

Climate Litigation and the Energy Transition

Sources & Hierarchy – An extrapolation from the UK?

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Outline

1. Introduction
2. Capacity Mechanisms as a practical example
3. *Zenobē Energy* in the UK, subsidies, Climate law duties and European angles
4. Conclusions

1. Introduction (1)

1. Introduction

Directly linking the climate litigation topic with specific issues in the Energy Transition.

UK as an example: different means of examining various national rules aimed at achieving (aspects of) Energy Transition, while incorporating climate goals and obligations relating thereto ...

1. Introduction (2)

Levels in a potential hierarchy of sources and obligations under Climate law ...

- **Public International Law** (ICJ, ITLOS, Inter-Am-CtHRs)
- **EU Law** (Climate and related goals), ECHR Law (*Klimaseniorinnen, etc*)
- **National law:**
 - Constitutional
 - Primary legislation
 - Secondary measures, etc

⇒ **Where do climate laws and obligations sit ... *and* ...**

⇒ **What impact(s) do they have in practice?**

2. Capacity Mechanisms as a practical example? (1)

2.1 Needed to provide reserve capacity and ensure grid reliability and stability – massive growth in renewable electricity (RE) generation leading to intermittency and spiking problems

2.2 Subsidy provided in return for promise of availability, potential State aid and related issues to address – entry point for Climate law?

2.3 Disguised means of supporting non-RE generation sources given their flexibility in storage and time-response

⇒ Support for RE can lead to support for non-RE too ...

2. Capacity Mechanisms (2)

2.2 Debate on improving design of CMs:

- To date, often focused on economic analysis and broader policy considerations, etc;
 - Can we formulate *legal* requirements and obligations for legislators, governments and regulators to ensure better CM design, with the goals of the energy transition and combating climate change at the forefront?
- ⇒ Where can climate law obligations generate traction?

3. *Zenobē Energy* in the UK etc (1)

3.1 *Zenobē Energy v. GEMA*

Challenge to proposed UK cap-and-floor regime for Long-Term Energy Storage, *inter alia* on grounds that the proposed scheme would be a subsidy scheme which do not satisfy the UK's Subsidy Control Act 2022

Competition Appeal Tribunal (CAT) ruled that Ofgem had been placed under a statutory obligation to introduce such a scheme, and this took it outside the CAT's jurisdiction to hear cases under the 2022 Act altogether (see s.78 and Schedule 3 to the 2022 Act – general right to challenge a subsidy disapplied where the subsidy is made by means of an act of Parliament).

⇒ Here, s. 10P of the Planning and Infrastructure Act 2025 says that Ofgem “must ... as soon as reasonably practicable” introduce such a cap-and-floor LTES regime ... this provided the sufficient stamp of Parliament to cover the decision of the regulator.

3. *Zenobē Energy* etc (2)

3.2 Outcome of the case is to reduce potential challenges to such schemes to:

- *ex post* judicial review of a scheme; or
- an appeal to the Competition and Markets Authority where a scheme involves modifications to electricity licence conditions.

⇒ Puts pressure on the *ex ante* consultation stage re design and development of any such support schemes ...

3. Zenobē Energy and EU comparisons

... (3)

3.3 Contrast the UK Anti-Subsidy legal position with EU law:

- EU energy legislation and EU State aid and free movement law have direct effect and primacy;
- Inserting climate considerations into EU State aid law as preconditions, etc, gives them teeth ...
- UK hierarchies?
 - Climate Change Act 2008 as a ‘constitutional statute’? See UKSC judgment in *Finch* re planning considerations and the new National Planning Framework;
 - contrast *Zenobē* outcome and ease of immunising subsidy decisions from such scrutiny via primary legislation ...

4. Conclusions

Questions of legal sources and the hierarchies they create under EU and national law:

- Implications will be subtly different for each country;
- Impacts of international law obligations, EU law, ECHR law, and national legal frameworks and their interactions *inter se* will determine the practical impact of climate law obligations across a range of Energy-Transition-relevant schemes and policies.
- Design of (EU and national) policies and rules to ensure the Energy Transition needs to bear in mind not only the political and economic, but increasingly the *legal* requirements of climate law.

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