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**How far can you push on timing, transparency
and when the clock starts for CAT challenges
following the latest run of cases?**

Joseph Barrett KC

1. When can you challenge? Some basics

- When is there is a “*subsidy decision*” within the meaning of s. 70 of the Act?
- This requires a “*decision to give a subsidy*” or “*a decision to make a subsidy scheme*”
- Raises a fundamental issue regarding at what stage during a decision-making process, particularly a multi-stage decision making process, a “*subsidy decision*” is completed
- This in turn determines: (i) whether certain process obligations imposed by the Act bite, (ii) when the CAT’s jurisdiction is engaged (such that proceedings under the Act can be commenced), and (iii) when the right to receive a PAIR response accrues
- S. 2(5) provides subsidy only “*given*” when beneficiary obtains “*enforceable right*”
- So clearly a difference between making a decision vs giving the subsidy/making the scheme: confirmed in *Weis v GMCA* (see following slides)
- Beyond that neither the Act, the ENs nor the Statutory Guidance provide great assistance

1. When can you challenge? *Weis v GMCA*

- *Weis v GMCA* [2025] CAT 41
- Challenge to c. £140m loans
- C alleged a challengeable “*subsidy decision*” was the decision of GMCA Committee in March 2024 to approve giving of loans. GMCA Committee delegated authority to officers to finalise and execute transaction documents. Execution also subject to certain “*confirmatory*” due diligence.
- D argued no “*subsidy decision*” unless and until loan actually entered into several months later
- CAT held in favour of C. CAT’s reasoning is sparse (cf. §§152-153), but makes clear that entry into an enforceable legal obligation is not required.
- Potentially permits, and requires, challenges at earlier stages of decision-making processes

1. When can you challenge? *Zenobe v GEMA*

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- *Zenobe Limited v GEMA [2026] CAT 22* (CAT's judgment pending)
 - Challenge under Act to GEMA's 'establishment' of LDES scheme
 - LDES scheme funded by network charges. Alleged by Z to constitute "*use of public resources*"
 - The policy decision to make the LDES scheme was made by SoS/GEMA on 11 March 2025 at the latest, but much detail remained undecided and subject to future consultation. Draft primary legislation also introduced to place duty on GEMA to establish LDES scheme
 - April 2025, GEMA commenced stage 1 selection process for LDES awards
 - May/June 2025, GEMA issued consultations on stage 2 assessment criteria and financial arrangements
 - September 2025, GEMA issued consultation responses and stage 2 application/assessment documents
 - Z issued CAT proceedings under the Act asserting that by publishing the September documents GEMA has made a decision to make a subsidy scheme

1. When can you challenge? *Zenobe v GEMA*

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- PIA 2025, s. 25 imposed duty on GEMA to establish LDES obtained RA (December 2025) and entered into force (February 2026)
 - GEMA then made a decision to adopt historic work for purpose of establishing the LDES scheme under the PIA
 - Z argued September publications sufficient to constitute a decision to make a scheme because: (i) GEMA had made a final decision to adopt a detailed plan or system of rules for the award of subsidies – the stage 2 criteria and application documents was said to satisfy this definition, and (ii) GEMA had commenced using the stage 2 criteria
 - GEMA argued there was no decision to make a subsidy scheme in September 2025, because:
 - GEMA's intention was not to establish a scheme at that date, but rather to put in place building blocks that could be used to establish the scheme if and when PIA entered into force
 - Significant details on the scheme remained undecided, for example the volume of LDES capacity to be supported, and therefore the value of any subsidy that would be provided and licence terms
 - Decisions remained to be made about certain parts of the Stage 2 award criteria
 - Judgment from CAT currently pending – will be a key decision would operation of the Act.

1. When can you challenge? *Thomas v Durham CC*

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- *Thomas v Durham County Council* [2026] CAT 47
 - Challenge to grant of financial assistance. C not legally represented for majority of proceedings. Pupil/very junior barrister instructed to resist strike out application by Council
 - D applied for strike out on grounds no “subsidy decision” made in circumstances because terms of grants remains subject to review/potential change
 - CAT held that “subsidy decision” required a ‘final’ decision to give a subsidy/make a scheme such that only “administrative steps” remain outstanding prior to implementation of decision
 - Recognises that determination as to whether a “subsidy decision” has been made will be fact sensitive but suggests generally will not be until a very late stage. Key statement of principle is §89:

“We do not, however, consider that the requirement...to have taken a “decision to give a subsidy” can be met where what has been taken is only a provisional or “in principle” decision to provide the assistance said to be a subsidy, subject to further consideration and review following due diligence or other steps in the decision-making process. Rather, what is contemplated by s. 70 is a final decision on the transaction or measure in question, albeit that it may be the case that further administrative, as opposed to substantive, steps are required to embody that decision in a formal and enforceable agreement.”

1. When can you challenge? *Thomas v Durham CC*

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- Strongly doubts correctness of decision in *Weis* (but nb. Judgment indicates not aware of specific evidence in *Weis* and contains erroneous account of facts e.g. factual summary at §84, second sentence, contains factual error and no reference to key correspondence)
- Facts in *Weis* were actually that: (i) D had taken final decision on terms and delegated authority to execute transaction documents, and (ii) D stated had taken positive decision that loan terms complied with s. 3(2) SCA
- Only circumstances in which position *might* change was if something unexpected arose from “*confirmatory*” due diligence and matters were sent back to Committee
- Query what is correct answer applying the *Thomas dicta* to those facts?

2. When must you challenge *TNLC v GC and Allwyn*

- *The New Lottery Commission v Gambling Commission and Allwyn* [2026] CAT 14
- Challenge to decision to provide funding for certain marketing activities to Camelot while it was operating under third national lottery licence
- Subsidy challenge was a spin-off from Richard Desmond's unsuccessful £1.5bn challenge to the award of the fourth national lottery licence
- Details of the funding had been in the public domain, via GC publications and Camelot published accounts for many years, prior to the SCA claim being commenced: §§170-171
- CAT held that undue delay JR principles to be applied in CAT SCA challenges
- By analogy with normal SCA time limits, a claim alleging the unintentional giving of what amounts to a subsidy by a public authority must be commenced within: (i) 1 month of C acquiring knowledge of the decision, or (ii) 1 month of receiving a response to an information request

3. What should C do?

- So what should C do if faced with a potential “*subsidy decision*”?
- If delay until either “final decision” (per ***Thomas***) or legally enforceable contract/commercial arrangements entered into:
 - Danger of being refused relief for undue delay/lack of promptness
 - Reduced prospects of obtaining interim relief
 - Significant risk too late/time-barred to bring other ground of challenge, e.g. ordinary JR grounds or claims under the Procurement Act 2023

3. What should C do?

- If issue as soon as there is a public law “*decision*”, C risks:
 - SCA claim vulnerable to strike out (per **Thomas**), or
 - D can argue no subsidy decision yet made and then use opportunity to take further decisions to seek to astroturf rectify legal flaws identified in earlier decision-making process (per **Weis** (CAT))
- C finds self with a rock and a hard place. But given likely strictness of promptness requirement in subsidy context, see **Bulb** at [44] (“...*measured in days*), much better to be premature rather than late
- C may also need to consider protective JR claims etc. in advance of SCA claim being issued, with view to subsequent joint case management

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Senior Clerk – Mark Dann

Director of Business Development – Andrea Kennedy

Director of Finance and Administration – Claire Halas

Tel: +44 (0) 20 7632 8500

Email: clerksroom@11kbw.com

Address: 11 King's Bench, London EC4Y 7EQ



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