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Unfair Competition

There is an interesting case by Zenobe Energy Limited before the Competition Appeal Tribunal.

The core of the Zenobe claim is that short-duration energy storage (SDES) earning its income from revenue stacking is being disadvantaged by the introduction of the cap and floor scheme because:

(a) the scheme supports long duration storage (LDES) with an investment floor (a percentage of the investment floor will be supported by the scheme); and

(b) projects with that investment floor support are assumed by Ofgem to use the same revenue-stacking markets as SDES and therefore the cap and floor scheme (by virtue of the investment floor) has created an anti-competitive arrangement that undermines the investment case for SDES.

This point has been made in different ways by different financial commentators: SDES is restricted to the revenue-stacking markets and doesn't also obtain a floor payment to cover its investment costs. So SDES income is less than LDES income and SDES investability is also therefore less than LDES investability as a result of the investment floor. When this is combined with both using the same revenue-stacking mechanisms, unfair competition has been created.

Zenobe cites the Subsidy Control Act 2022 to say the cap and floor scheme shouldn't have been introduced or, if introduced, not in the unfair competitive way it was and that rules should have been followed by Ofgem before (if at all) the scheme was introduced and which were not followed. Zenobe clearly has in mind that SDES revenue-stacking should not be the main market for LDES *or* alternatively consideration should have been given to there being an investment floor for SDES as well as LDES.

Ofgem's riposte is that there will be legislation in effect on 25 November 2025 which will be a bar to Zenobe's claim. In fact:

a. the legislation in question (the Planning and Infrastructure Act) is still in Bill form ping-ponging in the Lords and will not come into effect before Christmas at the earliest or at some stage in or later than Q1 2026 (and it is perfectly possible it could come into effect even later, not least as a result of any changes that may be made to take account of the Zenobe case);

b. Ofgem refers to a "Statutory Bar" to Zenobe's claim. There is no obvious Statutory Bar in the Planning and Infrastructure Act, although there are provisions about judicial review that, *inter alia,* make applications much harder to pursue ("*the court may, at the oral hearing of… an application, decide that the application is totally without merit*": it is far from obvious that a judicial review on the point would be without merit);

c. Ofgem claims the cap and floor scheme isn't a subsidy, a subsidy being defined as provision of financial assistance by a government or public body. Zenobe rejects that because the financial assistance in question is provided through network charges of publicly-owned bodies such as NESO. The assistance is coming in the first instance from a public body even though ultimately it is the consumer who pays.

Interestingly, despite its reference to a Statutory Bar, despite it claiming the cap and floor scheme is not a subsidy, Ofgem thinks the case will be complicated and will take some time to deal with.

Let's suppose that the Zenobe case is heard before the Planning and Infrastructure Act is in force: it appears to be scheduled to be heard in early 2026. If we further suppose the case is found proven and the stated Ofgem responses don't work (and on their face they don't look as though they will work), the upshot will be that the Subsidy Act rules weren't followed and as a consequence the cap and floor scheme is not legitimate.

That obviously cannot be allowed to happen. The cap and floor timetable is tight and any delay to its implementation would fundamentally undermine government policies for 2030.

Would it be a simple matter to amend the-then-impending Planning and Infrastructure Act to override the Subsidy Control Act to nullify the outcome? For example, by way of a provision that states something (much abbreviated) along the lines of *"for the purposes of the relevant cap and floor provisions in Section 25* ***Long Duration Electricity Storage*** *the Subsidy Control Act has no application"*?

Simple removal of the Subsidy Control Act from the scope of the Planning and Infrastructure Act would be a hammer to crack a nut. The Subsidy Control Act has many uses and simply disapplying it in toto is likely to remove provisions that must apply. For example, there is a list of prohibitions and conditions that indirectly apply to the cap and floor scheme and there are subsidy control principles that apply and their disapplication leaves the sections denuded of much of their justification.

What Zenobe has done in this case, if indirectly, is poked hard at Ofgem's core duty, its obligation to protect the interest of consumers by promoting effective competition (where appropriate to do so). Ofgem is obliged to ensure fair competition between existing energy market players (SDES) and new entrants (LDES). Zenobe's claim in effect is that it hasn't done so.

Leaving the issue of the Subsidy Control Act to one side and concentrating on Ofgem's core obligations:

a. how has Ofgem failed to promote competition? and

b. is it appropriate for it to have done so?

One major missing issue in the whole of the cap and floor scheme is NESO's demand for LDES; it is unknown – but it is what will be demanded; that, after all, is the point of the cap and floor scheme.

NESO will be involved in the selection process for LDES and will guide choices based on, among other things, but crucially, its developing Strategic Spatial Plan which should have (but seems not to have) a basic model of its uses for LDES. In assessing the viability of the cap and floor projects Ofgem, in concentrating on SDES markets while ignoring LDES markets, has signally ignored competition between these different entrants. Further, since the markets in question for LDES are

obviously intended to be LDES markets and not SDES markets, it is *in*appropriate for it to have done so.

So how is this to be dealt with? It sounds simple to suppose that there could be a carve-out in the Planning and Infrastructure Act to deal with the problem.

At present, there is no specific market for LDES – there is no demand for 8-hour-plus storage or its variants, which is what the Planning and infrastructure Act provides for: Ofgem just assesses cap and floor projects by reference to the shorter multiple revenue stacking markets in which SDES earns its income and where the anti-competitive conflict with LDES arises.

Both Ofgem and NESO know that at some point there need to be specifically LDES markets to deal with LDES assets. Dealing with these markets sooner rather than later would seem to be an obvious step to take. The LDES markets need not be in place before 2030 – but their shape must be outlined *in detail* at a much earlier stage.

Dividing SDES and LDES markets would overcome the main issues Zenobe claims affect investability in the different technologies; and doing so would avoid breach of Ofgem's core duties. An amendment to the Planning and Infrastructure Act to provide for these two separate markets for the two separate technologies could be done in broad form (with, for example, regulations to come into effect at a later date).

This needs to be done soon if the Zenobe claim is to be rebutted before its case concludes early next year and finds that the cap and floor scheme is illegitimate under the Subsidy Act rules. Such an amendment should have the effect of undermining Zenobe's case.

This should have been done some time ago.

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