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Case Nos: 1754/12/13/25
1769/12/13/26

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23 June 2026

Before:

THE HONOURABLE MRS JUSTICE BACON
(President)
JAMES WOLFFE KC
JOHN DAVIES

Sitting as a Tribunal in England and Wales

BETWEEN:

ZENOBĒ ENERGY LIMITED

Applicant (Zenobē)

- v -

GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent (GEMA)

Heard at Salisbury Square House on 28–29 April 2026

JUDGMENT

APPEARANCES

Nicholas Gibson KC (instructed by Norton Rose Fulbright LLP) appeared on behalf of the Applicant.

Joseph Barrett KC, Rupert Paines and Barney McCay (instructed by GEMA) appeared on behalf of the Respondent.

A. INTRODUCTION

1. These proceedings are concerned with arrangements that are being put in place to establish a cap and floor scheme (the **Scheme**) in Great Britain in respect of long duration electricity storage (**LDES**) installations. The Respondent, the Gas and Electricity Markets Authority (**GEMA**), is the regulator of the electricity sector in Great Britain and has been charged by Parliament with establishing and operating such a scheme. GEMA's operational work is undertaken by the Office of Gas and Electricity Markets (**Ofgem**).

2. The Applicant, Zenobē Energy Limited (**Zenobē**), owns and operates lithium-ion battery energy storage system (**BESS**) assets in the United Kingdom. Zenobē has brought two applications for review under s. 70 of the Subsidy Control Act 2022 (the **SCA**). The first concerns the publication in September 2025 of documents setting out Ofgem's intended approach to the award of cap and floor support under the Scheme (the **September documents**). The second concerns Ofgem's decision in February 2026 to adopt its prior development work on the Scheme, following the entry into force of s. 10P of the Electricity Act 1989 (the **February decision**).

3. Zenobē's central contention is that either or both of the September documents and the February decision were decisions to make a subsidy scheme, which did not comply with the relevant requirements of the SCA.

4. GEMA's response is that the September documents were not a decision to make a subsidy scheme but were simply an intermediate step in the decision-making process. Nor was the February decision a decision to make a subsidy scheme, since that simply adopted Ofgem's prior development work. The February decision was, moreover, made pursuant to a duty imposed by s. 10P of the Electricity Act 1989, such that the SCA requirements relied on by Zenobē do not apply. GEMA also submits that (if necessary to decide the point) the cap and floor arrangements under the Scheme do not involve the grant of subsidies within the meaning of the SCA.

5. At the hearing, the Applicant was represented by Nicholas Gibson KC. GEMA was represented by Joseph Barrett KC, Rupert Paines and Barney McCay, with oral submissions being made by Mr Barrett and Mr Paines.

B. THE EVIDENCE

6. Witness evidence was given by one witness for Zenobē and seven witnesses for GEMA.

7. Zenobē filed two witness statements from Tom Palmer, Zenobē's Head of Business Development, Network Infrastructure dated 22 October 2025 and 27 March 2026. Mr Palmer gave evidence about the electricity, energy and energy storage industry, private equity investment in the energy industry, Zenobē's business, the development of the Scheme, communications between Zenobē, Ofgem and the Department for Energy Security and Net Zero (**DESNZ**) regarding the Scheme, the question of whether the Scheme involves financial assistance from public resources, Zenobē's decision not to seek support under the Scheme, and the consequences of the relief sought by Zenobē.

8. GEMA's evidence was as follows:

   (1) A witness statement dated 4 March 2026 from Gordon Hutcheson Hayward-Grant, a Deputy Director at Ofgem responsible for LDES. Mr Hutcheson Hayward-Grant gave evidence on the background and development of the Scheme. He also commented on Zenobē's grounds of appeal in these proceedings, Mr Palmer's evidence and the impact of the relief sought by Zenobē.

   (2) A witness statement dated 4 March 2026 from Duncan Stone, the Deputy Director for Electricity System Flexibility at DESNZ. Mr Stone gave evidence on the importance of LDES to delivering the government's energy objectives, the development of the Scheme, and the impact of the relief sought by Zenobē.

(3) Witness statements dated 3 and 4 March 2026 from Lewis Elder, Commercial Operations and Policy Director at Statera Energy Limited, William Heller, the Project Director of Glenmuckloch Pumped Storage Hydro Limited, Christopher Wickins, Technical Director at Virmati Energy Ltd, Carl Crompton, Managing Director of Gilkes Energy Ltd, and John James Sturman, Managing Director of NatPower UK Limited. All of those witnesses gave evidence on the role of the Scheme in supporting their companies' LDES projects, and the impact of the relief sought by Zenobē on their companies.

C. BACKGROUND TO THE SCHEME

(1) The electricity supply system and LDES

9. GEMA grants licences under the Electricity Act 1989 for the generation, transmission, distribution and supply of electricity. The National Energy System Operator (**NESO**) is the publicly-owned operator of the electricity transmission system. NESO co-ordinates the flow of electricity into the network and imposes charges on users of the electricity network to cover the costs of maintaining and operating that network.

10. The supply of electricity to consumers in Great Britain involves the participation of generators, which produce electricity, and suppliers who buy electricity from generators and sell it on to consumers. Adjusting supply and demand to ensure that supply and demand continually match (known as "energy balancing") is necessary to ensure that there is enough electricity to meet demand, that the grid is running efficiently, and that it is doing so at the lowest cost for consumers. The network charges levied by NESO include a Balancing Services Use of System (**BSUoS**) charge, which is levied on electricity suppliers through a condition of electrical supply licences, to recover the costs incurred by NESO in balancing the system.

11. In 2019 the UK Government announced a target of achieving net zero greenhouse gas emissions by 2050. One of the means of achieving that target is the decarbonisation of the electricity supply system and a switch to renewable energy.

Renewable energy generation (which depends on environmental conditions such as the wind) is more variable than traditional forms of energy generation. This presents challenges for energy balancing.

12. One way of addressing those challenges is to increase the amount of energy storage available, so that electricity can be stored and released onto the grid when insufficient renewable energy is being generated. According to Mr Palmer, there has, since 2016, been increasing commercial investment in BESS assets, including by Zenobē (which is one of the largest BESS providers and the largest on the transmission network in Great Britain). The storage duration of BESS assets constructed in 2020 to 2025 has predominantly been one hour or two hours, though expected investment is likely to focus on projects with storage of around four hours or greater.

13. LDES installations are technologies which can store and discharge electricity for relatively long periods of time and at scale. The Scheme defines an LDES installation as an installation which generates electricity from stored energy, which has a generating capacity of not less than 50MW and is capable of generating electricity at full capacity for not less than eight hours. There are a number of different LDES technologies, but these have historically faced investment barriers. No LDES projects have been built in Great Britain in the last forty years.

(2) Consultations on the incentivisation of LDES investment

14. The Government therefore decided to develop proposals to incentivise LDES projects. In July 2021 the Department for Business, Energy and Industrial Strategy (**BEIS**) issued a call for evidence on facilitating the deployment of LDES. This identified a cap and floor scheme, based on an existing scheme operated by Ofgem to support the development of interconnectors (the **ICF Scheme**), as one possible option to incentivise investment in LDES.

15. A cap and floor scheme seeks to incentivise the market by providing a level of risk reduction to developers and investors. The ICF Scheme sets a maximum (the cap) and minimum (the floor) on the revenues that an interconnector may receive

annually. Under the terms of the ICF Scheme, NESO makes payments to the interconnector if its revenues fall below the floor, and the interconnector pays revenues that exceed the cap to NESO. NESO recovers the cost of any floor payments through charges to users of the transmission system. Developers and investors are provided with certainty that their income will not fall below the floor, and consumers benefit from the protection against excess returns above the cap, as well as from the investment in the energy system incentivised by the Scheme.

16. In April 2022, the UK Government published the "British Energy Security Strategy", which identified the challenges facing Great Britain's energy security, and referred expressly to the need to provide increased flexibility through greater LDES capacity. In August 2022 BEIS published its response to the call for evidence, noting the benefits of LDES in supporting the move towards net zero, and committing to ensuring that sufficient LDES could be deployed to "balance the overall system by developing appropriate policy to enable investment by 2024".

17. On 9 January 2024 DESNZ, which had taken over the relevant functions of BEIS, issued a further consultation on LDES, again setting out a cap and floor scheme along the same lines as the ICF Scheme as a possible option. The Government asked Ofgem whether it would be willing to act as the delivery body/regulator for such a scheme. Before agreeing to do so, Ofgem sought and obtained a commitment from the Government to introduce primary legislation that would require Ofgem to deliver the proposed scheme. Ofgem was informed that provision would be made for this in the Planning and Infrastructure Bill.

(3) The proposed cap and floor LDES scheme

18. On 10 October 2024, the Government issued its response to the January consultation, concluding that a cap and floor scheme was the most appropriate policy option to enable investment in LDES. The response explained that Ofgem had agreed to act as regulator for LDES, and to deliver the investment framework that would enable LDES projects to apply for investment support. The Government indicated that applications for the proposed cap and floor scheme

would open in 2025, and that a Technical Decision Document would be published to address the remaining questions for the scheme.

19. The UK Government stated that its response to the January consultation:

> "provides a firm commitment to deliver significant LDES capacity through an Ofgem regulated scheme, and outlines the government's preferences as to many of the key parameters of the scheme … We will now work with Ofgem and others with the intention of Ofgem opening a scheme for applications in 2025. This publication should be read as a 'green light' for projects in the pipeline regarding government's commitment to introduce a cap and floor scheme, bringing into delivery the next generation of LDES to support the net zero transition and energy security cost-effectively."

20. On 13 December 2024 the Government published the Clean Power 2030 Action Plan, committing to ensuring that clean sources of power would produce at least as much power as Great Britain consumes by 2030. It stated that increased flexible capacity, including 4–6GW of LDES, would need to be delivered to meet this target, and that a cap and floor scheme would support the deployment of LDES. It stated that a Technical Decision Document would be published in Q1 2025 which would "provide clarity on outstanding areas of the cap and floor scheme design".

21. On 18 December 2024, Ofgem published a call for input on its proposed LDES Scheme, setting out Ofgem's ambition to approve the first LDES projects by Q2 of 2026. The call for input explained, among other things, that the Scheme would be similar to the ICF Scheme, by ensuring a minimum amount of revenue for LDES operators; that Ofgem expected to manage the delivery of the Scheme in application windows, the first of which would prioritise projects that could be delivered by 2030; and that applications to the Scheme would thereafter be assessed in stages.

22. Like the Government's consultation response of 10 October 2024, the call for input anticipated the publication of a Technical Decision Document that would outline application window timelines, eligibility criteria, the approach to setting the cap and floor, and the potential LDES capacity needed, among other technical details.

(4) The Planning and Infrastructure Bill and Technical Decision Document

23. On 11 March 2025 the Government (i) introduced the Planning and Infrastructure Bill into the House of Commons; (ii) published (jointly with Ofgem) the Technical Decision Document that had been foreshadowed for the Scheme; and (iii) wrote to stakeholders, including Zenobē, to inform them how the work to introduce the Scheme would be conducted. The letter to stakeholders explained that:

> "The Bill will … 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 scheme as soon as reasonably practicable, which Ofgem is already looking to do in practice".

24. The Planning and Infrastructure Bill provided (in clause 21) for the insertion of a new s. 10P into the Electricity Act 1989, the terms of which were not amended during the Bill's progress through Parliament. The section is set out in full at §49 below. In short summary, s. 10P required GEMA to establish and operate a cap and floor scheme to encourage the development and use of LDES installations, with a generating capacity of not less than 50MW, and capable of generating electricity at full capacity for a continuous period of not less than eight hours. The scheme was to apply to LDES installations approved by GEMA; and GEMA was to determine how costs and revenue were to be assessed for the purposes of the cap and floor provisions.

25. In his witness statement, Mr Hutcheson Hayward-Grant explains that the main purpose of the Technical Decision Document was to communicate the key final decisions on the structure of the Scheme, and to provide sufficient information to market participants to enable them to expend significant work and expense in developing projects and applications to participate in the Scheme.

26. The Technical Decision Document thus stated that its publication marked the end of the LDES Scheme policy development phase, and the start of the delivery phase, with Ofgem expecting to open the first application window in April 2025. It explained that the Scheme would proceed as a three-stage process, comprising:

(1) Stage 1, the eligibility stage. At this stage, Ofgem would determine whether projects constituted LDES projects and were likely to be deliverable within the Scheme's required timeframes.

(2) Stage 2, the project assessment stage. This would involve a cost benefit assessment of the eligible projects against selection criteria, using economic and financial modelling, and would set provisional cap and floor levels. A multi-criteria assessment framework would be used, which would involve an assessment of projects for their economic impact, social and environmental costs and benefits and implications for consumers.

(3) Stage 3, described as a post-construction review, during which Ofgem would set the final LDES cap and floor levels.

27. The Technical Decision Document set out a timetable for completion of further development work on the Scheme, which included consultation on the financial model and financial parameters, and the drafting of licence conditions. It was apparent from the document that Stage 2 award decisions and Stage 3 decisions on the cap and floor levels would only occur in Q2 2026 at the earliest, after the Planning and Infrastructure Bill was expected to have come into force.

28. On 24 March 2025, the Planning and Infrastructure Bill received its second reading. On 10 June 2025, the House of Commons passed the Bill. It received its first and second readings in the House of Lords on 12 and 25 June 2025 and completed House of Lords committee stage on 17 September 2025.

(5) Opening of applications under the proposed Scheme

29. Meanwhile, on 8 April 2025, Ofgem opened its first Stage 1 application window for the Scheme. 171 applications were submitted, of which 150 were for various types of BESS projects.

30. On 28 May 2025, Ofgem issued a consultation paper which outlined the proposed approach to project assessment at Stage 2. It proposed a multi-criteria assessment framework, involving economic, strategic and financial assessments. On 19 June

2025, Ofgem published a consultation on its proposed financial framework and related policies for LDES projects given cap and floor support in the first application window.

31. On 23 September 2025, Ofgem published the Stage 1 assessment outcomes, identifying 77 projects which had passed the eligibility stage and could therefore proceed to the project assessment Stage 2. (Ultimately 73 of those projects went forward to Stage 2.)

(6) The September documents

32. On 23 September 2025, the date on which the Stage 1 assessment outcomes were published, Ofgem published the September documents. Together with the February decision, those documents are the subject of the present proceedings. The September documents included:

    (1) "Assessment Framework: Cap and Floor Project Assessment: Long Duration Electricity Storage (window 1)" (the **Multi-Criteria Framework**);

    (2) "Decision on the Project Assessment Framework for Window 1 LDES cap and floor regime" (the **Project Assessment Framework**);

    (3) "Financial Framework: LDES Window 1 Cap and Floor regime" (the **Financial Framework**); and

    (4) "Guidance: Cap and Floor Cost Assessment: Long Duration Energy Storage (window 1)" (the **Cost Assessment Guidance**).

33. The Multi-Criteria Framework explained that the project assessment would involve an "in-the-round" economic assessment designed to estimate the benefits that each project will deliver, taking a flexible approach which would combine both monetised and non-monetised impacts on the electricity system, and which would include consideration of consumer socio-economic welfare as well as wider social and economic impacts.

34. The Financial Framework gave details of the mechanics of cap and floor support. It explained that BSUoS charges would be used to fund payments if a LDES project's revenues fell below the floor or exceeded the cap. NESO would act as "the central intermediary for managing payment flows", by collecting BSUoS charges from suppliers and distributing floor payments to projects when needed, and reclaiming surplus revenues when projects earned above the cap. The amounts due would be based on outcomes from the assessment periods, with payment flows following the annual BSUoS charging periods. All transactions would be governed by licence conditions and reflected in BSUoS tariffs to ensure accountability and traceability.

35. Mr Hutcheson Hayward-Grant states that whilst the September documents set out certain elements of the framework which Ofgem would use to conduct Stage 2 of the application process, they did not finally decide the assessment methodology or process which Ofgem would apply to determine which applicants would or would not receive support. Nor did they determine what level of storage would be supported by the Scheme, the licence terms or the financial model: those would be decided only at a later stage and would be informed by a wide range of considerations including information provided by the Stage 2 applications and by NESO. The financial model was published on 9 October 2025.

(7) The February decision

36. On 18 December 2025 the Planning and Infrastructure Bill received Royal Assent and became the Planning and Infrastructure Act. Section 26 of the Act inserted the new s. 10P in the Electricity Act 1989, and s. 118(m) provided for s. 26 to come into force two months later.

37. On the same date the Secretary of State published an open letter to stakeholders stating:

> "Ofgem began work to develop the LDES cap and floor scheme as soon as it was announced in the government consultation response in October 2024. Ofgem opened the first application window for the scheme in April 2025 and plans to make final decisions on successful projects in Summer 2026. In parallel to Ofgem's delivery work commencing, the government introduced legislation to Parliament, via the Planning and Infrastructure Act, directing Ofgem to implement this scheme. Government had the firm expectation that this legislation would be

enacted in advance of Ofgem's decisions on the identity of LDES projects to award a cap and floor scheme to within a scale of capacity Ofgem has been advised by NESO is required to meet electricity system needs."

38. On 18 February 2026, s. 10P of the Electricity Act 1989 came into force. On the same day, Ofgem published an open letter entitled "Establishing the Long Duration Electricity Storage Scheme Under Section 26 of the Planning and Infrastructure Act 2025". That letter included the following statements:

> "With the entry into force of s. 26 of the Planning and Infrastructure Act 2025, Ofgem has been placed under a statutory duty to establish and operate a scheme for the purpose of encouraging the development of LDES installations. The passage of (what is now) s. 26 through Parliament has progressed alongside Ofgem's development work to date. ...
>
> As this new statutory duty has been anticipated since the introduction of the Planning and Infrastructure Bill to Parliament in March 2025, Ofgem has already completed significant development work at pace in relation to the LDES Scheme. In particular: -
>
> 1. *in March 2025, Ofgem and DESNZ jointly published a Technical Decision Document that confirmed the key details of the LDES Scheme and the process that would be followed;*
>
> 2. *in April 2025, Ofgem (i) opened the first application window for parties seeking support via the LDES Scheme, and (ii) published its Eligibility Criteria Assessment Framework to set out the information that applicants would be required to provide to be assessed as eligible to proceed to the next stage of the process;*
>
> 3. *in September 2025, Ofgem published (i) its final decisions regarding eligibility and (ii) the assessment framework for eligible parties proceeding to Project Assessment; and*
>
> 4. *from September 2025 onwards, Ofgem has been progressing the assessment of eligible parties. That work continues.*
>
> … Ofgem has now adopted the development work undertaken on the LDES Scheme to date, including any and all decisions, supporting analysis, and publications made to date in support of that work, for the purpose of discharging its duty under s. 26. As has always been anticipated and as required by the 2025 Act, the LDES Scheme will be established and operated pursuant to s. 26 of the Act.
>
> … By formally adopting the development work undertaken to date, Ofgem can best ensure that the LDES Scheme, its ultimate policy intent, and the new statutory obligations upon Ofgem under s. 26 are delivered in time. Ofgem will now continue to work towards the forthcoming publication of our initial minded to decisions arising out of Project Assessment."

39. Ofgem's decision to adopt the prior work on the LDES Scheme is what we refer to in this judgment as the February decision. In the present proceedings, Zenobē

challenges the February decision as well as Ofgem's decision to publish the September documents.

40. On 16 March 2026 Ofgem opened its initial consultation in respect of the LDES cap and floor licence terms. That consultation closed on 20 April 2026. As at the date of the Tribunal's hearing of the Applications, Ofgem was still considering what level of storage capacity should be supported by the Scheme, and the assessment of the Stage 2 applications was still ongoing.

D. ZENOBĒ'S APPLICATION FOR REVIEW

41. Throughout the consultation process, Zenobē opposed the proposed LDES cap and floor scheme. Its position was that the Scheme would adversely affect investment in short duration storage assets, and thereby jeopardise the roll-out of capacity needed to meet the Government's Clean Power 2030 objectives. It also criticised both the design of the Scheme and the analytical work underpinning it. Mr Palmer expressed a similar view in his evidence, stating that support for LDES projects would place other forms of energy storage at a competitive disadvantage and materially affect markets in which unsupported BESS assets currently operate.

42. On 25 June 2025, in its response to Ofgem's 28 May 2025 consultation, Zenobē called on Ofgem to refer the Scheme to the CMA for formal review under the subsidy control regime. Zenobē's solicitors sent a further letter to Ofgem on 30 June 2025, again contending that the LDES mechanism qualified as a subsidy under the SCA. Ofgem responded on 14 July 2025, taking the view that the Scheme would not involve the use of public resources within the meaning of s. 2(1)(a) of the SCA, and therefore would not give rise to any subsidy.

43. In further correspondence between the parties, Zenobē maintained its position that the proposed cap and floor scheme should be characterised as a subsidy, and Ofgem maintained its position to the contrary. The issue was also discussed, without resolution, at a meeting between Zenobē and Ofgem. Following a pre-action information request sent by Zenobē's solicitors on 7 October 2025, Ofgem responded on 16 October 2025 reiterating that it did not consider that it had given

a subsidy or made a subsidy scheme for the purposes of the SCA. It also said that once enacted, any SCA challenge would be precluded by what was then clause 25 of the Planning and Infrastructure Bill.

44. On 22 October 2025, Zenobē filed an application with the Tribunal under s. 70 of the SCA, contending that the publication of the September documents was a decision to make a subsidy scheme as defined in the SCA. It sought a review of the decision on the grounds that (i) GEMA had not considered the subsidy control principles or the energy and environment principles, contrary to ss. 12 and 13 of the SCA; (ii) GEMA had not requested a report from the CMA or entered the Scheme on the subsidy database, contrary to ss. 52 and 33 of the SCA; (iii) the Scheme was *ultra vires*; and (iv) GEMA had failed to provide notice that it had provided information in response to a pre-action request, contrary to Rule 98A(8) of the Tribunal Rules. By way of relief, Zenobē sought (among other things) an order quashing the September documents.

45. In its defence (originally filed on 5 December 2025), GEMA agreed that it had not taken into account the subsidy control principles or the energy and environment principles, had not requested a report from the CMA, and had not entered the Scheme in the subsidy database. Its position was that the Scheme, when finalised, would be established and operated under a duty imposed by primary legislation, once s. 10P of the Electricity Act 1989 was enacted, which would render the relevant provisions of the SCA inapplicable; and that in any event the Scheme was not a subsidy scheme and would not give rise to financial assistance from public resources. GEMA also contended that the *ultra vires* ground was not within the jurisdiction of the Tribunal, and in any event, took issue with that ground and with the Rule 98A ground.

46. Following the enactment of the Planning and Infrastructure Act 2025 on 18 December 2025, GEMA sought leave to amend its pleadings. That application was granted by the Tribunal at a CMC on 28 January 2026. At the same hearing Mr Barrett KC, for GEMA, noted that once s. 10P came into force Ofgem would take a decision adopting the work which had already been undertaken, which would require further amendment to the pleadings.

47. As anticipated, once the February decision was made, GEMA sought further amendments to its defence to rely on that decision, which were permitted at a further CMC on 17 March 2026. Zenobē then filed a second application under s. 70 of the SCA challenging the February decision, and the Tribunal directed that the two applications be consolidated.

48. For completeness, the Tribunal notes that Zenobē also challenged the September documents and the February decision in judicial review proceedings. On 3 June 2026, however, the parties informed the Tribunal that Zenobē had applied for permission to withdraw those proceedings.

E. LEGAL FRAMEWORK

(1) Section 10P of the Electricity Act 1989

49. Section 10P of the Electricity Act 1989 provides as follows:

> "(1) The Authority [i.e. GEMA] must, as soon as reasonably practicable after this section comes into force, establish and operate a scheme in accordance with this section.
>
> (2) The scheme must be designed for the purpose of encouraging the development and use of long duration electricity storage installations.
>
> (3) The scheme must be open to persons who—
>
> > (a) hold or intend to apply for a generation licence to operate a long duration electricity storage installation, and
> >
> > (b) meet any other specified criteria.
>
> (4) The scheme must provide for an LDES operator who operates an approved installation—
>
> > (a) to receive payments from a holder of an electricity system operator licence where the operator's assessed revenue from that installation is below a specified amount, in specified circumstances, and
> >
> > (b) to make payments to a holder of an electricity system operator licence where the operator's assessed revenue from that installation is above a specified amount, in specified circumstances.
>
> (5) In subsection (4)—
>
> > 'an approved installation' means a long duration electricity storage installation which is approved by the Authority for the purposes of subsection (4) in accordance with the scheme;

'assessed revenue', in relation to a long duration electricity storage installation, means the difference between—

(a) revenue of a specified kind earned or derived in connection with that installation, and

(b) costs of a specified kind incurred in connection with operating the installation.

(6) The Authority may determine how costs and revenue are to be calculated for the purposes of the scheme.

(7) In setting charges to which Article 18(1) of the Electricity Regulation applies, the holder of an electricity system operator licence may take account of payments it makes or receives under the scheme.

(8) In this section—

'LDES operator' means a person who, under a generation licence, generates electricity by means of a long duration electricity storage installation;

'long duration electricity storage installation' means an installation that—

(a) generates electricity from stored energy,

(b) has an electricity generating capacity of not less than 50 megawatts, and

(c) is capable of generating electricity at its full capacity for a continuous period of not less than eight hours;

'specified' means specified by the Authority for the purposes of the scheme in—

(a) a document published by the Authority, or

(b) a condition of a licence;

'stored energy' has the meaning given by section 4(3ZB).

(9) The Secretary of State may by regulations amend the definition of 'long duration electricity storage installation' by substituting—

(a) for the amount of electricity generating capacity for the time being mentioned in paragraph (b) of the definition, a different amount;

(b) for the period for the time being mentioned in paragraph (c) of the definition, a different period (which may not be less than eight hours)."

(2) Relevant provisions of the SCA

50. For the purposes of the SCA, a subsidy is defined in s. 2 as follows:

"(1) In this Act, "subsidy" means financial assistance which—

(a) is given, directly or indirectly, from public resources by a public authority,

(b) confers an economic advantage on one or more enterprises,

(c) is specific, that is, is such that it benefits one or more enterprises over one or more other enterprises with respect to the production of goods or the provision of services, and

(d) has, or is capable of having, an effect on—

(i) competition or investment within the United Kingdom,

(ii) trade between the United Kingdom and a country or territory outside the United Kingdom, or

(iii) investment as between the United Kingdom and a country or territory outside the United Kingdom.

(2) For the purposes of this Act, the means by which financial assistance may be given include—

(a) a direct transfer of funds (such as grants or loans);

(b) a contingent transfer of funds (such as guarantees);

(c) the forgoing of revenue that is otherwise due;

(d) the provision of goods or services;

(e) the purchase of goods or services.

(3) Financial assistance given from the person's resources by a person who is not a public authority is to be treated for the purposes of subsection (1)(a) as financial assistance given from public resources by a public authority if the involvement of a public authority in the decision to give financial assistance is such that the decision is, in substance, the decision of the public authority.

(4) For the purposes of subsection (3), the factors which may be taken into account when considering the involvement of a public authority in the decision of a person to give financial assistance include, in particular, factors relating to—

(a) the control exercised over that person by that public authority, or

(b) the relationship between that person and that public authority.

(5) For the purposes of this Act, financial assistance is to be treated as given to an enterprise if the enterprise has an enforceable right to the financial assistance."

51. A "subsidy scheme" is defined in s. 10(1) as "a scheme made by a public authority providing for the giving of subsidies under the scheme".

52. Section 12(3) provides that a public authority must consider the subsidy control principles "before making a subsidy scheme", and that it "must not make the

scheme" unless it is of the view that the scheme will be consistent with those principles. Section 13 makes similar provisions in respect of the energy and environment principles, where a subsidy scheme provides for the giving of energy and environmental subsidies.

53. The subsidy control principles and the energy and environment principles are set out in Schedules 1 and 2 to the SCA. It is not in dispute that Ofgem did not consider these before it published the September documents and made the February decision.

54. Chapter 3 of Part 2 of the SCA provides for transparency in the making of subsidies and subsidy schemes. Section 32 provides for the establishment of a publicly accessible subsidy database. Section 33(1) requires a public authority to ensure that an entry in the subsidy database is made in respect of a subsidy scheme made by the authority. Again, it is common ground that no entry in the subsidy database was made in respect of either the September documents or the February decision.

55. Section 52(1) provides that a public authority must request a report from the CMA before "making a subsidy scheme" that is "of particular interest", as defined in the Subsidy Control (Subsidies and Schemes of Interest or Particular Interest) Regulations 2022. Those Regulations apply to, among other things, subsidies of specified amounts that concern a "sensitive sector", which includes the production of electricity. Under s. 31, a subsidy scheme that is subject to such referral is prohibited if it has not been referred to the CMA.

56. Section 70(1) of the SCA provides for the review by the Tribunal of the making of a subsidy decision. Under s. 70(2), where the application relates to a subsidy given under a subsidy scheme, the application must be made for a review of the decision to make the scheme rather than a decision made under that scheme. Under s. 70(5), the Tribunal is required to apply the same principles as would be applied by the High Court in determining judicial review proceedings, in the case of proceedings in England and Wales. Under s. 70(7), a subsidy decision is a decision to give a subsidy or make a subsidy scheme.

57. Section 76 of the SCA requires the provision of pre-action information about a subsidy or subsidy scheme, on request by an interested party, to be provided in writing within 28 days of receiving the request for information.

58. Section 71 of the SCA inserted a new Rule 98A into the Tribunal Rules, dealing with the time for bringing an application under s. 70 of the SCA. There is, in the present case, no dispute about the time within which Zenobē's application was filed. Zenobē does, however, rely on Rule 98A(8), which requires a public authority to give notice to the interested party that it has provided information in response to a pre-action request made under s. 76(1) of the SCA. The reason for that is that where a pre-action information request has been made within the relevant time period, time for making an application to the Tribunal will then run from the date on which the notice under paragraph (8) is given by the public authority.

59. Special provision is made by s. 78 and Schedule 3 of the SCA, significantly limiting the application of the SCA to subsidies provided by means of primary legislation. Section 78 SCA provides:

> "(1) Schedule 3 applies provisions of this Act in the case of financial assistance provided, or schemes for the provision of financial assistance made, by means of primary legislation.
>
> (2) Nothing in this Act applies to the giving of such assistance, or to the making of any such schemes except so far as provided for by that Schedule."

60. Schedule 3 of the SCA provides:

> "1. This Schedule provides for the application of this Act in the case of subsidies provided by means of primary legislation.
>
> …
>
> 3 (1) The definition of 'subsidy' in section 2 applies for the purposes of this Schedule (so far as the context requires) as if the reference in subsection (1)(a) of that section to financial assistance given by a public authority were a reference to financial assistance provided by means of primary legislation.
>
> (2) Section 4 applies for the purposes of this Schedule as if—(a) the reference in subsection (4) of that section to financial assistance given by a public authority were a reference to financial assistance provided by means of primary legislation, …

(3) The definition of 'subsidy scheme' in section 10 applies for the purposes of this Schedule as if the reference in subsection (1) of that section to a scheme made by a public authority were a reference to a scheme made by primary legislation.

4. In this Schedule references to a subsidy provided by means of primary legislation—

(a) include reference to a subsidy given by a public authority under a duty imposed by that legislation;

(b) do not include references to a subsidy given by a public authority under a power conferred by that legislation (but see section 1(7)).

5. In this Schedule—

(a) references to a subsidy provided by means of primary legislation include references to a subsidy scheme made by that legislation;

(b) references to a subsidy given by a public authority include references to a subsidy scheme made by the authority."

61. The subsequent provisions of Schedule 3 specify the extent to which the substantive provisions of the SCA apply to subsidies provided by means of primary legislation. In short, the *only* provisions of the SCA that are applied to financial assistance provided, or schemes for the provision of financial assistance made, by means of an Act of Parliament are Chapter 3 of Part 2 (which provides for the subsidy database) and ss. 56, 57 and 59 (which provide for voluntary referrals to the CMA).

62. Section 70 is not within the provisions in Schedule 3 that are specified to apply to subsidies made by means of an Act of Parliament. It follows that the Tribunal has no jurisdiction in respect of schemes for the provision of financial assistance made by means of an Act of Parliament.

F. ARGUMENTS OF THE PARTIES

(1) Zenobē's position

63. Mr Gibson submitted that by publishing the September documents, Ofgem had in substance decided to establish the framework under which cap and floor support would be granted to individual LDES projects. He contended that this amounted to a decision to make a subsidy scheme as defined in the SCA. He argued that the

test under the SCA that the assistance "is given directly or indirectly from public resources by a public authority" is materially identical to the equivalent test in EU State aid law, and that financial assistance provided under the Scheme satisfies this test because:

(1) Any floor payment will be made by NESO, which is a public authority, and will be funded by the imposition of the BSUoS charge levied by NESO on the suppliers who use the network. That is a parafiscal charge on the end users of the network services provided by LDES installations. The sums recovered through that charge will remain constantly under public control and/or supervision. Ofgem (with support from NESO) will determine which projects benefit from the Scheme and the level of the cap and floor and will set and enforce the licence conditions both for electricity suppliers and NESO.

(2) In addition, there will be a potential time-lag between NESO's obligation to make a floor payment and the recouping of that payment through BSUoS charges from suppliers, and that time-lag is covered by a working capital loan facility provided by the Secretary of State to NESO, which also constitutes public resources.

(3) Mr Gibson contended that there is no meaningful difference between the Scheme and other UK schemes that have been treated as subsidy schemes and referred to the CMA as such.

64. On that basis, Mr Gibson said that Ofgem was obliged to comply at that stage with the requirements of ss. 12, 13, 52 and 33 of the SCA: namely to consider the subsidy control principles and the energy and environment principles; to refer the Scheme to the CMA; and to ensure that an entry in the subsidy database was made in respect of the Scheme. It is common ground that Ofgem did not do any of those things, in relation to either the September documents or the February decision.

65. Mr Gibson argued that the adoption of the February decision following the entry into force of s. 10P made no difference to the analysis, since (he argued) the effect of the February decision was not to supersede the September documents; and the

September documents therefore continued to have a legal effect that was not validated by s. 10P, since that provision is not retroactive. He also argued that s. 10P does not empower Ofgem to "adopt" an existing decision to make a subsidy scheme; and that the February decision was not, therefore, properly taken under s. 10P.

66. In any event, Mr Gibson said that a Scheme adopted pursuant to s. 10P was not a scheme "for the provision of financial assistance made by means of primary legislation" within the meaning of s. 78 SCA, because s. 78 only applies where the subsidy scheme in question is prescribed by primary legislation without affording any discretion to the public authority tasked with its implementation, whereas s. 10P leaves the design of the scheme substantially to the discretion of Ofgem. In support of that interpretation of s. 78, he relied on the following statement made by Paul Scully MP, the Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy, as recorded in Hansard (House of Commons, Subsidy Control Bill (Eleventh Sitting), 18 November 2021, cols 329–330):

> "… it will be helpful to explain what I mean when I refer to subsidies provided by primary legislation. Primary legislation in Westminster or the devolved legislatures can provide for granting subsidies in a number of ways. The most common is by conferring a discretion on Ministers or other public authorities to provide financial assistance … That provides the necessary statutory underpinning for financial assistance but does not mandate financial assistance to be given. The amount and conditions of any financial assistance are at the discretion of the public authority. A subsidy that is granted under a power conferred by a primary enactment is not a subsidy granted by primary legislation. For these purposes, therefore, a subsidy is granted by primary legislation only if the Act itself makes provision that directly amounts to the grant of a new subsidy, or requires a grant of a new subsidy by a public authority with no room for discretion on the part of that authority. Apart from taxation, that is very rare. The reference to a subsidy granted by primary legislation is in practice therefore usually concerned with the grant of a statutory entitlement to a specific tax relief or credit that amounts to a subsidy, for example a tax credit for small businesses to carry out research and development."

67. Mr Gibson further contended that if the September documents did constitute a subsidy scheme, that was *ultra vires* since GEMA did not have any power to make a subsidy scheme in September 2025. He maintained that GEMA was also in breach of Rule 98A(8) of the Tribunal Rules, by failing to give a notice pursuant to that provision following Zenobē's request for pre-action information.

68. Mr Gibson contended that there was no reason why the relief sought by Zenobē should not be granted, including orders quashing the September documents and the February decision. Indeed, he argued that the Tribunal has no power to withhold relief in respect of the alleged breach of s. 52(1) SCA, because s. 31 mandates that a scheme which does not comply with s. 52(1)(a) is "prohibited".

(2) GEMA's position

69. Mr Barrett submitted that the current position is that there has not been any decision to make a subsidy scheme within the meaning of the SCA; and that any such decision (if indeed the Scheme could be characterised as a subsidy scheme on the basis of the definition of a subsidy) will only be taken once a final decision has been taken on the storage capacity to be supported by the Scheme and the cap and floor licence terms.

70. In any event, however, he submitted that following the entry into force of s. 10P of the Electricity Act 1989 the Scheme is being made, and will be made, under a duty imposed by primary legislation, such that under s. 78 and Schedule 3 of the SCA none of the provisions upon which Zenobē relies apply to the Scheme. On that basis, the February decision adopted the previous development work for the purposes of fulfilling GEMA's statutory duty under s. 10P.

71. As for the September documents, Mr Barrett said that those did not constitute a decision to make a subsidy scheme within the meaning of the SCA, but were simply an intermediate step in a multi-stage, on-going, decision-making process. Substantially more significant decisions had been made at earlier stages, and substantially more significant decisions were yet to be made, notably in relation to the level of storage capacity to be supported, the licence conditions and the project award decisions. The decision-making process provided for in the September documents was, moreover, highly discretionary, flexible and subject to change, such that the September documents did not set out a system of detailed, objective criteria or rules of the sort necessary to establish a "subsidy scheme" within the meaning of the SCA.

72. Mr Barrett also disputed the characterisation of the Scheme as involving the provision by Ofgem of financial assistance "from public resources", within the meaning of s. 2(1)(a) of the SCA. He argued that the Scheme will not involve any charge to the public balance sheet, nor the foregoing of any revenue that would otherwise be due to the public authority; rather the Scheme would provide for a variation of licence conditions leading to the consequence that resources *may* be transferred between private parties.

73. Mr Paines submitted that Zenobē's *vires* ground was an abuse of process, on the basis that the Tribunal's jurisdiction under s. 70 of the SCA is confined to the compatibility of a subsidy control decision with the SCA, and does not encompass broader public law questions, which are properly matters for determination in a judicial review in the Administrative Court. In any event, he said that s. 10P provides *vires* for the development work now being undertaken; and prior to the entry into force of s. 10P, Ofgem had *vires* to undertake development work on the Scheme under its existing legal powers, including ss. 3A, 6(1)(a), 7, 11 and 11A of the Electricity Act 1989 and paragraph 11 of Schedule 1 to the Utilities Act 2000.

74. Mr Paines contended that Zenobē's reliance on Rule 98A of the Tribunal Rules was likewise unfounded, since GEMA's response to Zenobē's pre-action information request was not a subsidy control decision that is susceptible to the Tribunal's jurisdiction under s. 70 SCA, and breach of Rule 98A does not give rise to a separate cause of action. In any event, Zenobē's pre-action information request was answered by GEMA, and Rule 98A was not breached simply because that response denied that there had been a subsidy decision.

75. Finally, Mr Paines invited the Tribunal to refuse relief (or at least to refuse relief quashing the September documents and/or February decision), given the adverse impact of that relief on the transition to renewable energy and the existing applicants for cap and floor support, relying on the evidence referred to at §8 above.

G. THE ISSUES

76. The arguments of Zenobē and GEMA give rise to six issues for determination by the Tribunal:

(1) Do the September documents and/or the February decision constitute subsidy decisions for the purposes of s. 70 of the SCA?

(2) If so, what is the impact of s. 10P of the Electricity Act 1989 on Zenobē's applications for review of either the September documents or the February decision?

(3) Does the Scheme involve the grant of financial assistance directly or indirectly from public resources, within the meaning of s. 2(1)(a) of the SCA?

(4) Was Ofgem's publication of the September documents *ultra vires*?

(5) Was GEMA's response to Zenobē's request for pre-action information a breach of Rule 98A of the Tribunal Rules, and if so does this give rise to a cause of action?

(6) If necessary to determine the point, what relief (if any) should be granted by the Tribunal in respect of Zenobē's application?

H. THE TRIBUNAL'S ANALYSIS

(1) Existence of a subsidy decision

77. In considering whether the September documents can be characterised as a subsidy decision reviewable under s. 70 of the SCA, it is necessary to have in mind the context in which the Scheme was being developed. The following features emerge from the background set out above:

(1) It was evident that establishing the Scheme was a significant multi-stage project.

(2) The delivery of that project was to include both the passage of legislation to provide statutory support for establishing the Scheme, as well as significant work by Ofgem to develop the Scheme.

(3) With a view to delivering the project within the desired timescale, important elements of the development work were being undertaken by Ofgem in parallel with the Parliamentary process, and in anticipation that the legislation would be enacted.

(4) Further, the work to develop and define the Scheme was being undertaken alongside, and was informed by, the process of inviting the submission of projects for assessment. So, for example, a decision about the aggregate capacity to be supported by the Scheme was to be informed by assessing the eligible projects to be submitted at Stage 2.

(5) By September 2025, the Planning and Infrastructure Bill had been published, had been passed by the House of Commons and was under consideration by the House of Lords. The new s. 10P of the Electricity Act 1989, provided for in clause 25 of the Bill, if passed by Parliament, would require GEMA to "establish and operate" the proposed LDES cap and floor scheme. It was evident that Ofgem would and could, in implementing that statutory responsibility, "establish" the scheme only after the statute had come into force.

(6) The publication of the September documents was an important stage in the multi-stage process of developing the Scheme. This suite of documents provided sufficient information about the project assessment process to enable eligible projects to be submitted for assessment. But it remained a stage in a process that was being undertaken on the footing that Ofgem would establish and operate the LDES cap and floor scheme under s. 10P of the Electricity Act 1989, after that provision had come into force.

(7) Although eligible projects were to be submitted for assessment during the application window which opened with the publication of the September

documents, it was anticipated that Stage 2 decisions would be made only after s. 10P had come into force.

(8) In addition, it was only at that stage that a decision would be made as to the level of storage capacity to be supported by the Scheme. The decision as to the aggregate capacity to be supported would be an essential precursor to the decisions to grant cap and floor support to particular projects. It was accordingly clear that no project would be granted cap and floor support until after the legislation had come into force.

78. In these circumstances, the September documents did not "make" a subsidy scheme within the meaning of ss. 2 and 10(1) of the SCA. Rather, they formed part of the development of a scheme that was to be established under the proposed new s. 10P of the Electricity Act 1989, once that provision was in force. Although the September documents set out the framework under which projects would be assessed at Stage 2, significant decisions – including the aggregate capacity to be supported and the terms of the licence conditions to be imposed under the Scheme – remained to be decided once s. 10P was in force. The publication of the September documents was therefore simply a step in the development of the Scheme, not the making of the Scheme itself.

79. It follows that the decision to publish the September documents was not a "subsidy decision". It further follows that the Tribunal does not have jurisdiction to entertain Zenobē's challenge under s. 70 of the SCA in relation to the September documents.

80. The February decision was likewise not a decision to make a subsidy scheme. Since the publication of the September documents did not (for the reasons we have set out above) make a subsidy scheme, the adoption of those documents by the February decision likewise did not do so. It remained the position that the work being undertaken at that time was preparatory or development work that was being done with a view to the future establishment of the Scheme by Ofgem pursuant to s. 10P when that provision had come into force. It follows that the February decision was also not a "subsidy decision" and the Tribunal has no jurisdiction to review it.

(2) Application of s. 10P of the Electricity Act 1989

81. Although these conclusions suffice to dispose of Zenobē's applications, we nevertheless address the parties' submissions about the application of the SCA to the Scheme to be established under s. 10P of the Electricity Act 1989. There are two main issues to be considered in that regard. The first is whether the Scheme is "made by means of primary legislation" within the meaning of s. 78 of the SCA. If the answer to that question is "yes", the second issue is the impact of that upon the Tribunal's analysis of the September documents and the February decision.

(a) Whether the Scheme is "made by means of primary legislation"

82. Section 10P represents the law now in force. It is plain that it imposes a duty on GEMA to "establish and operate" a scheme in accordance with the section. The subsection uses the imperative "must". Further, it specifies:

(1) the timescale within which the duty must be fulfilled ("as soon as reasonably practicable": s. 10P(1));

(2) the purpose for which the scheme is to be designed ("encouraging the development and use of long duration electricity storage installations": s. 10P(2));

(3) the LDES operators and LDES installations that are to be eligible for support under the scheme (as defined in s. 10P(8)); and

(4) that the scheme must provide cap and floor support (as described in s. 10P(4)).

83. Within these parameters, the section gives GEMA substantial freedom to design the scheme. GEMA is given specific powers to specify "any other" criteria that LDES operators must meet (s. 10P(3)(b)), and to determine how costs and revenue are to be taken into account and assessed for the purposes of the scheme (s. 10P(6)). But GEMA's powers in respect of the design of the scheme do not

detract from its duty, by reason of s. 10P(1), to "establish and operate" a scheme in accordance with the section.

84. The parties have advanced competing submissions as regards the application of s. 78 and Schedule 3 of the SCA to the Scheme. The issue between the parties is whether, on the assumption that the Scheme does involve the grant of subsidies, that scheme would be a scheme "for the provision of financial assistance made by means of primary legislation" as defined in the SCA. We have concluded that it would, and that this significantly limits the application of the SCA.

85. Schedule 3 §4 defines subsidies "provided by means of primary legislation" to include subsidies given by a public authority under a duty imposed by that legislation. Where a subsidy scheme is concerned, rather than an individual subsidy, §4 needs to be read together with §5. The effect of doing so is to extend the scope of Schedule 3 (and therefore s. 78) of the SCA to a subsidy scheme that is made by a public authority under a duty imposed by primary legislation.

86. Zenobē argues that the word "duty" connotes a responsibility or obligation to do something which excludes "any choice or discretion". Accordingly, it contends that a subsidy scheme is made by a public authority under a "duty" imposed by legislation, for the purposes of §§4 and 5 of Schedule 3, only where "the whole scheme is prescribed by primary legislation without affording any discretion to the public authority tasked with implementing the scheme", other than the purely administrative discretion involved in administering the scheme. It therefore says that the Scheme is properly to be characterised as a scheme made under a "power" rather than under a "duty".

87. Zenobē argues that its interpretation is to be preferred because this would accord special protection only to schemes which Parliament has itself designed without giving any discretion to any other body, whereas GEMA's interpretation would extend protection to a scheme that was designed by a public authority and not by Parliament itself. It also relies, as noted above, on a statement made by the relevant Minister in the House of Commons, suggesting that the reference to a subsidy granted by primary legislation is in practice usually concerned with the grant of a tax relief or tax credit.

88. We reject Zenobē's interpretation. As we have explained above, the effect of §§4 and 5 of Schedule 3 to the SCA is to bring within the scope of the Schedule a subsidy scheme that is "made" by a public authority under a duty imposed by primary legislation. That explicitly extends the scope of Schedule 3 beyond schemes that are wholly prescribed by legislation (i.e. without affording any discretion to the public authority charged with their implementation), to cover, in addition, schemes that are "made" by a public authority pursuant to a legislative duty. Zenobē's submission that a subsidy scheme will only fall within Schedule 3 where it is wholly prescribed by primary legislation is not, therefore, consistent with the clear statutory language.

89. Nor is Zenobē's interpretation supported by the context and purpose of the provisions. In our view, both the context and respect for Parliamentary sovereignty (which we accept is one of the purposes of the provisions in s. 78 and Schedule 3 of the SCA) favour interpreting the provisions in accordance with the natural and ordinary meaning of the statutory language as we have explained it. The language used in §5(b) referring to a subsidy scheme "made" by a public authority is consistent with references elsewhere in the SCA to a public authority "making" a subsidy scheme, for example in ss. 12 and 13. Accordingly, on Zenobē's interpretation of Schedule 3, a public authority that has a statutory duty to make a subsidy scheme, but has a measure of discretion as regards the design of the scheme, would be prohibited from making the scheme unless it considered that the subsidies provided for would be consistent with the subsidy control principles and the energy and environment principles. That would render the fulfilment of the duty which Parliament has imposed on the public authority contingent on that authority's view as to whether the subsidies to be provided by the scheme would be consistent with the subsidy control principles and the energy and environment principles.

90. The implications of that can be illustrated by the present case (proceeding, for the sake of argument, on the assumption that admission to the Scheme involves a subsidy). As we have explained, Parliament has specified both the nature of the scheme (i.e. a cap and floor scheme) and the LDES projects which are to qualify for support. Zenobē's essential contention is that this will distort the market to the detriment of shorter duration storage projects. Zenobē's interpretation of

Schedule 3 would, on the face of it, require Ofgem to assess whether the provision of cap and floor support to the defined LDES projects satisfies the subsidy control principles and energy and environment principles set out in Schedules 1 and 2 to the SCA. But the policy choices which would require to be addressed, when considering those principles, have *already* been made by Parliament by reason of the enactment of s. 10P. To require Ofgem to undertake an analysis which, depending on the view which Ofgem took of these matters, might by reason of ss. 12(3) and 13(3) result in the conclusion that it "must not make the scheme" would be directly contrary to the decision which Parliament has made, when enacting s. 10P(1) that GEMA "must" establish and operate a scheme in accordance with that section.

91. As for the Ministerial statement upon which Zenobē relies in support of its interpretation, under the rule in *Pepper v Hart* a statement in Hansard is admissible as an aid to interpretation only if (a) the statutory provision is ambiguous or obscure, or leads to an absurdity, (b) the statement as to the meaning of the provision is made by or on behalf of a minister or other promoter of the Bill, and (c) the statement is clear and unequivocal on the point of interpretation which the court is considering: *R(O) v Home Secretary* [2022] UKSC 3, [2023] AC 255, §32; and *Darwall v Dartmoor National Park Authority* [2025] UKSC 20, [2025] AC 1292, §40.

92. For the reasons set out above, we do not consider that the relevant provisions are ambiguous or obscure or lead to an absurdity. Nor is the Ministerial statement clear and unequivocal on the point at issue in this case. The passage upon which Zenobē relies is concerned to distinguish between a provision which empowers a public authority to give a *subsidy* and a situation where the legislation makes provision that directly amounts to the grant of a *subsidy*, or requires a grant of a *subsidy* by a public authority. The cited passage does not address the making of *subsidy schemes* and is therefore of no assistance on the specific question of interpretation that is before us.

93. We therefore accept GEMA's submission that if the Scheme does involve the provision of financial assistance as defined in s. 2 of the SCA, it is a scheme that

is "made by means of primary legislation" within the meaning of s. 78, thereby excluding the jurisdiction of the Tribunal under s. 70.

(b) The analysis of the September documents and the February decision

94. The remaining question is the analysis of the September documents and the February decision, if (contrary to the conclusion we have reached above) these are (or either of them is) to be construed as a "subsidy decision".

95. Starting with the September documents, we accept GEMA's submission that whatever the effect of those documents, they have now been superseded by the February decision, such that Zenobē's application to review the publication of the September documents is now academic. There is, to use the language of Sheldon J in *R (Hidenda) v HMRC* [2025] EWHC 551 (Admin), §21, no longer a *lis* to be decided in respect of the publication of the September documents which will directly affect the rights and obligations of the parties.

96. In that regard, Mr Barrett referred us to the reasoning of the Court of Appeal in *Shrewsbury & Atcham Borough Council v SS for Communities and Local Government* [2008] EWCA Civ 148, [2008] 3 All ER 548. That case concerned the replacement of two-tier local authorities with unitary authorities. In tandem with the introduction and progress in Parliament of the necessary primary legislation, the Secretary of State also took forward a three-stage process of assessment, following which she issued letters explaining the unitary authorities which she intended to establish in certain areas once the legislation came into force. Two borough councils brought judicial review proceedings, challenging the right of the Secretary of State to embark on the process in anticipation of the legislation, as well as the way in which the process had been undertaken and the decisions that the Secretary of State had reached.

97. On 10 October 2007 Underhill J dismissed the applications. On 1 November 2007 the legislation came into force, and on 5 December 2007 the Secretary of State confirmed the decisions which she had previously taken. An appeal against Underhill J's decision was heard by the Court of Appeal in January 2008. At the outset of the appeal, the case remained focused on the pre-enactment work and

decisions. During the appeal the appellants were given permission to amend the proceedings to challenge the December decision.

98. Carnwath LJ, giving the judgment of the Court of Appeal, observed (at §31) that the amendment was "essential to ensure that the relevant decisions were within the scope of the proceedings." As he went on to explain, judicial review

> "is concerned with actions or other events which have, or will have, substantive legal consequences: for example, by conferring new legal rights or powers, or by restricting existing legal rights or interests. Typically there is a process of initiation, consultation, and review, culminating in the formal action or event ('the substantive event') which creates the new legal right or restriction (§32)."

99. The "substantive event" in that case would have been the taking effect of the necessary orders under the 2007 legislation, bringing about the creation of the new authorities. While the Boroughs were entitled to commence proceedings at an earlier stage, once the legislation had been passed and formal decisions taken under it the focus of any challenge inevitably had to shift to the post-Act decisions (§§34–5). The only issue that ultimately mattered was therefore the legal effect of the December decisions, and the steps taken pursuant to them. The judgment below, made in a different statutory context, had therefore been overtaken by events (§36).

100. We acknowledge, of course, that these remarks were made in the context of the particular issues which arose in that case. But there are some points of similarity. As matters stand today, GEMA is obliged by s. 10P of the Electricity Act 1989 to establish and operate a LDES cap and floor scheme. Admission of projects to cap and floor support will take place pursuant to the scheme which Ofgem establishes under that section. Ofgem has, in the February decision, explicitly adopted all the previous development work for the purposes of GEMA's statutory responsibilities under s. 10P. As in the *Shrewsbury* case, now that s. 10P is in force and the February decision has been taken pursuant to GEMA's functions under s. 10P, it is essential to refocus the challenge on that decision. Any ongoing legal effect or consequence which the September documents may have now derives from the February decision to adopt the earlier work.

101. That does not involve giving s. 10P a retroactive effect which Parliament did not intend. Rather, it is a recognition that, in light of the coming into force of s. 10P and Ofgem's express adoption of its work already undertaken, the decision to publish the September documents has no current legal effect or consequence separate from the February decision. No useful or practical purpose would now be served by reviewing the earlier decision, even if, contrary to our view, it involved the making of a subsidy scheme.

102. Nor do we accept Mr Gibson's submission that the February decision was not properly taken under the provisions of s. 10P. In so far as this was a separate argument to the non-retroactivity argument, we understand the point to be that the provisions of s. 10P are "forward-looking" and do not empower Ofgem to adopt a decision that has already been made (in this case the September documents). We do not accept that submission. Section 10P(1) specifically requires GEMA to establish and operate an LDES cap and floor scheme "as soon as reasonably practicable" after the entry into force of the section. There is nothing in the section which precludes GEMA from commencing development work on that scheme prior to the entry into force of s. 10P, or from adopting that work following the section's entry into force in order to "establish" the scheme as required.

103. The February decision was therefore properly taken pursuant to s. 10P. It follows that it superseded the publication of the September documents, and it is therefore (in principle) the February decision that must be the subject of any challenge by Zenobē. The effect of s. 78 and Schedule 3 of the SCA, however, is that the Tribunal does not have jurisdiction to review that decision.

104. It follows that, even if the publication of the September documents and/or the February decision constituted a subsidy decision within the meaning of the SCA, the application to review the September documents is academic in light of the February decision; and the Tribunal has no jurisdiction to review the February decision pursuant to s. 78 and Schedule 3 of the SCA.

(3) The other issues

105. Given our conclusions above, it is not necessary for us to address the remaining issues set out at §76 above. In particular, it would not in our view be appropriate to seek to resolve whether the Scheme would fall to be characterised as a "subsidy scheme" within the meaning of the SCA when, for the reasons we have set out above, we have no jurisdiction to review the decisions which Zenobē seeks to challenge, and when, in any event the factual basis to which the law would fall to be applied, in that regard, is not yet finally settled.

106. As to the other issues, they do not arise for determination given the conclusions we have reached. We do, however, make one observation on the *vires* argument relating to the publication of the September documents. GEMA contended, in that regard, that the Tribunal's jurisdiction is confined to what it characterises as "subsidy control" issues, and that any separate argument of *vires* must therefore be raised by way of judicial review proceedings in the Administrative Court. We do not accept that submission.

107. Section 70(1) provides that an interested party aggrieved by the making of a subsidy decision may apply to the Tribunal for a review of the decision. Section 70(5) requires the Tribunal to apply the same principles as would be applied in a judicial review. Parliament has therefore determined that in this specialist field, as in the case of merger decisions (see s. 120 of the Enterprise Act 2002), a judicial review should be brought before the Tribunal rather than before the High Court in England & Wales or Northern Ireland or the Court of Session in Scotland. It would be highly undesirable, and inconsistent with considerations of procedural economy, for an interested party aggrieved by a subsidy decision on multiple grounds (including breaches of the SCA and other public law grounds) to have to raise parallel proceedings in the Tribunal, on the one hand, and in the High Court of England & Wales or Northern Ireland or in the Court of Session, on the other.

108. If, therefore, the Tribunal had jurisdiction to review the publication of the September documents, we do not consider that it would have been precluded from doing so on the basis of a public law argument that the decision to publish those

documents was *ultra vires*, as well as any other arguments that might have arisen on the basis of the requirements of the SCA. In the event, however, we have concluded that the Tribunal does not have jurisdiction to undertake such a review, and the question of *vires* therefore does not arise.

I. DISPOSITION

109. We accordingly dismiss the Applications. This judgment is unanimous.

The Honourable Mrs Justice Bacon
President

James Wolffe KC

John Davies

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 23 June 2026