the end of yesterday by my learned friend. There was something of a cry from heart to the effect that Ofgem has not taken into account or given sufficient weight to the claimant's concerns or representations. We say that is simply incorrect, and demonstrably so on the basis of the evidence you have before you.

Mr Hutcheson explains in paragraph 147 of his witness statement the very lengthy and detailed policy design process which has been conducted in this case. It spans five years, seven different consultation exercises, a detailed statutory impact assessment and a series of expert analyses commissioned by independent specialist consultants. At every stage of that consultation process the claimant has had the opportunity to make representations. Those have been taken into account and considered with an open mind. See Mr Hutcheson's witness statement at paragraph 13.

That process is not addressed in more detail in Mr Hutcheson's witness statement that's before you because those issues are not issues that are before this Tribunal. The issues that are before this Tribunal are legal questions as to whether there was a decision to make a subsidy scheme, if so whether it is or is not subject to section 78.

If my Lady or my Lords are interested, there is another witness statement from Mr Hutcheson in the judicial review proceedings where these allegations are relevant, where he deals in great detail step by step with what he looked at and thought about.

**MRS JUSTICE BACON:** Yes. For my part I don't think that that's -- we don't think that's necessary. We don't have before us any challenge on grounds of non-consultation. That's simply a point that's made by Mr Gibson, but there is no pleaded challenge on that basis. When it comes to the subsidy control principles, there is no question there isn't any evidence of consideration of that at this stage. There may be at some other stage, but that's not the challenge before us.

**MR BARRETT:** I am grateful for that indication, my Lady. In that case I won't spend time on that point.

**MRS JUSTICE BACON:** Yes.

**MR BARRETT:** Could I then just deal with one discrete point that I need to, and it is a quick point to deal with, which is the claimant's reliance on the LCP Delta report. That's the highlight of what it presents to the Tribunal as its concern, it would say justified concern, as the potential adverse impact on competition of the LDES cap and floor scheme.

It is set out, my Lady, in the claimant's consolidated notice of appeal. It is paragraph 68. It's reply is at paragraph 3.1. In Mr Palmer's witness statement it is at paragraph 299. The point is referred to no fewer than four times in the claimant's skeleton argument: there is an assertion that the LCP Delta report demonstrates an adverse impact on competition of £2.2 billion.

My Lady, as we have explained very clearly in our skeleton argument at paragraphs 40 to 42, that proposition, that assertion is simply false. The report does not contain that statement, any analysis supporting such a statement, still less any evidence supporting such a statement. We pointed this out in our skeleton argument at

paragraphs 40 to 42. There were two options legitimately open to my learned friend yesterday. He either had to take you to that document and explain how we got it wrong and misunderstood or he needed to retract those four submissions in his skeleton argument and apologise to the Tribunal. Neither of those have been done. Instead we got filibustering. That in my submission is not acceptable or appropriate.

The net effect, my Lady, is that firstly that submission needs to be disregarded and secondly, I do say that needs to be borne in mind when the Tribunal is weighing and considering the evidence and approach of the claimant as a whole.

Could I then turn, please to, the detailed chronology. What I will be doing in large part is referring the Tribunal to the witness statement of Mr Hutcheson, which I respectfully invite the Tribunal to accept in full.

The Tribunal will be aware of the applicable legal principles in judicial review. Notwithstanding various threats, there has been no application for specific disclosure. There has been no application for cross-examination. I think it was said in the skeleton argument that my learned friend was going to invite you to draw adverse inferences. No such submissions have been made. In those circumstances we would respectfully invite you to accept Ofgem's evidence in full.

Now as I go through the facts I will inevitably pick up a range of different points. Can I just identify three key points I am eager for the Tribunal to appreciate from the factual background?

Firstly, the making of the LDES cap and floor scheme was (and is) a collaborative and cooperative endeavour between the Secretary of State for energy, security and net zero, Parliament and Ofgem; with Parliament at its heart. That is for the purpose of delivering a scheme of substantial public benefits and public importance. I don't wish to belabour that latter point, my Lady, which I hope is evident from the detailed documentary evidence you have before you, the consultation materials, the impact

assessments and the third party expert analyses.

The short point is this, my Lady. These projects need to be online by 2030 if the lights are to stay on. That's the punchline of the evidence. I believe no-one disputes that now, not even the claimant. I think they accept the capacity from the LDES scheme does need to be there by 2030.

**MRS JUSTICE BACON:** When you say the lights need to stay on, you are not just talking about net zero. You are talking about long-term energy stability and deliverability.

**MR BARRETT:** Absolutely so. If, for example, there are sustained periods of weather where electricity is not being generated, that these assets are not available to tide the country over during those periods.

**MRS JUSTICE BACON:** Yes.

**MR BARRETT:** Particularly in some parts of the country, because there are disparities across the grid, there will be difficulties.

**MR GIBSON:** That is not agreed by us at all. We say 2030 is part of the achieving of net zero and is an aspiration of the government that we support and try to assist. It is nothing to do with keeping the lights on, I am afraid, and there is no evidence of that.

**MR BARRETT:** Secondly, I want the Tribunal to understand the structure and chronology of the decision-making process. Importantly we say that has been crystal clear to all reasonable observers from March 2025 at the very latest. The essential point being that a decision to make the LDES C&F scheme would be made under section 10P if and when that provision was given Royal Assent by Parliament and then entered into force. We say on any common sense or realistic view there is no scope for sensible debate or argument about that.

**MR WOLFFE:** I have a question if I can just raise with you.

**MR BARRETT:** Yes.

**MR WOLFFE:** The word "establish", does that refer to a single point in time or does it refer to a process of establishing?

**MR BARRETT:** A single point in time. It is creating something. I can put it simply in these terms. It is a ready synonym for "make".

**MR WOLFFE:** Okay. Does that mean that there is yet to be?

**MR BARRETT:** On my analysis absolutely. I will seek to explain this.

**MR WOLFFE:** I am sorry. I don't want to take you out of order.

**MR BARRETT:** I don't want to have to give you the short answer, my Lord. I hope this has come across from my skeleton. If it isn't clear, that's my fault and I apologise. In my analysis the point at which there will be the making or establishment of a scheme for subsidy control purposes will be when what I would describe as the key ingredients of the scheme are decided, in particular -- and I will develop this in due course -- when the decision is made about how much capacity is going to be supported.

Perhaps if I can explain this. It is a useful point to try to flush out as early as possible. Absolutely central, fundamental to any consideration of what, if any, impact on competition this scheme will have is how much storage capacity is going to be supported. If one spends one pound on the scheme, there is obviously going to be no impact. If one spends £100 billion on the scheme, there may be a lot. There are obviously almost an infinite number of positions, gradations in between.

I say on any real world, common sense analysis the proposition that you have established a scheme for the purposes of the Subsidy Control Act before you have decided that absolutely fundamental question is a surprising suggestion, in my respectful submission.

So my primary analysis, my Lady, for that reason and other reasons I will seek to explain, is yes, the decision hasn't been made yet, and what I also say is if I am wrong about all of that, if there can be a decision to establish a scheme at some earlier stage

without what I regard as these absolutely fundamental ingredients, then it was certainly the section 10P decision on 18th February which was that decision, because the point you are putting, my Lady, doesn't change my fundamental point. My fundamental point is it was always intended and absolutely understood by everyone that anything that was going to be established/made would be under section 10P. No-one in the real world ever thought, could possibly have thought looking at these documents, that there was going to be something being made/established under Ofgem's existing powers.

I am getting ahead of myself but I do want to answer your question as directly as I can. iT would be positively perverse. You have seen the evidence. Ofgem says to the government "We will take on this role if you put in place a statutory obligation on us to deliver the scheme". The Government introduces the legislation. Parliament considers and passes it. On the claimant's case we act to fundamentally thwart the outturn of that. It is a surprising submission in my respectful submission.

**MR WOLFFE:** I just pose this question, because it's the question interpretation that I've been wondering about and don't feel you need to answer it now if you're coming back to it, which is I wondered whether the (inaudible) establish in the context whether what did refer to a single point or whether it refers to a process of putting in place the various arrangements. I mean, part of that thought has been prompted by appreciating the sequential nature of the exercise of ultimately reaching our decision.

**MR BARRETT:** Yes.

**MR WOLFFE:** You know, that's why I raised the question.

**MR BARRETT:** My Lord, I will reflect on that. My immediate answer is again in my respectful submission one has to stand back and actually think about what's happening in the real world here. What's happening in the real world is that Parliament

has determined: Ofgem -- this needs to happen. Ofgem needs to do this. What does Parliament do when it decides someone needs to do something? It imposes an obligation. In this case what was the obligation? What needs to be done is to make a scheme, establish a scheme. In my respectful submission there is no sophistication or complexity beyond that. I say in the end this is a relatively simple case.

So that was my second point. I am sorry. I digressed slightly there. Apologies for that. My third point is I am very keen in light of the way my learned friend sought to put his arguments yesterday that the Tribunal has a very clear understanding of the different stages of the decision-making process and what issues are being considered and decided at each stage. I do say in my respectful submission that is very important to the correct analysis of this case.

What I will refer to broadly as the early stage encompasses the Secretary of State's consultation and the TDD. The really material point about that stage in my respectful submission is that at that stage all of the decisions are made which are necessary to establish on the claimant's case a subsidy scheme. It is the fact that this is a cap and floor scheme for LDES and it's going to be funded using network charges.

I would ask the Tribunal to look closely at my learned friend's pleaded case. Those are the decisions. Those are the facts which form the basis of the challenge. There is nothing decided after that point which materially changes or adds to those decisions on those issues, and the inescapable position is if the claimant wished to have a claim on the premise that a decision was going to be made before section 10P came into force, it could have been brought and in my submission should have been brought promptly after publication of the TDD.

The second stage is what I will refer to broadly as the middle stage. That encompasses the September publications, which are the subject of this claim and are said to constitute the decision to make a subsidy scheme.

The key points that I am keen for the Tribunal to appreciate is, firstly, as I have already explained, it wasn't the September publications that decided any of the issues that made this a subsidy scheme or not and, secondly, importantly, the September publications don't decide any of the features of the scheme which will determine whether it has any material impact on competition or what the nature or extent of what any such impact will be. That's going to be the third stage I will refer to as the late term stage. That's in particular decisions about the level of storage capacity to be supported. I have sought to explain that in broad terms already. I hope the point is self-evident. It is clear from the documents I say respectfully on any reading on any basic common sense analysis.

Also very importantly, the consultation decision as to the licence terms. The Licence terms are, let's make absolutely clear, critical to the restrictions, the controls that these projects will be subject to and particularly importantly for the claimant's case what, if any, restrictions will be placed on the market-facing activities of projects that benefit from LDES cap and floor support.

I hope the Tribunal will have the point when one looks at the claimants' consultation response and its arguments, the two arguments are: procure at the bottom of the range, because that will impact less of our profits and/or impose lots of restrictions on what markets the LDES projects can compete in or what terms they compete on. Again that will reduce the impact on our profits.

The two crucial decisions that will actually make a difference to any impact on competition of the LDES cap and floor scheme are the later stage decisions. They haven't been made yet. That is, as I will come on to seek to explain, an important part of my case as to where I see on proper analysis for the purposes of the Subsidy Control Act there has not been a decision to make a subsidy scheme.

Where that leads us by way of outturn is I do say in this case we are in a very curious

position. The Claimant doesn't challenge the decisions that made this a subsidy scheme, isn't challenging any of the decisions that determine whether there has been any impact or any material impact on competition, NS what the nature or extent of that will be. Instead it's gone for this middle target. I do say the reasons for that are obviously opportunistic and tactical.

The claimant on any sensible analysis has been well aware of section 10P. It has very experienced expert legal advisers and it has identified a decision that it hoped it could knock down without having to grapple with s. 10P.

So, with those introductory points, turning to the chronology, the policy has been developed from 2021 onwards. That's a period now of around five years or so. That's explained in Mr Hutcheson paragraphs 34 to 48.

In terms of the detail of the scheme that is now before the Tribunal, that really begins in January 2024. Central Government issued a substantial consultation supported by detailed analysis from LCP Delta. That analysis supports the conclusion that LDES will deliver very substantial net benefits. That's Mr Hutcheson at paragraphs 39 to 32 and also Mr Stone from DESNZ at paragraph 9, 15 and 16.

Just a side note in light of the claimant's complaints. From January 2024 the risks of the scheme adbersely impacting battery operators and producers has been absolutely noted, considered, and taken into account. We see that in the consultation. I am not going to turn it up, but it is bundle E. We see this at pages 264 and 293.

The majority of the respondents to the consultation are strongly supportive of the policy. The claimant was not. The claimant's response was to argue, firstly, that there should be no LDES cap and floor scheme, secondly, that instead the government should provide more subsidy to operators such as the claimant by way of the capacity market; and, thirdly, much like the submissions that you heard yesterday, as the claimant said in its own words, that there was already massive over-supply of BESS

storage in the market and that over saturation was severely impacting on the claimants' existing business operations.

You see that in Mr Hutcheson, paragraphs 44 to 46.

On 19th August 2024 the Secretary of State made the decision to introduce the LDES cap and floor scheme. You see that in Mr Stone of DESNZ at paragraph 17. On 10th October the Government issued its consultation response that communicated the Secretary of State's decision to introduce the scheme. See Mr Stone at paragraph 18. This was a key stage in the development of the scheme. The consultation response settled a substantial number of design parameters. See Mr Hutcheson explaining those parameters at paragraphs 47(a) through to (k).

As the response stated in terms, it provided a firm commitment to deliver significant LDES capacity through an Ofgem regulated scheme and set out many of the key parameters of the scheme. That's at E, 1, page 403. Even at this early stage we say important features of the scheme design are being decided.

Now Central Government, as I mentioned, approached Ofgem to Act as the regulator or delivery body for LDES cap and floor, that was based on significant part on Ofgem's previous work relating to the interconnector scheme. Ofgem considered that request and confirmed that it would be willing to take on that role provided primary legislation would be introduced by the Secretary of State to require Ofgem to deliver the scheme. That's Mr Hutcheson paragraph 43.

As Mr Stone explains on behalf of the Secretary of State in paragraphs 21 to 22 of his witness statement, the Secretary of State's position was that no subsidy would arise under the scheme, because LDES cap and floor would not be providing financial assistance from public resources. He decided, and I am quoting Mr Stone at paragraph 22:

"DESNZ decided to introduce a legislative obligation for Ofgem to establish and

operate a cap and floor investment support scheme for LDES as soon as reasonably practicable to ensure that Ofgem prioritised swift delivery of the scheme, reflecting the importance DESNZ placed on increasing LDES capacity, which would support the Government's Clean Power 2030 mission."

Thirdly, on 12th December the Secretary of State confirmed to Ofgem he would indeed impose a duty in primary legislation. That is Mr Stone at paragraph 23. Ofgem, following that confirmation, proceeded with development work on the scheme in reliance of its existing legal powers, the powers that it had used to establish and operate the interconnector scheme. That is Mr Hutcheson paragraphs 50 to 52.

On 18th December Ofgem issued its first substantial consultation, that was the call for input. That's explained by Mr Hutcheson in paragraphs 54 to 57. Again the claimant submitted a response essentially repeating the arguments which it had made in its response to the Secretary of State's previous consultation. See Mr Hutcheson at 57.

We then reach 11th March, which we say is a key stage in the decision-making process. On 11th March the Secretary of State did three things so far as material for present purposes: first, he introduced what was then clause 11 of the Planning and Infrastructure Bill into Parliament. That's explained by Mr Hutcheson at paragraph 60. Just for your note, clause 21, as it then was, reflects what was subsequently enacted by Parliament. There were no amendments, changes during its passage through Parliament.

Together with the defendant, jointly, the Secretary of State published the technical decision document. I will refer to that as the TDD. That's Mr Hutcheson at paragraph 61.

Thirdly, the Secretary of State wrote to stakeholders, including the claimant, and specifically explained to them how the work to introduce LDES cap and floor would progress.

Clause 21 of the Bill, as you know, provided for the insertion of a new section 10P in the Electricity Act. We will obviously look at that in great detail later in my submissions. Short points for present purpose, it imposed a statutory obligation: Ofgem must establish and operate the scheme as soon as reasonably practicable after the section enters into force. I do say of some importance “in accordance with the section”,. It is not just a scheme. It is a scheme that complies with the requirements of the statutory provision and the regime it establishes.

To take one illustrative example of that, as you know, subsection (9) gives the Secretary of State power to change the definition of LDES. That's an component part of the statutory scheme under section 10P.

It was expected at that stage that Royal Assent would be late 2025. Now I say importantly the explanatory notes accompanying the Bill made plain, firstly, that section 10P would impose a statutory duty on Ofgem.

Secondly, that Ofgem had already undertaken and would continue to undertake substantial development work prior to section 10P receiving Royal assent or entering into force.

Could I ask you to turn that up quickly? I don't think you have been shown that. It is bundle D in the authorities, tab 72 and it is page 2201.

**MRS JUSTICE BACON:** Are we looking at the explanatory notes now? What document are we looking at?

**MR BARRETT:** It should be the explanatory notes to the Planning and Infrastructure Bill.

**MRS JUSTICE BACON:** I have 2201. What paragraph?

**MR BARRETT:** Paragraph 39, please. And paragraph 40:

"The Bill gives effect to the proposals set out in the government response."

In particular 40:

"Ofgem intends to open this scheme to applications in the second quarter of 2025". That is before section 10P is in force or indeed has been given Royal assent "and to award the first contracts in the first half of 2026. This legislation will impose a duty on Ofgem to establish and implement this scheme. To inform delivery, Ofgem published a Call for Input."

So it has already undertaken significant work. So we say as I have indicated at the outset that this has always been and is a collaborative endeavour and Parliament has been absolutely aware of that at all stages. I will come on to that in due course. That is absolutely the basis on which section 10P was passed.

The TDD, my Lord, three points I would draw attention to, if I may. Again it reiterated the point that the Government was legislating to impose a statutory obligation. You will see that, and I will not turn it up. It is E, 1, 633. The document was setting final firm decisions in respect of the design. See Mr Hutcheson, paragraph 62 to 63.

Second, it set out a significant number of the key details of how the scheme would operate and what the decision-making process would be. That's explained by Mr Hutcheson in paragraph 66.

Now if I could just give you, please, some references --

**MRS JUSTICE BACON:** Can you give me the bundle reference for that?

**MR BARRETT:** In Mr Hutcheson it is paragraph 66 of and that's B, 11, 467.

Then if I could just give you some references -- I am not going to turn it up -- to the TDD to give you a flavour of the important matters which it decided. Firstly, the multi-stage assessment framework. That is E, 1, 636.

Secondly, an indicative capacity range. That is E, 1, 637.

Thirdly, the basis on which the floor would be set in respect of debt and equity. That is B, 1, 621.

Fourth, that the cap would be set to allow recovery of invested capital and to provide

a fair return of investment. That's B1, 621.

**MRS JUSTICE BACON:** These are all references to the TDD?

**MR BARRETT:** They are all references to the TDD, my Lady.

The last section, network charges would be used as means through which any support would be provided. E1, 633.

Third and final element of the TDD for present purposes, also important, it sets out a detailed timetable for how the subsequent process of decision-making would operate. That's explained in Mr Hutcheson at paragraphs 64 to 65. Bundle reference, my Lady, B, 11, 466 to 467.

The timetable was set out in the TDD. I am not going to turn it up. I will summarise it. E1, 622 to 623 and 629 to 630.

In summary, stage one would take place during the first half of 2025. There would be development in respect of the stage two assessment process and elements of the financial package during 2025, but key decisions in relation to the level of storage capacity to be supported, the licence terms and what, if any, award should be made would not take place until spring 2026 at the earliest, ie after section 10P was expected to have entered into force.

Finally for the purposes of 11th March then the Secretary of State's letter to stakeholders, could I ask you to turn that up, please. You will find that in bundle E, tab 4, page 5012. It starts a page earlier but the page I would like you to look at I believe is 5012.

**MRS JUSTICE BACON:** This is a letter of what date?

**MR BARRETT:** 11th March, as I understand it. I will just check that. That's correct. It is 11th March.

**MRS JUSTICE BACON:** Is that point 30 on your chronology? Letter from DESNZ to stakeholders on (inaudible).

**MR BARRETT:** It is, my Lady.

Just for your note, the recipients include the claimant. It is said very plainly:

"The Bill will also support the delivery of the Government's Clean Power 2030 target by ensuring that key clean energy infrastructure is built without delay. As such, the Bill includes a clause on LDES, which will impose a formal duty on Ofgem to deliver the cap and floor investment support schemes soon as reasonably practicable, which Ofgem is already looking to do in practice."

Entirely consistent with what you saw in the explanatory notes and that's been communicated to the relevant stakeholders.

So, my Lady, the net effects of those decisions and those arrangements is explained by Mr Hutcheson at paragraph 71 of his witness statement. He explains that following publication of the Bill, in line with the approach set out in TDD, Ofgem progressed the development work on the scheme under existing legal powers on the basis that that work would subsequently be adopted under clause 21 of the Bill and section 10P of the Act if and when that provision came into force.

An essential point I make, my Lady, is we respectfully submit that would have been clear to any reasonable party paying any attention or giving any consideration to these matters.

So that's my point, my Lady. I foreshadowed these decisions as of 11th March have settled all of the matters which on the claimant's case make this a subsidy scheme.

**MRS JUSTICE BACON:** Are you moving now to your 10P section?

**MR BARRETT:** I'm going to take you through some of the interim steps before I go there, but I just want to make this point.

**MRS JUSTICE BACON:** Oh, I see. So you are still in the factual point.

**MR BARRETT:** I am still in the factual context. Just as a footnote, as it were, we do say the decisions you have seen, you have been shown, settle all of the matters, all

of the design features of the scheme which the claimant relies on in its notice of appeal. We say, therefore, if it was to claim on the basis it has, a claim could have and needed to be brought promptly following 11th March.

On 24th March the --

**MR WOLFFE:** That's not a case (inaudible).

**MR BARRETT:** So I don't rely on this, my Lord, as a positive case on limitation. My case is for the purposes of the Act a scheme decision will not be made until much later. What I am saying is that on the claimant's view of the world, and he has no basis to dispute this again -- he has not given you any clear or direct answer on this. On the claimant's analysis of the relevant legal framework all the necessary ingredients were there on 11th March. An organised plan. Certainly an organised plan in the TDD. He can certainly say there was some more detail to be added. I don't dispute that for a moment. The problem with that for him is there is also more detail to be added after the September publications.

So the scheme then is actually launched on 8th April and opened to applicants. We do say again on any realistic view, on the claimant's view of the world, that ought to be the final nail in the coffin, people spending large sums of money, lots of work, investment and reliance on the decisions that have been made.

I think Mr Gibson put it to you, my Lord, at one point, that the April opening of the scheme shouldn't be regarded as a problem for him, because it wasn't making final decisions, I think is what he said to you about who would or wouldn't receive a subsidy. That is plainly incorrect. If you are excluded at stage one, there is absolutely a final decision that you are not going to receive a subsidy. See the judicial review claim brought by ILI, which we have dealt with at a rolled-up hearing in February this year.

It is a staged decision making process. The decisions being made, stage 1, absolutely binding decisions as part of the overall process. They can't be airbrushed in the way

suggested.

**MR WOLFFE:** I suppose there is an interesting question whether you satisfy the criteria for a subsidy scheme until you have got to the point where you can actually apply, or eligible to apply to have their application assessed, but I take the point.

**MR BARRETT:** I will try to clarify that, if I can. The applications were absolutely being assessed at stage one.

**MR WOLFFE:** But only for eligibility.

**MR BARRETT:** Can I just be clear about this as regards the words being used and the substance. If my Lord looks at the papers, what you will see is what's happening at stage one is that people are absolutely putting in their substantive project. It is referred to as eligibility. I entirely accept that, but what they're doing is putting in the substance, the financial model, the planning situation, and so on and so forth.

If one looks at the two stages of the decision-making process, what you will find in terms of the actual substance and detail is essentially that stage two is simply a more detailed and rigorous exercise of examining the project. It is not the case -- I think my Lord may have in mind -- I don't know, I am speculating -- my Lord, may have in mind sometimes one has processes, for example, for contract awards. We have stage one that looks at the characteristics or the capabilities of the potential suppliers. At Stage two you look at the bid. That is not this decision-making process. It is a less rigorous and then more rigorous process. Both are absolutely looking at the substance, are these good projects that should be awarded cap and floor support?

24th April the Bill proceeds to the House of Commons committee stage. On 6th May the Secretary of State published his impact assessment. That's dealt with by Mr Hutcheson at paragraph 75 to 76.

You can see the impact assessment in the bundle. I am not going to turn it up, it's a long document. It is at E1, 1879. I would respectfully invite the Tribunal to look at that.

You will see a number of interesting points. Firstly, you will see a detailed analysis of what the need and justification for the scheme is.

Secondly, you will see made very plain the point that I sought to explain that there is no scope to do any sensible or proper analysis of the competitive impact of the scheme unless and until you decided what storage capacity was going to be supported and other important decisions that don't happen until after September. The expert third parties conducting the impact assessment say that in terms. "We cannot quantify this. We can't give you a meaningful view about that until we know these very important ingredients first".

Then the 28th May consultation. That is dealt with by Mr Hutcheson at paragraph 77. I think my learned friend said we were trying to downplay or avoid the consultation. We don't accept that. We were entirely happy for you to look at the consultation. It is a consultation on how we are going to deal with stage two. That's absolutely what it is, exactly as the TDD contemplated.

On 9th June the Bill proceeded to the report stage in Parliament. On 12th June the House of Lords commenced its consideration of the Bill. That is Mr Hutcheson 79.

Nineteenth June publication of the consultation on the financial framework, stage two. That's Mr Hutcheson, 82. Again I am very happy for you to look at that. What it is is a consultation about some parts, not all, but some parts of the financial package that will be available to those who succeed and pass through stage two. That is what it is, again as foreshadowed in the TDD.

The claimant responded to that consultation on 25th June. I do say with some interest still with Mr Hutcheson at paragraph 83 the claimant articulated in its response a subsidy control complaint in language which indicated its view at that stage was that the scheme had been made and there was an obligation to refer.

I will not turn it up unless you would like to see it at this point. The reference is E, 1,

1593.

We then reach the September publication. I will deal with the detail in relation to those in the course of my submissions. Mr Hutcheson summarises their purpose and content in paragraphs 93 to 98. The short point which I have made already is we respectfully say the central context for understanding or interpreting the September publications is the decisions which preceded them and the staged decision-making process they had mapped out.

If I can then pick up a short point. Mr Gibson suggested to you, my Lord, that the Claimant might get some assistance for its argument from the fact that Ofgem actually started using the September documents. Two problems with that in my respectful submission. The first one is in terms of submission of stage two responses that doesn't happen until some time after the September publications. There was a time gap. So it doesn't help my learned friend, the suggestion that there was a decision made on 23rd September.

The second point, which I respectfully say is more fundamental, is the fact they are used doesn't matter. The stage one publications were also used to make decisions which were final. That cannot in my respectful submission or shouldn't be the relevant point of reference.

On 9th October the authority published the LDES financial model and handbook. That is itself a critical part of the assessment methodology and process. Strenuous efforts made yesterday by my learned friend to run away from that. He says it doesn't matter. It was merely transposing was the word he said to you, the decisions made in September. That is not right, the document he showed you doesn't say it transposed anything. It said it would align, ie it would be consistent with, a very different concept. What's said by the claimant in its pleading at paragraph 83 is that this is a critical document, that's the claimant's own case, a critical document for the decision-making

process. We respectfully say that's correct. We agree with it. The problem is it demonstrates rather starkly we say the claimant's case and theory about 23rd September is not correct.

So the continuing work, my Lady, and my Lords, firstly, as I have mentioned, the key decision to be made, the storage capacity to be supported. That's made in conjunction with input from NESO. That process is ongoing. I think it is at the latter stages and expected to come to culmination shortly, but no decision as of today as far as I am aware made about that.

Licence conditions. On 16th March the consultation process on the licence conditions was published. That invites information and representations relating to, amongst other things, what, if any, constraints should or not be imposed on market-facing activity of the supported projects. The consultation closed on 20th April. I understand the claimant has contributed to that consultation. I also understand the claimant is or has been contributing to Ofgem's process of consideration about the level of storage capacity that should be supported.

The assessment of the stage two submissions themselves is ongoing. As of today it remains the intention and objective for a decision to be made and published for consultation in spring or early summer of this year.

So as I hope has been clear from the chronology, in parallel with ongoing work Ofgem has been conducting, the Bill has been making its way through Parliament. Addressed by Mr Hutcheson in paragraphs 71 to 91.

Eighteenth December the Bill received Royal assent and became the Act. (Inaudible) at all relevant times Parliament has been aware and on notice of the development work that's been conducted in parallel with the passage of the Bill. I do say on any realistic real world view that can only be construed as Parliament endorsing or certainly being content with the work that's been carried out.

On 18th December the Secretary of State published its open letter to stakeholders. For your reference that's E, 3, 836. Then on 18th February 2026, two months after Royal assent, the Act entered into force and amended the Electricity Act introducing section 10P.

On the same day Ofgem published its decision to adopt the development work which had been conducted on the scheme to date for purposes of discharging its statutory duty under section 10P. That's Mr Hutcheson at paragraphs 112 to 113 and you see that decision in the bundle. E, 3, 4165.

**MRS JUSTICE BACON:** Do you want at this point to address Mr Gibson's comment that adopting -- by doing so you were doing the opposite of superseding?

**MR BARRETT:** Yes. I think that is an absolutely absurd contention which betrays a fundamental misunderstanding of administrative law. The decision is superseded by a later decision not because it either agrees with, disagrees with or takes some middle position as to the content of the earlier decision. It supersedes the earlier decision, because it is a valid subsequent public law act.

My Lady, you encounter this in every realm of public law, whether you are dealing with age assessments or decisions about discretionary benefits or in this case the making of a scheme. You have one public law decision. Absent a further decision it is that initial decision which is in existence. It is in operation. It is the basis on which decisions are being made and people are relying and acting. If there is a lawful later decision, then the effect of that lawful later decision is that the earlier decision ceases to have legal effect, ceases to be relevant.

I am going to show you a lot of authorities that support that proposition. I say that the point is particularly stark in this case because of the difference in vires. So an axiomatic principle of public law, if you as a public body have multiple vires that allow you to do something, it is entirely up to you which you use. You are not precluded

from using either if you think one is more apt or better in some respect.

Here on my learned friend's view of the world there is the first decision on 21st September to make a scheme, the legal basis of that is Ofgem's existing legal powers. Now, interesting, I say somewhat ironically, he says Ofgem doesn't have the legal power to do that at all. So it is a nullity he says. It is a nullity. It is void because there is no legal power.

Ofgem gets the section 10P power on 18th February. On my learned friend's view of the world the previous decisions were a nullity in any event.

Let's assume for a moment that 23 September wasn't ultra vires. A later decision on orthodox public law principles supersedes and renders irrelevant the prior decision in my respectful submission.

**MR WOLFFE:** Can I just pursue a little further in light of the discussion we had earlier. What the authority is obliged to do after the section comes into force as soon as reasonably practicable is establish and operate a scheme.

**MR BARRETT:** Yes.

**MR WOLFFE:** I think the way you explained that you read that is that the act of establishing pursuant to that duty is yet to happen.

**MR BARRETT:** That's my primary analysis.

**MR WOLFFE:** So the question I have is in what sense is the adoption decision a decision under 10P if what 10P obliges Ofgem to do is at some date which is yet to happen.

**MR BARRETT:** Can I answer that in a series of stages?

**MR WOLFFE:** Absolutely.

**MR BARRETT:** I do want to be as clear as possible about that. With respect, the way the claimant has put it case is overly complicated and confusing. The correct analysis is very simple in my submission.

The obligation is on Ofgem with effect from 18th February to establish the scheme. It is part of discharging that obligation on any view to adopt the prior decisions. So as I have sought to explain to you -- I hope it is clear -- on my analysis for the purposes of the Subsidy Control Act, any decision to make a subsidy scheme will not be until later, but as part of establishing the scheme, and this is explained in clear terms in the letter in my respectful submission, the first step or one step in that is setting out "These are the terms that we are using for the statutory scheme", so it is part of the establishment.

**MRS JUSTICE BACON:** So you are saying effectively the earlier decision-making forms part of the building blocks.

**MR BARRETT:** Absolutely.

**MRS JUSTICE BACON:** But was not the scheme itself. In order to establish the scheme, you need to do lots of things. Those include dealing with the building blocks which are dealt with by adoption.

**MR BARRETT:** Absolutely. Again if I may just stand back for a moment, on any common sense view surely this is Government working as it should. What is the vice? My learned friend has not identified any mischief, any vice. Indeed, as you have seen he is running away from this argument because he is worried about the time problem.

**MR WOLFFE:** So you say that it's implicit in the duty to establish and operate to put in place, as the President said, the building blocks and so the vires come from -- come directly from that duty once that duty is in force.

**MR BARRETT:** Of course, my Lord. I know that members of this panel will have more experience than me of this. When you are running these large policy schemes, of course you must do that. The public need to know what is happening. People need to understand what the position is. I would ask you to read the evidence of the interested parties, the investment decisions. It is very, very important that people

understood what was happening under section 10P. That's why there is an open letter to industry.

**MRS JUSTICE BACON:** And your point is that they had to do it in this staged approach because there simply wouldn't have been name --

**MR BARRETT:** Absolutely.

**MRS JUSTICE BACON:** -- if they had waited to start the whole consultation process until February 2026.

**MR BARRETT:** Precisely so.

**MRS JUSTICE BACON:** In order to have a full and proper consultation which you have described to us in the chronology you have taken us to, that needed to start earlier, with relevant decisions made about elements of the scheme, but you say none of that amounted to the final decision on the scheme. It was simply the staged building blocks which needed to be done.

**MR BARRETT:** Yes.

**MRS JUSTICE BACON:** Before the final scheme was adopted.

**MR BARRETT:** Absolutely. We look at authorities, cases like the Shrewsbury case. You will see the good sense of that. If you can find someone that has *vires* that fit the job, fit the task, this is a good candidate to do that preparatory work. As I sought to explain, everyone is told about this from Day 1: this is how this is being done. There is no secret here. No-one is hiding anything. I would say this is transparent and joined up Government.

**MR WOLFFE:** It's slightly unusual for this it might be said, is that ordinarily you have a statute put in place and then you do the work. What's unusual here is for policy reasons you have explained work has had to be progressed in tandem with the Parliamentary process.

**MR BARRETT:** Yes. I entirely accept that, my Lord.

**MR WOLFFE:** What we are having to tangle with are the possible legal consequences of things having been done in that way.

**MR BARRETT:** Yes. What I say, my Lord, is it is very interesting that the claimant, as I sought to previously indicate, my learned friend in his skeleton argument has completely backed off from his vires argument: I don't dispute Ofgem had *vires* to do any and all of this, except make a subsidy scheme. That is the only thing they didn't have vires to do. That's the argument he puts forward in the skeleton argument. Ofgem actually is not making a subsidy scheme for the reasons I have been seeking to explain.

**MR GIBSON:** Can I just come back? We have not changed our position one iota. It's always been our case that Ofgem did not have vires to establish a scheme, and we are like ships passing in the night. I just object to the mischaracterisation of my case.

**MR BARRETT:** I don't need to take the point any further. I would just invite you to read the notice of appeal and skeleton side by side and form your view about that.

**MR WOLFFE:** Can I just come back to the question about establishing (inaudible).

**MR BARRETT:** Yes.

**MR WOLFFE:** As I say when I read that, it struck me that it was capable of being read in one of two ways referring to definitive decision or referring to the process of establishing. I suppose what I'm interested in is you've described the various stages which everyone has understood are going to have to be undergone to reach a set of final decisions. Is there a point in the future when in a sense all those are going to be summed up? There is going to be a decision which, you know, establishes a scheme which one could see written down or articulated in a decision.

**MR BARRETT:** Yes.

**MR WOLFFE:** Is that the idea?

**MR BARRETT:** Yes. If I can explain it in this way, my Lord. In my analysis of what's

necessary to -- and this is all to the ends of the Subsidy Control Act for present purposes -- I am not speaking about older analyses. For the purposes of establishing a Subsidy Control Scheme, on my analysis, in my respectful submission, that will occur at the stage when the decision is being made and how much storage capacity is going to be supported. That may happen in the next, I think all being well, month or so.

**MR WOLFFE:** But at that point that decision will be made, but in addition there will be all the other decisions that have been made incrementally leading up to that.

**MR BARRETT:** There absolutely will. I think for my own part I would express the point in a slightly different way, I would express the point that section 10P imposes a duty in my respectful submission to establish, ie make the scheme. How you discharge that duty comprises, of course, involves doing different things and taking different steps, different components. I don't see that myself conceptually as a question of interpretation of establish. I see that as a matter of what establishing entails, if that makes sense.

**MRS JUSTICE BACON:** So your position is that it won't be established until a month or so's time as a scheme until -- sorry.

**MR BARRETT:** For the purpose, of the SCA.

**MRS JUSTICE BACON:** At the point which a decision is made about storage capacity.

**MR BARRETT:** Storage capacity and one may ask also about the licence terms. I would say on proper analysis you need both. They are big drivers of whether this impacts competition and, if so, how much.

**MRS JUSTICE BACON:** So the two key decisions which crystallise the decision as a scheme, obviously you say it is not a subsidy scheme --

**MR BARRETT:** (Overspeaking).

**MRS JUSTICE BACON:** If it were a subsidy scheme, that would be the point at which

questions arise, a point where you have number one storage capacity decision and number two, a decision on licence terms.

**MR BARRETT:** Yes, absolutely. If I can just deal with the point my learned friend sough to raise, he sought to submit to you there would be a problem with that because he said what would happen is that you would have these decisions being made at the same time as individual awards and he would be precluded from challenging. Basic error of analysis: different decisions, decisions about establishing the scheme, decisions about individual awards. The Act doesn't preclude you challenging the scheme. That is not what statutory words do.

**MR WOLFFE:** One thing I am interested in is schedule 3 I think protects a subsidy scheme made under a duty imposed by primary legislation.

**MR BARRETT:** Yes.

**MR WOLFFE:** So what I am interested in is when is the scheme made for the purposes of schedule 3?

**MR BARRETT:** Yes.

**MR WOLFFE:** And whether there are any implications for your reliance on schedule 3 of treating the scheme as having been established at a later point in time.

**MR BARRETT:** Can I answer that again as directly as possible again? We say the confusion is generated by the claimant's confusing arguments. If I am right that it hasn't been established yet, it doesn't matter because it hasn't been established. If I am wrong and it has been established, then schedule 3, paragraph 4 bites as at 18th February. There is no gap for my purposes. My primary case is it hasn't been established. If so, don't bother thinking about schedule 3, because you don't need to worry about that. If I'm wrong about that and it's been established on 18th February, then it follows inescapably it was a decision for the purposes of Schedule 3 to make the scheme. Thank you, my Lords, my lady.

Could I then turn to some authority. Apologies. It is incredibly trite but all of the questions before you are questions of statutory interpretation so I am anxious that you have looked at and been reminded of the detail of relevant principles.

Can I ask you to turn up the R(O) case? That's in the authorities bundle, 35, page 1026. Can I ask you to start by turn up 29 at page 1042. This is Lord Hodge giving the judgment on behalf of the court along the principles of statutory interpretation. This is agreed with by all of the members of the court, subject to Lady Arden indicating a difference of view.

**MRS JUSTICE BACON:** We saw this passage yesterday.

**MR BARRETT:** You have got that. The point I am keen to emphasise is that the primary source of meaning is the words. I say in this case the primary source of meaning on each of the disputed points of statutory interpretation supports Ofgem's case. I say on proper analysis the claimant would need to be showing you, or explaining to you why there are some powerful reasons that justify departing from the meaning of the statutory words used, and I say there hasn't been an attempt to do that.

Could I ask you to turn up then paragraph 30? I don't know if you were shown that.

**MRS JUSTICE BACON:** "External aids to interpretation ..."

**MR BARRETT:** Yes. Just two points I wanted to make about that. Second of all and at the end of the passage:

"None of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

As I have indicated we say we are in that territory at the end of the passage. We say we have clear statutory words in this case, no ambiguity, no absurdity.

Can I then turn to the question of the meaning of duty and power. This was the London

Borough of Barnet case. Could I ask you to turn that up? It is authorities bundle, tab 22, page 667. If I may just start by asking you to note --

**MRS JUSTICE BACON:** Sorry. I missed the reference.

**MR BARRETT:** Tab 22, page 667.

**MRS JUSTICE BACON:** Yes.

**MR BARRETT:** If I could ask you to note this was set out in my skeleton argument but not addressed yesterday at all by the claimant.

**MRS JUSTICE BACON:** The paragraph is?

**MR BARRETT:** Can I ask you to turn up to 12, please? If I could ask you to read 12 through to 15 to yourself. (Pause.)

**MRS JUSTICE BACON:** Yes.

**MR BARRETT:** Two essential points in my submission, my Lady. First a fundamental point. What is a duty? It is a provision which requires someone to do something rather than leaving it to their discretion.

Second point, duties may, of course, incorporate very significant discretion. The fact that very significant discretion is incorporated does not mean something is a power.

Can I just give you passage references for the other judges agreeing with that analysis. Lord Steyn, 690, F through to G, paragraph 64. Lord Hope, paragraphs 79 through to 81.

**MRS JUSTICE BACON:** Yes.

**MR BARRETT:** Short submission, my Lord. You don't need to rely on me or Mr Gibson to help you on what a duty and a power are. That's been analysed and decided by the House of Lords. That's the basis upon which Schedule 3, paragraphs 4 and 5 were made and falls to be interpreted.

Can I then turn to deal with section 10P and the first part of the submission is that it imposes a statutory duty. In light of the way in which my learned friend put his case

yesterday I don't understand him to dispute that in the general sense, if I can use that language, section 10P is a duty and imposes a duty. I understand his position to be that power and duty are to be given a special and different meaning within schedule 3 of the Subsidy Control Act.

I wonder if he can confirm that, if that is his position we will just deal with the interpretation of schedule 3, but if he disputes as a general matter section 10P is a duty, I will need to make some submissions to you about that. I don't know if my learned friend could.

**MR GIBSON:** I say it is a mixed case, as I described. We accept on the face of it what section 10P says, it says "must" in sub paragraphs 1, 2 and elsewhere, as my learned friend has indicated. The question we say is, as my learned friend has taken you to, the R (O) Authority. It is not just the words. It is the words in their context. The passage you looked at refers to context in about four or five instances. We say, therefore, the starting point is to look at schedule 3, the words in that context and then ask yourself against that backdrop what section 10P means.

I hope I was clear about that yesterday.

**MR BARRETT:** I do not understand whether he does or does not accept as a general proposition section 10P, so I will need to make submissions about that, if I may.

**MR WOLFFE:** It clearly poses a duty.

**MR BARRETT:** Yes.

**MR WOLFFE:** I think Mr Gibson's point -- I hope I am not putting words in his mouth -- is in the context of schedule 3 and whether one regards it as a special meaning or not schedule 3, but what that was intended to apply to was a situation -- it wasn't intended to apply to a duty to in effect --

**MR BARRETT:** Sir, I follow that point, that point in my humble opinion is about the correct interpretation of those words specifically within schedule 3. I was seeking --

**MR WOLFFE:** The words always have to be interpreted in their context.

**MR BARRETT:** I entirely accept that but I don't want to waste time on it. I will make my submissions as shortly as I can and I will move on to schedule 3.

So we say, my Lord, as a matter of the correct interpretation on orthodox principles of statutory interpretation it could not be clearer, we say that section 10P is imposing a duty. On the authorities you have the Jones v Wrexham case. That's at tab 41, page 1254. I am not going to turn it up, but for your note paragraphs 75 and 166 to 167 the Court of Appeal makes very plain absent some very strong evidence to the contrary, the use of "must" as opposed to "may" will indicate a duty.

**MRS JUSTICE BACON:** Sorry. Which case were you referring to?

**MR BARRETT:** That's Jones v Wrexham, my Lady. The reference is tab 41, page 1254, paragraphs for your note are 75 and 116 to 117.

Supplying the authorities I refer to section NP, we say the clear and unequivalent meaning of the words used by Parliament is to impose a statutory obligation to make the scheme. See Jones v Wrexham. In choosing to use that statutory word, Parliament's word of choice was to provide in the clearest available terms that Ofgem was being subjected to a duty.

As you saw in R (O) the words used, clearest indication of meaning.

That's confirmed in the explanatory notes. I have shown you those. I will not turn it up. It makes very clear in paragraphs 38 through to 40, a single sentence in paragraph 40:

"The legislation is imposing a duty". It is at that tab 72, page 2181, page 2200.

Thirdly, the word "must" is used on four occasions within section 10P. Each of those indicate what's being done is an imposition of mandatory requirement. As the Tribunal is well aware, words used multiple times within a single provision is to give a consistent interpretation. The authority for that is the ICO case, paragraph 47, 1381, paragraph

39.

Further contrast the drafting of section 10P(9) providing a power on the part of the Secretary of State to amend the definition of LDES.

Sixth, contrast the terms of section 10P(1) with the terms of the provision within the Planning and Infrastructure Act which immediately follow section 26, section 26 being the section that introduced section 10P. That is the new section 38A of the Electricity Act, which provides that the Secretary of State may by regulations establish a scheme. One could not really have a sharper contrast in my submission. You have a Bill with two consecutive provisions. One is saying you must establish a scheme. The other one is saying you may establish a scheme. It couldn't be much clearer than that.

Seventh, we say that's also supported by and consistent with the various extrinsic statements and documents that you've seen throughout the passage of the Bill through Parliament.

Eighth, the purpose of an obligation being imposed, which I say you get from the words of section 10P(1) is to remove any discretion on the part of Ofgem as to whether the scheme should or should not be made and ensure that the scheme is made as soon as possible. It's the purpose one plainly gets from the words of 10P(1).

**MRS JUSTICE BACON:** When you come to the end of this point, we should probably take a short break.

**MR BARRETT:** I can stop there if that is convenient.

**MRS JUSTICE BACON:** Right. We will take five to ten minutes.

**(Short break)**

**MR BARRETT:** My Lords, if I may, turning then to section 78 and schedule 3. Could I please show you section 78 and schedule 3. I think my learned friend was pressed for time yesterday. I am not sure he took you through the structure. There are features of the structure I just want to be clear on. You will find section 78 in the authorities

bundle at tab 8 at page 156. It is a simple point to make. The way the provision works is the Act mustn't apply to financial assistance given under a duty imposed by primary legislation save insofar as schedule 3 positively provides that it shall. I hope that makes sense. It is not subject to the Act unless we specifically say in some respect it is.

Turning then to schedule 3, paragraphs 4 and 5, which is at page 171 within tab 8, no disagreement between the parties as to the effect or meaning save for the critical question, interpretation of the statutory words "duty and power".

We then see paragraph 6 and that makes positive provision for facts of the Act apply to schemes made under a duty imposed in primary legislation. Mainly you will see, my Lady and my Lords, acts in relation to the (inaudible) legislation for the most part but two provisions which do apply to Westminster legislation, that's paragraph 8, page 173, which places an obligation on the appropriate authority, that's the Secretary of State, to make a database entry.

You have seen Mr Stone's witness evidence. The Secretary of State's position no subsidy in this case because no financial assistance from public resources.

Paragraph 9 provides for voluntary referral. Again, my Lords, my Lady, you have seen Mr Stone's evidence. Not something the minister has voluntarily elected to do.

If I can just pick up one point made yesterday, there was a submission made that paragraph 9 supports an interpretation of duty as being restricted to what my learned friend calls pure schemes. Not a good point. Paragraph 9 is entirely permissive. You may refer, if you wish. It doesn't give him any help on that separate and prior question as to the interpretation of power and duty.

So turning then to my main submissions on the correct interpretation of duty and power within paragraphs 4 and 5, firstly, we submit that the clear and unequivocal meaning of the statutory words Parliament has chosen to use is if a scheme is made under

a duty imposed by legislation, then it will not be subject to any of the provisions of the Act on which the claimant relies in these proceedings.

**MR WOLFFE:** (Inaudible).

**MR BARRETT:** My Lord, you are quite right. Conversely, if a subsidy scheme is made under a power, then the provisions the claimant relies on would apply. Paragraphs 4 and 5 are thus, we say, classic examples of provisions which are defining the ambit of the legislative scheme.

Critical question. What is the correct construction, interpretation of the words "duty and power". Two introductory points. Firstly, what do those terms mean? I say that has been subject to detailed consideration and decided at the highest level. That's the R(G) case. I say in making paragraphs 4 and 5 of schedule 3 Parliament must be taken to be proceeding consistently with that analysis.

**MR WOLFFE:** Is part of that submission that because so far as subsidy schemes are concerned what paragraph 5 tells us to do is simply substitute the words "subsidy" provided by means of primary legislation, the words "subsidy scheme" made by that legislation?

**MR BARRETT:** That's the effect of it.

**MR WOLFFE:** You say that's a purely sort of contextual substitution.

**MR BARRETT:** Absolutely.

**MR WOLFFE:** And that there's no exercise of interpretation for us.

**MR BARRETT:** There is not, because the point of principle in my submission means it remains exactly the same. If Parliament has told you that you must do it, in my respect submission you are subject to the obligation. You cannot decline to do it. Even if you think yourself personally that subsidy is not the most appropriate instrument so you can't comply with principle E, the point is in either scenario Parliament has decreed that you must do the thing. That is the reason for the ...

**MR WOLFFE:** Presumably things that are done pursuant to that duty on your analysis would remain subject to judicial review on the grounds.

**MR BARRETT:** Yes.

**MR WOLFFE:** But wouldn't be subject to the subsidy control principles.

**MR BARRETT:** Absolutely, my Lord. Speaking for myself, I don't think there's any basis to suggest that section 10P is a general ouster of judicial review. This is a specific carefully drawn statutory scheme in my respectful submission.

So, my Lord, we do say that is the clear and unequivocal meaning both as the natural and ordinary meaning of the words, reinforced further by the fact that they have been subjected to detailed consideration decision at the very highest level.

I have made my detailed submissions as to the correct construction of section 10P. For all the reasons I sought to explain it is a duty in my respectful submission.

**MRS JUSTICE BACON:** It does mean that as soon as you get into the duty scenario even if, as in this case, the primary legislation does not specify the minutiae of the scheme, there is no Tribunal control over whether the decision maker, in this case Ofgem, considers the subsidy control principles or not, should it have decided it was a subsidy scheme or not. All of the protections that are provided by this regime fly out of the window as soon as you have a scheme that is at a high level you say.

**MR BARRETT:** Yes.

**CHAIRMAN:** Mandated by primary legislation.

**MR BARRETT:** Yes. I don't shrink from any of that, my Lady. I accept all of that. I say two things in response. I say, firstly, that consequence follows from Parliament making the decision to impose a duty. Obviously Parliament can and will consider the implications of imposing such duties as a matter of Parliamentary sovereignty.

The second point, my Lady, is I do say if that were not so, I do say it would significantly denude paragraphs 4 and 5 of effect. If it was the case that paragraphs 4 and 5 only

applied in the very extreme cases postulated by my learned friend, I do say that would significantly curtail the effect and utility of paragraphs 4 and 5.

**MRS JUSTICE BACON:** Of schedule 3.

**MR BARRETT:** Indeed, my Lady. Paragraphs 4 and 5 of schedule 3. Indeed, my Lady, one would be, in my submission, needing powerful interpretative material in the Act to support that view. This in my respectful submission you would need. Even if the Tribunal did not agree with me about that, you would need something I would say extraordinarily clear in the explanatory notes. I say there is just nothing at all to that effect.

**MR WOLFFE:** Do we have the relevant context for us to look at the TCA and the obligation in particular? I am looking at article 366.

**MR BARRETT:** I will come back to that after lunch, if I may consider it. I can give you the legal response to that now, my Lord. The relevance of the TCA to the construction of schedule 3, paragraph 4, is very limited. So the relevant legal context is that this is domestic legislation. You will be aware of the pedigree of the Act, as analysed in the *British Sugar* case it is intended to give effect to the TCA but also other instruments. The wording of the TCA, it is only potentially relevant if one were concerned with a genuine ambiguity, having exhausted existing domestic principles of statutory interpretation. Even then it is a factor that would only be given limited weight. That is the legal analysis in my respectful submission. I will come back on the specific wording, if I may, of that provision of the TCC.

**MR WOLFFE:** That would be helpful.

**MR BARRETT:** I will, of course.

So we say clear and unequivocal meaning. Secondly, we say that our position is supported by and consistent with the explanatory notes. Can I ask you to look at those quickly as I think you were shown them, but if you could look at them again quickly. It

is at tab -- sorry, I don't have the tab reference. It is at page 2180. It is at tab 71, page 2180.

**MRS JUSTICE BACON:** And this is the explanatory notes to?

**MR BARRETT:** Schedule 3.

**MRS JUSTICE BACON:** To schedule 3.

**MR BARRETT:** Paragraph 229 I hope, my Lady. I rely in particular on the final sentence of paragraph 229:

"This would not otherwise capture broad powers to grant financial assistance which are to be exercised at the discretion of a public authority."

I say that's touching on the nub of the distinction which you saw explained in the R(G) v LB of Barnett case.

**MR WOLFFE:** I have to say the explanatory notes look to me as though they don't exhaust the options because it says:

"Schedule 3 deals with the application of this Act in the case of subsidies provided by means of primary legislation. This may occur, for example, where an Act grants a subsidy or makes a scheme on its face."

Which I think is the sort of situation that Mr Gibson is suggesting is covered. Then it goes on to say:

"This would not otherwise capture broad powers to grant financial assistance."

What he actually doesn't address is the kind of situation we have here.

**MR BARRETT:** What I would say about that, my Lord, is if you read the second and third sentence together, the second sentence:

"This may occur, for example."

Then it is telling you what isn't in and what is a power. So I think I accept the point you are putting to me in part. There are other permutations that the second sentence could address.

**MR WOLFFE:** For better or worse it doesn't actually address the permutation we have here, at least not in terms.

**MR BARRETT:** Not in terms, but I would respectfully say you do get assistance from the second part of the second sentence, prescriptive spending provisions. If one thinks about that in the real world, I think that is close to the present case.

Third point, please, is the statutory guidance. Again if I could ask you to turn that up. That's tab 74, page 2501. I rely in particular on the first sentence. My Lord may say to me it is just question begging, but I do place some reliance on that. I also place some reliance on the wording at the end of the last sentence in parenthesis. I say that shows in its extreme form the submission you have had from my learned friend is not correct.

Fourth point. I have actually dealt with this in response to some of the questions. I say our construction is supported by the statutory purpose. The statutory purpose is Parliamentary sovereignty.

**MR WOLFFE:** I just wanted to -- the last sentence in the guidance says:

"In summary, subsidies given and schemes made in devolved primary legislation must comply with the subsidy control controls ... whereas those given or made in Acts of Parliament ... are exempt ..."

One could read that language as envisioning a subsidy given or a scheme made in an Act, which might tend to suggest the broader -- the approach Mr Gibson was putting to us.

**MRS JUSTICE BACON:** Do we get any help from the next paragraph?

"The UK Government or a devolved government will have no discretion over whether to give the subsidy, because the primary legislation will require it to be given."

Does that imply that the subsidy is required under the primary legislation, ie that the primary legislation has on its face contains a scheme which requires the subsidy to be

given.

**MR BARRETT:** I don't think it does. I think that second sentence is, firstly, just dealing simply with subsidies. It's not dealing with schemes at all, is the first point.

The second point is I don't think it is actually addressing the second sentence, whether it is a scheme made in the legislation or one where a duty is imposed. I don't think it is actually telling you which of the two it is addressing. The point I say you do get from it is that the language in parentheses is indicating it is certainly not the case that it's a requirement that all of the parameters or what is going to be provided or done will be settled or determined.

**MRS JUSTICE BACON:** What would be the consequence if there were a subsidy given that was provided for by primary legislation that was contrary to the obligations under the TCA, because the last sentence of 14(1) says:

"But not from our international obligations."

What level of control is there over that then?

**MR BARRETT:** I think firstly it is a matter for the state parties in terms of obligations under the treaty. As to whether it would be conceivable, one might try to find some other form of legal challenge that could be brought. I couldn't speculate about that, my Lady, but, as I say, I don't and, you know, I can't shirk from the proposition you're putting to me. This is indeed the consequence of the scheme which Parliament has provided. I say it's done so deliberately.

As I was just seeking to explain my submission, it's done so for in my respectful submission entirely understandable good reasons relating to Parliament sovereignty. There are a number of obvious types of scenarios in which Parliament may consider that it is necessary and appropriate that this sort of scheme should be made without being subject to the process of delay and potential disruption which arises if the subsidy control legislation applies. Whether that is or is not justified in a particular

case is a decision for Parliament. That's precisely what these mechanics provide for.

**MR WOLFFE:** So you are saying that -- because we are looking at potentially whether the TCA helps us to interpret this provision one way or the another.

**MR BARRETT:** Yes.

**MR WOLFFE:** You say the language is clear. It doesn't admit of doubt.

**MR BARRETT:** Yes.

**MR WOLFFE:** A consequence of that may be that Parliament, you know, will legislate in a way which breaches obligations under the TCA, but that's not something which is our concern.

**MR BARRETT:** I do say that. I would make a further submission. There hasn't been -- there is not any submission that's been made in my learned friend's skeleton argument or his oral submissions yesterday that the construction for which I contend leads to a breach of the TCA, that's not part of any case that's been put against me. I will look at the provision my Lord is putting to me. I do recall it. I will deal with it after lunch, if I may.

**MR WOLFFE:** Of course.

**MR BARRETT:** If one needed to reach that stage, then yes, I would respectfully submit that.

**MR GIBSON:** I should make it clear the whole of the Act is to be interpreted in accordance with the TCA and I cited --

**MR WOLFFE:** We have read the relevant paragraph. That's clear.

**MR BARRETT:** My final point on purpose I foreshadowed. I do say it is an important point. Again the obvious reason as to why schedule 4 -- paras 4 and 5 had the effect which we submit is that if they did not, you would be obliged to comply with the subsidy control principles, which include principle E -- that's the nub of the point. You need to decide for yourself whether giving a subsidy is the appropriate thing to do or not. The

essential consequence of Parliament placing the obligation on you is to preclude that. We say if it is suggested that you get round that by some sort of *a la carte* approach to the subsidy control principles, that doesn't work. That is not how the scheme works.

**MR WOLFFE:** And you would say that (inaudible) include assessing whether or not a decision to require a cap and floor --

**MR BARRETT:** Precisely so.

**MR WOLFFE:** -- approach to this.

**MR BARRETT:** The principle is a subsidy that provide a justified response or should it be something that is not a subsidy, should it be a policy or some softer measure? An absolutely core part of the duty.

**MR WOLFFE:** If it is right the setting of a floor gives a subsidy, and you dispute that.

**MR BARRETT:** Precisely so.

**MR WOLFFE:** -- but if that's right, then the application principles would require that legislative judgment to be repossessed.

**MR BARRETT:** Precisely, my Lord. This all fits together. There are obviously good reasons for this.

My final point, we do say that the claimant's proposed interpretation goes significantly beyond the application of available domestic principles of statutory interpretation. This is not a *Marleasing* case. It is not a section 3 Human Rights Act case. The substance of the claimant's proposed construction is that the word "power" is to be rewritten to mean a power or a duty which does not comprehensively prescribe all terms of any scheme to be made.

We do say that that is an interpretation, an approach to interpretation that is outwith what the domestic principles of statutory interpretation permit.

**MR WOLFFE:** Interesting interpretation. Section 29 of the Future Relations Act only applies to existing domestic law, not to new law.

**MR BARRETT:** That's quite right.

**MR WOLFFE:** Insofar as the TCA is relevant, it is simply on the basis of the principle of interpretation that if you can interpret domestic legislation in accordance with international obligations as they are intended.

**MR BARRETT:** Yes, that is the principle that I mentioned earlier today. If that principle is of interest we will provide you with the authority. It is the *Western Sahara* case I think. We will provide you with that authority if it is of interest.

Final point. My learned friend places reliance on Hansard. The relevant authority is in the bundle, *Darwall v Dartmoor NPA*. That's at tab 43, page 1292. It is paragraphs 39 to 43. I won't ask you to turn it up unless you would like me to, but it is just a recent, very firm Supreme Court judgment emphasising the stringency of the *Pepper v Hart* rule and the limited circumstances under which any reference is permissible. We say certainly two of the three criteria are not met. We say there is no relevant ambiguity or absurdity in the relevant statutory provisions. As was canvassed in debate yesterday, we certainly say that the relevant passage my learned friend seeks to rely upon is not clear and unequivocal. The proposition that the Hansard passage is clear and unequivocal but the statutory language is ambiguous and obscure, we say that's very difficult to understand.

**MRS JUSTICE BACON:** This was the (inaudible) case.

**MR BARRETT:** It is, my Lady. That's right.

As I set out in my skeleton the legislation referred to doesn't provide any support for the claimant. The example of a power is a ‘may’ provision. The example of a scheme is a scheme in primary legislation, but interestingly it is a scheme of primary legislation where there clearly is quite significant discretion given to the responding public authority as to the design of the scheme.

So, my Lords, I move on, if I may, to what we say is the legal significance or

consequences of that analysis. Materially if, contrary to our case, there was a decision on 23rd September to make a scheme for the purposes of the Subsidy Control Act, we say that that decision has been rendered academic by the section 10P decision of 18th February 2026.

Could I just ask you to turn up very quickly the claimant's skeleton argument at paragraph 155(a)? You will find that I think at bundle B, tab 1, I think page 30. Sorry notice of appeal. It is B, tab 1, page 36, 155(a). I just wanted you to see that. So it is not disputed that section 10P provides *vires* for the decision. That's common ground.

**MRS JUSTICE BACON:** Reference again?

**MR BARRETT:** I misspoke. I apologise. It is B, tab 1 and it is page 36, paragraph 155(a).

**MRS JUSTICE BACON:** I am there.

**MR BARRETT:** Sorry about that. It is accepted that section 10P provides the necessary *vires* for the decision.

Then if I could ask you to turn up my learned friend's skeleton at paragraph 166, you will see that notwithstanding the admission that section 10P provides the necessary *vires*, there is an argument advanced that nonetheless, notwithstanding the acceptance of the necessary *vire*s, notwithstanding that the provision says Ofgem must establish and operate a scheme, there's an argument made at paragraphs 166 to 169 that the Tribunal should interpret section 10P as precluding Ofgem taking any decision to establish a scheme under that provision.

I would just invite you -- my learned friend did not want to make oral submissions to you about it yesterday -- I would say that's for obvious reasons, but I would just invite you to look closely at 166 to 169. We do say these are not coherent submissions and we would do say that they are demonstrative of the errors in the claimant's analysis. Its analysis drives it to submit that a section which says that a public authority must

establish a scheme precludes the authority making a decision to establish a scheme. We say that's a surprising and not coherent submission.

**MRS JUSTICE BACON:** I think the point is made that there is no duty to adopt a previous decision to establish a scheme and indeed he then says effectively not only is there no duty, there is no power to do so.

**MR BARRETT:** That's the crucial mis-step, my Lady, in my submission.

**MRS JUSTICE BACON:** 10P only applies where GEMA did not already establish a scheme. So because he says that there was already a scheme, he says 10P doesn't apply, because that is only forward looking.

**MR BARRETT:** Absolutely. That is the second step you have identified, my Lady. In my respectful submission that is the crucial mis-step. Let's assume in my learned friend's favour that he was absolutely right that a decision had been made to make a scheme under the old existing powers, why should section 10P be construed to prevent Ofgem, as Parliament has decreed, acting under that provision to make a scheme under that provision on those terms? There is no explanation in my submission, no justification that is or can be given for that.

So the position and substance is that Ofgem has adopted the development work previously conducted under its existing powers. No acts or decisions will be made by Ofgem pursuant to that initial decision that was made under its existing legal powers and it is of no continuing or extant legal effect. All of Ofgem's decisions, actions are being undertaken and will be undertaken under section 10P(1) and we say it follows from that on the application of orthodox principles that even if, *quod non*, a 23rd September decision to make a subsidy scheme was made, that decision is of no continuing legal effect or relevance. The challenge to it is academic and no relief should be granted.

As to the authorities, if I could ask you to turn up the *Shrewsbury* case. That's

a judgment of the Court of Appeal. That is in the authorities bundle at tab 27, page 788. The Secretary of State acting in the context of local Government reorganisation undertaking substantial development work before the introduction of new primary legislation that would authorise putting into effect the reorganisation. See paragraphs 6 to 8 the development work went through a three staged decision-making process. At the conclusion of the three stages the Secretary of State issued decision letters explaining the unitary authority intended to establish in certain local authority areas once the primary legislation entered into force. That's paragraph 13.

Three months later the Act entered into force. The Secretary of State took decisions adopting all of the development work previously undertaken. That is paragraphs 14 to 15. The claimants, two borough councils, would be abolished as a consequence of the decisions, brought judicial review proceeding to tthe decisions made before the Act had entered into force.

The Court of Appeal required the claimants to amend their claim for judicial review to challenge the decisions made under the Act after it had entered into force. That is because the prior decisions we say on the same analysis as in the present case have been superseded by the more recent decisions made under the recently enacted primary legislation.

We see that analysis and explanation set out in paragraphs 31 through to 35.

The material point for present purposes, in my respectful submission, is the case is concerned with adoption or previous decisions. It is as close to this case as one could get without being the same case in our respectful submission. That's the decision of the court --

**MR WOLFFE:** Just to follow the logic of that, your primary submission is what happened in September was not a decision to make a subsidy scheme at all.

**MR BARRETT:** Yes.

**MR WOLFFE:** So does it follow from that that your primary position is that the adoption doesn't make a subsidy scheme either?

**MR BARRETT:** Yes, yes, absolutely.

**MR WOLFFE:** And your fallback position is that if you're wrong on that, then the consequence of the adoption is the making of a subsidy scheme pursuant to the duty and therefore (inaudible).

**MR BARRETT:** Precisely so. I am sorry if I have not explained that clearly.

**MR GIBSON:** I lost the last part of that.

**MR WOLFFE:** If it is a subsidy scheme you say, if I may understand it correctly, that it is a subsidy scheme made pursuant to the statutory duty.

**MR BARRETT:** Precisely so.

**MR WOLFFE:** There's sort of questions of the order of arguments, isn't there? You are basically presenting an academic argument hypothesis and if the hypothesis says you are wrong --

**MR BARRETT:** If I am not wrong on the September publications we don't need it look at this at all but it just follows logically from the section 10P point so I find it convenient to sort of deal with it in this place. I entirely agree with what my Lord put to me.

Let me just try again and make my position as clear as I can. My primary position is, and we are only ever speaking with regard to the Subsidy Control Act here. We are not talking in any broader sense. Any decision to make a subsidy scheme will not take place until the fundamental parameters of the scheme are being decided on. That's a point in the future. If I'm right about that, lots of these other issues fall away.

If I'm wrong about that, if it's correct that what happened on 23rd September was a decision to make a subsidy scheme, then absolutely, as my Lord just put to me, a decision was made on 18th February under a statutory duty, section 10P, to make a subsidy scheme. That supersedes on the analysis in the *Shrewsbury* case the

23rd September decision and renders the challenge to that earlier decision academic.

**MR WOLFFE:** Just taking your first point.

**MR BARRETT:** Yes.

**MR WOLFFE:** You say it's not a subsidy scheme because it's neither a subsidy nor satisfying the parameters of a scheme.

**MR BARRETT:** Yes.

**MR WOLFFE:** Do you also say in relation to the September -- what happened in September that even if on analysis it did those two things --

**MR BARRETT:** Yes. It was not a decision to make.

**MR WOLFFE:** -- when you read it in context and the understanding everyone had that there was to be a statute, it wasn't a decision to make.

**MR BARRETT:** Absolutely, and I will seek to develop that, but absolutely I do say that. I say there are multiple reasons why the 23rd September was not a decision to make a subsidy scheme.

**MR WOLFFE:** I think this was the point Mr Gibson was making in terms of -- he was saying once you have got, as it were, the statutory criterion met, analytically you made a scheme. You may not have intended to, but ...

**MR BARRETT:** Let me just give you the answer to that. The statutory words are "decision to make". I do say those statutory words are important. We are dealing with public law decisions here. Again in my respectful submission as a matter of common sense there are a number of scenarios in which people may either decide what that final methodology is going to be, or certainly have a pretty firm idea about large parts or most of it, but there will be reasons why that will not be instantiate -- I am not going to use that word because I can't pronounce it -- given the effect of the decision, a decision with a legal consequences. It is necessary to focus on the statutory words, the language is a decision to make a scheme. “Make” cannot be airbrushed out of the

picture in my respectful submission.

So my Lady, my Lords, I say the *Shrewsbury* case is as close to this one as we could hope to find. It hasn't really been dealt with by the claimant. We say this court should apply that analysis.

The second authority is the *Charity Commission* case. We say that is to like effect. We say helpful analysis in the judgment of Mr Justice Fordham in particular at paragraph 34, where he considers and rejects a submission by the claimant that the subsequent decision does not render the challenge academic because the initial decision had not been withdrawn. That's one of the claimant's key propositions, and he explains in paragraph 34, the fourth and fifth sentences why that's not right.

**MRS JUSTICE BACON:** This is tab 50.

**MR BARRETT:** Sorry. I have not given you the reference. It is tab 50. The reference is para 34 at page 1524. The claimant says "Yes, you have the later decision which overtakes the first decision, but doesn't mean my claim is academic. I am still aggrieved. You have not withdrawn the decision. I still feel aggrieved". I'm sorry the decision has been superseded. It is only the second decision that has continuing legal consequences. Final sentence.

Then I will not ask you to turn them up. You have them in the skeleton. The *Stratton* and *AFA* cases, we say are to the same effect. (Inaudible) the earlier submissions, basic administrative law principle. If you have a later decision, it is the one that has legal effect, renders the previous decision academic. See the *AFA* case. Very simple, very everyday occurence. Very often the later decision will wholly agree with the first decision. It will just be bettered reasoned or have regard to some material the first decision didn't. Claimant doesn't like it any better. Still feels very aggrieved, but there it is. It is academic.

My learned friend made some submissions to suggest to you yesterday that even if

you were satisfied that the issue was academic you should nonetheless deal with it on the basis of the exceptionality criterion and the *Zoolife* case. We would say that's not a well founded submission. We would say on any view this is a rather unusual and specialist niche case. Very hard to see that there are long queues of people who find themselves in these circumstances and need legal guidance on questions that arise. I have dealt with --

**MRS JUSTICE BACON:** I did think he was saying even if you find that this is all covered by section 10P, he wants us to go on and decide whether if our decision had been otherwise, whether we would have found that it was a subsidy for the purpose of elucidating the world on the interpretation of the Subsidy Control Act?

**MR BARRETT:** Yes, yes. He did make that point yesterday. I mean, I will deal with that, if I may, in the course of my submission about the subsidy question. What I am going to submit about that, or certainly one part of my submission is going to be that that is a novel question, a complex question and an important question. I don't dispute or demur from any of that. It is a question in my respectful submission the Tribunal should only reach if it needs to and it's going to be decisive of the case, not least because as anyone can readily see in the real world, it is the sort of point that may well lead to appeals and so on and so forth.

**MR WOLFFE:** In a sense you have made that your primary submission, because your academic point all proceeds on the hypothesis -- I suppose you have still your decision to make point.

**MR BARRETT:** Yes. I don't need you to find, my Lord, there's not a subsidy to find in my favour on those grounds.

**MR WOLFFE:** Uh-huh.

**MR BARRETT:** If you are satisfied that even if ex hypothesi it was a subsidy, section 78, schedule 3 and/or academic meaning that the claim fails, in my respectful

submission you wouldn't need to go on to answer the subsidy question. I do say there are good reasons in this context why if that's not necessary, it is not something that it is sensible to grapple with. I will seek to explain the reasons for that in more detail when I get to the subsidy question.

I do say there are some very difficult points that arise. They should only be decided as and when it is necessary.

I think I have foreshadowed my final submissions on this. I am trying to develop them relatively briefly my learned friend's objections to that analysis.

Firstly, he has a point -- I think it has assumed less prominence but it is maintained to some extent. He says we are contending for retroactive effect. We say that's not a good point. I have shown you four cases we are relying on in this case. None of them involve retroactive effect. We say that's just a bit of a muddle on the part of the claimant.

The second point he relies on is the point that Mr Justice Fordham dealt with in the judgment I showed you, paragraph 34. He says you are adopting. You are not withdrawing. It can't be academic. That is not correct, not consistent with those cases for the reasons I have explained. I have shown you those.

The final way he puts it, which really is not substantively a different point, but it's a different use of language, is to assert that it is not academic because a *lis* continues to exist. Again it is the same conceptual error. The *lis* is the legal claim relating to the 23rd September decision. That's what the *lis* means. If that decision is no longer legally extant, then the *lis* has gone as well. It is the same point in my respectful submission.

**MR WOLFFE:** If we were to grant a quashing of the September publication.

**MR BARRETT:** Precisely so.

**MR WOLFFE:** That wouldn't affect you would say the February --

**MR BARRETT:** He accepts we have *vires*. It would just cause confusion and uncertainty as to the law in a context where in my respectful submission clarity and legal certainty are important values.

Turning then, my Lord, to the point you have raised, the September publications, we say that the publication of the September publications did not comprise the making or decision to make a subsidy scheme. We say that was not the character or substantive content of the decision that was made on 23rd September. We say there must be a decision to 'make' a scheme. That is the key statutory word. What does that mean? It means establish, to bring into existence a body of rules that will have legal effect from that point in time and can be relied upon for the relevant legal purposes. That was not what was being done.

What was being done was to make decisions following the consultations about various matters that would be used and relied upon if and when section 10P received Royal assent and entered into force.

**MR WOLFFE:** They were being given some effect in the sense that is (overspeaking).

**MR BARRETT:** Entirely --

**MR WOLFFE:** Things were going to be done.

**MR BARRETT:** As was the case in stage 1 under the existing suite of legal powers available to Ofgem. I entirely accept all of that, but the key point is there was no decision made to make a scheme on 23rd September. We do say, my Lord, two parts really to that submission. I will show you this.

Firstly, that's obviously clear as a matter of factual evidence you have from Mr Hutcheson. Secondly, we say that is also entirely clear from any objective analysis of the relevant facts and events in their relevant context and in particular the structure of the decision-making process that preceded and follows 23rd September.

The first point is a simple point and you may say a cheap point. There is obviously

nothing in any of the documents that says or indicates that a scheme is being established with effect from 23rd September. To the contrary, all of the documents make clear that there are subsequent steps in the decision-making process that are going to be carried out and make clear that that will happen after the date when section 10P is expected to come into force.

Can I just give you three references for that, please? B, 5, 166 makes clear that the cap financial model and handbook are still to come. B, 7, 2 ...

**MRS JUSTICE BACON:** I think it would be helpful if you told us what the documents are that you are referring us to. B5.

**MR BARRETT:** Bear with me one moment, my Lady. B 5, which is the financial framework. So that's 166. That tells you that the decisions about the financial model and handbook are still to be made and will follow.

B, 7, 286 at 6.27, that's the multi-criteria assessment framework and that tells you that the decision about storage capacity is still to be made and will follow on.

**MRS JUSTICE BACON:** B, 6.

**MR BARRETT:** B, 7, 286 at 6.27.

**MRS JUSTICE BACON:** Yes.

**MR BARRETT:** The final reference, which is a wrong reference I will correct. It is B, 4, page 164, paragraph 7.8, which tells you that the licence conditions will be consulted on and the decisions about those will be made in the spring of 2026.

So, as I mentioned, Mr Hutcheson's evidence explaining what was actually happening, what was actually intended by the issuance of the September publications is his witness statement, paragraphs 71, 93 and 123. The punchline of that is the final sentence of 123 where he explains that:

"Ofgem did not intend or understand by issuing the September publications it was making a subsidy scheme nor did it wish to. Quite the contrary."

**MR WOLFFE:** (Inaudible) subjective view of a senior official of Ofgem, but you may simply be wrong.

**MR BARRETT:** Yes, of course. My Lord, he could be wrong about the legal analysis of the relevant acts. My Lord, I do say as a matter of fact (inaudible) context. I do say it is relevant. I say it is not inadmissible that the factual evidence -- because there is a question of fact there as to what was actually done -- the factual evidence says from the responsible officer discharging this whole programme of work, "It was no part of what we were intending to do". Indeed the intention, as he says in terms, was to make the scheme when section 10P was in force. I do say that's admissible and relevant.

My main submission, my Lord, is that as a matter of the objective analysis of the relevant acts any reasonable observer would have understood that the purpose and effect of the publications was not to make a subsidy scheme. That is relying upon all of the documents and the prior decision-making process that I've sought to explain during my section on the factual background. So it's the content of the TDD, the terms of what was then clause 21 of the Bill, which was before Parliament at the time, the 8th April publications and the stage 1 assessment process.

I respectfully submit that the objective reasonable observer reviewing the September publications would entirely apprehend that what was intended was that the decisions recorded in those documents would be part of the scheme that would be established pursuant to section 10P(1) as and when that statutory provision entered into force.

I do say, my Lady, that the contrary contention is a surprising and unnatural one. I do say in that relevant context I've sought to explain the objective observer would consider it very odd that notwithstanding that relevant context and the passage of the Bill through Parliament Ofgem was purporting to establish the scheme under its existing *vires* on 23rd September. We say that the claimant's case fails to engage properly with that important factual context.

We do say, my Lords, and my Lady, that that is supported by the witness evidence you have before you from the parties who were actually participating in the scheme. They are set out in my skeleton argument, but I will just give you the references if I may. The witness statement of Mr Crompton. That's B, 16, 537, paragraphs 20 to 30. He explains that stage in the process.

Evidence to like effect from Mr Elder. That's at B, 13, 517.

Mr Heller --

**MRS JUSTICE BACON:** Which paragraphs of Elder?

**MR BARRETT:** Mr Elder is paragraph 31. Sorry.

Mr Heller is B, 14, 523 at paragraph 28, (inaudible) documents.

Mr Sturman, B, 17, 547, paragraph 4.4. Simply the next stage in the process, providing some further detail.

Mr Wickins at B, 15, 529, paragraph 26.

**MRS JUSTICE BACON:** Paragraph?

**MR BARRETT:** 56 -- 26, my Lady. Pardon me. 26.

We say objectively construed not a decision to make a scheme on 23rd September. That's supported also by some of the points I am going to go on to make about what was absent. We say the points do run together. They are also relevant. We say a reasonable objective observer would understand.

So the second submission, which is a separate point, but also overlaps, is that we say the September publications did not decide the essential parameters necessary to meet the definition of a subsidy scheme within the meaning of the Act. We say in order to understand that one needs to interpret the statutory words; "subsidy scheme" against the relative legislative framework. One needs to understand what role a subsidy scheme plays within the legislative framework in order to understand its correct interpretation and what the necessary characteristics or ingredients of a subsidy

scheme and the decision to make a subsidy scheme are. We say the claimant was wrong to submit to you, as it now does, that the correct statutory interpretation is that a decision to make a subsidy scheme occurs wherever there is any organised plan for making decisions.

So these points will be very trite, my Lady, and my Lords, but I think one does need to step through the provisions of the Act to get the full picture.

The statutory trigger for an obligation to conduct a principles assessment is the making of a subsidy scheme. That's section 12(3)(a) set out in my skeleton Argument, paragraph 46, so the statutory obligations can be discharged any time before the subsidy scheme is made.

A subsidy scheme must not be made unless an SCA principles assessment has been conducted, and we say importantly the public authority is of the view that all of the subsidies that may be provided for under the scheme will be consistent with the principles.

If a subsidy is given under a scheme, then it cannot be subject to challenge under the Act. That's section 70(2), my skeleton paragraph 49.

So we say with the benefit of those points of reference it is clear within the legislative scheme that the concept of subsidy scheme essentially operates as a qualification to or carve-out from the basic statutory obligation to conduct a principles assessment against each individual subsidy that is proposed or envisaged that may be made. We say the option or the power to elect to establish a subsidy scheme is essentially a dispensation or a benefit which the legislation confers on public authorities. It does so to enable them, if they elect to do so, to avoid the need to conduct large numbers of individual principles assessment against large numbers of related or connected subsidies and instead to conduct one overarching principles assessment before the scheme is made.

We say it is a necessary -- I emphasise necessary -- corollary of that that to constitute a scheme within the meaning of the Act an arrangement must provide, firstly, the key parameters and terms of the subsidies that may be given under the scheme and, secondly, a sufficiently -- I emphasise 'sufficiently', because I think some of the points taken against me put it quite high, that I am contending there can't be any discretion. That's not the submission. -- a sufficiently detailed, prescriptive and certain system of rules and criteria to determine the circumstances in which a subsidy may or may not be given under the scheme.

If one does not satisfy those criteria, it would follow, firstly, that no proper or effective principles assessment could be conducted in many cases that would qualify as subsidy schemes. They would lack any key parameters. They would have no clear certain criteria. Nonetheless on my learned friend's definition they would be subsidy schemes. No proper assessment could be conducted. Take the example we have discussed today. There is no decision as to how much subsidy is going to be given.

**MRS JUSTICE BACON:** So what do you say is the basic definition of a scheme and in what respect does that differ from the European definition, because the European Court has given a very particular definition of a scheme and neither of you rely on that definition.

**MR BARRETT:** My fundamental submission is that you really have to focus intensely on this scheme of this Act. In my respectful submission I don't think one gets help from the EU definition in this context. It is a different structure.

**MRS JUSTICE BACON:** Yes, it is a different mechanism.

**MR BARRETT:** It is.

**MRS JUSTICE BACON:** So what's your definition then? Mr Gibson has given us his sort of natural language interpretation. What do you say?

**MR BARRETT:** Let me put it as clearly as I can. The definition is a set of

arrangements which provide, firstly, key parameters and terms of the subsidies that may be given under the scheme and, second, a sufficiently detailed, prescriptive and certain set of rules.

**MRS JUSTICE BACON:** You are going to need to slow down.

**MR BARRETT:** I am sorry.

**MRS JUSTICE BACON:** A sufficiently detailed, prescriptive and certain set of rules.

**MR BARRETT:** Rules/criteria governing the circumstances in which a subsidy may or may not be provided under the scheme.

**MRS JUSTICE BACON:** Sufficient for what?

**MR BARRETT:** Why you need these things is what I am trying to explain. The first point is if you do not have these things you couldn't conduct a proper effective principles assessment. A principles assessment is all about analysing the potential adverse impact on competition of, if you recall, going back to the statutory provisions I showed you, any and all of the subsidies that may be given under the scheme. If you don't have these key ingredients set up, you can't do that analysis.

**MRS JUSTICE BACON:** When you say sufficiently detailed, et, etc, the sentence should end that an assessment under the subsidy control principles can be conducted.

**MR BARRETT:** That is the first limb, my Lady, but there's a second limb which I am just about to come on to. If you do not satisfy those requirements in my submission, it would create a situation where the authority would effectively be able to given subsidies under the "scheme" that would not or would not necessarily comply with the principles at all.

A simple example of that, if there are not sufficiently certain, clear and prescriptive rules, if the rules are too flexible, vague and subjective, the authority can then give the subsidy under the scheme under those really vague, subjective rules and there can be no assurance, no reassurance that the individual subsidy is actually going to

comply with the SCA principles, because there is no scheme of rules that ensures that. You need that structure.

**MR WOLFFE:** Here, for example, one might look at the TCA and that might drive one to give scheme a narrow interpretation in order to ensure that --

**MR BARRETT:** In my respectful submission, my Lord, one doesn't need to consider the TCA. I say Parliament's purpose. If we ask ourselves rhetorically the question does Parliament want something to constitute a subsidy scheme under the legislation when there's been no decision as to what its value is going to be, no decision as to the shape of the subsidies that are going to be given under it, and the rules are basically open-ended and enable the authority to give a subsidy to who or what they like on whatever terms they like, and then the individual subsidies are -- this is my next point -- they are inculcated from challenge under section 72. So I say it is a basic point on the construction of a statutory scheme, in my respectful submission.

**MR WOLFFE:** Do your submissions mean that you can never have a statutory scheme in terms of the definition without having identified the aggregate amount of the subsidies that will be granted? You made a point about it not being possible to apply the subsidy control principles --

**MR BARRETT:** Yes.

**MR WOLFFE:** -- without that parameter. That I have to say, just speaking intuitively, feels quite surprising.

**MR BARRETT:** Well, speaking for myself, my Lord, I would be inclined not to find it surprising. If one actually stands back and thinks about this scheme and what the purpose of the obligation to do the principles assessment is and the mischief that the legislation is actually directed to addressing, in my respectful submission it is compelling that you would want or need clarity and certainty about an absolutely fundamental parameter, because, as I have sought to explain, if you don't at least have

a relatively narrow range as to the proposed value of the subsidy, it's very hard to see how a meaningful, valuable principles assessment can be done.

I don't think I would go so far as to say you need a fixed value in every case, but what I say is you certainly need some degree of certainty -- that's why I emphasised sufficient. These are all questions obviously of fact and degree.

The facts here are you have an indicative rang. It is just an indicative range. Ofgem has to make a decision about what the level of supported storage capacity is. You have people such as the claimant, they would have us support a level of storage that is much lower than the published range. We have the Secretary of State who would like us to support a level of storage that is significantly higher than the published range.

**MR GIBSON:** I think you misspoke. We support it being much less than the supported range, not more.

**MR BARRETT:** I am sorry. If I said that, I apologise.

My Lord, in terms of the difference on the impact on what the claimant regards as competition it seems to be common ground -- certainly the modo energy analysis -- if Ofgem was to support A level of storage capacity towards the lower side or end of the indicative range, IT seems to be accepted or common ground that that would not have a material impact on future BESS development. Conversely if one was to support a level towards the top of the range it was said by the Claimant that would have calamitous effects.

That in my respectful submission illustrates the point of substance I am seeking to make. Certainly on the facts of this case until one has that decision it seems quite difficult to see either how or why one should be straining to find that there has been a decision to make a scheme. That's just that point.

I am going to go on to develop, if I may, a bit later in my submissions, that this point supported by the explanatory notes. If I could ask my Lady and my Lords to turn that

up. It is tab 71 at 2179, paragraph 47:

"Public authorities may carry out a single assessment for a subsidy scheme with defined parameters and conditions."

I do say it is not inconsistent with my earlier submissions. I do say the interpretation within section 10 of the term "subsidy scheme" is one, given the opacity of that language, where, having regard to the explanatory notes, the relatively clear guidance I submit you are getting from that is helpful, permissible and important.

We also say that's supported by this Tribunal's previous judgment in the *Durham* case. That's at tab 37, page 1097 at paragraph 51. It refers to a subsidy scheme as providing:

"... a means of setting out in advance the binding criteria which a subsidy will or may be granted ... an appropriate degree of fettering or (more aptly) controlling of discretion ..."

If I can pause that there to interpolate and deal with my learned friend's submission yesterday about the Hancher chapter by Mr Peretz. If the Tribunal is interested in that, if you read Mr Peretz's article, he is actually talking about two points. (Inaudible) the point is that the use of the language of 'fettering', and the point he makes is that that is not actually a correct use of language, because one has schemes where other public authorities -- my Lady and my Lords have the point. So 'fettering' is not very accurate. I would say, and I never like to disagree with Mr Peretz, but I would say with all fairness to the Tribunal I am not sure they were making that mistake in this paragraph. I think that it may just be the language they chose to use. What I think in substance they are talking about is, one sees at the end of the passage, binding or control of discretion. It is not about 'fettering' in that sort of hard-edged sense.

**MRS JUSTICE BACON:** Let me just turn up the relevant passage in Durham.

**MR BARRETT:** Of course. That is 51, my Lady, tab 37.

**MRS JUSTICE BACON:** Do you have a page number?

**MR BARRETT:** For me I have it as 1097.

**MR WOLFFE:** "... an appropriate degree of fettering or (more aptly) controlling of discretion in order better to further predictability and consistency in the grant of subsidies."

**MR BARRETT:** I see. It is the same point in substance.

**MRS JUSTICE BACON:** You say you could get to the same point without referring to fettering?

**MR BARRETT:** Correct. I think Mr Peretz is probably quite correct to say that's not the most useful choice of language. I would respectfully say I think that if it is suggested that the tribunal is making a substantive error, I don't think that's right. I think they are quite right. The choice of language might just need to be tweaked slightly or adjusted.

**MRS JUSTICE BACON:** Your definition is that the criteria need to be sufficiently detailed, prescriptive and certain that you can assess any subsidy by reference not to the individual subsidy, but by reference to the scheme, because that's the point of the scheme.

**MR BARRETT:** Yes. I must say, my Lady, I do think this question, this analysis that we are debating at the moment, there are absolutely going to be questions of fact and degree. There is going to be some sort of continuum and I found this quite hard trying to distil a definition that's going to capture everything. I would say if we deal with the facts here in this case, however precisely one draws the continuum I see this as a case where the relevant standard in regard to the statute re provisions in regard to the statutory provisions and the mischief that I've identified indicates very clearly this shouldn't be regarded as – the 23rd September publication shouldn't be regarded as making a scheme. That would be really quite problematic, if one thinks about it,

against this definition.

Could I then refer you to the statutory guidance which I also say supports that analysis? That's tab 74 at paragraphs -- page reference. Forgive me. Page reference 2358. If you could read paragraphs 2.26 and 2.29. (Pause.)

**MR BARRETT: :** So in the example here (inaudible) that's the suggestion by the writer of the statutory guidance, my Lady. Speaking for myself; I must say considering construing the statutory scheme, I feel quite worried about that, because I think doing an assessment of the largest single subsidy under a scheme may not even begin to grapple with the impact of the position of the scheme as a whole.

So what I would respectfully submit is that this is the writer of the guidance I think trying to construct workarounds to enable you to characterise something as a scheme even if it does significantly lack certainty as to its key parameters.

My primary submission certainly is that ought to be treated with significant caution and that's because adopting that sort of approach would give rise to the risks and problems I have sought to explain. I do say there's actually no particularly good reason as a matter of statutory interpretation to strain to give the concept of a subsidy scheme and this wider, broader meaning.

As I have explained in my submissions, the purpose and effect of something being characterised properly as a scheme is essentially a benefit to the public authority. It benefits the public authority to do something as a scheme within the meaning of the Act, because it only needs to do one assessment, not a bunch of different assessments.

I say that it's in the hands of a public authority. It has a choice under the legislation. It can establish something that meets the criteria that doesn't give rise to these problems that I have sought to explain under the Act and get the benefit of a single assessment. If it doesn't want to do that, it wants to keep its options open it just does

some more assessments.

**MRS JUSTICE BACON:** I am struggling with what you cavil at in this paragraph. The point is the public authority has to assess the scheme and needs to assess all the possible subsidies that could be given under the scheme. You said the point of doing a scheme is that you don't then assessment the individual subsidy. So the public authority couldn't properly make a scheme that is said to comply with subsidy public control principles unless it was satisfied that all of the subsidies that could be given under the scheme could so comply.

That is the way that I read this last sentence. So it would have to be having in mind what's the largest possible subsidy? Would that still comply?

**MR WOLFFE:** Worst case.

**MRS JUSTICE BACON:** The worst case scenarios. What is in that that you don't like?

**MR BARRETT:** The point I was seeking to address -- I may have misunderstood the question or was not meeting the question -- was to say if one was just, to take an example -- if one was looking at a scheme where, for example, up to 100 billion of subsidies may be given and one was only analysing the effect on competition of the largest contemplated individual subsidy within the 100 billion, I would say that wouldn't be sufficient. I would say one would want to analyse the impact on competition of everything that was done under the scheme. I am sorry. I think I may have been at cross purposes.

**MR WOLFFE:** It may be that different circumstances call for different approaches. You say in this case it is the angle of the impact that really matters from a competitive point of view. Therefore you would say --

**MR BARRETT:** I would.

**MR WOLFFE:** -- in this case, whatever may be the position elsewhere, I put --

**MR BARRETT:** I think I was trying to articulate that earlier in my submissions. I feel cautious about trying to be entirely prescriptive, because actually I think there may be different sorts of scenarios and different sorts of cases. I see this case as a rather simple case. It is a question of what is the size of the pot? That's what's going to determine whether this scheme has a significant impact on what the claimant regards as competition. There's a decision going to be made about that within a very short period. In my respectful submission, looking at the statutory scheme, looking at the provisions we have analysed, it seems to me it is an error to suggest that you make the decision to make the scheme without that fundamental ingredient being decided.

**MR WOLFFE:** I just pick up the point Mr Davies made, analysing the largest worst case subsidy. Do we see at paragraphs 330 and 331 on page 2368, it is not just a sort of random comment, because as I read those, you get a much more detailed explanation of how one should be approaching the assessment of a subsidy scheme would suggest one should do exactly what the writer has suggested at an earlier stage, but you say that that's not exhaustive and doesn't apply in case.

**MR BARRETT:** I do. I say one has to deal with the particular scheme, the particular facts and circumstances.

Again just to test my proposition, on what basis are you doing the subsidy principles assessment before that decision has been made? My learned friend, I think he said to you -- he said "Well, take the lower end of the range and the higher end of the range" but that is ultimately arbitrary. That is wholly arbitrary. That was an indicative range given at an early stage of the process back in March. The reality is, my Lady, my Lords will be familiar, all sorts of geopolitical developments and events have occurred and mean the position in the energy market is changing rapidly in significant ways.

NESO has been doing a great deal of detailed work to analyse what the correct approach is. As I say, there is going to be a decision about that within a short period.

It seems to me on the facts of this case that's a highly material point.

**MR DAVIES:** If I may, there is another way of doing the worst case that might apply in some circumstances, which is to say "Well, actually the amounts really don't matter in this case. Given the way we have designed the scheme there is no way in which it could operate that would harm competition in that way". Then it wouldn't depend on the numbers.

**MR BARRETT:** Yes. Based on the material, the various expert analyses I have seen or had some discussion of, it seems to be common ground between the economists and the financial specialists that the supported storage capacity is really a critical parameter of the impact on competition in this case. That seems to be common ground.

If one read the consultation responses from the claimant, they are very interested in what the level of storage capacity is going to be. NESO is very interested. The Secretary of State is very interested. I think it is hard to escape from the facts of this case. If one thinks about the mechanism, why is the claimant aggreived about this? It is realising a certain level of profit on a number of these margins at the moment. How much new capacity comes into those markets is going to be the key determinant of what happens to those prices and in due course may drive investment decisions. There's a knock-on effect. As I see it and it has been explained to me --

**MR DAVIES:** I don't think I was questioning this case. I am just personally a little worried about your trying to define too specifically when you can assess things, and that might create a very narrow window in general terms.

**MR BARRETT:** I would accept the force of that observation and would say focus on the facts we have here.

**MR GIBSON:** I just wanted to stay make sure my opponent addresses my actual case, which is not that we are losing profit but the consequence is businesses will not

proceed. The build-out will not happen.

**MR BARRETT:** Of course. I was about to turn to the key matters that were not decided or addressed. We have dealt I think in substance with the first point I wish to make. It is the level of storage capacity. Just a reference for that in the bundle. It is B, 7, page 286 at paragraph 6.27. That's the MCA framework. For the reasons I sought to explain we respectfully submit it is absolutely critical.

The second matter is the licence conditions. Again it's another facet of the same economic point. So again, my Lady and my Lords, when you have the chance, you will see the claimant's various consultation responses. The point pressed again and again is impose restraints on either the right of the supported projects to compete in markets or constrain the terms on which they can do so. That is the subject of the licence conditions decision. That has been consulted on. The consultation has been closed on 20th April and a decision in due course will be made about those questions. That is the second most important driver of the impact on competition for the principles assessment that we are discussing.

I say when one stands back and thinks about that, the two most significant parameters are not decided yet. Again hard to see it as being a decision to make a scheme.

The next submission, we say that the methodology that is prescribed by the September publications is not sufficiently objective, certain or clear to meet the statutory definition of a subsidy scheme. We say that was a deliberate considered policy choice in the circumstances of this case.

Mr Hutcheson explains that in his witness statement at paragraph 101, (d)(i). That's at B, 11, 479 to 480. That is a central feature of the particular decision-making methodology that's been adopted here. No decision at this stage as to the weightings the various criteria will have. That will only be decided at a later stage when submissions have been received and considered. My Lady and my Lords, you are

very familiar, and very experienced in subsidy schemes and wider procurement of public contract schemes I imagine.

The weighting of a criterion is an absolutely fundamental aspect of what the rules are. If I have one criterion -- three criterion, one has a 90% weighting and the other two 5% weightings, that's obviously highly influential or determinative of the decisions that will be made.

Testing the position in this case against my learned friend's definition, have the final rules been determined? No, they have not when the weightings have not been determined. That is a crucial element we say of the evaluation methodology and criteria.

**MRS JUSTICE BACON:** Do you mean in this particular case what concrete weightings haven't yet been determined?

**MR BARRETT:** Primarily it is the three assessments. You will recall the economic assessment, financial assessment and strategic assessment. Essentially it is what is the relationship going to be between how people get on in each of these three stages? What is the relevant importance going to be? What we have said is – and the claimant disagreed with this. The claimant and other people disagreed with this -- they said in the consultation responses: 'you need to decide and publish this in advance'. We didn't think that was the correct thing to do on the facts of this case. We wanted a more in the round and more flexible approach for this particular process in window one.

**MR WOLFFE:** So you would say -- do you say then that if you look at this aspect of the September publications because they -- it's a broad assessment across a number of criteria, that doesn't meet the ones that you say apply to have a scheme, and that would be the case regardless of whether in the future there is going to be some decision which we don't know anything about, that may or may not happen of actually deciding to apply greater weight to one or of the other.

**MR BARRETT:** Just to make sure I have accurately described the position. It is said we are going to --

**MR WOLFFE:** You are going to.

**MR BARRETT:** It is swing weighting in terms of that. I will give you the reference after lunch, if I may.

**MR WOLFFE:** It is concrete and we will find somewhere in the documents a commitment that there will be some further definition of the relevant weightings.

**MR BARRETT:** It is just a decision as to what the weightings will be. Yes, I will give you a reference for that.

**MRS JUSTICE BACON:** Yes. If you could give us a reference to help us, help illustrate exactly what you mean in this respect.

Is now a good time for us to rise for lunch?

**MR BARRETT:** Of course.

**MRS JUSTICE BACON:** How are you doing on time?

**MR BARRETT:** I think I am a little behind, but I think I am getting close to finishing -- I think I need about 15, 20 minutes on this section and then I am going to deal with subsidy. I will deal with that as quickly as I can. So I am a little behind, but I can get on track so that we are finished by 4 o'clock I think.

**MRS JUSTICE BACON:** Yes, bearing in mind we have read both of your skeleton arguments. So in terms of the exposition of the authorities.

**MR BARRETT:** Understood.

**MRS JUSTICE BACON:** We have seen the points you make about the complexity of this and the way that the European authorities have gone back and forth. We would particular appreciate your response to Mr Gibson's submissions yesterday.

**MR BARRETT:** Yes.

**MRS JUSTICE BACON:** Thank you.

**(1.04 pm)**

**(Lunch break)**

**(2.00 pm)**

**MRS JUSTICE BACON:** Yes, Mr Barrett.

**MR BARRETT:** Thank you very much, my Lady. My Lady, could I just begin by picking up some of the points that were raised at the end? My Lord Mr Wolffe's question about art. 366 of the TCA. It doesn't materially assist for three reasons. I am sorry. I have not managed to get print-outs. We can send those to the Tribunal in due course.

The applicable principle is one would only be having regard to a treaty if there was an ambiguity in the proper sense of the word, applying domestic principles interpretation. We say there is not such an ambiguity.

The second point is that art. 366 we say respectfully is a rather general provision as to the scheme to be adopted. It has to be read in particular with article 371, which preserves the principle of parliamentary sovereignty. The TCA does not purport to and could not in my respectful submission purport to tell Parliament what the correct balancing act is. That's very much in my respectful submission within Parliament's purview. So there's no hard edged provision of the TCA that helps us on the question we are looking at today.

In relation to the points, my Lady asked about swing weighting. Could I try to deal with it in this way: I think the best explanation of the concept that you will see in the documents is at tab B, 7, 255 at paragraph 3.11.

**MRS JUSTICE BACON:** B or E?

**MR BARRETT:** B for Bertie. This is the September document. It is the framework and it is at para 3.11. You will see a somewhat short I hope helpful explanation of what swing weighting means. There is a wider point. Is there a commitment that's

how it is going to be done? Yes. See that passage 3.11, also see behind the same tab, page 268, paragraph 2.84.

**MRS JUSTICE BACON:** This is for each project. I am not sure -- I thought we were talking about a weighting that would go into the scheme decision. You said you understand your submission to be that at the moment that decision hasn't been made and that's one of the other reasons why a scheme has not been made yet.

**MR BARRETT:** Yes. So the swing weighting, and I may not explain this well, so I apologise in advance, I will try to get a better explanation, the swing weighting absolutely is a factor which will influence the decision as to who is going to get a subsidy and who does not. It feeds into that analysis, that decision. It is a material part of the decision-making process.

**MRS JUSTICE BACON:** Are you saying there is also some decision about that to be made before --

**MR BARRETT:** Yes.

**MRS JUSTICE BACON:** -- before the scheme is adopted?

**MR BARRETT:** Yes, before the decisions can be made. Again I will explain this poorly, but maybe we can get some additional material to help explain this. You need to decide what the content of your swing weighting rule is and that decision hasn't been taken yet.

**MRS JUSTICE BACON:** In order for there to be a scheme, there has to be a decision as to what the content of the swing weighting will be and then that rule will be applied to individual projects.

**MR BARRETT:** Yes.

**MRS JUSTICE BACON:** To determine who gets what under the scheme.

**MR BARRETT:** Whether you get subsidy or not.

**MRS JUSTICE BACON:** Yes. All right.

**MR BARRETT:** So that's swing weighting.

**MR WOLFFE:** I am conscious you need to make progress, Mr Barrett. Can I just make sure I have (inaudible)?

**MR BARRETT:** Yes.

**MR WOLFFE:** Can we look at that:

"Parties shall ensure in accordance with its general and constitutional law and procedures that its courts and Tribunals are competent to:

(a) review subsidy decisions taken by a granting authority or a relatively independent authority or body for compliance with that party for implementing Articles 3.66."

Where do you get the --

**MR BARRETT:** In accordance with its constitutional conditions.

**MR WOLFFE:** Okay. Then I wondered if 3-724 was relevant, which is on the next page.

**MR BARRETT:** One moment, my Lord. No. My Lord, that's a specific provision and that's dealt with in the (inaudible) case. That is the standard of review. You don't have an obligation to broaden it beyond what you have already. We say that's a separate point to what you saw in the passage I took to you in 372(1)(a), which is about preserving Parliamentary sovereignty.

**MR WOLFFE:** How do you say it would infringe Parliament sovereignty if in the kind of case that Mr Gibson suggests we are dealing with where there is a duty to make a scheme, but the design is likened to a public body. How does that interfere with Parliamentary sovereignty to subject the detail of the scheme to the subsidy control principles, bearing in mind the public body is the subject of judicial review?

**MR BARRETT:** I think the correct analysis, the necessary analysis here is to look at the Acts that Parliament has enacted. That's the Subsidy Control Act, section 78 and schedule 3. Parliament's scheme is that if the scheme has been made under a duty

then it is not subject to the relevant principles or the requirement to do a principles assessment. In my respectful submission when you understand that the requirement to conduct a principles assessment includes the analysis and decision as to whether a subsidy scheme should be made at all (principle E), it would infringe Parliamentary sovereignty to seek to read that down or depart from that. I think that's as direct an answer as I think I can give to that question.

I am sorry. I have lost my train of thought slightly. What I am going to try to do -- I think it is the most efficient way to give you the references for my proposition that the particular methodology used in this case is too subjective, too vague to constitute a scheme within the meaning of the Act, is to ask you, if you could take up the supplementary bundle, Bundle F?

If I could ask you to turn in that to tab 2. You will find the detailed ground of resistance in the judicial review claim. If you could turn to page 57 of that document.

**MRS JUSTICE BACON:** Internal 57 or 57 of the bundle?

**MR BARRETT:** I think it is the bundle page 57. It should take you, my Lady, to a page on which there is paragraphs 38 through to 40, but the references, paragraph 40 through to 44, give you I think a concise but materially complete series of references for the parts of the documents that I would rely on. What I would propose to do, therefore, is we will send you a marked up version of this, which will give you the correct references for your trial bundles so that you can find each of these extracts. Is that a satisfactory way to deal with this?

**MRS JUSTICE BACON:** Yes.

**MR DAVIES:** I did not quite catch it.

**MRS JUSTICE BACON:** What he is saying is he wants to refer us to paragraphs 40 to 44. In the bundle those paragraphs are given references to the judicial review bundle which we don't have, of course. For example, at the end of 40(1) there is

a reference to FB/9/1874. That's a document we don't have. These documents, however, are in our bundle so what he is proposing is to mark this up to make sure that the relevant documents which are referred to in these and which are in our bundles but just in a different place are -- the references to those bundles are given by reference to our bundles and not the judicial review bundles. That's all. Is that correct?

**MR BARRETT:** That's entirely correct. Thank you very much. So that's the material which I rely on in support of my separate but overlapping proposition, which the particular scheme that's in issue here doesn't have sufficiently clear or objective or prescriptive rules. It is too flexible.

**MR GIBSON:** Sorry. Before you go on, I want to point out, obviously if he needs to add other material, it's open to him. The only problem with that is we didn't know exactly what proposition he was going to rely on that material for in this case. So we have to reserve our position until we have seen that and if there was anything that we didn't have an opportunity to respond to in this case. It may be we don't need to, but I wanted to just ensure everything is properly fair.

**MR BARRETT:** I am sure that's fine.

**MRS JUSTICE BACON:** We wouldn't expect any lengthy response, because what he is just saying is this is the place where -- this is somewhere which brings together in one place the reference to the underlying documents to say that at the moment the scheme is not yet crystallised. His underlying argument is one that he has made in his skeleton argument and pleadings for this hearing and the documents are all before us.

**MR GIBSON:** If there is nothing more, we will not say anything but I want to make our position clear on that.

**MR BARRETT:** The question on the decision to make a scheme, I do say the final

stage of the analysis is to consider the context of the legislation. Is there a reason or a compelling reason to strain to give a scheme, a broadening or even just a favour a very broad meaning of the term scheme? I respectfully submit not. As we have seen, it's essentially a dispensation or benefit for public authorities. They can choose based on their own assessment whether they want to have something that's very broad and open or have something that's more well-defined and objective and either have the benefit of that approach or not.

I think it was suggested to you by my learned friend in his oral submissions that there would be a problem or there would be prejudice to claimants if one didn't adopt the very broad and loose definition of scheme.

We say that's not correct at all. We say actually that the contrary is true. We say it is not in the interest of a claimant if it is compelled to challenge something as a subsidy scheme or object to the subsidy scheme before a point at which the absolutely fundamental decisions that we have been discussing about the key parameters, terms and conditions are made. That we would say respectfully would lead to an unsatisfactory position where potentially unnecessary litigation would have been commenced and conducted.

Furthermore, we would say there is no practical issue or difficulty that arises. It is very, very common if someone has a worry or a concern that a decision that adversely affects their interests needs to be challenged they can either engage in pre-action correspondence in the conventional way and/or issue a claim and then consider what the next steps are.

See the *Weis v GMCA* litigation in this Tribunal. Precisely that happened. We had a decision from the local authority we thought might be a subsidy decision. We were aware of that. We issued a claim and agreed a stay and it was dealt with in a perfectly sensible, and we would say proportionate, manner.

We say, my Lords, my Lady, test that by reference to the current case. Is it better that a claimant is coming to court in circumstances where none of these absolutely fundamental issues have yet been decided? Would it be better if it is open to the parties to understand in light of those sort of fundamental decisions whether they want to, whether they need to, challenge or not? The answer to that we say is obvious.

So for those reasons we would invite you to support our case in respect of that issue.

I turn on to the final section of my submissions, which is the subsidy question. Obviously I have heard what the Tribunal has said about the approach and I will try my best to take account of that.

I do need to say, it is probably self-evident, but this is obviously a very important issue potentially for my clients. As the Tribunal will be well aware network charges are the primary source for a significant part of my clients' policy work and are used in a number of schemes of significant public importance and benefits. It is a very important issue. More broadly it is obviously a very important issue for regulators, or indeed any public bodies whose functions include what I broadly refer to as the pass-through of private resources. So that is just a point I wanted to state clearly at the outset.

I do say in light of the issues in this case, the structure of this case, there are compelling reasons that the Tribunal doesn't need to and shouldn't get into this question. In particular, as the Tribunal noted, there obviously is a very significant and disparate body of Court of Justice case law, and that's even before one gets to interesting questions, some of which I will touch upon, about what relevance that case-law should or should not have for the purposes of the Subsidy Control Act.

A further reason, my Lady, why we would invite you not to reach this issue unless you need to is that the arrangements in significant respects are still subject to consideration and decision. We saw that, if you recall, at paragraph 133(d) of Mr Hutcheson's witness statement yesterday, which my learned friend took you to. He took you to that

in support of his argument that working capital facility would, he said, be used for the purposes of cap and floor payments and he based that on what Mr Hutcheson had said in 133(d).

He didn't draw your attention to it, but immediately after the section my learned friend referred to Mr Hutcheson says "This is still under consideration". It is still under consideration. It is not decided whether payments under cap and floor arrangements will, as it were, come before the relevant BSUOS charge have been collected.

We say the fact that this is a developing policy area -- as I have mentioned licence conditions are also still under consideration -- is a further reason for why we say a degree of circumspection is justified on this point.

So can I turn to the substance? I am going to try to take the Tribunal's direction. I am not proposing to repeat my skeleton. I am going to just really try to focus on what I say is the correct legal analysis. There is quite a lot of detail. I apologise for that but I do need to make these submissions I think on the detail.

Obviously statutory definition section 2. Our starting point is we say that needs to be interpreted and applied based on orthodox domestic principles of statutory interpretation. The starting point is not the Court of Justice case law.

Second point. We say that the focus for the Tribunal's analysis is the question of whether an award of a cap and floor arrangement involves financial assistance being given from public resources. So temporally, the point in time we say for the relevant analysis on the claimants' case is the point at which the award has been made: is there financial assistance being given from public resources at that point in time?

As to the law, we say section 2(1) is to be given its natural and ordinary meaning. We say that comprises a burden on state budgets. We would further define that as a charge to the public balance sheet or the foregoing of revenue to which a public authority would otherwise be entitled. We say that is the core meaning of section 2(1).

We entirely accept -- this was touched on in debate -- that can include contingent liabilities, of course it can, a guarantee would be a classic, simple, example. We say a guarantee is a useful example. If a public body is given a guarantee of course it is a contingent liability but it is an immediate charge against the balance sheet of the public authority and it will be recorded on the public balance sheet.

The fundamental distinction with the grant of a cap and floor arrangement is that that's not something that leads to a guarantee being given by a public body or a charge against a public balance sheet. The "guarantee", the underwriting to use my learned friend's preferred language, is being provided by private resources in the hands of private parties. That's the difference of substance between a number of points my learned friend has put to you and the cap and floor arrangements on proper analysis.

**MRS JUSTICE BACON:** You will get to that in due course, but I didn't understand it to be private resources in the hands of the private parties, because I thought that the working capital was funded through some part of the BSUoS charge, which then went to NESO. I thought once it gets to NESO, it is then public resource. Obviously it derives from private resource but it ends up in the hands of NESO.

**MR BARRETT:** So what was just put to me is not the financial assistance that is given at the date of cap and floor payments, it is about money actually being transferred and changing hands. In my submission that's a different point and I say not the correct focus of analysis.

The financial assistance which is complained of in this case is at the dates when one gets a cap and floor arrangement the fact of that -- let me use the word 'guarantee' broadly and very loosely, means that they have a degree of revenues certainty of protection and that essentially increases the value of their assets or their business.

**MRS JUSTICE BACON:** When you say guarantee, you mean the floor?

**MR BARRETT:** Yes. Sorry if I didn't make that clear. That's really the crux of the

arrangement. The floor is the advantage. The floor is the potential subsidy.

**MR WOLFFE:** And this doesn't appear against the public sector balance sheet by contrast with the guarantee, because although there's a contingent right to payment under the scheme.

**MR BARRETT:** It is not against the public authority.

**MR WOLFFE:** I mean, it will be paid from the scheme, but the public authority will recoup it. So the public authority 's balance sheet remains in neutral.

**MR BARRETT:** Can I try to be as precise as possible. The way the case has been put by the claimant is I think is causing a degree of difficulty with this. Insofar as I have instructions, and I don't have detailed evidence on this because the first way the claim is put in the skeleton argument is not pleaded, so I don't have detailed evidence to argue it. It is just not pleaded. But as I am instructed, it is not expected that the working capital facility is going to be used to make floor payments. Those are my instructions. That is not the expectation or intention.

If I can put it as simply as possible, the point is I say the relevant legal question is: is the grant of a cap and floor arrangement a subsidy within the meaning of the Act at the date the arrangement was awarded. I say it is not. I will come on to try to answer my Lord's question as best I can in one moment.

The cause, to take the guarantee example as an analogy: insofar as there's a charge, a notional charge against someone's balance sheet, it is against the private parties who may in future be required to make BSUOS payments to cover any floor payment obligation that arises. The point I think my Lord puts to me is whether that is right, isn't it the case that the charge would go against the public authority's balance sheet theoretically? We would recover it from either parties using BSUOS charges. Is that the point my Lady has in mind?

**MR WOLFFE:** Yes. The way it has been explained to us is that the payment will

come from NESO. So to that extent the scheme envisages a contingent right to be paid a sum of money by NESO if you fall below the floor.

**MR BARRETT:** NESO has --

**MR WOLFFE:** NESO will be entitled to recover under the scheme the equivalent amount through the BSUoS charges. So NESO will remain ultimately neutral but the funds flow through NESO.

**MR BARRETT:** As my learned friend put it to you, and claims back from private parties. The case he was putting to you is the structure of this is the public authority pays out public money in advance and claims back money from private parties under BSUoS. What I am trying to explain is, and I don't have detailed evidence because it is not a pleaded case. Paragraph 104 of his skeleton is notice of appeal. My instructions are that that's not, in fact, the intention or the likely position. The likely position is money being brought in from private parties via BSUoS charges and that then being used to make floor payments, if it were to be the case that a need arose to make a floor payment.

If I could try to summarise my position, my Lady --

**MRS JUSTICE BACON:** Mr Davies has a question.

**MR BARRETT:** Of course, sorry.

**MR DAVIES:** Are you saying that just because of the timing, ie that NESO pays out at the same time as the BSUoS charges, or are you saying it might be that the BSUoS charges are paid directly?

**MR BARRETT:** I will sound a note of caution because I am not sure that is addressed by my instructions, but I will give you my best understanding, if I may, to try to assist. My understanding is that the mechanism involves forecasting and my understanding at the moment is that because you've forecasted what you will or may need to pay in respect of any floor payments with the benefit of input from the parties, the parties who

have the C&F arrangements, the first material point is it is just not regarded as likely that you will on any view need to, whether it was using a working capital facility, adjust all the charges. Based on experience it is likely you will have the right amount of money. There is then a question what you do if you don't have the right amount of money to meet any payments that are required, but I don't have a clear picture on that for which I apologise, and I say there is a perfectly understandable reason why I don't, but my instructions and my understanding is it is just not the case, the intention, that a decision has been made that this will be run relying on the working capital facility.

**MRS JUSTICE BACON:** So if you don't have the liquid sums to make payment contrary to your forecast, then you will use working capital?

**MR BARRETT:** No. My Lady. I am not making it clear.

**MR WOLFFE:** You have to wait.

**MRS JUSTICE BACON:** Oh, you wait. Then what's the point of the working capital, because we saw documents that were saying there is this figure of 300m. They are working out if that's the right amount. There was obviously something that went into that calculation. What's the point of having it there if it is not actually doing anything?

**MR BARRETT:** The working capital facility, as I understand it, is in no sense specific to LDES C&F. It is for NESO's operations as a whole.

**MRS JUSTICE BACON:** It is operational working capital you say.

**MR BARRETT:** Query whether I am using the word operational correctly. As I understand it, it is certainly nothing specific to LDES C&F at all. It pre-dates LDES. It is for NESO's potential use for all sorts of purposes, but it is not the case that there is, as it were, £300 million in a pot for LDES.

**MR GIBSON:** If it assists, we are not suggesting that it is there for LDES. It is there for BSUoS, the document I took you to, the working group document, the only public document we were able to obtain when we were preparing Palmer 3 refers to BSUoS

fund, the 300 million as being in relation to the BSUoS. So those funds will be for BSUoS in order to cover shortfalls. Just for the avoidance of doubt the evidence I took you to, including my learned friend's evidence makes perfectly clear it is intended to cover shortfalls pending receipt of BSUoS charges.

I don't want to repeat my submissions on this.

**MR WOLFFE:** That was certainly my recollection.

**MRS JUSTICE BACON:** Is it paragraph 21?

**MR BARRETT:** Paragraph 21 deals with the working capital generally. If we begin with that, that's convenient.

**JUDGE WOLFFE:** What page are we on?

**MR BARRETT:** 454.

**MR WOLFFE:** Before we do that is the position -- is your primary position that no final decision to be made and this is all subject to change.

**MR BARRETT:** Precisely so.

**MR WOLFFE:** Or is your position that decision have been made but it may not reflect the understanding we have gained, rightly or wrongly, from the evidence we have been shown.

**MR BARRETT:** The primary position is that the decision has not been made. That's what I was trying to make clear by reference to 133(d).

**MR GIBSON:** If you do look at that, could you read the last sentence. I did take you to this.

**MRS JUSTICE BACON:** Last sentence of 21.

**MR GIBSON:** 133(d), which is what my learned friend was inviting you to look at. The last sentence is: "In either case."

**MRS JUSTICE BACON:** I am sorry. 133, page number?

**MR GIBSON:** 489.

**MRS JUSTICE BACON:** Which bundle?

**MR GIBSON:** The same bundle, madam.

**MR BARRETT:** If I could deal with my submissions, please .

**JUDGE WOLFFE:** Please make them.

**MR BARRETT:** It is page 489, please. If the Tribunal has that, it is paragraph 133(d). Please could you read the sentence beginning in the middle of the paragraph:

"Ofgem has also not yet finalised whether any LDES cap and floor amounts would be shown as a separately itemised ... tariff component or incorporated within existing balancing-cost elements. Our current working assumption, subject ...", blah, blah, blah.

I have no difficulty with reading the last sentence. I'm terribly sorry. It's the first sentence as well:

"Though a final decision has not yet been taken ..."

Pardon me. So my first and primary position, my Lord, to Mr Wolffe's question, the decision has not been taken. That's the primary point.

The second point is I don't have more detail and I am sorry for that, because I am dealing with a point that hasn't been pleaded in my respectful submission.

**MR DAVIES:** We are going back to the point Mr Wolffe started with. I think even if there is a timing difference and therefore there is some use of public funds, the working capital facility NESO is made whole by the BSUoS payments not just in the sense of even covering the cost of time.

**MR BARRETT:** Precisely so. That's a point I am about to come on to.

So my first proposition – which I say it is the correct proposition for the Tribunal to proceed on if it is dealing with this point -- is that the correct analysis is we are dealing here not with a charge against any public balance sheet. We are dealing with a notional charge, the equivalent of a notional charge against private balance sheets.

Even if I was wrong about that, I say that the further point of substance is that for the reasons my Lord, Mr Davies, has just put to me, the fundamental substance of the arrangements is that the ultimate obligation to pay any floor does not rest with NESO or Ofgem. The fundamental character of these arrangements is not that the backstop or the underwriting of any potential floor liability rests with the public sector. It is with the private sector.

**MR WOLFFE:** You say it is (inaudible) private balance sheets but we couldn't identify against whose balance sheet any amount of --

**MR BARRETT:** No, because it is too uncertain and too contingent.

**MR WOLFFE:** Yes.

**MR BARRETT:** That's not a point against me in my submission. That's a neutral point or, if anything, that is a point in my favour.

I am very anxious that this point is understood. I say as a matter of substance if one is analysing and asking the question "Is this a subsidy arrangement using public resources?" I say a critical question is or ought to be who is the backstop for this? Is it the public balance sheet or private resources. I say the substance of this is it's the private resources. That's the point of difference between this case I say and some of the cases that one sees from Luxembourg.

**MR WOLFFE:** It is sometimes helpful to test this kind of problem on the assumption that a party or parties goes insolvent. Let's say all the relevant private operators have become insolvent and were unable to meet BSUoS payments -- entirely hypothetical, but it is to test the question, NESO would still have to make the floor payment.

**MR BARRETT:** I will take instructions on that, if I may, because I think that's an important point to answer. My current understanding is it is not the intention that there are going to be provisions in floor arrangements that put the state on the hook for the money.

**MR WOLFFE:** Okay.

**MR BARRETT:** I will take instructions on that, my Lord, and I will give you the answer to that.

So I don't wish to put this too high, because it obviously is a very different case, but I do say that the submissions I have made thus far derive some support from the *Durham* case. That's at tab 37, paragraph 31. I am not going to turn it up, but that's the reference to subtraction from a public body's assets.

As I say, it is a different case. I entirely accept that. We are in the category of contingent liability, not direct subtraction, but I say the thrust of the substance of the point that the Tribunal was making in that passage is applicable and provides support for the substantive analysis I am advancing.

Third point. We respectfully submit that the claimant's submission that section 2(1) as a matter of domestic statutory interpretation indicates a wide interpretation of public resources is not correct. Beyond the reference to direct and indirect, which is quite a specific reference we say, there's no indication in the term public resources as to whether it is wide or narrow.

The basis of the claimant's submission to contend for a wide approach was to point you to the definition of financial assistance in section 2(2) and seek to derive some help from the fact that section 2(2) gives a number of different examples of financial assistance.

We say that doesn't help at all particularly by reference to this case. Look at each of those examples that's given in 2(2), reference to a guarantee, reference to services, for example, being provided free or at under value. They are all classic cases where there is a charge to the public balance sheet. There is an immediate cost to the public accounts.

Fourth point, and we say importantly, section 2(1) we submit needs to be read carefully

together with section 2(3) and we say section 2(3) is an important indication as to the proper scope of section 2(1) on its own terms. Section 2(3) provides that private resources providing financial assistance are to be treated as public resources, but only if the involvement of the public authority in the decision to give the financial assistance is such that the decision in substance is that of the public authority.

I make two points in relation to that. I say that in 2(3) Parliament has specifically legislated to address the circumstances in which private resources can and should be treated as public resources for the purposes of section 2(1)(a).

Secondly, section 2(3)'s existence I say is a powerful statutory indication that section2(1)(a) absent the existence of section 2(3) on its true construction would not be wide enough to cover the circumstances which section 2(3) provides for. Thus proper construction of section 2(1)(a) with 2(3) --

**MRS JUSTICE BACON:** Is that right, because if you look at section 2(1), that is the general principle, for example. Then we have clarification in a number of subsequent paragraphs, for example section 2(2):

"The means by which financial assistance may be given include", I mean you would not say that directly or indirectly from public resources wouldn't otherwise include these. This is just exemplars to indicate the scope of the provision, why is section 2(3) any different?

**MR BARRETT:** The principle in my respectful submission is particularly onerous (inaudible) specifically identified a particular type of case in this category and it has made provision additional to section 2(1)(a) is my submission as to the correct construction. I think I entirely follow the point you put to me. It is possible to take the view it is not, as it were, adding. It is an entirely non-exhaustive illustrative example. I think that's not the correct construction of the two provisions read together. I say that would be a very curious approach from the draftsman. The draftsman is obviously

well aware of the different sets of circumstances in which Court of Justice case law provides for private resources potentially being treated as public resources. I would say it would be an unusual and odd approach to adopt in this case.

**MR WOLFFE:** You say in effect the phrase is to be treated for the purposes of a deeming provision or deeming language which tells us that we are deeming something to fall within one that it wouldn't otherwise.

**MR BARRETT:** Yes. I think there are probably different maxims one can refer to to try to make the point. Each statutory word is supposed to have an operative part to play. You know, if it was just, as it were, non-exhaustive illustrative example, that would not be consistent with that approach to statutory construction.

**MRS JUSTICE BACON:** Even if you are right on that, we have this provision which, irrespective of whether it adds to or is simply illustrative of section 2(1). So we know this is covered by section 2(1) on whatever basis. Are you saying that that sets out a test which should be interpreted differently from the test in the Court of Justice authority?

**MR BARRETT:** Absolutely, my Lady. I absolutely submit that. I will say that is absolutely inescapable looking at the statutory language which Parliament has elected to use. The statutory language that Parliament has enacted in section 2(3) is specifically focused on cases where there is direct intervention by public authority in a specific decision-making process. That's the scheme that Parliament has chosen to adopt.

What I say, my Lady, is that language as a matter of its normal and ordinary meaning and also purpose of provision does not capture I say regulatory schemes such as this. That's not what the provision in section 2(3) is about. It is about cases, circumstances where you have specific decisions being made and you have direct involvement from the public authority based on their arranging relationships with the private entity that

influences the decision whether, to use the statutory language, to give or not give resources.

**MRS JUSTICE BACON:** What example -- can you give an example --

**MR BARRETT:** Of course. Shareholders. Perhaps they have some sort of contractual arrangement. It can be any context. You get help with this, my Lord, from the statutory guidance. It can be any context where there is some of this existing relationship, ownership status, where there is essentially leverage, if I can put it in those broad terms, in the hands of the public authority to influence what the private party would or would not do.

**MRS JUSTICE BACON:** So, for example, a private entity which is wholly-owned by a public authority, but is nevertheless not itself a public authority, say a wholly owned company.

**MR BARRETT:** That's an example for sure.

**MRS JUSTICE BACON:** In which the public authority is the controlling shareholder and it has directors.

**MR BARRETT:** It could be for sure. It could be a looser arrangement. It could be there is some sort of joint venture or partnership arrangement. There could be some other form of economic relationship.

**MRS JUSTICE BACON:** What is conceptually the difference between that where the public authority directs that a private authority shall give some transfer funds and a case where the public authority directs that funds shall be collected from private entities and then paid out to somebody?

**MR BARRETT:** So I say, my Lady, the relevant distinction, as it were, the relevant line is between what I have characterised as acts, conduct on the part of public authorities, which directly influence specific decisions and measures of legislative or regulatory intervention, which place legal obligations, regulatory regime, legal

obligations on parties to make relevant payments. I say that the terms of section 2(3) are not on their proper construction apt and wide enough to capture that latter sort of case. I say that's this sort of case.

My Lady, I say that can be tested in this way. If that were the correct construction of section 2(3) a scheme such as *PreussenElektra* would be caught by 2(3). So imagine we had the cap and floor scheme. Imagine that the funds do not pass through NESO. We simply have a much less efficient arrangement of direct transfers between private parties. If section 2(3) were to be given the interpretation that was just put to me, it would capture that sort of scheme. We say that can't be right. I say section 2(3) is concerned with a narrower category of case and that is supported by the language.

**MRS JUSTICE BACON:** So if a public authority simply directs A to give money to B, if that was sufficient then that would absolutely cap PreussenElektra, which we know from EEG is -- and PreussenElektra itself is not the case.

**MR BARRETT:** It's not a subsidy scheme. I don't think this is straightforward, but this does support in my respectful submission that the intense focus does need to be the statutory scheme in section 2(1)(a) and 2(3).

**MRS JUSTICE BACON:** This is a sort of lex specialis you say.

**MR BARRETT:** Indeed.

**MRS JUSTICE BACON:** Does that rule out the question then -- let's say that's outside section 2(1)(a). Do you think Mr Gibson then would say let's go back to section 2(1)(a) and see what's directly or indirectly from public resources. Plug into Prism Electra, EEG and all the other cases. You don't need to have to look at a special set of rules for, let's say, wholly owned companies.

**MR BARRETT:** Yes. I have no doubt my learned friend would say that. To meet that response I would say that's not the correct interpretive approach. In my respectful submission the correct approach is we are construing a domestic statute and this

requires intense focus on the natural meaning of the words and the structure of the provisions. I will come on to this obviously.

I don't, of course, go so far as to say Court of Justice case law is irrelevant, can't be looked at. It may be of assistance. It may not, but that all needs to be carefully considered following very detailed analysis of --

**MRS JUSTICE BACON:** But directly or indirectly from public resources. I mean, it's a term that's all over the EU case law. It's been pored over in numerous decisions of the European Courts. As you quite rightly identified, they have gone back and forth and there is a huge amount of case law on this. Where is there anything to indicate that all of that case law which has been -- everyone has been agonising over for decades, this is completely thrown out the window and there is no intention for any of that to be imported into our regime.

**MR BARRETT:** Can I answer that as directly as possible? I say that asking "where is the indication that it's disapplied" is not the correct question. I say the correct approach is construing this act of Parliament on domestic principles. That may lead to a conclusion that it's of assistance or likely to be of assistance. It may lead to a conclusion that it's not, but that absolutely follows from the careful consideration of the statutory scheme.

I am going to come on, my Lady -- I obviously recognise there may well be a forceful submission to be made that one can, one should to some extent be looking at the Court of Justice case law on these questions. I am going to come on to deal with that, if I am wrong, as it were, on that.

**MRS JUSTICE BACON:** Are you telling us that the approach that was adopted in previous decisions such as New Lottery on the importance of the EU case law is not -- that wasn't the fact. It was one of several decisions. Is that all wrong, because the starting point that is hitherto be unless there is something clearly indicating the

opposite, this is a regime to which one looks obviously at the European case law, unless there is different wording in the statute that indicates a different test is required.

**MR BARRETT:** Yes. If I can answer that in two stages, my Lady. The first point, for the reasons I have sought to explain, I say there is a clear indication here, it is a different test. That is what I am trying to make good. You may accept that or you may not. I say there is indication here in the scheme of the Act that it's a different approach that's been taken.

My second submission, my Lady, would be this. I would entirely accept my Lady's summary obviously of the recent cases. A rather different approach was taken in the *Durham* case. The *Durham* case in a sense took the opposite approach. It seemed to presume EU law was not of assistance unless there was a positive indication. I would characterise my position as being somewhere in the middle. That's how I would seek to put my position. I don't think there is, as it were, any presumption. I think it is intensely dependent on the particular statutory provision. I don't think that is different to what was said in the TNLC case. As I am understand the *dicta* in that case. That is a point made there. It depends very much on the particular statutory provision. So I don't seek to dispute that.

**MRS JUSTICE BACON:** Yes. Where the words are the same, then reference to EU law unless there is some indication that language is not intended to mean that. In this case we have directly or indirectly from public resources, which is this sort of idea of don't directly or indirectly from public resources, as I have said, is all over EU case law.

**MR BARRETT:** I don't dispute that proposition and speaking for myself in the case we are dealing with here I don't see directly or indirectly as being probably key words. In my submission it is probably what are public resource or not. That may not matter. I think my core answer is I do say, looking at section 2(1) and (3) I do say there is

an indication that it is not just a read across of the Court of Justice case law.

**MR WOLFFE:** Just so I understand the point, that's because if we were simply applying Court of Justice case law on directly to indirectly to public resources, 2(3) wouldn't be necessary.

**MR BARRETT:** Yes. Absolutely.

**MR WOLFFE:** 2(3) on one day, if you read it -- you could read that language in a more limited way on the case law we have been shown.

**MR BARRETT:** I accept that. I can't say it's not a problem, but that's my submission. That is my submission about that.

So we say for those reasons -- and this is my primary submission -- we say when the Tribunal is coming to analyse this case a very important consideration is whether the particular structure in this case is captured by section 2(3). We say it is not.

Now I am going to move on, if I may, to try to deal with what would follow from the points that have been put to me if one is in the territory of the Court of Justice case law. What do we submit in relation to that?

So the principle that we contend for, my Lady, my Lords, is that which is stated at paragraphs 60 and 84 of *Commission v Germany*. So I am not going to turn that up. It is tab 59. You have seen what we say in our submissions. But 60 and 84 state, we say the long-established and well-established principle of EU State aid law, that from state resources requires that the measure must result in a reduction of the state budget or a sufficiently concrete economic risk of burdens on the budget.

This is really the point of substance I am seeking to explore. We say the characterisation of this scheme, on the correct understanding of it, the scheme is not resulting in such a reduction or a sufficiently concrete economic risk of burdens. We say, properly analysed, burdens are allocated to the private sector rather than the public sector.

Second submission. We say that if the court is minded to adopt or adopt in some form the Court of Justice test of 'resources under constant control,' which is an entirely different test to section 2(3), it is not about decision again, it is about control after the resources have left the hands of the appointed party. We respectfully submit the Tribunal should adopt the iteration of that test which was adopted by the Court of Justice in *Commission v Germany*. That's tab 59, paragraphs 73 and 75 to 76.

That is: there will only be constant control if there is a power of disposal. So, as my learned friend submits in his skeleton, there's no question that any money from BSUoS's charges in this case flows into NESO. There is no question of NESO being able to use that for wider purposes, other purposes. Money is there under the statutory scheme for this purpose.

That would satisfy the iteration of the constant control test in some of the authorities my learned friend has shown you, but the version of the test which is adopted, we say correctly, in *Commission v Germany* requires that there be freedom on the part of the public authority to dispose of the private funds as it considers fit.

**MR DAVIES:** But doesn't GEMA decide what the BSUoS charges shall be and where they will go? NESO doesn't on a day-to-day basis.

**MR BARRETT:** Absolutely. As a general proposition Ofgem is responsible for determining charges policy and that's fed through NESO. The point I am making is a point that's common ground between the parties. Let me just give you the reference in my learned friend's skeleton argument. It is my learned friend's skeleton argument, paragraph 50(5). So insofar as additional charges are levied under BSUoS to meet a requirement for a floor payment, under the relevant legislative scheme it will not be open we respectfully submit for either Ofgem or NESO to, as it were, use those monies for other purposes or as they see fit. The additional charges will have been added to BSUoS bills for the specific purpose of meeting floor requirements and they cannot be

used for wider purposes.

Perhaps just to give you the context of this point, the position regarding what is actually required to establish control is a rather, we say, odd and unsatisfactory point in the Court of Justice case law. The cases that my learned friend was showing you are cases that say in order to satisfy the control requirement it must be the case that the public authority doesn't have the ability to do as it wishes with the money. That is what the cases my learned friend showed you say.

*Commissioner v Germany* in my respectful submission says the opposite in those passages I have given you references to. It says to really have control over something you have to be able to do with it what you will. If, in fact, this is all occurring subject to a highly prescriptive statutory scheme where you don't have that freedom of disposal, it is not in truth within your control, and I say what *Commission v Germany* does in its substance is give a principled basis for dealing with pass-through cases and gives a principled basis for drawing the line between circumstances where a pass-through arrangement should or shouldn't lead to the conclusion that money that fundamentally is private money gets treated as public money for the purposes of subsidy control.

I say, my Lady, my Lords, that it is a useful test to compare our case with *PreussenElektra* and compare the current scheme with an obvious hypothetical alternative scheme in this case. It would be possible for any monies in this case being levied under BSUoS not to pass through NESO and instead for a regulatory arrangement to provide for some form of direct transfer.

**MRS JUSTICE BACON:** That's not the way it has been set up.

**MR BARRETT:** It is not. The only point I am making is what is the principled basis in circumstances where either Ofgem or NESO actually have the power of disposal over the money, in circumstances where they are not underwriting the money. What is the principal basis for saying that nonetheless the money gets treated as becoming public

resources, whereas it wouldn't if there was a direct transfer.

I say there is not a principled answer to that in the Court of Justice case law that my learned friend relies on. I say in one when one considers *Commission v Germany* carefully what the Court of Justice was doing in that case was actually seriously thinking about what the basis of the analysis is and giving some good answers. If there was a power of disposal, that would be an indication that this is in substance controlled by the public authority, and should be treated as a public resource. If the authorities actually backstop the money, again that's an indication that this should be treated in substance as a public resource.

So we say, my Lady, that that approach one sees in *Commission v Germany* we say is a principled and compelling approach to dealing with pass-through cases. We say that in interpreting section 2(1)(a) and 2(3) one should assume Parliament would be adopting a rational scheme, a principled scheme. We say that is served by the legal principles in *Commission v Germany* and we say it wouldn't be served by the approach in some of the other cases.

Very shortly then, my Lord, can I give you my bullets, comments, my response to my learned friend's authorities? So the DOBELES case, that is a case that we saw, reference tab 65, paragraphs 40 to 41 for the relevant measure involved a parafiscal charge with the charge being compulsorily passed on to consumers. There was also analysis of the control test again and my learned friend is entitled to rely on those passages. I say that is a case where on assessment both criteria were met. If the court's view is that it is inconsistent with *Commission v Germany*, I invite you to prefer *Commission v Germany* for the reasons I sought to explain.

My learned friend's reliance on the *Covestro* case, he relied on that for the proposition that it is sufficient to establish a para-fiscal charge under EU state aid law even if the charge is not as a matter of obligation passed on to consumers. That is simply

an incorrect proposition. We say it is well-established in the Court of Justice case law that there is indeed a requirement that there must be an obligation for the charge to be passed on to end users.

The references for that are *Commission v Germany* which I have given you already. The *Achema* case, D, 60, at paragraphs 57, 64 and 68. My learned friend's *FGV* case. That is D, 61, paragraphs 90 to 95 and indeed the DOBELES case, tab 65, paragraphs 37 to 40.

What happens or appears to happen in the *Covestro* case is that at the General Court level there appears to be a finding of fact about the particular arrangements there. As I understand the relevant passage, the position is that some end users, some "consumers" pay the charge, others don't. There appears to be a finding of fact in the particular circumstances of that case that the supplier should be treated as the relevant point of reference. Contrary to what my learned friend submitted, that's not approved by the Court of Justice. The reference is D, 67, paragraph 176.

The Court of Justice said "There appears to be a finding of fact here. We don't think there is a ground of appeal because it is a finding of fact. It did not involve a legal proposition or test".

We say the legal proposition or test is the one I have articulated and we rely on those four authorities I have mentioned for that purpose.

Can I then deal with each of my learned friend's three ways of putting his case very shortly.

So his first submission, you should find that resources are being provided from public resources because, as he puts it, money from the working capital facility will be used to make cap and floor payments.

My answer to that is it is not pleaded. Therefore, it is not addressed in evidence from my clients. That's fundamental prejudice and a reason not to deal with as it would be

unfair I submit to do so.

A further answer is that, as I have explained and shown you the evidence, the arrangements in respect of the timing and the choreography of any payments is a matter subject to consideration not yet decided.

**MR WOLFFE:** That's something that's dealt with in the licence conditions.

**MR BARRETT:** I think the licence conditions may be part of it but I don't think it is necessarily all of it.

The second submission I have dealt with. It is the submission that you should find that there is funding from public resources because there is a charge that will be compulsorily applied to suppliers, not consumers.

Not pleaded. Therefore not addressed in evidence. No factual evidence from my clients as to what the correct characterisation of 'end user' is for the purposes of this analysis. I would ask the Tribunal to look at the letter we provided the day before the hearing started, which sets out the references in the claimant's own evidence where it was positively arguing and contending that the end user in this case was consumers.

The reason for that is that until the claimant served its skeleton argument its case, vigorously advanced, including in its reply witness statements, was that the end users were consumers, and notwithstanding there wasn't a legal obligation, a compulsory obligation for the consumers to pay charges, the Tribunal should find as a matter of fact in practice this happens and is practically inevitable and that would be good enough.

That was the case that was vigorously advanced in the reply evidence. I think my learned friend said to you in his oral submissions that he thought perhaps we had not noticed the *Covestro* case. We rather think it is the opposite. We think in the course of writing the skeleton argument the *Covestro* case has been noted and there's been a desire to introduce the argument. We have not had notice of that. We couldn't have

notice of that. Therefore we say it shouldn't be permitted to proceed. We say if it is permitted to proceed it is wrong in law and fact, see the cases I have referred you to and also seen my friend's own evidence.

The third ground is constant supervision and control. I have given you the substance of my submissions about this. We say, firstly the test here is section 2(3). That's a different test. It is not constant supervision and control. We say the test in 2(3) is not satisfied, because this is a regulatory scheme case. If I am wrong about that and I need to deal with the Court of Justice case law, we respectfully submit that this court should consider the Court of Justice authorities critically and we respectfully commend to the court the analysis in the *Commission v Germany* case. We say that's the principled compelling analysis and we would invite the court to adopt that legal test, which we say is not satisfied on the facts of this case for the reasons I sought to explain.

Could I just take some instructions to make sure I have covered the points I need to? Nothing further from me. Thank you very much. Mr Paines will address you.

**MRS JUSTICE BACON:** Shall we take five minutes before Mr Paines starts?

**MR PAINES:** Yes. Why not?

**MRS JUSTICE BACON:** Thank you very much.

**(Short break)**

**Submissions by MR PAINES**

**MR PAINES:** I am afraid the problem with having to do this is you get two sets of housekeeping. There is a small piece of paper on your desk, which is an extract from Lewis. I will not take you to it immediately but I thought it was best to hand it up in the break. My learned friend has a copy.

My second question is do you have the transcript from yesterday, because there are

some points where I can make reference to that?

**MRS JUSTICE BACON:** Yes.

**MR PAINES:** I am grateful. I have structured my submissions under three headings: firstly, very briefly deal with the last point in my learned friend's claim, the pre-action information request point and clear that out of the way; then deal with vires; and then spend the bulk of my time on relief.

On the PAIR point the essence of the claimant's claim is that a substantive appeal relating to an alleged failure properly to answer pre-action correspondence. I won't take to you it, but both in the notice of appeal, paragraphs 165, 166(b), tab 1, page 38, and in his skeleton the claimant argues that because Ofgem didn't expressly state in its pre-action information response that the response was under section 76 of the Act and instead denied that that section applied, Ofgem breached rule 98A of the CAT rules. You spent quite a lot of time on that yesterday, so I will not show you the rule.

Very briefly if I could show you the correspondence on this, which is in bundle C, and the relevant first letter is at page 10. This is 7th October 2025, Norton Rose. The substance isn't important. You obviously see it is PAIR under section 76.

There's then an initial response on page 15:

"I acknowledge receipt of this request and note that we have 28 calendar days to respond in full."

That's the statutory timescale under the Act. One can see that on page 17. Norton Rose make that point in their response. In essence they ask for a quicker answer than the Act required.

Page 19, that was answered essentially saying:

"We will look to answer more quickly if we can, but in any event we will provide a substantive response within the statutory deadline."

So on any view it being made fairly clear by Ofgem that this is a response under the

statutory provision.

You then get the substantive response at page 31. You see it is a reply re pre-action information request under section 76. First section:

"Further to your request, Ofgem does not accept that it has given a subsidy or made a subsidy scheme. It follows that section 76 of the Act is not applicable. In any event I can respond to each request as follows."

Then a substantive response is given. At the bottom, just for completeness, you will see even at that very early stage the point being made that this would all be arid once the statutory duty was in force.

That's really the sum total of the relevant factual material for these grounds. My short submission on that is on any view it is very clear that Ofgem's response is a response under section 76 in response to the request under section 76. There couldn't be any reasonable doubt about that. So on the facts this is not a sensible point, but even leaving that to one side, there are at least three reasons why this couldn't be a proper ground of appeal.

Firstly, what's being alleged is breach of a procedural rule, rule 98A, not -- this is my second point -- any sort of conduct which involves the making of a subsidy decision and the CAT's substantive jurisdiction is given by section 70 of the Act and relates to the making of subsidy decisions. So you can't appeal against something if it's not a subsidy decision, and us responding to a pre-action letter even under a provision in the CAT rules is not us making a subsidy decision. It's simply not the sort of thing that can be the subject of a substantive appeal to this Tribunal.

Thirdly, the point which really flows from that, what remedy could the Tribunal possibly give on this appeal even if you thought that we hadn't answered this pre-action letter in quite the right way? None of the relief that is sought would be remotely appropriate, because this is pre-action correspondence concerned with time limits. One can see

how in a situation in which the response was genuinely unclear it might be relevant -- that fact might be relevant in a dispute over whether time had expired for a challenge -- but ground 6 of the claimant's claim simply makes no sense as a matter of analysis.

For your note my learned friend's submissions on this yesterday are in the transcript at page 137. Essentially two things were said there: firstly, that there was a cause of action under section 71. Section 71 is the provision that incorporates rule 98A into the CAT rules. It very clearly doesn't create any sort of right of challenge independently.

**MR GIBSON:** Maybe I was speaking too quickly. I meant 70(1).

**MR PAINES:** Sorry. Section 70(1) is the point about making a subsidy decision. This doesn't involve making a subsidy decision.

The second point that was taken, he says:

"Once you have established a cause of action" -- that's not the right term -- a challenge -- "then it's 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."

Those are judicial review grounds, but those are grounds that apply before a decision is taken whereas this is a challenge of something that on his own case happened afterwards. So none of that helps. So that's the PAIR point.

Moving on to vires, firstly, I am going to address how this fits into the issues. Mr Barrett has already addressed you on that, so I will be brief.

Secondly, the abuse point, whether the CAT should be determining this and relatedly the delay issue in the context of the judicial review, and then, finally, the substance, because we do say, and the fact that we have three different prior objections shouldn't take away from the fact that we do say, it is clear that there is vires in this case and that hasn't been seriously disputed in oral submissions.

If I could ask you to take up bundle B, page 36, which is the part of the consolidated notice of appeal you saw in Mr Barrett's submissions, this is the ground of lack of vires as it stands today, paragraphs 153 to 155A. You will see the final sentence of 153 the pleaded position, as opposed to the position advanced to you in submissions, is that Ofgem had not been empowered prior to section 10P even to design an LDES scheme -- design, establish and operate.

That is the pleaded case. You also see, and it is in implicit in that sentence, the past tense. From 155A you see that it is common ground that section 10P did give Ofgem vires -- my learned friend says that's a power, not a duty -- but it gave vires to design, establish and operate an LDES scheme. Implicitly in section 155A the February decision, to give it a neutral title, was a decision taken under section 10P.

Given that, if, as we submit, the effect of the February decision on the facts was to adopt and to supersede the September decision, all the vires arguments are academic in essence. This is an exercise in archeology. On any view there is vires it is common ground to take the February decision to adopt that prior work and to move forward.

The second point on vires is the abuse of process issue. We say the vires challenge is not one that can properly be brought before this Tribunal. The claimant issued, as you know, these proceedings and the judicial review on the same day.

If I could ask you to take up bundle F and page 26 in bundle F. You see ground (1). There is a summary of the grounds in 97 and the detail is the same as in the CAT notice of appeal. You see ground (1) in the JR is GEMA exceeded the scope of its powers.

The reason to go to this is just for sake of an illustration that I will come to. If I could ask you to go on to page 37, you will see a heading D.4 in the middle of the page, "GEMA failed to undertake a proper impact assessment ..."

This relates to an allegation brought in the judicial review, not in these proceedings,

under section 5(a) of the Utilities Act. I just want to use that as an example that I will come to. There is an allegation in the judicial review that under section 5(a) of the Utilities Act Ofgem has a duty to carry out an impact assessment in respect of any important proposal, and in essence what's said in the JR is the September publications were an important proposal and Ofgem did not carry out an impact assessment. Therefore, its decision should be quashed.

That is not run in the CAT. We say it follows from that that the claimant must recognise that if allegations are being brought in relation to the September publications, which aren't allegations of failure to comply with the Subsidy Control Act, they need to be brought by way of JR, not by way of appeal to this Tribunal. That is also our position.

**MR WOLFFE:** Can I test that, Mr Paines?

**MR PAINES:** Yes.

**MR WOLFFE:** Could we have section 70 of the Subsidy Control Act in front of us?

**MR PAINES:** It is page 150 in bundle D.

**MR WOLFFE:** Thank you very much. What we are told in subsection (1) is:

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

A little further down we are told at (5):

"In determining the application the Tribunal must apply the same principles as would be applied --

... in determining proceedings in judicial review."

Then we see in 71 remedial provisions brought in.

Assuming it's a subsidy decision, we don't find any limitation or qualification on the grounds of review in section 70, and the question in my mind is whether what's intended by Parliament here is that if it's a subsidy decision, in effect your route for a judicial review is the statutory route to this Tribunal, and this Tribunal can consider

any relevant ground of judicial review, including ultra vires, procedural impropriety as well as breach of the subsidy control principles, otherwise one is going to get into a situation where there are parallel proceedings attacking the same decision, assuming it is a subsidy decision, a decision having to be made about which grounds are dealt with here and which in the Administrative Court.

Now, of course, your primary position is this was not a subsidy decision and if it wasn't a subsidy decision, then other issues may arise and those could not come through the CAT and we wouldn't have jurisdiction.

I would be interested in -- having put in a sense that proposition to you, I would be very interested if you can help me understand why that is wrong and why there are grounds that -- traditional judicial review grounds which are excluded from our consideration and which would have to be raised in parallel proceedings in another place.

**MR PAINES:** Absolutely, sir. The real question in my submission, and it is a question that was implicit in what you are putting to me, is what the words "aggrieved by the making of a subsidy decision" in (1) means. We know what a subsidy decision is. We are told that in (7):

"... a decision to give a subsidy or make a subsidy scheme."

The real question is when you are aggrieved by the making of a subsidy decision, does that mean that you are aggrieved by the making of a decision which falls into the legal category subsidy decision and that any grievance you have relating to the fact of that decision has to come to this Tribunal, or does it mean that right of appeal is against the decision in its character as a subsidy decision?

The example that you put to me, sir, is a situation in which someone has a problem with the characterisation of the decision as a subsidy decision, but also wants to raise some freestanding judicial review grounds as well, but, in fact, the logical consequence of that construction is not limited to that situation, because you might well have a case

in which there was no -- it was a subsidy decision that fell into the legal definition, but there was absolutely no issue from the claimant's perspective with its character as a subsidy decision.

Take a simple example in this case. Take a situation in which Ofgem had acceded to the claimant's requests that it complied with the subsidy control principles and it had gone through the exercise. It had sent it off to the Subsidy Advice Unit and this was the scheme that it made thereafter, but Ofgem had not done an impact assessment. The claimant said, "Well, we say it's a subsidy decision. You have complied with the subsidy control principles, fine, but you have not done an impact assessment for the purposes of your section 5A DT", so the only ground the claimant wants to run is ground 4 of the JR. Does the claimant have to come to this Tribunal to run that ground?

Or, to take an example different from the facts of this case, let's say there was a subsidy being awarded in the area of social housing in London and Southall Black Sisters, or The Public Law Project or someone else was aggrieved that no public sector equality DT impact assessment under section 149 of the Equality Act had been conducted.

Now is a JR purely on the basis of section 149 of the Equality Act going to be brought in this Tribunal because the decision happens to fall into the definition of subsidy decision? In my submission that can't be what Parliament intended when it enacted section 70.

The obvious -- I don't say the obvious, because I fully accept that the construction you're putting to me is, as it were, linguistically possible, but the purposive construction I say of "aggrieved by the making of a subsidy decision" is aggrieved by the decision in relation to its character as a subsidy decision.

That's reinforced in my submission by reading the Act as a whole, because if one looks

at section 1 of the Act, and that's D, page 103, one gets the structure of the Act in section 1. Sorry. The section begins on page 102, "Overview and application of the Act". You get the structure. Then (5):

"Part 5 contains provisions relating to the enforcement of the subsidy control requirements."

So what section 70 is doing is providing a provision that relates to the subsidy control requirements.

So this is why I say section 70 doesn't give up a right of appeal to this Tribunal on a ground that does not relate to the enforcement of the requirements of the SCA.

The question that is also raised by the point you are putting to me, sir, is what is section 70(5) doing then? The short answer to that is that is about the principles which the Tribunal is applying to determine the appeal. So most obviously the Tribunal is not going to be substituting judgment on the public authority's assessment of whether or not the subsidy control principles are satisfied. That's a matter for rationality review, for example. Those sorts of questions are entirely within the Tribunal's jurisdiction. What's not in my submission within the Tribunal's jurisdiction is an appeal that does not relate to the character of the decision as a subsidy decision under the Act.

That's not only a construction I say that's the correct construction. It is not only a construction that is implicit in the claimant's own conduct in everything other than this ground, but we are in a situation where a JR has been brought as well. The claimant may be right.

**MR WOLFFE:** You know, the real question it strikes me is whether what Parliament has intended is if what you have is a subsidy decision, then in effect you have been given a statutory alternative to judicial review in the Admin Court or Court of Session by coming to this Tribunal to deal with any grievance the person aggrieved may have that's properly raised by a judicial review, and in effect in the Admin Court, you know,

there would be an answer to a judicial review if you took the view it was a subsidy decision, that actually (inaudible).

You might have a claimant who has a real dispute as to whether what's been done is a subsidy decision, who might consider they needed to raise parallel proceedings, but it wouldn't take away from the force of that analysis as such.

**MR PAINES:** One consequence of the construction you are putting to me is if that construction is the correct one, there is an adequate alternative remedy bar to all the claimant's judicial review challenges.

**MR WOLFFE:** Yes, if it is a subsidy decision.

**MR PAINES:** Yes, precisely, but the consequence of that construction, as I said, is that this Tribunal has been empowered to hear appeals which are nothing to do the requirements of the Subsidy Control Act simply because the underlying decision falls into the legislative concept of subsidy decision. That's inevitable on the construction.

**MR WOLFFE:** Absolutely.

**MR PAINES:** That's the primary submission on abuse, that section 70 does not render this an acceptable route for this challenge, but even if section 70 does allow a vires challenge to be brought in this Tribunal, there is a second limb, as it were, of the abuse of process argument.

This is the point in the skeleton from Trim. Perhaps I will not take you to it, given the time, but in essence a challenge brought otherwise by way of judicial review is an abuse if it seeks to circumvent the protections of part 54. Those are, of course, classically both delay and the permission stage.

On delay if I can just give you the references, in the judicial review delay is at the forefront of our case, including on vires and that is for obvious reasons it's been apparent to everyone involved in this process for a very long time that Ofgem was proceeding under its existing powers while section 10P went through Parliament. That

won't have been any surprise to anyone, because precisely the same vires was used for interconnectors.

It is paragraph 10 of the judicial review detailed grounds. For your note that's bundle F, tab 2, page 44. Mr Justice Choudhury, in directing a rolled-up hearing, (inaudible). That's bundle F, tab 4, page 89. In essence what is we say is happening on the vires ground, the reason why my learned friend has not withdrawn it, is that it's being brought in these proceedings in the hope that it can be pursued notwithstanding the delay objection in the judicial review. So that is the second respect. Even if this was an acceptable route to run the point, it's a circumvention of the protections of part 54 and therefore an abuse of process.

Dealing then with the substance -- and I will deal with this briefly, because my learned friend made limited submissions on this yesterday -- the legal provisions on vires are in my skeleton, paragraphs 110 to 111 for your note. If I can summarise their effect, under the Electricity Act 1989 Ofgem has a power to modify licence conditions. Electricity storage licences are a species of generation licence. It is empowered to make modifications having regard to its general duties under section 3(a), section 7 and 11(a) together. Under the Utilities Act -- and again the provision is that paragraph -- Ofgem has power to do anything calculated to facilitate, conducive to or incidental to its power to modify generation licences.

In essence what we say is that the series of work that has taken place in relation to LDES C&F are a series of steps that are calculated to facilitate, conducive to or incidental to the ultimate modification of generation licences to include the cap and floor essentially.

The claimant does not maintain the full ambit of what was said in the latest appeal I showed to you. The claimant now accepts that Ofgem had power to do development work -- that's paragraph 107 of the claimant's skeleton -- but argues in essence that

there's a distinction between vires to publish documents or do development work and power to make a scheme or make a decision.

What seems to lie behind that is some sort of idea that one needs special vires to create a subsidy scheme as opposed to do anything else that a public body may do. We submit that's simply wrong. There is no authority for that whatsoever. This Tribunal will know very well that subsidies are awarded under general powers of authorities all the time. So if one gets to the substance for all the reasons I have given very clearly there is vires on the substance and no serious argument has been made to the contrary.

Going on then to relief, I will focus for the purposes of relief on the Subsidy Control Act challenges. You have my point on vires as it relates to -- sorry -- on relief as it relates to vires and on the PAIR ground.

We make three submissions on relief. Firstly -- and you have heard from Mr Barrett on this, so I won't repeat it -- that relief should be refused, because the arguments put forward are academic in the light of section 10P. Obviously our primary position on academic for the reasons set out in Zoolife are that the court doesn't even need to entertain the argument once it's found that the claim is academic. As you said, my Lady, at the start of these proceedings, the Tribunal is not in the business of giving advisory opinions and that's essentially where we are, but even if you did want to entertain the point, for the reasons that are in paragraph 35 of Shrewsbury, and again you have seen that, we would invite you to refuse relief. Any sort of relief that didn't have practical consequences would simply create uncertainty in these proceedings. So that's the first point.

The second point is my learned friend's prohibition argument, so section 31 of the Subsidy Control Act. You will be familiar with the scheme of the Act and it is set out in section 1, which we just went to. There is an entire chapter of part 2 entitled

"Prohibitions and other requirements". It seemed to be suggested yesterday that section 1 was somehow special and that this should be taken as a marker that there was an absolute need for relief in relation to section 31. That's simply not right. I won't take you through all the provisions, given the time, but the chapter begins at page 111 in bundle D and it goes through for the next ten pages with multiple sections ending at section 31.

If I could ask you to pull up section 31, which is bundle D, page 121:

"A subsidy, or subsidy scheme, in respect of which a public authority must request a report from the CMA under section 52 ..."

The cross-reference for your note is page 136. In essence those are either subsidies of particular interest, or schemes of particular interest, or where the Secretary of State has given a specific direction, which the Secretary of State has power to do:

".... is prohibited if:

(a) a mandatory referral request has not been submitted [to the CMA]."

So if no request has been sent:

"(b) [It] has been submitted, but the CMA has given a notice ... that the request does not comply with the [statutory] requirements of [what it has to say].

(c) ... the ... report has not been published but the reporting period has not expired."

Basically the CMA gets a certain period of time to do its work:

"(d) [the] request has been submitted, the ... report has been published but the cooling off period has not expired."

That is a five-day period after the report in which basically the public authority has to think about whether it wants to go ahead before it awards the subsidy.

I will not take you through all those provisions, but if I could ask you to look at page 136 in this same bundle, which is section 52:

"A public authority must request a report from the CMA --

(a) before giving a subsidy, or making a subsidy scheme ... or

(b) where directed to do so by the Secretary of State ..."

What one has, if one reads 52 and 31 together, is a positive obligation -- do X; send a report -- and then a negative obligation -- then do Y while X is going on in essence if you read section 52 through to 55. All of these are primary obligations. You have a mandatory obligation and a negative obligation that relates to that.

Neither of these in my submission is saying anything about the remedies that are available if you breach either the positive obligation in 52 or the negative obligation in 31. That has been dealt with in section 72, which is page 152. You have seen that. I won't go through the detail, but it's very clear that relief is discretionary. That is made clear by the fact that it is judicial review, by subsection (2) in section 72, by subsection (5), by subsection (8) and, as you said yesterday, sir, by subsection (9) and the highly likely to make no difference.

There is absolutely nothing in this section to suggest that where there's a breach of chapter 2 of part 2, ie one of the prohibitions, that somehow those discretions as to relief are excluded.

The only point I think I need to address from yesterday is the prohibitory order reference. My learned friend rather leapt on the words in 72(2)(b). This is page 129 of the transcript. If I could just read it out:

"There is nothing necessarily contradictory in the fact that Parliament generally prescribed the judicial review orders, but among those judicial review orders, which you will remember includes a prohibiting order, they specified that this consequence should follow in that particular eventuality."

So we say the harmonious interpretation is actually the correct one. Parliament said, "These are your suite of options generally. In this case make sure you do the prohibiting option", ie the prohibiting order.

There are two problems with this. Firstly, it is expressly not sought in his notice of appeal. For your note that's page 39.

But, secondly, and this is the piece of Lewis that I've handed up, presumably the reason it is not sought is it would be totally inappropriate. If I could ask you to read paragraph 1 of chapter 6 in the Lewis extract, second sentence:

"Each of the remedies has its own sphere of operation. Quashing orders are issued to quash unlawful decisions. Prohibiting orders are ordered to restrain a public authority from acting unlawfully."

There is then six -- that's the start of the chapter. Paragraph 37 you have the same point as the first sentence:

"A prohibiting order is used to restrain a public body from acting unlawfully."

Then 38:

"A quashing order issues to quash a decision that's already been reached and is unlawful. A prohibiting order may operate at an earlier stage to prevent the body acting unlawfully and reaching flawed decisions."

So the distinction is very clearly. A quashing order issues where you want to quash the effect of something that's already happened. A prohibiting order issues when you went to stop someone doing something that's going to be unlawful if they do it. Simply not on any view a remedy that he needs here.

If I go on then to the third part of relief, which is even if the claim isn't academic, relief should be refused in the exercise of the court's discretion. I will deal with this in three parts: firstly, the legal principles; secondly, the factual position; and then, if I have time and very briefly, I will deal with the claimants' submissions.

As to the legal position, as we have seen, relief is discretionary. One case I would ask you so look at on this is the Argyll case. In summary -- sorry. I have a wrong reference. In brief summary of the facts of Argyll, you had two companies, Argyll and

Guinness, who were both bidding to take over Distillers. The bid was referred to the Monopolies & Mergers Commission. Guinness met the chairman of the Commission and made some proposals to the effect they might not take over all of Distillers and the chairman recommended that the reference to the Commission should be set to one side, because it was no longer going to be of effect.

Argyll brought a challenge to that, saying that the chairman should not have taken that decision on his own and the Court of Appeal upheld that conclusion, but they refused relief. This is really the classic case on at least some of the circumstances in which the court would do so.

Beginning at letter D, the court must:

"... approach [its] duties with a proper awareness of the needs of public administration."

"I am going to draw attention", the Master of the Rolls says, "to a few points which are relevant here".

"E. Good public administration is concerned with substance rather than form."

He says the same decision could have been reached lawfully in any event.

That obviously has particular relevance here in relation to the September publications versus February decision point.

Second:

"F. Good public administration is concerned with speed of decision, particularly in the financial field."

It will be apparent here -- I will take you to the documents in a moment -- that there is very substantial need for speed, both given the requirements for Clean Power 2030 and also given the effect on applicants.

Third point:

"Good proper administration requires a proper consideration of the public interest. In

this context the Secretary of State is the guardian of the public interest. He consented to the reference being set aside."

I will go on to the public interest considerations, but simply so I don't have to make the point in detail, it will be very obvious to you in my submission that the Secretary of State has been involved fully in this process all the way through, has seen everything the claimant has been saying in these proceedings and in the judicial review. Indeed, the Secretary of State is an interested party in the judicial review and, as you will know, sir, sought to become one in these proceedings. The Secretary of State has made very clear in public statements that he continues to support LDES C&F, and indeed he is asking Ofgem to go further and faster. So, insofar as the Executive is the guardian of the public interest, the Secretary of State has made very clear the priorities as the Government sees them.

"H. Good public administration requires a proper consideration of the legitimate interests of individual citizens, however rich and powerful they may be and whether they are natural or juridical persons."

We say the primary point of this is the effect that refusal of relief would be on the applicants that have spent literally tens of millions of pounds on applications in good faith, but the other point I take from this paragraph is what counts as a legitimate interest. You will see in the middle of the paragraph:

"Argyll has a strong and legitimate interest in putting Guinness in baulk, but this is not the purpose of the administrative process ..."

We say here, and obviously the claimant vigorously disputes this, that the claimant's real purpose is to seek to bring down LDES. You heard my learned friend say earlier that the claimant supports LDES, but, in fact -- and the reference is paragraph 46 of Mr Hutcheson's statement -- at the outset of this process the claimant had made very clear in the consultation response that it didn't think LDES C&F was the right way

forward, preferring capacity market reforms. As you have seen, and it is just as true in the judicial review, every point has been taken that might have been taken for the claimant or not. That is obviously -- the Master of the Rolls makes the point it is legitimate from the claimant's perspective, but it doesn't fall into account in the public interest balance.

Then:

"Lastly, good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary."

There five days, just over the page, was seen as being too much of a delay, because deals will have been done in the financial markets on the basis of the five days.

That's the only authority I propose to take you to, given the time. You will have seen there is the O'Malley case in our skeleton, which is the other really classic case on refusal of relief, and Imam from 2023 specifically cites and approves both Argyll and O'Malley. That's Lord Sales in the Supreme Court, paragraph 64, page 1250 of the D bundle.

So that's the law. On the facts you will have seen from Mr -- in the course of Mr Barrett's submissions, and he has given you the references, that from -- well, from 2021, but in particular from October 2024 there's been a consistent focus on the imperative to get on with LDES C&F.

If I could give you a couple of references: firstly, the E bundle, tab 1, page 403, which is the end of the government response to the consultation in October 2024. Basically there is a firm commitment from the government to the rapid and efficient preparation of LDES.

There was a statement to Parliament on the same day -- that's E, tab 3, page 3829 -- which made clear that it was critical to hit LDES C&F operational by 2030 for the purposes of the clean power goals.

Then if I can show you one document on this, which is the Clean Power 2030 goals themselves. Those are in the E bundle, tab 1 and begin at page 406. The relevant passage is 411 to 412. You will see a large picture of Ed Milliband hopefully. The language here is somewhat political but the points are in my submission significant ones:

"Since Russia's invasion of Ukraine, Britain has experienced a devastating cost of living crisis caused by our exposure to volatile fossil fuel markets."

Bottom of that column:

"But there is a solution: by sprinting to clean, homegrown energy, we can take back control from the dictators and the petrostates. That is why the Prime Minister has put delivering clean power by 2030 at the heart of one of his five missions and Plan for Change."

Bottom of the next column:

"This plan", ie this document, "sets out how the government will work with the clean power sector ... to achieve [the] goal. 2030 is just six years away and we are under no illusions about the scale of the task ahead, but mission-driven government is about ...", so on and so forth.

"... in my first week ... I [have done various things]."

Next paragraph, top of the next column:

"Ultimately we need to move fast and build things", presumably a joke, "to deliver the once-in-a-generation upgrade of our energy infrastructure Britain needs. In the first five months we have [done X, Y, Z]. This is the speed at which we will continue to work."

Then:

"The clean power sprint is the national security, economic security and climate justice fight of our time ..."

So, as Mr Barrett said, this is not simply about the desirability of preventing climate change. This is also a matter of national security and economic security.

Obviously Mr Milliband can't foresee the future, but the events of the last few months rather underline the sense in all that.

The detailed part of this document as it relates to LDES is page 520 in this bundle. If I could just ask you to read the right-hand column and then the first two-thirds of the left-hand column on the next page. (Pause).

**MRS JUSTICE BACON:** Yes.

**MR PAINES:** Those are the public interest considerations as they stand at October 2024. There is a need effectively for up to 3 gigawatts of additional LDES online by 2030. You then get the NESO 2.7 to 7.7 range. I will not take you to it, but the technical decision document, E, tab 1, page 637, shows you that that's because potentially more is needed by 2035. That's March 2025. Then obviously, as Mr Barrett has said, the world has kept turning in the years since and no final decision has been taken on capacity,.

But, in summary, in my submission it is very clear both that the procurement of LDES C&F is a matter of clear and pressing national interest and that there is a need for substantial additional capacity.

Those points are restated in the open letter at the time of the enactment of the Planning Industry Act 2025 in December, and for your note that's E, tab 3, 3833 where the Secretary of State is re-stating after the challenge has been brought.

**MRS JUSTICE BACON:** How much longer do you need, Mr Paines?

**MR PAINES:** I will be very quick, perhaps five to ten minutes.

**MRS JUSTICE BACON:** I think you really need to finish within the next five minutes so there is time for Mr Gibson to do his reply.

**MR PAINES:** I am grateful. Perhaps giving you references then, the assessment of

Ofgem is that if substantive relief was granted in these proceedings, the effect of that relief would be obviously that at the very least Ofgem would have to go back to before stage 2, would have to go through the required steps under the subsidy control principles, so including referral to the CMA, and in the light of whatever came out of that assessment we would have to reconsider at the very least what the project assessment stage would involve.

It's possible if the changes were sufficiently extensive that it might be necessary as a matter of fairness to go all the way back to restart the process as it were. Mr Hutcheson's evidence, which for your note is B, tab 11, page 496, is that re-running to before the project assessment, so going back to -- for example, the first consultations under that were done in May 2025 last year -- running that through to final awards would take at least fifteen months, leaving aside the work involved in doing the subsidy assessment itself. If they went back to re-do stage one, it could be as much as two years, again based on the amount of time it has actually taken Ofgem to date.

Those are in my submission entirely realistic assessments in sworn witness evidence. Mr Hutcheson gives you the implication. It's paragraph 164 of his statement, E, tab 11, page 497.

"I am certain that on either scenario Ofgem would not meet the relevant objectives of the Clean Power 2030 action plan."

That is also the assessment of DESNZ. That's Mr Stone's statement, paragraphs 31 to 32, bundle B, tab 12, page 507.

It is also the assessment of applicants and that's Elder, paragraphs 21, 45(a) to (b), and that's bundle B, tab 13, page 514 and 518.

It's the assessment of Mr Heller, who essentially says they would need to cancel a pump storage hydro project in the event of a delay at fifteen months. That's

paragraphs 32 to 34, B, 14, 523 to 524.

It is also said not just in relation to pump storage hydro but in relation to BESS projects. That is Wickins, paragraph 32, B, tab 15, page 530.

The claimant said nothing about any of that in oral submissions and we respectfully ask the Tribunal to proceed on that basis. There is in my submission a real risk that if relief was granted, the utility of LDES to meet the Clean Power 2030 targets would be lost, with the consequences that were set out in the piece from Mr Milliband that I have shown you.

There's also then the effect on applicants. Again if I can give you the references: Elder, paragraph 22 through to 46. That is beginning at B, tab 13, page 514. I can just give you the numbers. He says that £25 million was spent on one pump storage hydro project before September 2025. There was also 3 million on a number of BESS projects. Then after September 2025 there has been another £5 million. So just on that applicant's five projects you are looking at over £30 million of money already spent. He says in paragraphs 44 to 46 that the pump storage hydro project wouldn't be able to proceed and that the BESS would have to be reworked to a short duration and that would cost money as well.

One further reference on that. Crompton, paragraph 26, £20 million spent through to March 2025 and it is likely that both those projects would be written off in the event of delays. So a very significant effect on applicants who had made their applications in good faith.

The claimant says essentially two things in response to that. Firstly, the claimant says, "Well, this is development expenditure, so it's been put forward at risk, so it doesn't matter". In my submission that is no answer at all. It is expenditure that's been made. These applicants have put their money in on the basis of an assessment under this scheme, and the loss that they face is the loss of the money, not because they've been

unsuccessful in the scheme but because of the effects of the relief that's been -- that the Tribunal would ex hypothesi be granting.

Then the second point which the claimant makes in relation to these -- I'm sorry -- in relation to these projects is that it might be possible effectively to remodel the scheme so that you could get a small number of projects through in order to still hit the clean power goals, but in my submission that simply doesn't work. These are projects which are in the substantial public interest and supposed to run for decades. It wouldn't be open to Ofgem to remodel the scheme to obtain the smallest capacity possible from the quickest projects. The only sensible thing that could be done would be to do the fifteen months of work and that would have the effects both on the public interest and on applicants that I have suggested.

**MRS JUSTICE BACON:** Thank you very much.

**MR PAINES:** I am grateful.

**MRS JUSTICE BACON:** Is that your submissions, Mr Paines?

**MR PAINES:** It is. If I could give you one reference on the claimant's case on this. You have heard Mr Barrett on the 2.2 billion, but Mr Hutcheson's statement, paragraphs 150 to 153, B, tab 11, pages 494 to 495, deal in some detail with the fact that the project assessment is in the middle of effectively assessing the impact on applicants, but that's that.

**JUDGE WOLFFE:** Thank you very much.

**MR PAINES:** I am grateful.

**Reply by MR GIBSON**

**MRS JUSTICE BACON:** Just for the avoidance of doubt you absolutely don't have to repeat anything you said in your opening submissions.

**MR GIBSON:** I will endeavour to --

**MRS JUSTICE BACON:** You don't need to remind us of everything. We have a careful note in the transcript.

**MR GIBSON:** I will endeavour -- I am conscious of a tendency to do that and I will -- if you find me doing that --

**MRS JUSTICE BACON:** I was not suggesting you would do it. That's fine.

**MR GIBSON:** Sometimes in the heat of the moment one does tend to forget, but I hope to avoid that. I will highlight any points where they have not been addressed, but I will not go to the detail of them.

**MRS JUSTICE BACON:** Yes.

**MR GIBSON:** Dealing in the order my learned friend dealt with them, as in the nature of reply, I note that there was no real answer to the first point we made in relation to whether section 10P precluded a challenge, namely, that on a proper construction of 10P it had been a forward-looking provision. It did not cover the 2026 decision, which is purporting to adopt previous work.

Going to whether or not section 10P is a power or a duty, the first thing that I would like to take up with is the analysis at paragraph 9. There was no answer to that at all. He simply said it is entirely permissive.

**MRS JUSTICE BACON:** This is paragraph 9 of?

**MR GIBSON:** Sorry. Forgive me. Paragraph 9 of Schedule 3. You remember we looked at Schedule 3. Paragraph 9 imports the voluntary referral regime and section 56 for the purposes of even proposed primary legislation.

The point I was making there yesterday, and I only repeat to explain the context, paragraph 9 was saying you can voluntarily refer. Hence my learned friend's point about it being entirely permissive. My point was if you do, then you must be able to comply with section 56, which imposes requirements as to what you have to do on a referral. So Parliament in creating that regime -- remember I handled up the mark-up

with 56 and 57 so you could see it. If you make that choice, Parliament clearly envisaged that you would be able to comply with all of the criteria under section 56. That is not permissive. Those are requirements. That was the point I was making and that wasn't answered.

I also make the point that -- I think he made a point about that being a provision about subsidy. Maybe that was yesterday. I can't remember. The thing is it must operate the same for both a subsidy and a scheme, because there's only one definition of duty under section 4(a). So it must apply to both, regardless of whether someone is in the moment talking about subsidy or scheme.

So I say the only inference you can draw from paragraph 9 is that Parliament intended that a scheme falling within the concept of duty under paragraph 4(a) of Schedule 3 necessarily is one in which Parliament had provided all the necessary detail with which to perform -- with which to make a referral compliant with the section 56(2) requirements. If you test section 10P against that, it is clearly not sufficiently detailed to meet that test. Ergo it is not the type of duty that Parliament envisaged when making the distinction between 4(a) and 4(b). That point was not addressed.

As to Parliamentary sovereignty, which was also mentioned, I just want to make quite clear that, as regards Parliamentary sovereignty, it is up to Parliament to determine the degree, the width of the sovereignty in question. With the greatest respect, it's not for the Tribunal to second guess. Parliament must decide on that point, and I say that the consequence of paragraph 9 is that Parliament has delimited the scope it considers necessary to give effect to that important principle, and reading paragraph 9 means that the duty in that context has a very specific meaning as prescribed for in those sections.

As to reliance on Hansard, I think I can take this quite quickly. He says there is no ambiguity, but we say, well, there isn't, it is clear, because paragraph 9 allows for only

one conclusion. If there were any ambiguity -- if it is not clear, then it is certainly ambiguous, because paragraph 4(a) and 4(b) don't explicitly deal with a mixed case. They deal with -- in terms they say 'includes duty but did not include power'. It doesn't address what one might describe as a lacuna, which it would be but for the clear guidance you get from paragraph 9. So I say paragraph 9 means there is no lacuna, because it is perfectly clear that in its full context it's the correct exercise, but if there were any doubt about that, then you look to Hansard and you find it very helpfully does deal with that.

I should say on that, madam, you made the point that in Hansard it was talking about subsidies. I think it might have been his loose use of language, but the examples the Minister gives, as my learned friend admitted, are examples of schemes. Indeed, as I say, the statutory language does not distinguish between "subsidy" and "scheme". Paragraph 5 just says, "When you're reading 4, read it to include scheme".

So I say that the statutory scheme, when you read it as a whole, is completely coherent, completely consistent with the principle of Parliamentary sovereignty and logic, and in those specific circumstances it means a very specific thing about what duty is.

So to that extent whilst my learned friend quite rightly showed you other authorities, other situations dealing with what the word "duty" means in those other contexts, I submit that they are of no material assistance whatsoever and certainly don't trump looking at the words in context, which, as the Supreme Court has made pellucidly clear, is the primary source by which to conduct this exercise.

I would also say -- I think my learned friend said something about the intention of Parliament had always been clear that section 10P would effectively take cases outside the control of the CAT.

I would respectfully refer you to -- it may be convenient to -- well, the detail may be too

much, but if you turn up the impact assessment at your leisure -- I will give you the reference. It is bundle E, tab 1, page 1927. This is the impact assessment for the P&I Bill and it was introduced -- I think they actually published the impact assessment a couple of months later than the Bill -- I think it was May 2025. But the impact was assessed on the basis of what became section 10P as drafted, which, as my learned friend said, did not change one iota between being introduced and being passed, the impact assessment said words to the effect -- I am not quoting, so I am doing this from memory -- they said something to the effect that a subsidy control assessment might be needed before anything was done under section 10P.

If the effect of section 10P was to make it a pure case of duty, which took it outside the scope -- put it within Schedule 3 and therefore outside the scope of section 12 and section 13, that statement wouldn't make any sense.

So I say if you actually look at things carefully, you see that Parliament did not see things in quite the way my learned friend suggests. That's all I want to say about section 10P in terms of its construction.

I turn now to looking at what the effect of section 10P is in terms of the impact on the 2025 decision. I don't want to labour the point, but we are looking at a decision that was taken in September 2025, and my learned friend is pointing to an event that happened afterwards. So the starting position is he has a massive chronological problem. Now, his only answer to that is to say when you deal with situations like this, the subsequent event can have the effect of making the prior event irrelevant.

He says, and you can see it, because he points to paragraph 155A of our amended notice of appeal and says, "Oh, there you are. You have admitted you have a power -- as at 18th February you had a power to establish a subsidy scheme". Well, yes, we say that. But if you read the whole of what we say in paragraph 155A, with the cross-reference to paragraph 92G, you see our position is a little bit more

sophisticated than that.

As I have said in my submissions, yes, you have a *forward*-looking power and therefore any decisions that you take *henceforth* to establish a scheme would fall under section 10P. But, and this is the crucial rider, you adopted a decision that purported to take into account what happened *before*. That was not a proper use of the section 10P power. So that was clear on the face of our pleading. If it wasn't clear enough on the face of the amended notice of appeal, it is also referred to in the re-amended reply, paragraph 30(2). That's B, 3, 100. So I submit it is a futile exercise to misrepresent a party's case contrary to its express pleaded position.

Did I go too fast for you? Good.

So we submit that the test that needs to be established in order to decide whether section 10P has this consequence is the test established by ex parte Salem, as quoted in Hidenda and indeed in some other cases my learned friend relies upon, namely is the effect --

**MRS JUSTICE BACON:** Ex parte?

**MR GIBSON:** Ex parte Salem. It is quoted in the Hidenda case. I will get the reference for you, if necessary, but it is in my skeleton argument. I will get you that reference at the end if necessary. The test is: is the effect that there is no longer any lis between the parties to be decided? Against that backdrop I say none of the cases that my learned friend referred to actually address that point. They don't address my fundamental point that all those cases were distinguishable. I have explained why they were distinguishable. I am just going to give you the headline points rather than repeating it in detail.

Shrewsbury. Claimants were attacking a "minded to" decision. We say that's irrelevant here, because we're attacking a final decision. The reason that is irrelevant is because the crux of what Lord Justice Carnwath said at the end in the

paragraphs my learned friend relies upon is one needs to identify the substantive event; but, in this case, the 2025 decision on our case was the substantive event. If we are wrong, then there is no purpose in looking at this anyway, because we have lost the case anyway. If we are right about that, then this case does not assist GEMA at all.

As to the Charity Commission case, Parliament decided to take -- took a *different* decision to follow a *different* process, and it was on that basis that the judge found that the prior decision had been superseded and found the case to be academic.

Here, GEMA has taken the *same* decision and actively adopted it, following the *same* process in identically the *same* form. Ergo, this case is readily distinguishable.

As to the AFA case, this is an eligibility decision, an immigration case. It was then subject to a review decision. This very clearly involves consecutive and different stages, which in the names themselves make clear that the 'review' decision is looking at matters afresh and coming to a *new* decision.

What we are dealing with here is, as I said, adopting the *same* decision. There's no progression. There is no review and reconsideration as between the 2025 and 2026 decisions. It is an adoption for one purpose only, to be able to claim, erroneously we say -- to be able to try to claim the assistance of section 10P.

Stratton. The defendant in that case admitted the first decision was wrong and in error and therefore took a *new* second decision on the basis of a *separate and different* planning permission application. Here, GEMA has not admitted an error. It has adopted the *same* decision. Nothing has been superseded.

My final point. None of those authorities deal with the situation where the only change in question -- everything else is exactly the same -- the only change is that a piece of legislation which Parliament chose not to adopt retroactively has now entered into force. The sole purpose of retaking the decision -- *adopting* the decision -- retaking

would suggest there was some active consideration, whereas GEMA adopts it without making any attempt to comply with public law duties or anything on that basis -- the sole purpose of that was to take advantage of section 10P and it was not able to take advantage of that previously. So I say that is fundamental. There is no authority relied upon which deals with that same situation, that is, retroactivity by the back door. I would say that, therefore, the correct test to be applied is does section 10P operate retroactively? I am not going to repeat my submissions as to why that's obviously not the case.

That's what I wanted to say on that point, which, of course, is all contingent on the point I am coming to next, which is whether the 2025 decision constituted a decision to make a scheme. I accept that if we are wrong about that, then the position is radically different. The point is, which is why I attempted -- I did not manage to persuade the chair at the time that there was no point in going down that section 10P route, because it added precisely nothing, but we are here today.

So I've addressed section 10P. Now I look to what I say is the more important point, about whether the 2025 decision constituted a decision to make a scheme.

Now GEMA does not properly answer the point that I elaborated rather laboriously and I remember at one point, Madam President, you were a bit frustrated, not knowing exactly where I was going. I apologise. I should have signposted it more clearly, but the objective of my submissions at the beginning of that topic was to explain, by careful reference to the whole statutory scheme, why it is that we say the correct test is that you have to find out whether you have a worthwhile claim, which I think, given the Parliamentary impulse towards getting things -- the importance of any decision being cleared up as quickly as possible. There are very, very tight time limits that are imposed. The consequences -- almost impossibility of going outside those time limits and, of course, section 70(2) in relation to the consequences being you can't challenge

a subsidy if you don't challenge the scheme. The point is you have to challenge the scheme. You can't challenge the subsidy. Therefore you have to check you have the ingredients of the claim, i.e., one, a decision; two, as to the making of a scheme; three, as to the giving of subsidies; and four, by which you are affected; and, five, it is in breach of a relevant duty.

Once you have that, the statutory scheme is clear. Bring your claim at the first opportunity. You cannot wait. Get on with it. That is entirely consistent with the wording of the scheme and particularly the word "first" in relation to the knowledge trigger and as I said, in section 70(2). In particular, my learned friend only lightly questioned my definition of a scheme as being a plan for doing something, and in particular in this context a plan for the giving of subsidies, i.e., a process by which to decide to whom you should allocate these subsidies. There is no actual proper reason given why that is not the correct reading. That is the plain and natural wording of what section 10 says.

It is through that prism, therefore, that one needs to test on this continuum of events we have both laboriously taken you through from March 2025 all the way through to the present day, where on the continuum do you first hit the necessary mix of ingredients that I have come up with, because it's at that point you have to put up or shut up. That's what the regime does. We duly put up and will not be shut up, if I may put it that way.

My learned friend stays it all turns on the word "made". That just begs the question: made what? Made a scheme; and therefore you need to think what it is a scheme means. I will not repeat myself, but we say it is obvious that the 2025 decision was a decision to make a plan for deciding to whom you should give the cap and floor support. That is what it does on its face. It says on its face it is a final decision and it is setting out a framework, which I think is a pretty good analogy for scheme. The

word "scheme" is even in the document. The word "final decision" is in the document. The word "scheme" is in all the documents. What does it do? It provides for how we're going to go about deciding to whom to allocate subsidies. That is what we are looking for, and there's no component of the test that is missing as at September 2025. My friend says that it's a loose test to impose what I have described as the worthwhile claim test. That would be true of the worthwhile claim test generally, even though he says it could lead to unnecessary litigation. Well, it could be true of the test that the Court of Appeal has confirmed by reference to highest authority in the case I took you to that the President was the first instance judge in. So that doesn't take us anywhere. Of course, one needs to balance that risk of unnecessary litigation against the public interest -- which is replete in the statutory scheme -- the need to get – to make sure that people test the alleged subsidy decision as quickly and as vigorously as possible. So, yes, there is the peripheral possibility of unnecessary litigation, but that's got to be balanced against the desire to avoid any delay in sorting these issues if there is a proper subsidy decision that's been wrongly taken, and, of course, the risk of that -- the peripheral risk is minimised by the pre-action information request process, which is expressly designed to allow people, if they don't think they have quite enough information, to ask for a bit more information and they will not be penalised in the limitation period, because they will be allowed the time to receive that and they would have another month from then with which to perfect their claim.

So I say what I have said is entirely consistent with the regime. My learned friend did not at any stage take you to where what I have said is actually wrong. He just espoused a different test without any anchoring in the statutory scheme.

By way of general overview of what he said, he said that the TDD was -- did not purport -- the TDD would have been the first correct position to attack if we are right about the definition of scheme. He said that he didn't need to plead that. Well,

I respectfully disagree. I am not going to repeat the references, but that was precisely the point that was discussed at the first CMC, i.e., the alternative argument 'if we are right, then this'. He accepted that that was not part of his case then, but yet it is part of his case now in paragraph 19 of the skeleton argument.

Even if was properly pleaded, the TDD did not purport to set the plan for the giving of subsidies. The TDD gave you some initial details about what the subsidy would look like. You know, for example, it would be cap and floor. It would use network charges of some kind. I can't remember all the things my learned friend listed. We accept that it would give some parameters of what the subsidy would be, but we are dealing here with the scheme question, i.e., was there sufficient detail for it to constitute a plan as to how you are going to go about giving subsidies?

On its face it said it wasn't. It said, "We are going to launch two consultations which detail our plan as to how we are going to go about giving subsidies". Then in May and June they launched those consultations. Then in September they make a final decision on the basis of those consultations. So, GEMA made repeated references to living in the real world. I submit that *we* are living in the real world, whereas I am afraid GEMA has disappeared in some sort of looking glass alternative reality.

The April eligibility assessment again was mentioned. This was not a plan for how to allocate cap and floor support. This was a pre-qualification exercise with extremely low thresholds, which couldn't possibly constitute a proper plan as to how we are going to allocate these cap and floor support schemes to particular applicants.

Just for the -- just so you can see what those thresholds were -- I will not turn it up -- bundle E, tab 1, pages 640 to 641 sets out what the eligibility thresholds were. If you look at those, you will see you could not possibly decide how to specifically allocate subsidies to particular projects on the basis of those thresholds. Then, of course, the consultations, which *do* set the parameters, give the lie to the suggestion

that the eligibility exercise was intended to serve that purpose.

The consultations my learned friend rightly doesn't suggest would have been a proper target, because they were obviously consultations. Therefore, the September decision is the first point at which a challenge could be brought.

The fact that we refer to the cap and floor financial model is nothing to the point, because if the first point was 23rd September, as we say -- our primary argument is it didn't add anything. The model reflected in financial form, i.e., as a spreadsheet, the narrative decisions that had been taken in the September 2025 decision documents. But, even if it did give you *more* detail that was critical or important, that would not be good enough, because we have established if you have a worthwhile claim on the basis of the September 2025 decision, you get a bit more in October 2025 and then more maybe later on and a bit more and bit more after that. If you don't apply a worthwhile claim test, then you would not know -- there would not be any principled basis on which to decide when to make a claim. That would be unworkable.

My learned friend refers to things that happened later and said, "Look, those are things you really need to perfect your claim". Those are precisely the kind of things that are either further detail about a scheme that is not necessary to bring the claim, and therefore if you tried to do that, you would be in the uncomfortable position of Mr Turner in the case that has temporarily escaped my mind, even though I adduced it. My mind has gone blank. The case in which you were the first instance judge. It went to the Court of Appeal on a question of knowledge in a deliberate concealment case.

**MRS JUSTICE BACON:** Gemalto.

**MR GIBSON:** Gemalto. Sorry. Thank you. Yes. Mr Turner was trying to argue that subsequent events did not affect his claim. Obviously that was not right. He was too late. That's exactly the analogy to what we are looking at here.

Just taking them in turn, the MCA framework, this is an application of the scheme.

This is actually taking the plan that's been set about choosing projects to receive support, and making a decision as to how you go and make those choices. It is not the plan how to do it, which is what the relevant decision for a scheme is.

He also gives the example of capacity and licence conditions. Those are both elements necessary to decide a subsidy. My learned friend said "Ah, no. What we are going to is make a subsidy scheme and we are going to make subsidies at the same time". That doesn't really work logically. I will come and develop my thoughts on that in a moment, if I may. I am just trying to make sure I deal with the prior points first.

**MRS JUSTICE BACON:** In a fairly short way.

**MR GIBSON:** In a fairly short way, madam, yes. I am sorry to have gone over time. Can I have a little bit longer?

**MRS JUSTICE BACON:** The idea was you would have half an hour, so that gives you another five minutes. Another five minutes or so.

**MR GIBSON:** I will go as quickly as I can.

**MRS JUSTICE BACON:** Just one moment. We are happy to sit until 4.45, if that helps.

**MR GIBSON:** That's very helpful. I will go as quickly as I can.

So capacity and licences are only decided once the decision to give subsidies is taken was my learned friend's -- he said the subsidy *scheme* would not be made until the summer, once capacity and licence terms were decided. But capacity and licence terms are only decided once a decision to give the *subsidies* is taken. It is once you've decided to whom you are going to give the subsidies -- the subsidy decision -- that you then decide on those matters. To collapse a subsidy scheme decision into the decision to give subsidies in that way does not make any real logical sense in terms of the statutory scheme.

I also would highlight the point -- we didn't have the authority in the bundle because I didn't know my learned friend was going to make this point, but in the Weis case, which my learned friend will be familiar with, having appeared for Mr Weis, if I recall correctly -- Mr Malek, KC, as the chair, made a decision in paragraph 152 -- he made the point the *decision to give* a subsidy is an earlier step and not necessarily the same step as the *actual giving* of the subsidy.

So on GEMA's case it is alleged that the scheme is not decided until after or at least simultaneously with the decision to give subsidies. So you have two decisions you've now got to take happening at the same time. That makes no sense on the face of the Subsidy Control Act, which defines 'scheme' as a plan for the giving of subsidies, i.e., as a plan for what public authorities *will do* regarding selecting to whom to give subsidies.

My learned friend makes points about subsidy control principles. Basically, he says you can't have a scheme unless the subsidy control principles can be applied *and* it is consistent with those principles. That assumes that the scheme is not a scheme unless it complies with the subsidy control principles, which is the wrong way round.

To test whether you've got a scheme, one of the components there, I accept, is whether you can *apply* the subsidy control principles. That's the first part of the limbs under section 12 and section 13. Then the second limb is if you can't *comply* with those rather than apply them, then you don't proceed. The only thing you need to be able to do in order to meet the test of whether you bring the cause of action is whether they could apply it. I've already taken you yesterday as to where it's obvious they could apply the subsidy control principles. The fact they can't then comply with them or satisfy them is not a reason why you can't have a scheme. That would be completely illogical. That would denude the whole of the statutory scheme of any meaning. You wouldn't ever be able to have a scheme unless they could satisfy the

subsidy control principles, which means you wouldn't be able to challenge them on that basis. That is obviously not what Parliament meant, merging the two duties in a way that doesn't make any logical sense.

The weighting criteria point, there's no proper parallel with the procurement regime. The test, here, is whether you have plans as to how to give subsidies, not whether you have all the details necessary to actually make the subsidy decision in due course. It goes to the point about administrative discretion. If that were the case, then limb C cases could not be pleaded on that basis. The presence of administrative discretion is one way of satisfying limb C. You would never be able to rely on that, because then it wouldn't be -- you would never have a scheme that could give a subsidy that fell within that box. So again that doesn't work as a matter of logic either.

Turning then to the topic of whether support is given from public resources, my learned friend says this is an important issue because network charges are regularly used by public authorities in this sectoral context. Well, precisely. That is why we say we need a decision on this come what may. One would expect public authorities working in the sector to welcome clarity as to how the test would be applied in this very sector in relation to the very charges they use.

Disagreement in the EU case law. Yes, there had been, but it's settled. If you were not going to follow the EU approach entirely, then what you would do is take a broader approach rather than the EU's narrow approach, because the one thing one does notice from the EU case law is the influence of, for example, reference to Articles 30, 34 and 110, which are articles concerned with free movement and the like, and therefore to some extent will be influenced by the single market imperative, which obviously is no longer relevant post Brexit. I submit you should apply EU law. But if you took a different path that would go in our favour, because you should take a broader approach, because you are not constrained by those EU-specific

considerations that justify a narrower test. But I am saying given that Parliament has borrowed the wording very deliberately, so I don't think that's an option we need to consider.

My first point about assistance being given directly . My learned friend talked a lot about it having to be on the public balance sheet. That's an even narrower view of the law than what he described as the contested EU law. The use of a recovery mechanism to achieve a neutral outcome is the common feature of all the relevant EU cases I took to you, so that can't be a sensible basis to proceed. And if you did take a different, narrower path under UK law, it would make for a very limp subsidy control regime indeed.

I am mindful that the EU as the other party to the TCA is already very concerned that the Subsidy Control Act regime does not require particularly strong protection of the type they would have expected. There is no statutory wording that requires us to take this artificially constrained, narrow approach.

Indeed, this is the first filter. When you decide something is a subsidy, you are not condemning -- you are not giving it any disapprobation. You are saying the public authority must go on and conduct the proper assessment. There is nothing wrong -- just like dominance in the competition context. There is nothing wrong with being dominant. You have to decide whether you think you'll be abusive. There is nothing wrong with being a subsidy. You have to assess whether it is a compliant subsidy.

He says it is not pleaded. I showed you the pleadings and evidence that I took you to. He did not answer that. He says he did not have any more detail, but the required detail I referred you to was in his own evidence. The reason why it was in his own evidence was because we made clear the connection. I took you to the parts of Palmer 1 and Palmer 2 and indeed to the pleadings as well in the re-amended reply

and amended notice of appeal.

We looked at -- he looked at section 2. He said -- just in relation to construing section 2(3) we don't say it is a limiting principle. One also needs to read it in light of 6(1), which sees the public authority as a wide functionally-based meaning. And the discussion in the PreussenElektra case, while interesting, is not relevant on these facts.

I would just endorse the test of the President in the New Lottery case. I don't think we need to dwell on that.

He looked at the distinction between the way EEG had looked at control versus the DOBELES case. He didn't mention that the DOBELES case is a more recent authority and Grand Chamber authority. On any view it's far more authoritative, quite apart from the fact it is far more logical. Paragraph 41 of DOBELES, that's D, 65, 1949, is absolutely clear. It says:

"... and cannot be spent for purposes other than those provided for by law."

So if there is any inconsistencies in the case law in relation to the question of control, it's been decisively decided by Grand Chamber, the highest possible authority of EU law.

Covestro. He tries to suggest that Covestro is somehow incorrect, because it is inconsistent with other law. It is not incorrect. It is a distinct circumstance. I explained that EU law has identified three different scenarios where -- I won't repeat that. Covestro is dealing with a different scenario, a different case from EEG. It has impeccable reasoning. It is explained by the General Court, and endorsed by Advocate General Medina. The point about the Court of Justice saying it's a factual appraisal is because they didn't think it was a legal point of appeal at all, because the General Court's reasoning is unassailable in terms of its legal pedigree.

The point about assistance being given indirectly, i.e., the para-fiscal charge point: he

says it is not pleaded again. He doesn't take you to the reference I gave, in the re-amended reply, at paragraph 37(1)(a), where I say it is backed by a “compulsory charge to suppliers”, so the very point we advance now. We also evidenced a degree of control and what have you.

He makes the point we also evidenced the alternative possibility that you could look to the fact that there was a de facto compulsory charge to end users. At the stage we were preparing evidence we obviously did not know which way the court would go, whether you would be persuaded by the argument. We adduced evidence to ensure that when I stood up here, I could not be accused of ambushing them with a different argument for which we had not got evidence. As it happens, our primary argument has always been as pleaded (i.e., a compulsory charge to suppliers); and I decided not to pursue my alternative argument when I realised it wouldn't be a good use of my limited time to advance something that was irrelevant on the facts. That's why that point was in there, but that is why you didn't hear from me on it.

The indirectly through public control limb, he did not question my reference to the test and did not make any submissions in response to the fact that it is satisfied on the facts. So even if everything else we have said so far was wrong, that we still get home on that criterion.

I am moving to the ultra vires point. No abuse of process. I don't think I need to say anything more on that. I can explain why we approached matters as we did, but it would all be -- I would have to do it without waiver of privilege. I think it is perfectly sensible to do a prophylactic response. I don't think I need to take up time on that.

The idea that we are circumventing -- I don't need to bother on that. I think I addressed that already.

The point about section 31(1)(a) mandating a prohibitory order, my learned friend pointing out the commentary in Lewis. I am afraid I only received that commentary

over lunch and I was busy preparing this reply submission, so I have not had to chance to check whether I agree that the summary in Lewis is exact in terms of the way he described it. But even if that is -- and, you know, Lord Justice Lewis does know his onions; I suspect it probably is, but I would have liked the opportunity to check -- paragraph 6-037 of the handout you have got there talks of a prohibiting order. The last two sentences read::

"A prohibiting order , is a means of supervising the exercise of public law power. The scope of a prohibiting order is virtually identical to that of a quashing order and the same definition of public law power applies."

So, if Parliament, using the words "is prohibited" under section 31(1)(a), intended you to use a power in order to ensure that they would not be able to proceed with this, and if a prohibiting order is technically not quite the right device for that, you have the quashing order available in your armoury that you have also been given by Parliament. So all my submissions about everything hanging together nicely still work just fine.

In relation to the remainder of the submissions on remedy I think we can just go -- take the point -- he took you to what we said in our consultation response about LDES as the reason why they keep accusing us of wanting to bring the whole regime down. (This is my penultimate point. I will take it very quickly.) We have put in our evidence, sworn testimony, that we don't want to tear the regime down. It is not appropriate to seek to impugn our witnesses by referring to something that is out of context and means something different from actually what we say our objective is here. We take great exception to that, because we are a business that supports clean power. That's the whole way we operate. What we said in the consultation response was that LDES is not a particularly good way of achieving what you want to do. But once they had decided that, once they had made that decision, as my learned friend said, we have engaged constructively at every stage of the consultation, trying to make sure that,

having made the decision to go with LDES, it's going to be the best version of LDES. We have suggested design choices which would result in a version of LDES which avoids being monumentally counterproductive by damaging SDES, which is as important, if not more important, to achieving clean power by 2030 as LDES is. That central proposition has not been properly tested by GEMA. They say, "We have looked at it". They have not looked at it properly and they have not explained why what we say is not right.

GEMA focuses on only part of our case, concerning the £2.2 billion figure, but I have explained that this is advanced in a separate -- on the basis of different assumptions that were correct as at April 2025, but different from the ones that obtained in September 2025.

If you look very closely at what was said, we never challenged that and never said otherwise. What we said is that is an indication of the scale of harm that could be caused by what GEMA were doing, and I have explained that that has not been second guessed, not been addressed at all. We have explained how businesses operate with stacked revenues and we explained how we were dependent on third party investors to come in and take over the asset basically and to optimise and to manage it in a way that makes the best use of the asset, and if we get can't those investors, we can't justify the development. That is true of all business development for SDES projects. That's why LDES has posed a massive problem. That's not been addressed. We say that's why you should avoid the siren words of my learned friends saying you should not quash this. If you don't quash it, those precise consequences which motivated us from a concern throughout this process, consultation, litigation, very reluctantly -- we didn't want to be in litigation -- those concerns remain absolutely live.

The consequences of agreeing with us on everything and then saying "No, we will quash it": you are exposing SDES to that very risk. If you quash it, I am sure everybody

will work as quickly as they can -- remember throughout this process we have been trying to push the agenda to get this resolved quickly. We would have had this resolved in February 2026 and then obviously it would have depended on how quickly your good selves wrote the judgment. This could have been done and dusted.

It was GEMA who dragged their heels and opposed every single procedural step we made to try to bring this on quickly. So, we say one must treat with a measure of caution their suggestion that they are concerned about the implications of delay. If they were that concerned, which they have should have been, they should have been accepting with open arms the constructive opportunities advanced by a responsible litigant to try to resolve this as quickly as possible.

I am just going to turn my back just to check. Yes. I am reminded very helpfully the reference to the -- two references. The Hidenda reference. You have the ex parte Salem case. Hidenda, bundle B, tab 42, page 1284. Ex parte Salem quoted at paragraph 18 on page 1289.

Also my learned friend was referring to a speech from Ed Miliband which he quite candidly admitted was a bit charged up with political rhetoric and some cheesy jokes. I think it would be useful to look at what the government has actually set out in its Clean Power 2030 objectives. They appear at bundle E, tab 1, page 406 in relation to battery storage, page 500, and in relation to LDES, 514. So that is the correct place to look if you want to understand what we are trying to actually achieve here today.

Those are my submissions unless I can assist you further.

**MRS JUSTICE BACON:** Thank you very much, Mr Gibson. You will be pleased to know we don't have any questions.

**MR GIBSON:** I am relieved. It's been a fun two days, but I think we have all probably had our fill. Thank you very much to the court staff, the Tribunal staff and Tribunal panel for indulging me by sitting that little bit later. I apologise for overrunning.

**MRS JUSTICE BACON:** Thank you very much. You will receive a draft judgment in due course.

**(4.51 pm)**

**(Hearing concluded)**

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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? |