BEFORE THE COMPETITION AND MARKETS AUTHORITY

(1) EDF ENERGY (WEST BURTON POWER) LIMITED

(2) SSE GENERATION LIMITED

(3) THE ENTITIES LISTED IN SCHEDULE 1

- and -

GEMA

AN APPEAL UNDER SECTION 173 ENERGY ACT 2004

Appellants

(1) EDF Energy (West Burton Power) Limited (together with the EDF Energy entities listed in Schedule 1 hereto, 'EDF Energy'), 40 Grosvenor Place, Victoria, London SW1X 7EN

(2) SSE Generation Limited (together with the SSE entities listed in Schedule 1 hereto, 'SSE'), No. 1 Forbury Place, 43 Forbury Road, Reading, RG1 3JH

(3) The entities listed in Schedule 1 hereto, being either the parent, subsidiary or affiliate companies within the EDF Energy and SSE corporate groups that are licensed electricity generators

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(for the purposes of this application, GEMA may also be referred to as 'Ofgem' below and in accompanying documents).

Potentially affected parties

A copy of this application for Permission to Appeal and accompanying documents has been sent to those persons[1] who appear to the Appellants to be affected by the Decision in accordance with rule 4.4 of the Energy Code Modification Rules (CC10) (the "Rules"). A list of those parties is contained in Schedule 2 hereto.

[1] Based on those who responded to the three stakeholder consultations for CMP261 which closed on 28 July 2016, 16 November 2016 and 9 June 2017 respectively - as set out in Annexes 4-6 of the CMP261 Final Modification Report dated 23 June 2017.

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1. INTRODUCTION

1.1 This appeal is brought by EDF Energy and SSE, as well as the separate companies identified in Schedule 1 hereto, which are all licensed electricity generators within the EDF Energy and SSE company groups (together, 'the Appellants'). The Appellants seek permission to appeal against GEMA's Decision dated 16 November 2017 ('the Decision').[2] By that Decision, GEMA rejected Connection and Use of System Code ('CUSC') Modification Proposal ('CMP') 261: "*Ensuring the TNUoS paid by Generators in GB in Charging Year 2015/16 is in compliance with the €2.5/MWh annual average limit set in EU Regulation 838/2010 Part B (3)*" ('CMP261')[3]. The appeal is brought pursuant to section 173 of the Energy Act 2004 ('EA04').[4]

1.2 The Appellants are all energy companies. In the context of this appeal, their relevant activity concerns the generation of electricity in Great Britain ('GB'). EDF Energy owns nuclear, coal and gas assets; SSE owns coal and gas, hydro, pumped storage and wind assets. SSE was the proposer of the CMP261 Proposal. EDF Energy supported that proposal, responded to the three Consultation Documents and took part in the CUSC workgroup procedure. The other companies listed as Appellants in Schedule 1 are each holders of licenses issued by GEMA to generate electricity and/or asset owners i.e. Generators. They are directly and materially affected by the Decision.

1.3 The sector as a whole has recently been the subject of a market investigation reference before the Competition and Markets Authority ('CMA'): see *Energy Market Investigation, Final Report*, 24 June 2016. Electricity generation is discussed, in particular, in section 4 of that Report.[5] The underlying issue in this appeal was not identified by the CMA as a feature giving rise to an adverse effect on competition.

1.4 The CUSC is produced pursuant to the Transmission Licence under which National Grid Electricity Transmission plc ('NGET') operates. It is established by paragraph 2 of Standard Condition C10.[6] It is made contractually binding between NGET as the licensee and CUSC users, such as EDF Energy and SSE, by a CUSC Framework

[2] [B71]
[3] [B64]
[4] The Decision is not excluded from the right of appeal pursuant to section 173(2)(d) EA04 and the Electricity and Gas Appeals (Designation and Exclusion) Order 2014/1293.
[5] [B47] Note that only Section 4 is extracted in the accompanying bundle.
[6] [B59]

Agreement. It provides in Part 2 of Section 14 the methodology for the calculation of Transmission Network Use of System ('TNUoS') charges.[7]

1.5 TNUoS charges and connection charges (in total) recover the costs that the GB Transmission (network) Owners ('TOs') incur in providing and maintaining transmission network assets. The total costs of the transmission network are set by GEMA each year, in the form of the allowed revenue that NGET (as the GB system operator) levies annually on transmission connected users, such as generators, embedded generators over a certain size, suppliers and directly connected demand. The CUSC sets out, separately, the methodological means by which: (i) the Connection charges; and (ii) the TNUoS charges are to be applied in order that the allowed revenue is recovered from Generators and Suppliers (in line with the quantity of Demand, which is also referred to as 'Load', from end consumers such as industrial, commercial and domestic sites that they supply).

1.6 In the spring following the end of each charging year (ending on 31 March) NGET, in accordance with CUSC condition 3.13.2,[8] undertakes a reconciliation of forecast versus achieved usage to take account of data needed to apply charges in the charging year which are only available at the end of that year (i.e. after 31 March).

1.7 Part 2 of Section 14 of the CUSC sets out the methodology for the calculation of TNUoS charges. Generator TNUoS charges are based on network users' capacity and comprise a locational element and a residual element. The locational element reflects the different costs that network users impose on the network depending on where they are located. The 'residual' element is set to recover the remaining costs that have been allocated between generation (G) and demand (D) network users by the 'G:D split'. This has historically, but for the €2.5/MWh GB cap, been set at '27:73.' That is, 27 per cent of transmission network costs are recovered from Generators and 73 per cent from Demand network users.

1.8 Generators pay 'connection charges' in addition to and separately from TNUoS charges. Part 1 of Section 14 of the CUSC sets out the methodology for the calculation of Connection charges.[9]

[7] [B70 / Section 14 / p. 31]
[8] [B70 / Section 3 / p. 17]
[9] [B70 / Section 14 / p. 4]

1.9 EU Regulation 838/2010 ('the Regulation')[10] limits annual average transmission charges for Generators in the European Union Member States. The annual average charge for each Member State is equal to the total transmission charges collected from Generators in that Member State in a given year, divided by the total output of those Generators in that year. Charges paid by producers for physical assets required for connection to the system or the upgrade of the connection are to be excluded in this calculation. The range of allowable average transmission charges for Generators in GB is €0-2.5/MWh, and the range for most other EU countries is €0-0.5/MWh. The maximum permissible level for charges is accordingly five times higher for GB Generation than it is for most of their counterparts in most other Member States.

1.10 It has been apparent since at least September 2011[11] that, for the charging year 2015/16, the upper limit of €2.5/MWh for GB Generation was likely to be exceeded. In the event that the upper limit were exceeded, the TNUoS charges and the licence condition which requires them to be paid would be in breach of directly applicable EU law. The prediction of a breach was dependent on forecast figures which applied the existing regulatory approach and the correct legal construction of the Regulation, which, in keeping with the approach in the CUSC, separates connection charges from TNUoS charges. In other words, those forecasts were based on what GEMA now terms the "narrow interpretation" of costs that can be excluded from calculating that upper limit.

1.11 That narrow interpretation had been determined in the course of CMP224 which had resulted in a binding decision taken by GEMA against which none of the CUSC parties had appealed. It also reflected consistent regulatory practice from GEMA in the intervening period. TNUoS charges, rather than Connection charges, had been collected and paid by Generators on the basis of GEMA's interpretation of the Regulation over this period.

1.12 SSE foresaw that the increasing level of TNUoS charges during 2015/16 would lead to it and other Generators paying transmission charges which exceeded the legally permissible limit during the course of that year. Rather than seek to recover charges levied in breach of EU law on an *ex post* basis, SSE chose to raise CMP261 during 2015/16. The aim was to try to ensure that there was a reconciliation of the TNUoS

[10] [C8]
[11] Paragraph 2.10(ii) of the CMP261 FMR (post send back) [B64 / p/12]

charges paid by GB Generators during the charging year 2015/16 with the upper limit. Any amount in excess of the €2.5/MWh upper limit could then be paid back via a negative generator residual[12] adjustment (in effect a credit) levied on all GB Generators who paid TNUoS during the relevant period if necessary.

1.13 GEMA was asked to determine CMP261 on an urgent basis such that the reconciliation could have occurred, possibly, within the same charging year, using the established CUSC reconciliation arrangements (described in paragraph 1.6 above). That would have avoided the need for an *ex post facto* assessment to be made of the nature and extent of the overpayment over two different charging years (where the over-payer and the recipient of a repayment might not be the same entity). A CUSC panel was urgently convened on 9 March 2016, but the request for urgent treatment of the modification proposal was rejected by GEMA on 17 March 2016.[13]

1.14 The subsequent CMP process was lengthy, involving consultations with all relevant parties. In short:

(a) GEMA received the original Final Modification Report ('FMR') on 30 November 2016 from the CUSC Panel ('CMP261 FMR').[14]

(b) GEMA then issued a send-back letter to the CUSC Panel on 22 February 2017,[15] setting out its decision to direct that the CMP261 FMR be revised and resubmitted, mainly because of concerns about the distribution of the envisaged repayment of over-paid TNUoS charges.

(c) Following the send-back letter, the CMP261 workgroup revised the CMP261 FMR and it was re-submitted by the CUSC Panel to GEMA for decision on 23 June 2017, adopting the "narrow interpretation" of the Regulation in line with CMP224 and proposing a mechanism by which compliance with the upper limit could be restored and maintained ('CMP261 FMR (post send-back)').[16]

(d) By its Decision of 16 November 2017, GEMA rejected CMP261.

[12] That is, a negative "transmission generation residual" charge ('TGR') which would *de facto* amount to a rebate to the Generators of the overpaid sums to NGET.
[13] [B44]
[14] [B54]
[15] [B55]
[16] [B64]

1.15 The Decision has major consequences for the Appellants, other Generators and the GB energy market as a whole. The result of the unlawful overpayments of transmission charges in breach of EU law is that Generators' investment plans have been jeopardised, there is a greater risk of sub-optimal investment decisions in the future and GB Generation will continue to be set at a competitive disadvantage when compared to its other EU counterparts. Within the UK as a Member State, differential treatment will also be maintained between GB Generation and electricity generation in Northern Ireland. The fundamental change in regulatory approach takes effect retrospectively whereas, if a change of policy is intended, its effect should be prospective only.

1.16 By this appeal, the Appellants seek permission to appeal against the Decision on the following grounds, being each either an error of law or an error of fact within the meaning of section 175(4) EA04:

(a) **First ground**: GEMA erred in law in its construction of the Regulation, for all or some of the following reasons:

(i) The objective of the Regulation was to achieve a certain degree of harmonisation in the EU electricity generation market, to facilitate the efficient use of the interconnected transmission system across Europe and to avoid distortion of investment decisions. GEMA failed to adopt a teleological construction of the Regulation.

(ii) GEMA erred in law by adopting a broad approach to permissible exclusions from transmission charges, rather than adopting a narrow construction of such exclusions which a teleological construction of the Regulation would mandate. As a matter of general principle, exclusions from the application of EU law are to be construed narrowly.

(iii) Whether because GEMA considered there was an ambiguity in the exclusion for connection charges in the Regulation or otherwise as an aid more generally to interpretation, GEMA failed to have recourse to the *travaux préparatoires* for the Regulation when construing it.

(iv) GEMA failed to give the expression "charges paid by producers for physical assets required for connection to the system or the upgrade of the connection" its natural and ordinary meaning.

(v) GEMA accordingly erred in law in excluding local circuit / local substation / Generation only spur ('GOS')[17] charges from the annual average transmission charge in GB in 2015/16 when seeking to determine if a breach had occurred.

(b) **Second ground**: GEMA erred in fact in treating GOS and local circuits / local substations as if they were "connection assets", rather than as "transmission assets" for the benefit of the transmission system as a whole. It made other material errors of fact.

(c) **Third ground**: The Decision is vitiated by errors of law in that it constitutes an abuse of process and/or infringes the principle of regulatory consistency, since GEMA had previously adopted a "narrow" construction to the exclusions in the Regulation in the course of its decision in CMP224.[18] The decision in CMP224 was not subject to any appeal by NGET or parties to the CUSC. It is still binding on those parties in the absence of any material change in circumstances. For GEMA now to seek to depart from its previous decision is an abuse of process and infringes the principle of regulatory consistency.

(d) **Fourth ground**: GEMA also erred in law in that the Decision infringes general EU law principles of legal certainty, proportionality, non-discrimination (or equality) and/or the right to effective legal protection of EU law rights.

1.17 The Appellants note that the 2018 Capacity Market T-4 auction for 2021/22 is due to start on 6 February 2018, less than a week before the CMA's decision in this Appeal is expected on a standard appeal timetable. Given the impact of the Decision, and

[17] GOS is not a stand alone defined term in the current GB electricity codes (i.e. the CUSC and Grid Code) but is widely used (including by GEMA in the Decision) as a description of transmission network assets that are being utilised largely by generation, either predominantly for production and, possibly, for consumption. Such assets may include, although not exhaustively, local substations and local circuits, both onshore and off-shore, belonging to a Transmission Owner (as defined in the CUSC). Hence GOS are within the definition of local circuit charges and local substation charges which are defined within TNUoS. Throughout the appeal, the three terms - local substations / local circuits / GOS - are used interchangeably.

[18] [B28]

therefore this Appeal, on the Appellants' (and other GB electricity industry participants) bid strategy for that auction, it would be of considerable assistance if the CMA were to issue its decision on the Appeal prior to 6 February 2018. The Appellants would be content to receive a simple statement of the CMA's decision with reasons to follow in accordance with the usual timetable if that were to make such an early statement of the CMA's decision possible. The Appellants are mindful of the already short timetable in these proceedings, and the intervening Christmas period, but raise this request given its considerable commercial implications for all those GB electricity industry participants who are looking to participate in the 2018 Capacity Market T-4 auction in early February.

2. APPLICATION FOR PERMISSION TO APPEAL

2.1 The Appellants respectfully seek permission to appeal against the Decision pursuant to section 173(4) EA04 for the following reasons:

(a) The appeal has a real prospect of success, as GEMA's interpretation of the Regulation is wrong in law and represents a reversal of a prior decision it adopted.

(b) The appeal raises important questions of EU law and its application to the GB energy market, that have not previously been definitively determined.

(c) The Decision has very significant consequences for the Appellants and other GB generators, as well as for the energy market as a whole. For GB generators, the value of the breach of the Regulation is almost £120 million (plus interest).[19]

(d) The Decision is likely to lead to significant uncertainty in the GB generation market. By its Decision, GEMA has apparently abandoned its previous regulatory practice in respect of the delineation between connection assets and transmission assets. Were it to be correct, there is significant scope for numerous regulatory and charging disputes to arise.

2.2 There is no basis for the CMA to refuse permission on the grounds set out in section 173(5) EA04.

[19] See the witness evidence of Mark Cox dated 6 December 2017 (*Cox 1*), on behalf of EDF Energy, at 2.1.

2.3 In the view of the Appellants, all arguments and material raised in this application were made to GEMA in the course of the CUSC procedure as set out in the CMP261 FMR (post send-back), or during related communications between the Appellants and GEMA, save for parts of the two witness statements, which have been prepared in response to issues raised in the Decision itself.

3. BACKGROUND

GB electricity transmission

3.1 GB's electricity transmission network transmits high-voltage electricity from where it is produced to where it is needed throughout the country.[20] The system is made up of high voltage electricity wires and cables that extend across GB and nearby offshore waters. It is owned and maintained by regional transmission companies, while the system as a whole is operated by a single System Operator ('SO'). This role is performed by NGET. NGET is responsible for ensuring the stable and secure operation of the whole transmission system. Most users that take power from the transmission system are connected to the distribution networks across GB. These networks carry electricity from the transmission systems to industrial, commercial and domestic users. But it is not a linear system. Flows throughout the system can be affected by a given party (either Generator or Consumer) due to the need to balance supply and demand.

3.2 There are currently three TOs permitted to develop, operate and maintain a high voltage system within their own distinct onshore transmission areas in GB. These are NGET for England and Wales, Scottish Power Transmission Limited for southern Scotland and Scottish Hydro Electric Transmission plc for northern Scotland and the Scottish islands.

3.3 In relation to investment decisions in electricity generation, the CMA has previously described the position as follows in the *Energy Market Investigation, Final Report*:[21]

> "4.43 Between the introduction of NETA in 2001 and DECC's introduction of a Capacity Market in 2014, sunk and fixed capital costs were recovered entirely from earnings derived from energy sales in the wholesale electricity market. The decision

[20] See generally the witness evidence from Garth Graham on behalf of SSE dated 6 December 2017 (*Graham 1*) at 2.1 to 2.4.
[21] [B47] Note that only Section 4 is extracted in the accompanying bundle.

to invest in a power project is high risk. A large capital commitment (around £0.5 billion for a mid-sized project) is required in exchange for an uncertain flow of revenues that will recoup sunk costs over decades.

4.44 In this sense, entering the traditional generation markets at scale has been equivalent to forming a long-term judgement on complex outcomes over a 20- to 50-year horizon. A decision to invest requires consideration of a wide range of factors…

4.45 The risks relating to investments are considerable and are likely to have increased in the recent past, when emissions-reductions objectives and policies have led to a rapid and substantial transformation of the capital used to generate electricity. It is a UK and EU policy goal that electricity generation will be substantially decarbonised in the coming years, yet the exact ways in which this is going to be delivered and incentivised are not yet absolutely clear, so adding to the risk of investment."

3.4 Generation assets can be situated in a variety of geographical, and thus electrical network, locations. The underlying evidential issue that arises in the present appeal is what constitutes the "transmission" network (and the assets within it) and what constitutes a "connection" asset upon which a connection charge may be based. That is the subject matter of witness evidence from Garth Graham on behalf of SSE dated 6 December 2017 (*Graham 1*). The Decision seeks to reclassify what have hitherto been treated by GEMA and the industry as "transmission" assets as "connection" assets giving rise to "connection" charges.

GB Capacity market

3.5 The Capacity Market is a mechanism introduced by the Government to ensure that electricity supply continues to meet demand. It aims to ensure there is sufficient generation or load-management capacity in the system to cope with times of stress on the network when, for example, the wind stops blowing or there is a surge in demand.

3.6 Within the Capacity Market, NGET buys capacity in the form of (£/kW/yr) ahead of delivery, to ensure there is sufficient investment in the development of new generation to meet ongoing reliability standards. Pursuant to the Capacity Market rules, sufficient capacity is guaranteed by Capacity Market agreement holders at periods of system stress. Providers can rely upon a fixed income to cover some of the investment costs not readily recoverable through the energy market.

3.7 There have been a number of auctions to date with, notably, contracts already awarded for periods up to four years ahead. The Capacity Market (and Capacity

Mechanism) was considered and described in the *Energy Market Investigation, Final Report*. For example, the CMA stated at [47]:[22]

"The Capacity Market was introduced by DECC to help ensure sufficient investment to meet future demand. In an energy-only market, potential investors in generation might be sceptical about their ability to recover the costs of their investment, since this would require prices to be allowed to spike to very high levels on the (rare) occasions of system stress."

Factual background to CMP261

3.8 A detailed chronology is provided together with this Appeal,[23] along with a glossary of terms used throughout the appeal documentation.[24]

3.9 A useful summary of the relevant regulatory background to the charges payable by Generators under the TNUoS charging regime is set out in the CMP227 decision, which GEMA took on 15 September 2015.[25] It states:

"Transmission Network Use of System (TNUoS) charges recover the costs that TOs incur in providing and maintaining transmission network assets. They are based on network users' capacity and comprise a locational element and a 'residual' element. The 'locational' element reflects the different costs that network users impose on the network depending on where they locate. The 'residual' element is set to recover the remaining costs that have been allocated to generation (G) and demand (D) network users by the 'G:D split'. This is currently set at "27:73", i.e. 27 per cent of transmission network costs are recovered from generators and 73 per cent from demand network users.

The Regulation limits average transmission charges for generators in European Union member states. The average charge for each member state is equal to the total transmission charges collected from generators in that member state in a given year divided by the total output of those generators in that year. The range of allowable average transmission charges for generators in Great Britain (GB) is €0-2.5/MWh, and the range for most other EU countries is €0-0.5/M Wh. GB TNUoS charges were forecast to exceed the €2.5/MWh upper limit in 2016/17. To prevent this, we approved CUSC Modification Proposal CMP224 in October 2014. CMP224 'caps' the average generation TNUoS charge in GB by setting the G:D split each year to ensure compliance with the Regulation. The G:D split is now forecast to shift in favour of generation over the next five years to a split of around 18:82 by 2020."

3.10 The possibility of breach of the €2.5/MWh threshold was raised in GEMA's "*Project Transmit Technical Working Group*" initial report, published in

[22] [B47 / p. 11]
[23] [A5]
[24] [A6]
[25] [B36]

September 2011.[26] The report predicted the threshold might be exceeded as early as in charging year 2015/16 or beyond.[27] It was precisely to address the risk of this breach that NGET proposed a modification to the CUSC on 19 September 2013 (CMP224).[28] That code modification proposal stated:

"If in any given year the average annual generation transmission charges do not fall within this range [€0-2.5/MWh], National Grid runs the risk of being non-compliant with the regulation ... Therefore it is important that the average annual generation transmission charges remain within the current prescribed range ... The driver for this [CMP224] proposal is to counter the risk of non-compliance with the EC regulation if indeed a breach of the range applied on generation transmission charges becomes a possibility in future."

3.11 The CMP224 proposal also stated:

"As specified in the EC regulation, the value for average annual transmission charges payable by generators is calculated by dividing the **total revenue collected from generation users through Transmission Network Use of System (TNUoS) charges** by the **total measured energy injected into the Transmission Network or simply the total demand for that year.** The total demand for any given year is an absolute number. However, the total generation TNUoS revenue can be adjusted to a level so that the average annual transmission charges payable by generators do not exceed the prescribed limit."[29] [Emphasis in original]

3.12 The CMP224 proposal also noted that the fixed rate of 27% recovery of TNUoS charges from Generators risked putting NGET in breach of the threshold given the trend of year on year increases in the overall TNUoS revenue. It therefore proposed putting a cap on the annual generation TNUoS revenue, so that average annual transmission charges payable by Generators would "always stay within the range specified by the EC Regulation."[30] The proposal was that the G:D split ratio would be modified for any year accordingly. In other words, the G:D split ratio would be changed *ex ante* in Generators' favour ahead of any charging year where it was forecast that otherwise the Regulation threshold would be exceeded.

3.13 GEMA directed that this proposed modification be made by a decision dated 8 October 2014 ('the CMP224 Decision').[31] It should be noted that GEMA observed, based on the then current G:D split of 27:73, that the average transmission charges for

[26] [B17]
[27] See paragraph 2.10(ii) of the CMP261 FMR (post send-back) [B64 / p.12]
[28] [B21]
[29] [B21 / p. 2]
[30] [B21 / p. 2]
[31] [B28]

Generators were expected to exceed the €2.5/MWh upper limit at some point in the five years from 2015/16 to 2020/21. The Decision also noted:[32]

"The proposals would set the G:D split ahead of the relevant charging year based on forecasts of the relevant variables. So there is a risk that charges exceed the upper limit of the Regulation because of forecast error. To mitigate this risk, the proposals include an 'error margin', i.e. the G:D split would be set with the target of an average transmission charge for generation that is below (rather than equal to) the upper limit allowed by the Regulation. The error margin would be set by NGET each year based on its historical forecast."

3.14 Having assessed a series of different options from the original proposal developed by the industry workgroup assessing CMP224, GEMA directed that the original proposal should be implemented.[33] It took effect from 22 October 2014. It is therefore open to NGET to ensure compliance with the Regulation in a given year by adopting the mechanism of adjusting the total TNUoS revenue collected from GB generation.

3.15 As will be examined in further detail below, CMP224 re-affirmed the inclusion of GOS in the calculation of TNUoS charges. Past GEMA and NGET practice has consistently treated the charges associated with local circuits / substations and GOS as TNUoS charges rather than connection charges. This approach dates back at least as far as 2003[34] and was reported by GEMA to the European Commission ('the Commission') on a number of occasions, including in 2010 and 2016.[35]

3.16 Thereafter, on a number of occasions during 2015 and 2016, the possibility that a breach of the limit set in the Regulation could occur was raised by SSE, EDF Energy and others with NGET. There were at least eight occasions[36] on which the real risk of an infringement of the threshold was brought to NGET's attention between January 2015 and March 2016.

3.17 A proposal for a CUSC modification (CMP227) was made by Intergen on 18 February 2014.[37] Intergen proposed that the G:D split of TNUoS charges should be amended to a lower figure for Generators, such as 15:85. The basis for the proposal was to ensure that TNUoS charges remained within the threshold set by the Regulation. lntergen commented that the proposal would enable GB Generators to

[32] [B28 / p. 2]
[33] [B28]
[34] See GEMA decision in CCM-M-07, dated 19 December 2003 [B3]
[35] See *Graham 1* at 3.10 to 3.12.
[36] As set out at Paragraph 2.35 of the CMP261 FMR (post send-back) [B64 / pp. 18-19]
[37] [B22]

compete on a more level playing field with their counterparts in other Member States.[38] That proposal was rejected by GEMA in a decision dated 15 September 2015.[39]

3.18 In August 2015, CMP251 was raised by British Gas ('BG').[40] This proposed the removal of the error margin[41] entirely and the introduction in its place of a system of *ex post* reconciliation payments to be passed through from Generators to Suppliers (i.e. Demand) or *vice versa* from charging year 2017/18 onwards. BG requested that its proposal be addressed with urgency, but that request was rejected by GEMA. NGET (on behalf of the CUSC Workgroup) obtained a legal opinion from Addleshaw Goddard dated 23 November 2015 to address some of the legal issues raised by the CMP251 proposal.[42] No decision has yet been taken by GEMA on the CMP251 proposal.

The CUSC procedure under CMP261

3.19 In March 2016, SSE raised CMP261. This proposed a modification to allow a 'mid-year'[43] tariff modification to enable a reconciliation payment in Spring 2016. Urgency was requested. A timetable was prepared by the CUSC Code Administrator that could have achieved this timeline.[44] That request for urgency was rejected by GEMA, but an accelerated timeline was agreed.

3.20 NGET (on behalf of the CMP261 Workgroup) sought a further opinion from Addleshaw Goddard in April 2016. That opinion[45] reiterated the view previously expressed that the Regulation did not stipulate whether *ex ante* or *ex post* control of average transmission costs was appropriate. It considered that the methodology adopted to date was a reasonable method, made in good faith. There was no present need to change it on the basis of one year's evidence of the threshold being exceeded. It reasoned that the Regulation's upper threshold of €2.50/MWh had been exceeded in 2015/16 because of the cumulative effect of a series of

[38] As well as within the UK Member State in terms of Northern Ireland.
[39] [B36]
[40] [B32]
[41] Which was introduced by CMP224, as set out in paragraph 3.13 above.
[42] [B38]
[43] The term 'mid year' is used within, for example, the CMP261 FMR. It denotes that a change to transmission tariffs can occur at any point within the charging year (rather than what might be thought as just the mid-point of the charging year).
[44] NGET Urgent Modification Timetable of 9 March 2016 [B43]
[45] [B45]

exceptional factors. Overall, it recognised a breach of the Regulation and suggested strongly that reconciliation of over-charges should take place for the 2015/16 charging year.

3.21 The CMP261 process was lengthy, involving consultations with all relevant parties. Additional detail is provided in the Chronology.

3.22 By its Decision of 16 November 2017, GEMA rejected CMP261 with major consequences for the Appellants, other generators and the GB energy market as a whole. A full analysis of the reasons for the Decision is set out in section 5 below.

4. LEGAL FRAMEWORK

Domestic and EU legislation

4.1 The legal framework has been set out separately in Annex A hereto.

4.2 That Annex also sets out the material, standard conditions which apply by virtue of the licences for Generators.

5. GEMA'S DECISION

5.1 GEMA's Decision of 16 November 2017 determined that there has not been a breach of the €2.50/MWh upper limit on average annual transmission charges for GB in the Regulation in charging year 2015/16. GEMA concluded that the implementation of the modification proposal will not better facilitate the achievement of the applicable objectives of the CUSC, and would not be consistent with its principal objective of exercising its functions in a way that protects the interests of existing and future consumers. GEMA reasoned that it had two interpretations of the connection exclusion before it:

"• **'narrow interpretation**' - only those charges classed in the Connection and Use of System Code ('**CUSC'**) as "connection charges" are within the connection exclusion.

• **'broad interpretation**' - connection charges and most, if not all, "local charges" are within the connection exclusion (see 'the nature of the underlying asset funded by the charge' below for details)."

5.2 GEMA adopted the latter, broad interpretation.

5.3 The Decision thereby committed a number of errors of law and/or fact. The detailed Grounds of Appeal are set out at Section 6 below. However, it is important to make several broader points regarding the Decision which, while not central to the grounds of appeal, are relevant to rebut several arguments put forward by GEMA.

5.4 The Appellants contend that GEMA incorrectly analyses CMP261 in the context of its CUSC objectives, and ignores or fails properly to consider the potential industry consequences of its decision. In particular:

(a) *Minimal consumer cost*. The Decision incorrectly characterises the impact of a rebate on consumer costs. In reality, the monetary impact on an individual consumer would be very limited[46], and not of a level to justify such costs being used as a basis for the Decision. EDF Energy's then CEO, Vincent de Rivaz, made this point to GEMA in a letter dated 1 July 2017. See First Witness Statement of Mark Cox dated 6 December 2017 on behalf of EDF Energy (*Cox 1*), which at 8.3 sets out the calculation relating to the estimated charges per consumer.

(b) *Skew of longer-run investment decisions*. In any event, this short-term impact has to be set against the impact on investment decisions and the finances of generation assets themselves. This is not a theoretical issue. The level of transmission charges has already had demonstrable market impact: see the closure (in 2015/16) of Longannet by Scottish Power. Scottish Power's press release of August 2015 stated:[47]

"The combination of high carbon taxes **and high transmission charging means that running a thermal plant in Scotland is uneconomic. Longannet Power Station will now close** on March 31st 2016, marking the end of its 46 years of power production in Scotland." (Emphasis added)

The ability to recoup charges raises similar issues. Given contracts under the Capacity Market have already been awarded, it is difficult for Generators now to recoup such sunk costs. This may well skew future investment decisions and discourage further capital investment in generation. See *Cox 1* at 3.10- to 3.12.

[46] Assuming that the approach noted in paragraph 10.111 of the CMP261 FMR (post send-back) were not adopted [B64 / p. 124]
[47] [B35]

(c) *Regulatory uncertainty*. The Decision represents a significant departure from previous regulatory practice: indeed it is a 180-degree U-turn from the position adopted under CMP224. This will have significant consequences for the regulatory certainty in the GB energy market. That factor has not been considered by GEMA in its Decision (see below).

(d) *Charging disputes*. There is real risk of a series of regulatory disputes should the Decision be upheld. A number of parties will feel that they have been charged for "transmission" under the GB regime when the charges were really "connection" charges. There has been no suggestion by GEMA that an *ex post* reconciliation of past charges should take place, even though it must follow from the Decision (if upheld) that transmission charges have been unlawfully inflated for many years. It is difficult to see how or why different interpretations of "transmission" and "connection" assets could be applied for the EU and the GB regime.

(e) *Negative impact on cross-border supplies of electricity*. As set out in *Cox 1* at 6.1, the Decision will also disadvantage GB Generators when compared with their continental EU counterparts. This may well have a long-term impact on the sustainability and viability of some GB Generation assets.

5.5 There is also no windfall to generators associated with applying the €2.5/MWh upper limit properly. There would simply be a reimbursement of sums which they should not have been charged. The risks associated with investment decisions in generation, as recognised by the CMA in the Market Investigation Reference, are noted above. The Decision takes a more short-term and (for the Appellants and others) draconian view. In respect of a rebate to the Appellants, the Decision states:

> "Since we do not consider there has been a breach of the Regulation, a generator rebate would constitute a windfall gain to transmission-connected generators (who held transmission capacity in 2015/16). This would have a negative impact on competition since it would not be paid to other types of generation (such as smaller EG) or demand-side response. Hence, a one-off rebate to larger generators in relation to past transmission charges would be likely to confer a material benefit to those receiving the rebate."

5.6 It is incorrect to categorise the rebate proposal under CMP261 as a "windfall gain". Many relevant generation assets owned by the Appellants operate in challenging market conditions: see *Cox 1* at 7.1 to 7.5. Rather than constituting a "windfall gain",

a rebate would simply place the Appellants in the position they would be in (and should have been in) had a breach of the Regulation not occurred. Furthermore, failure to remedy the breach has a negative impact on competition as it advantages other types of generation (such as smaller Embedded Generation or Demand-side response).

5.7 The only (least worst) route open to the Appellants to make good the shortfall caused by the breach of the Regulation would be via the GB Capacity Market, were that option to be open. However, the nature of the Capacity Market (as noted above) is that generators are locked-in to contracts for four years in advance, based on bids already submitted and accepted. They cannot therefore adjust their position to reflect the losses caused by the breach of the Regulation. Put another way, GEMA has changed a material fact or base assumption that underpinned the bids entered by Generators in the Capacity Market. They had made those bids using the existing regulatory practice and regime as applied in order to calculate the level of individual bids - and when they would exit the auction. The effect of this change is material. Bids may have differed by up to £4 per/kW: see *Cox 1* at 3.1 to 3.10.

5.8 The Decision also asserts that a rebate for an overpayment of TNUoS charges would have a negative impact on competition. This is an incorrect evaluation of the evidence, since it fails properly to consider the nature of investment decisions and the current financial state of many assets: see *Energy Market Investigation, Final Report* (*supra*) at Section 4 and *Cox 1* at 7.1 to 7.4.

5.9 Further or alternatively, if the Appellants are correct, then it is important for single electricity market objectives that charges are correctly levied across the EU/EEA, and in this case a rebate is required to do this.

6. GROUNDS OF APPEAL

Introduction

6.1 As set out above, the Decision that connection charges and most, if not all, "local charges" fall within the connection exclusion in the Regulation was based on what GEMA described as the "broad interpretation" of paragraph 2(1) of Part B of the Annex to that Regulation, which contains the Guidelines for a Common Regulatory

Approach to Transmission Charging ('the Binding Guidelines').[48] This approach was adopted notwithstanding the fact that GEMA took a diametrically opposite view in CMP224, where it based its decision to modify the CUSC on a "strict" (or "narrow") interpretation of the same provision.[49]

6.2 In the Decision, GEMA explains its view that the Regulation is "ambiguous with respect to the connection exclusion" and that both narrow and broad interpretations of that exclusion constitute a "reasonable interpretation". It then goes on to conclude that the "broad interpretation" is correct.

6.3 As set out in paragraph 1.16 above, Ground 1 challenges GEMA's conclusion on the basis that it represents an error of law. Ground 2 challenges GEMA's evidential assessment as an error of fact. Ground 3 contends that the Decision is vitiated by errors of law since it is an abuse of process and/or as infringing the principle of regulatory consistency found in section 3A(5A) Electricity Act 1989 ('EA89'). Ground 4 contends that the Decision infringes one or more general principles of EU law.

6.4 But for GEMA's errors of law or fact, the transmission charges paid under TNUoS in GB would have been subject to the €2.5/MWh upper limit in the Binding Guidelines. It is uncontroversial that, on this analysis, the upper limit would have been breached in 2015/16 amounting to a breach of EU law for which the Appellants are entitled to be compensated: see Decision, page 3.

Ground 1: Errors of law in the construction to the Regulation

Introduction

6.5 The Regulation is a piece of EU legislation. Expressions used in EU legislation must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purpose of the rules of which they form part: Case C-568/15 Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main [2017] ECLI:EU:C:2017:154, CJEU at [19]. The legislative intent behind a measure may be elucidated by reference to the *travaux préparatoires* which precede it: C-583/11 P Inuit Tapiriit Kanatami and Others v

[48] The provisions are set out in full in Annex A hereto.
[49] [B28]

Parliament and Council [2013] ECLI:EU:C:2013:625, CJEU at [59]; and Case C-477/13 Angerer [2015] ECLI:EU:C:2015:239, CJEU at [33]. This is particularly helpful in cases of textual ambiguity: Case C-304/15 Commission v. United Kingdom [2016] ECLI:EU:C:2016:706, CJEU, per Advocate General Bobek at [39]-[45].

6.6 GEMA erred in law within the meaning of section 175(4)(e) EA04 in its construction of the Regulation, for a number of different reasons, each of which individually is sufficient for the Decision to be set aside:

(a) The objective of the Regulation was to achieve a certain degree of harmonisation in the EU electricity generation market in order that variations in charges faced by generators for access to the transmission system do not undermine the internal market,[50] to facilitate the efficient use of the interconnected transmission system across Europe and to avoid distortion of investment decisions. GEMA failed to adopt a teleological construction of the Regulation.

(b) GEMA erred in law by adopting a broad approach to permissible exclusions from transmission charges, rather than adopting a narrow construction of such exclusions which a teleological construction of the Regulation would mandate. As a matter of general principle, exclusions from the application of EU law are to be construed narrowly.

(c) In the event that GEMA considered there was an ambiguity in the exclusion for connection charges in the Regulation, it failed to resolve that ambiguity by recourse to the *travaux préparatoires*. It failed more generally to pay due regard to the *travaux préparatoires* as an aid to the interpretation of the Regulation, specifically as an aid to determining the legislative intent behind the measure.

(d) GEMA failed to give the expression "charges paid by producers for physical assets required for connection to the system or the upgrade of the connection" its natural and ordinary meaning.

[50] See recital (10) to the Regulation.

6.7 GEMA accordingly erred in law in excluding local circuit / local substation / GOS charges from the annual average transmission charge in GB in 2015/16 when assessing if a breach had occurred. These points will be addressed in turn.

Ground 1(a): GEMA should have adopted a teleological construction of the Regulation

6.8 GEMA erred in law in its construction of the Regulation. The objective of the Regulation was to achieve a certain degree of harmonisation in the EU electricity generation market, to facilitate the efficient use of the interconnected transmission system across Europe and to avoid distortion of investment decisions.[51] The construction of the Regulation adopted by GEMA runs counter to these aims.

6.9 The upper limits set in the Binding Guidelines (for GB, €2.5/MWh) are caps that are set pursuant to the single market objective of the EU. This is explicitly referenced in recital (10) of the Regulation:

> "Variations in charges faced by producers of electricity for access to the transmission system should not undermine the internal market. For this reason average charges for access to the network in Member States should be kept within a range which helps to ensure that the benefits of harmonisation are realised."

6.10 Notwithstanding GEMA's apparent acknowledgement of the internal market objective behind the Regulation in the Decision, the absence of any analysis of that objective from its reasoning is stark. GEMA purports to consider the legislative history of the Regulation, the nature of the underlying assets, the nature of the charge and the reasons for GB's higher cap. What it does not do is consider how its interpretation serves the overarching goal of the Regulation, namely to harmonise transmission charges across the single market.

6.11 The purposive or teleological approach to the interpretation of EU law is well established. It is necessary to consider the "spirit, the general scheme and the wording" of the relevant provisions: see Case 26/62 van Gend en Loos v Nederlandse Administratie de Belastingen [1963] ECR 1, CJEU at p. 13. The interpretation must place the provision "in its context" and be read "in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied": Case 283/81 CILFIT v Ministero della Sanita [1982] ECR 3415, CJEU at [20].

[51] [B14]

6.12 The internal market objective is central to any interpretation of the Regulation's provisions. Indeed, the Regulation is but one of a number of legislative measures that have been adopted since 1996 to harmonise and liberalise the EU's internal energy market. The Regulation was made pursuant to Article 18 of Regulation (EC) No 1228/2003 ('the Electricity Regulation'). The legislative intent was to facilitate the creation of an internal market in electricity, as is illustrated by its recitals' reference to the obstacles to the sale of electricity on equal terms without discrimination or disadvantage across the EU (recital (3)), the importance of a level playing field for all electricity undertakings (recital (4)) and the need for harmonisation to avoid distortions of trade (recital (13)).

6.13 Those objectives also lie behind the Regulation, as seen by the title to the Part B Binding Guidelines: "*A common regulatory approach to transmission charging*". The harmonisation goal of the Regulation is articulated by recital (10) (set out in full at paragraph 6.9 above). Moreover, the repeated emphasis on the facilitation of cross-border flows of electricity in the recitals underlines the single market imperative behind the Regulation more generally.

6.14 The Commission's Impact Assessment[52] that accompanied its draft Regulation also explained that:

(a) The Binding Guidelines needed to address the question of tariff harmonisation. The Binding Guidelines formed part of the "third energy package", whose aim was to establish a single electricity market, by facilitating the cross-border supply of electricity (p. 5);

(b) Differential charges faced by generators for using the transmission system can affect the effective functioning of the internal market (p. 7);

(c) The Inter TSO Compensation regime ('ITC') was intended to compensate TOs (or 'TSOs' under the EU regime) for the costs engendered by users of the transmission system who are in fact importing or exporting electricity to or from another national network (p. 7);

(d) Tariff harmonisation was aimed at the charges for local system users for the "use of the transmission system." [Emphasis added] "Tariffs are paid to the

[52] [B15]

TSO to whose system the user is connected." (p. 12) In order to achieve "neutrality between generators in different countries", a harmonisation procedure for the G:D ratio was needed.

6.15 In setting annual average transmission charges across the EU, the Regulation was therefore intended to facilitate harmonisation and minimise any distortions in cross-border energy flows which stem from differential approaches to transmission charges which could undermine the internal market. A necessary corollary to this objective is that the exceptions to the charging regime provided for by the Binding Guidelines must be construed narrowly. A broad interpretation of the available exclusions would give greater scope for divergence in the charging practices for generation along national lines.

6.16 GEMA has failed to have proper regard to these objectives in its interpretation of the Regulation for the purposes of CMP261. GEMA should have construed the "connection exclusion" narrowly in order to adopt a purposive or teleological construction of the Regulation.

6.17 The Binding Guidelines provide for the following three exclusions to the transmission charge limit specified by paragraph 3 of the Binding Guidelines:

(a) charges paid by producers for physical assets required for connection to the system or the upgrade of the connection (the "connection exclusion");

(b) charges paid by producers related to ancillary services; and

(c) specific system loss charges paid by producers.

6.18 In its Decision, GEMA clearly states that there are two available interpretations of the connection exclusion, one of which is narrow and the other broad. A broad interpretation entails more charges being taken outside the harmonised transmission charging regime to be dealt with separately as connection charges. Necessarily, the greater the exclusions from the annual average transmission charge, the less relevance that charge has to overall transmission costs payable by generators for their use of that system. If a significant proportion of the charges a generator must pay to use the transmission system is not covered by the cap, that cap becomes largely meaningless as a harmonising measure as it bears little relation to the actual costs generators must pay to use the system. In that context, the proper construction is that any exceptions

must be construed narrowly so as not to frustrate the objectives of the EU measure. By contrast, a "broad interpretation" of the connection exclusion is contrary to the objectives of the Regulation as a tool to further the implementation of an internal energy market.

6.19 The clear aim behind the harmonisation measure was also to secure a degree of certainty for investment decisions in generation assets. That was best assisted by adopting a narrow construction of the exclusion, consistent with the general rule of construction of EU law identified in Ground 1(b) below. If GB generators are to be permitted to compete with other EU generators on a level playing field then a construction which minimises the extent to which the "G" charge in the G:D split is increased is appropriate. Otherwise the gap between the maximum levels set by the Regulation itself for GB Generators and other EU Generators in the Regulation itself becomes even greater, precluding GB Generators from competing on a level playing field with generators established in other Member States, as well as within the UK as a Member State in terms of generation in Northern Ireland.

6.20 Indeed, GEMA previously described the narrow interpretation as the "better interpretation" in the context of CMP 224.[53] This was for good reason. In particular, the substance of the Decision, were it to be correct, is effectively to enable a national regulator to shift costs so as to ensure that the cap set pursuant to the single market objective be complied with *ex post* - thus creating the very variation in approach deprecated in recital (10) to the Regulation.

6.21 The closest GEMA comes to tackling this issue is in its analysis of the CUSC charging objectives. In its assessment of whether "compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity" at page 10, GEMA states as follows:

> "We do not consider a breach of the Regulation has occurred, and since charges have not exceeded the permissible range, we do not consider adverse impacts on the competitive position of GB generators within the internal market have arisen. Further, even if a breach had occurred and demonstrably impacted the ability of GB generators to compete in the internal market, paying an *ex post* rebate to retrospectively adjust charges in a previous year would not directly remedy GB generators' competitive position in 2015/16."

[53] See consultation letter on CMP 224 [B27 / p. 5]

6.22 In considering whether there was a breach of the Regulation and then, as a secondary consideration, whether that breach harmed GB generators within the internal market, GEMA has its analysis back-to-front. The internal market objectives of the Regulation are central to the assessment of whether there has been a breach of the Regulation, as demonstrated by the "narrow versus broad" approach to construction GEMA has created. This is particularly so where GEMA considers that the Regulation is "ambiguous". GEMA should have had the internal market objective at the forefront of its considerations. Instead, it only turned to this factor as a subsidiary point when considering the consequences of its prior decision that there had been no breach in the context of the CUSC objectives.

6.23 It appears from the Decision that an alternative factor may have exerted an excessively strong influence on GEMA's analysis, namely the apparent "windfall" it says would have been awarded to GB Generators if it had adopted the "narrow" interpretation of the Regulation. First, it is not a "windfall" to refrain from the unlawful imposition of excessive transmission charges on Generators. Any remedial steps to repay wrongly levied charges must provide an effective remedy for that over-charge (see Ground 4 below). Secondly, a misplaced policy aim to shield consumers from the consequences of unlawfully high charges on generation cannot be used to justify a "reverse engineered" construction of the exclusions to the Regulation. Notwithstanding that the description of the proposed rebate as a "windfall" fundamentally mischaracterises the position, it is in any event irrelevant to the proper construction of the Regulation. This is also addressed in Section 5 above.

6.24 For these reasons, GEMA erred in its construction of the Regulation. It should have found that GB transmission charges exceeded the €2.50/MWh upper limit of the charge range in charging year 2015/16.

Ground 1(b): GEMA should have construed exclusions from the harmonised charging structure narrowly

6.25 GEMA erred in law by adopting a broad approach to permissible exclusions from transmission charges, rather than adopting a narrow construction of such exclusions which a teleological construction of the Regulation would mandate. As a matter of general principle, exclusions from the application of EU law are to be construed narrowly: see Case C-175/09 AXA UK Plc v HMRC [2010] ECR I-10701, CJEU at

[25] and [30]; and Case C-304/15 Commission v. United Kingdom [2016] ECLI:EU:C:2016:706, CJEU at [47].

6.26 The relevant provision upon which GEMA relies in order to find that there has been no breach of the GB €2.50/MWh cap in 2015/16 is an exclusion from a bundle of charges which would ordinarily fall within a defined category class. That is, the "connection exclusion". It is an exclusion from a category of charges which are otherwise due to be harmonised on a pan-EU basis in order to achieve a single market objective.

6.27 As is clear from the Decision itself, GEMA had the option of construing the connection exclusion in a narrow manner. It failed to do so, as is clear from the very wording of the Decision itself, where it describes its adopted approach as the "broad interpretation" as compared to its previous and now rejected approach, which is the "narrow interpretation". Its construction is vitiated by an error of law.

Ground 1(c): GEMA erred in its construction in the light of the travaux préparatoires for the measure

6.28 Further or alternatively, GEMA has erred in law in failing to construe the meaning and purpose of the Regulation in accordance with its *travaux préparatoires* and the legislative or other measures which preceded it. In doing so, GEMA adopted an interpretation of the connection exclusion which departs from the legislative intention.

6.29 The correct construction of the Binding Guidelines can be ascertained by a consideration of the *travaux préparatoires* and the legislative history. That analysis demonstrates that:

(a) the Regulation was based on an expected treatment of transmission charges in GB which holds true today, and which should therefore be respected when applying the €2.5/MWh cap; and

(b) connection charges were understood to mean "one-off" charges for an initial connection even if some of those "one-off" charges might constitute items of capital expenditure which, in accordance with accounting principles, would be subject to depreciation and therefore amortised over many years.

6.30 The historical genesis of the Binding Regulations is to be found in the guidelines developed by the European Regulators Group for Electricity and Gas ('ERGEG') at the instigation of the Commission in 2005 (the 'ERGEG Guidelines')[54]. The Binding Guidelines effectively put on a formal legislative basis the non-binding ERGEG Guidelines, which adopted the same €2.5/MWh hour cap for GB transmission charges. The ERGEG Guidelines also excluded from the scope of transmission charges the same three charge categories (i.e. charges for connection, ancillary services and system losses).

6.31 In turn, the Commission in the Binding Guidelines which it adopted saw no reason to depart from the approach to tariff harmonisation in the ERGEG Guidelines, recognising the extensive consultation processes involved in their development.[55] It is therefore highly relevant to determine how ERGEG developed the guidelines. In particular, in its response to a public consultation on those draft guidelines on 18 July 2005,[56] ERGEG stated that the €2.5/MWh cap "corresponds to the expected situation in the UK and Ireland (average charge for generators) and allows for currency risk and present efforts to create an All-island electricity market from the Republic of Ireland and Northern Ireland markets."

(a) The ERGEG Guidelines

6.32 The ERGEG Guidelines were adopted in response to the legislative requirement set by Article 8(3) of the Regulation 1228/2003/EC on Cross Border Electricity Exchanges.[57] Article 4(2) of that Regulation stated that:

> "Producers and consumers ('load') may be charged for access to networks. The proportion of the total amount of the network charges borne by producers shall, subject to the need to provide appropriate and efficient locational signals, be lower than the proportion borne by consumers. Where appropriate, the level of the tariffs applied to producers and/or consumers shall provide locational signals at European level, and take into account the amount of network losses and congestion caused, and investment costs for infrastructure. This shall not prevent Member States from providing locational signals within their territory or from applying mechanisms to

[54] [B6]
[55] Commission Staff Working Document - Impact Assessment on the Regulation SEC(2010) XXX final [B15 / pp. 36 - 37]
[56] ERGEG Public Consultation on Guidelines on Transmission Tarification - Evaluation of the Comments Received (18-07-2005) [B7 / p. 12]
[57] Regulation 1228/2003/EC of the Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ [2003] L No. 176, 15.7.2003 [C6(A)]

ensure that network access charges borne by consumers ('load') are uniform throughout their territory."

6.33 The ERGEG Guidelines of 18 July 2005 noted that transmission tariffs in Member States mostly reflect the requirements of Regulation 1228/2003 in that they were "by and large 'entry-exit' tariff systems rather than being distance based." They also noted that most Member States' tariffs fulfilled the criterion that "the majority of the charges fall on load rather than generation and that the major part of the electricity produced in the IEM is subject to a G charge regime which may put G at or very near zero." The Guidelines then added:[58]

"As well as the fixed costs of the transmission network in the short run, ie capital and operation costs, transmission tariffs often include specific charges for losses, congestion and other ancillary services.

Generators and consumers may also be required to pay a one-off charge for their initial connection to the grid usually called 'connection charge'. Charges related to losses, congestion and other ancillary services are also an important feature. These charges are no, however, considered to be part of the G charge for the purpose of these Guidelines."

6.34 In other words, the ERGEG Guidelines themselves drew a distinction between the initial (i.e. one-off) charge of connection to the transmission system and the subsequent transmission charges that a TSO would levy. Only the latter would be included in the calculation of the G Charge. The harmonising objective of setting G charges was explained in the following terms:

"To avoid distortions of competition, some harmonisation of the charges for access to networks of the generators, i.e. the 'G' charge is needed. Harmonisation of G charges, rather than L charges, is considered to be more important since the output from production facilities and the location of them is thought to be more responsive to price signals. However it should be emphasised that the 'G' charge is not the only charge a generator pays; connection charges have to be taken into account when making the investment decisions. The Member States also have different practises according to whether a generator is responsible for paying the costs connected to production related network components."

6.35 In specifically recognising the situation in GB at the time, ERGEG were fully cognisant of the existing connection charging boundary in GB (i.e. local circuit charges were categorised as transmission charges). The draft Guidelines catered for differences between the continental EU electricity systems and the "Nordel, UK and Irish systems", which were "interconnected by DC submarine cables to UCTE, the

[58] [B6]

main continental system."[59] The ERGEG Guidelines accordingly stated for the UK system (i.e. GB and Northern Ireland) that "different ranges for the 'national average G' may be applied and the ranges will be re-examined at a later stage."[60] It was considered that harmonisation of G charges would send appropriate locational signals to producers and consumers.

6.36 The final ERGEG Guidelines adopted the same approach as subsequently set by the Binding Guidelines, calculating the G charge by summing the "annual total transmission tariff charges paid by generators" and dividing them by the "total measured energy injected annually by generators to the transmission network." (p. 34). The ERGEG Guidelines also stated:

> "Annual average G shall exclude any charges **paid by generators for physical assets required for the generators connection to the system** (or the upgrade of the connection) as well as any charges paid by generators related to ancillary services or any specific network loss charges paid by generators." [Emphasis added]

6.37 The ERGEG Guidelines did not propose an exclusion for charges associated with "production related network components", despite the recognition from ERGEG that these were sometimes reflected in a separate charge to producers. Instead, ERGEG adopted the expression highlighted in bold in the citation in paragraph 6.36 above.

6.38 ERGEG necessarily assessed the information regarding the charging situation in the UK and other Member States at the time. At that stage, the GB charging structure included local circuit and GOS in the calculation of transmission charges under CUSC.[61] Therefore this was the established GB position prior to the development of the ERGEG Guidelines in the following year (2005). ERGEG set the generous GB cap of €2.5/MWh on that basis, with the Commission seeing no reason subsequently to change that approach (or amend the upper level of the cap). It would be odd, indeed perverse, for those charges to now fall outside the scope of the charges properly to be considered to be subject to the cap set by the Binding Guidelines. In truth, if the charges were to be excluded from the ambit of the cap, they should not have been levied by NGET as TNUoS charges in the first place.[62] The upper level of the cap

[59] [B6]
[60] [B6]
[61] See *Graham 1* at 3.4.
[62] Were the Decision to be upheld, it can be anticipated that a number of disputes on this very point will arise.

would accordingly have been lower than the €2.50/MWh rate at which it was set for GB generation.[63]

(b) The Commission's adoption of the Binding Guidelines

6.39 The Commission subsequently consulted on its proposed approach to adopt binding guidelines on transmission charges.[64] It was recognised at p. 4 that ERGEG guidelines produced in 2005 had themselves been the subject of public consultation. But it noted that the main concern was on transmission charges borne by generation, where "the risk of distorting decisions is greatest." It observed that with the exception of Nordel areas, the UK and Ireland, ERGEG's draft guidelines set a narrow band in terms of costs per MWh.

6.40 The Commission subsequently issued a proposed Regulation establishing a mechanism, for the compensation of TSOs for the costs of hosting cross border flows of electricity and a common regulatory approach to transmission charging (which became the Regulation). It was accompanied by an Impact Assessment.[65] The Impact Assessment made clear that:

(a) The Binding Guidelines would need to address the question of tariff harmonisation. The Guidelines formed part of the Third Energy Package, whose aim was to establish a single electricity market, by facilitating the cross-border supply of electricity (p. 5);

(b) The fact that a transmission network represents a natural monopoly means that strict rules on pricing, overseen by the NRA, governing access and pricing of network use are necessary (p. 6-7);

(c) Differential charges faced by generators for using the transmission system can affect the effective functioning of the internal market (p. 7);

[63] On GEMA's case, GB TSOs would get the "double counting" benefit of having connection charges included in the calculation of a higher cap level set for transmission costs, but then being removed from the assessment of the extent to which that cap was breached by the final G charges set.
[64] Commission Consultation Document on the Inter-TSO Compensation Mechanism and on harmonisation of transmission tarification, "*Towards fair and non-discriminatory arrangements for trans-European cross-border power flows*," 9 December 2008, DG TREN/C2 [B11]
[65] Commission Staff Working Document, Impact Assessment, Brussels SEC (2010) XXX Final [B15]

(d) A key aspect of the regulatory regime is that non-discriminatory and transparent prices for network access should be approved in advance by NRAs (p. 7);

(e) Tariff harmonisation was aimed at the charges for local system users for the "**use** of the transmission system." [Emphasis added] "Tariffs are paid to the TSO to whose system the user is connected." (p. 12) This implies strongly that the transmission charges are distinct from the connection charges paid in order to gain access to the transmission system in the first place. The costs allocated to the transmission system arise from costs allocated to the transmission of generated electricity (a cost to be allocated to generators); and from costs allocated to the consumption of electricity (a cost to be allocated to demand). This entails the G:D ratio found in the Guidelines, as what is not recovered from generation (G) must be recovered from demand (D). In order to achieve "neutrality between generators in different countries", a harmonisation procedure for the G:D ratio was needed;

(f) The harmonisation of G Charges had been proposed in guidelines developed by ERGEG (p. 13). These draft guidelines already permitted a specific range of G Charges distinctly for GB and Northern Ireland (as separate energy markets). In line with the approach recommended by ERGEG in the draft guidelines, the Commission focussed on the "absolute value of charges, rather than harmonising the basis on which costs are calculated and the proportion of costs allocated to generators." This allowed local circumstances to be taken into account (p. 13);

(g) The adoption of binding levels for G Charges in place of voluntary guidelines was considered appropriate. It was all part of a co-ordinated measure to compensate TSOs "in relation to costs they incur as a result of hosting cross-border flows of electricity on their network." (p. 14);

(h) The ITC mechanism was designed with a number of specific objectives in mind, including that it should be "transparent and stable" such that it is capable of specification and of being understood (p. 15);

(i) A case had not been made out for departing from the range of allowable G-Charges set by the ERGEG guidelines. (p. 36) The adoption of those guidelines by a formal legal measure would improve legal certainty. Beyond that, national regulators were best placed to set the appropriate level of transmission tariff for the systems which they oversee;

(j) Charges could be for both the actual use of the transmission system and the costs of connecting to the system, with the latter being described as the "**initial** costs associated with connecting … to the network" [emphasis added] (p. 51);

(k) In terms of connection charges, "shallow charging" was often preferred by the regulatory authorities to "deep charging" because it reduced the risk of the initial connector to the system bearing an undue level of costs for the system as a whole, which would encourage free-riding of investments by subsequent connectors. Shallow charging meant "**only costs which are exclusively associated with the new connection**" should be charged as connection charges (p. 52). [Emphasis added] This would then suggest that the bulk of the network infrastructure costs incurred by a TSO should be recovered through transmission charges, rather than connection charges.

6.41 The Commission Staff Working Document[66] found, following its December 2008 public consultation, that there was insufficient evidence to support the adoption of a different range of average annual G charges than those established by the ERGEG Guidelines in 2005. It therefore proposed the incorporation of the ERGEG Guidelines in a binding legal measure.[67]

6.42 It can be seen that the text of the Binding Guidelines as adopted is virtually identical to the text contained in the ERGEG Guidelines:

	ERGEG Guidelines	**Binding Guidelines**
Calculation of transmission charge	*The value of the 'annual national average G' is annual total transmission tariff charges paid by generators divided by the total measured energy injected annually by generators to the*	*Annual average transmission charges paid by producers is annual total transmission tariff charges paid by producers divided by the total measured energy injected annually by*

[66] [B15]
[67] Which the Commission noted in the Staff Working Document conclusions had significant support [B15 / p. 37]

	transmission network.	*producers to the transmission system of a Member State*.
Exclusions	*Annual average G shall exclude any charges paid by generators for physical assets required for the generators connection to the system (or the upgrade of the connection) as well as any charges paid by generators related to ancillary services or any specific network loss charges paid by generators*.	*…transmission charges shall exclude:* *(1) charges paid by producers for physical assets required for connection to the system or the upgrade of the connection;* *(2) charges paid by producers related to ancillary services;* *(3) specific system loss charges paid by producers*.
GB range	*The value of the 'annual national average G' within Great Britain, Republic of Ireland and Northern Ireland will be at maximum 2.5 €/MWh*.	*Annual average transmission charges paid by producers in Ireland, Great Britain and Northern Ireland shall be within a range of 0 to 2,5 EUR/MWh*.

6.43 Since the EU measure was intended to give effect to the ERGEG Guidelines, the intended meaning behind those Guidelines is plainly relevant. For present purposes, that includes:

(a) ERGEG's attempt to remove from inclusion in the G Charge those one-off costs associated with the connection of the generator to the transmission system in the first place; and

(b) the appreciation by ERGEG of the charging structure in place in GB at the time of ERGEG's consideration of the level of the transmission charge cap.

(c) The "expected situation" in GB

6.44 As noted above, the ERGEG Guidelines and thus the Binding Guidelines were explicitly based on the "expected situation" in GB. SSE asserted in CMP261 that this meant the ERGEG Guidelines were based on GB's charging arrangements at the time, namely that there was a shallow connection boundary such that the connection exclusion was only intended to cover the narrow category of "connection" charges in the GB system at that time.[68] Were the position otherwise, a lowering of the upper

[68] [B6]

(€2.50/MWh) limit would have been appropriate as a higher range of costs would have fallen outside the ambit of permissible "transmission charges."

6.45 The Decision refutes this for two reasons. It says that:

(a) the wider GB charge range was not based on connection boundaries, but to allow GB to continue its system of "wider locational" charges; and

(b) the Commission was unlikely to have intended that the charging arrangements be frozen in time and, in any event, they have changed significantly since 2004.

6.46 GEMA's conclusions on the significance of GB's locational charging practices do not stand up to scrutiny. An analysis of transmission charges in Member States which incorporate locational signals in their tariff structure does not support the alleged correlation between a higher transmission charge cap set in the Regulation and locational charging (see *Graham 1* at 4.1 to 4.3). By way of example, Denmark and Finland do not have locational transmission charging for generation; Sweden does have locational transmission charging for generators.[69] However, all three countries' annual generator transmission charges are capped, by paragraph 3 of the Binding Guidelines, at €1.2/MWh.

6.47 GEMA also emphasises how TGR charges are set to ensure average charges stay within the charge range set in the Regulation (for GB, of €0-2.50/MWh). To do so, the TGR is adjusted up or down depending on whether the revenue from the cost-reflective charges is too low or too high. GEMA expresses concern regarding forecasts that negative TGR is "*expected to increase significantly*" in the longer term such that an increasing proportion of onshore generators will receive TNUoS payments for holding transmission entry capacity ('TEC') (p. 12 of the Decision). It has been accepted since at least 1992, with the introduction of the 'Investment Cost Related Pricing for Use of [the Transmission] System,' that some GB generators would receive negative charges. But this was balanced by the fact that, on average, GB generation as a whole would have a positive charge: see *Graham 1* at 4.8. There is nothing contrary to the Regulation in having a negative TGR. GEMA's focus on it therefore amounts to it taking into account an irrelevant consideration (and thereby

[69] See CEPA presentation dated 24 March 2015 on '*European transmission tariff structures*' at slide 18 [B30]

erring in law). Any intended policy change in relation to TGR should be implemented through a CMP in the usual way, rather than through *ex post* adjustments to an established charging system to achieve the desired result by the back door.

6.48 As to GEMA's second point, the Appellants agree that the ERGEG and Commission Guidelines would not have expected to be based solely on the charging structure in one country at a fixed point. The point the Appellants make is that transmission charges and the exclusions from them were necessarily based on an assessment of the charging practices in all the different Member States (including the UK, as GB and Northern Ireland separately) at the time of their adoption (2005 and 2010 respectively).

6.49 Furthermore, paragraph 5 of the Binding Guidelines expressly states that the appropriateness of the ranges in paragraph 3 (including that for GB) would be reviewed by the Agency[70] by 1 January 2014, just over three years after the Regulation was published.[71] The aim of the ERGEG and Commission Guidelines was to harmonise the approach to the maximum level of G charge which could be levied. In order to do that, the Guidelines had to stipulate which charges could be taken out of the 'pot' of transmission charges. The consideration of the excluded charges and the decision to set the maximum rate therefore went hand in hand. Since at the time of the review GB transmission charges clearly included the charges which GEMA now says for the first time should be excluded, it necessarily follows that an adjustment to the "cap" would have been needed in the review to alleviate the "double counting" problem that would otherwise arise.

6.50 Moreover, GEMA's suggestion that there have been significant changes in the GB charging structure since 2004 is overstated. The position as regards the connection charging boundary has not significantly altered and, in any event, the overall system of charging TNUoS in line with the CUSC remains in place, which - at a minimum - must have been what ERGEG had in mind. The CUSC was developed in 2001 and included[72] (as part of the transmission use of system charges) the costs which GEMA now seeks to exclude as transmission use of system charges, not connection charges.

[70] The Agency for the Cooperation of Energy Regulators ('ACER').
[71] On 23 September 2010.
[72] Following the GEMA decision in December 2003 on CCM-M-07 – see paragraph 6.51 (a) below.

That regime was in place long before the ERGEG Guidelines and the Binding Guidelines were developed.

6.51 The GB connection boundary in place at the time of the Regulation coming into effect therefore included local circuit, local substation and GOS charges in the transmission use of system charging (not connection charging) structure. They had been charged by NGET to the Appellants as part of the TNUoS charges. Further support for this approach is demonstrated by the following:

(a) On 19 December 2003, GEMA issued its decision for CCM-M-07 – "Implementation of PLUGS - Change to Connection Boundary and associated removal of Land Charges and Type B Termination Charges and Change to Calculation of Site Specific Maintenance Charges".[73] By that decision, GEMA gave notice under section 49A EA89 that the amount NGET could charge via connection charges would be reduced. In doing so, GEMA supported the inclusion of local circuit / GOS costs as transmission use of system charges.

(b) During the autumn of 2004, GEMA considered a proposal from NGET[74] on the charging methodologies for connection to, and use of, the high voltage transmission system in GB which concluded, in December 2004, with a formal decision.[75] In that Decision, GEMA set out its support for "shallow" connection charging. It explained that a "deeper" definition of connection assets "would be less effective in promoting competition" and that such methodologies could "result in transmission users being unduly or arbitrarily advantaged or disadvantaged based on when and where they connect to the network."[76]

(c) In February 2005, GEMA published an Impact Assessment in relation to the "*Proposed Transmission Use of System Charging Methodology of the GB System Operator*" (Document 25/05).[77] GEMA cited NGET's contention that "recovering the costs associated with spur circuits through TNUoS rather than

[73] [B2]
[74] [B4]
[75] [B4]
[76] See paragraph 3.27, decision on NGET's proposed GB electricity transmission charging methodologies [B4]
[77] [B5]

connection charges" would "result in greater consistency in treatment between users."

(d) In December 2008, GEMA approved the separation of TNUoS in the TNUoS charging methodology into four components: (i) 'Local' circuit charges; (ii) 'Local' substation charges; (iii) 'wider' locational charges; and (iv) the Residual charge. While this measure introduced a change to the transmission use of system charging boundary between local and wider transmission locational infrastructure assets, it did not alter the connection/transmission boundary[78]. Local and wider transmission assets remain within the TNUoS charging system and were not treated as "Connection Assets." In explaining the background to its decision, GEMA noted that the "PLUGS" change in 2004 moved the transmission boundary from a "deep" to a "shallow" connection model. In doing so, it transferred "a substantial proportion of the costs associated with the cost of transmission infrastructure assets which are local to generator connections from connection charges funded directly from users to TNUoS charges."[79] This was, of course, in keeping with the Commission's preference for shallow transmission charging, as set out above at paragraph 6.40. GEMA further explained that (prior to the change being decided upon) individual generators' TNUoS charges did not reflect their capital costs. This 2008 decision aimed to make the allocation of TNUoS costs fairer as between generators, as opposed to adjusting the split between connection and TNUoS charges, contrary to the way it is portrayed in the Decision. There are accordingly good reasons why only the CUSC defined 'Connection Charges' should be excluded when the GB annual average transmission charges are being calculated for the purposes of the Regulation.

6.52 While GEMA is correct in its Decision to state that local charges were not a distinct charging category prior to its 2008 decision, it is wrong to suggest that those costs were previously treated as connection assets, and thus were outside of TNUoS charges: see *Graham 1* at 3.4 to 3.8.

[78] As was illustrated in the associated GEMA Impact Assessment and consultation document, dated 24 October 2008, in the diagram on p. 13 together with Figures 1 and 2 on p. 46 [B10]; See also *Graham 1* at 2.6 to 2.7 and 3.6.
[79] [B5]

6.53 Indeed, GEMA has previously accepted this to be the case. In its "2010 Great Britain and Northern Ireland National Reports to the Commission in relation to Directives 2003/54/EC (Electricity) and 2003/55/EC (Gas)",[80] GEMA stated as follows:

"Network Tariffs - structure of charges

53. **Transmission Network Use of System (TNUoS) charges have four component parts**:

> • **'Local' circuit charge**. A locationally varying element reflecting the cost of transmission infrastructure assets used by generators to connect to the Main Interconnected Transmission System (MITS). This charge is derived with reference to the incremental power flows along "local" infrastructure circuit assets between the generation node and the next MITS substation.
>
> • **'Local' substation charge**. This charge relates to the unit costs of relevant design and type of local infrastructure substation assets which are required for each generation connection.
>
> • **'Wider' locational charge**. A locationally varying element reflecting the zonal average long-run forward-looking costs of connecting an incremental (or decremental) Megawatt (MW) of generation or demand at a given point on the transmission network. This charge component will be calculated on the generic cost base for carrying unit power over unit distance.
>
> • **Residual charge**. The locational elements of the TNUoS charge do not recover the total amount of revenue allowed to the companies. This is because the transmission network is not optimally sized (as assumed by the charging model), and because the network comprises "non-locational" assets, such as substations, that contribute to overall security. Hence, once the 'local' and 'wider' locational tariffs have been calculated, a non-locational correction factor – generally called a residual charge - is applied to the tariffs to ensure that 27% of total revenues is recovered from all generators and 73% from all demand customers.

54. Under the powers conferred by the Energy Act 2004, **the Government has** been developing its policy to establish a regulatory regime for offshore transmission. It has **concluded that** a non-exclusive, price-controlled approach was the most appropriate licensing and regulating model and that **the current transmission licence and industry code arrangements, wherever possible, should be extended to offshore**. National Grid Electricity Transmission plc (NGET) has been appointed as the system operator offshore designate.

55. In this designate role, **NGET proposed a modification to incorporate offshore electricity transmission charging arrangements as part of an integrated regime following the commencement of the forthcoming regulatory regime for offshore**

[80] [B13]

transmission. On the 30th of March 2009, **we [GEMA] published our decision not to veto NGET's proposals**

The key features of these proposals included:

> **• The extension of the concept of transmission 'local' and 'wider system' infrastructure assets, the costs of which are recovered under the TNUoS charging methodology.**
>
> **• The extension of the application of existing principles in defining the boundary between 'local' and 'wider' infrastructure assets for the purposes of TNUoS charges.**
>
> **• The majority of assets forming part of the offshore transmission network will be categorised as 'local' and recovered from the local circuit and local substation elements of the tariff. These will be derived using the same principles as under the onshore arrangements whilst including the introduction of specific details necessary for calculating offshore tariffs.**[81]

56. There are 20 charging zones for generation and 14 for demand. For 2009/10 the demand charge varies between £3.38/kW and £25.90/kW whereas the 'wider' locational generation charge varies between £-6.98/kW and £21.59/kW."
[Emphasis added.]

6.54 This makes clear that GEMA has consistently treated local charges as part of TNUoS charges, and not as connection assets outside of TNUoS - and that it has communicated its approach to the Commission.

6.55 In summary, while there have been adjustments in the charging system over time, there has been no fundamental shift as to where the connection boundary should be drawn in GB since ERGEG developed its Guidelines in 2005. Thus, ERGEG's understanding of the GB charging system (which formed the basis of the €2.5/MWh cap) is equally valid today.

(d) Connection charges as "one-off" or "initial" charges for connection to the transmission system

[81] [Footnote 12 in the source document] "To include: (a) Local circuit expansion factors and local circuit security factors will be defined for each OFTO, b) The local substation tariff would be based on both assets located on each OFTO platform and the offshore platform itself, but will contain a discount to reflect the fact that the onshore substation tariff does not include civil costs, and c) The wider locational and residual tariffs are based on the existing calculation method."

6.56 The Explanatory Notes to ERGEG's Guidelines describe connection charges as "a one-off charge for their initial connection to the grid" (p. 2).[82] There is nothing to indicate that the Commission intended to give a drastically broader construction to the concept of "connection charges" when it excluded connection charges from the use of transmission charges covered by the Binding Guidelines. Indeed, its decision formally to adopt the ERGEG Guidelines, in almost identical terms, strongly suggests that the Commission did not intend (having consulted stakeholders) to depart from ERGEG's approach. The Commission's position is clearly set out in Section 6.2 of its Impact Assessment where it states:[83]

> ". . . there are good grounds for establishing a framework within which regulators exercise their powers. These are accepted by the regulators themselves, who, as discussed, drew up draft Guidelines in 2005 on allowable G-Charges.
>
> Neither as part of the consultation process or in the work undertaken by the consultants engaged by the Commission was significant evidence put forward to indicate a need at this point to adopt a different range of allowable G-charges than those provided for in the 2005 draft guidelines. Given the potential for adverse outcomes either in terms of costs faced by consumers of electricity or the effectiveness of locational signals within Member States, it is therefore not appropriate at this stage to make such changes to the regulatory regimes prevailing in Member States. However, the views expressed by respondents to the consultation clearly indicate that this is worth keeping under review, and in particular whether the variations in G charges are having a detrimental impact on cross border trade.
>
> A 'no EU level action' approach would in many respects have the same outcome as formally adopting the draft guidelines, as the policy environment would remain largely similar. However, uncertainty as to the evolution of transmission tarification across the internal market would continue. In this light it is important to note the consultation process indicated **widespread support for formally adopting the 2005 draft guidelines**. Moreover, when they were developed it was clearly envisaged that they would serve as the basis for binding guidelines under the Regulation.
>
> **Adopting the 2005 draft guidelines would serve to increase the legal certainty for market participants. It would not adversely affect the ability of TSOs and regulators to include effective locational signals within their territory. It would thereby have a clear and positive impact upon the coherence of the rules governing the internal market in electricity, without undermining either the effectiveness or efficiency of the current regime where there is a wide degree of discretion for national regulators**.
>
> The alternative approach of focusing on the methodology underlying the calculation of tariffs potentially would ensure that generators were treated equivalently. However, the rules would necessarily be quite complicated – dealing with matters of regulatory policy such as cost of capital, detailed treatment of infrastructure costs, treatment of

[82] [B6]
[83] [B15]

losses, congestion management etc. Inevitably much regulatory discretion which exists at a national level would end up being removed, and this could have significant adverse consequences, and go against the principle of subsidiarity. **This is particularly relevant when the desirable outcome of a level playing [field] in the internal market in electricity can be more simply achieved by focusing on "outputs" – that is the actual charges faced by generators – without restricting the discretion of national regulators.**"[Emphasis added].

6.57 In its Decision, GEMA emphasises that the Regulation itself does not refer to "one-off charges" for "initial connection to the grid". It therefore reasons that the "manner in which the charge is paid" is not determinative, but rather that "one must instead focus on the nature of the assets in question." To do so, however, is to ignore the legislative history of the measure which sheds light on the proper construction to be given to the terms used. In failing to take the legislative history properly into account, GEMA has committed an error of law.

6.58 Instead, GEMA has sought to rely on a series of policy factors behind its construction which simply did not feature in the drafting of the ERGEG Guidelines or the Binding Guidelines which followed. Those policy factors include a perceived desire to avoid giving Generators a "windfall", which is in truth the rebate of unlawfully overcharged transmission charges; and a concern to keep the costs for consumers[84] down. GEMA's current policy concerns (which are in substance unfounded in any event) cannot assist in determining the proper construction of an EU Regulation applying the canons of construction recognised by EU law.

6.59 Indeed, the Commission was not deaf to the concerns that costs for consumers might increase if transmission charges for generators were capped. Its Impact Assessment recognised that adopting formally binding Guidelines could give rise to an incentive at a national level "to increase charges [to generators], and so provide a (short run) benefit to consumers" (p. 25).[85] However, as the Commission then explains, this would create "degree of legal and regulatory uncertainty, which has the potential to undermine [generator] investment decisions in the internal market" (p. 25). GEMA, by its Decision, has sought to advance a "short run" policy goal at the expense of the

[84] Assuming that the approach noted in paragraph 10.111 of the CMP261 FMR (post send-back) were not adopted [B64 / p. 124]
[85] [B15]

wider structural security for generation, despite the Commission rightly resisting the temptation to do so.

Ground 1(d): GEMA failed to give the expression "charges paid by producers for physical assets required for connection to the system or the upgrade of the connection" its natural and ordinary meaning.

6.60 GEMA purports in its Decision to give the expression "charges paid by producers for physical assets required for connection to the system or the upgrade of the connection" its natural and ordinary meaning, but it has failed to do so.

6.61 In the Decision, GEMA concluded that local circuit / local substation / GOS charges fall within the "connection exclusion", rather than forming part of the annual average transmission charges paid by generators. As set out above at paragraph 6.36, the ERGEG Guidelines intended the exclusion from "G charges" to apply to any charges paid by generators for physical assets required for the generators' connection to the system (or the upgrade of the connection). The emphasis was (and should be) on the act of connecting a particular generator to the transmission network.

6.62 In contrast, permissible "G charges" would focus on the "use" of the transmission network by a Generator who transmits generated electricity to a Supplier by means of that network. This is confirmed by the Commission's Impact Assessment (as cited in paragraph 6.40 above) in which it confirmed that tariff harmonisation was aimed at the charges for local system users for the "**use** of the transmission system." Tariffs are paid to the TSO to whose system the user is connected. Transmission charges are necessarily distinct from the connection charges paid in order to gain access to the transmission system in the first place.

6.63 Indeed, this is entirely consistent with the legal advice which NGET procured and received as Code Administrator for the CUSC Working Group under CMP261. The Working Group's legal advisers, Addleshaw Goddard, provided a legal opinion[86] dated 20 April 2016 which GEMA refers to, under its 'Reasons for our decision', as having considered.[87] At paragraph 19, the opinion concluded that it was a reasonable

[86] [B45]
[87] "Having considered the material before the Authority, including in particular the legal advice **provided by Addleshaw Goddard LLP to the workgroup**" [emphasis added]

approach for charges in respect of "generation only spurs" to be included within the TNUoS charges. At paragraph 20, the opinion stated:

"We say this on the basis of the wording at Part B of the Annex to the Guidelines Regulation, which refers to the Guidelines Regulation's G Charge limits applying to 'total transmission tariff charges' and taking into account the exclusions (including in respect of 'charges paid by producers for physical assets required for connection to the system or the upgrade of the connection') set out in paragraph 2 of the same Part B. While these terms are not given specific definitions within the Guidelines Regulation, **given that generation only spurs are treated as part of the transmission system in GB and TNUoS charges include charges for the use of such spurs, we agree with the conclusions reached in respect of the CMP224 that it is reasonable that such spurs should be included within the average G charges calculation**. In contrast, it is not clear on what basis the exclusion of 'charges paid by producers for physical assets required for connection to the system justifies the exclusion of TNUoS charges (as opposed to connection charges) in respect of generation only spurs and therefore the justification for such a specific carve-out appears lacking." [Emphasis added]

6.64 GEMA's Decision either wrongly construes the expression used in the Binding Guidelines, or fails to apply it correctly to the facts of this case. GEMA has included within the "G costs" charges from NGET which are based on the transmission of electricity across its network. Those cannot rationally be described as "costs of connection" rather than "costs of use."

Conclusion on Ground 1 - GEMA accordingly erred in law in excluding local circuit / GOS charges from the annual average transmission charge in GB in 2015/16.

6.65 As a result of each or any of the above errors of construction, GEMA has erroneously excluded local circuit, local substation and/or GOS charges from the calculation of the annual average transmission charge in GB in 2015/16 in the context of any excess of the €2.50/MWh upper limit set for GB in the Regulation. It seems likely that it will continue to apply the defective construction to future charging years. The Appellants seek, *inter alia*, a direction from the CMA that GEMA should cease applying an erroneous "broad interpretation" to the exclusion, but should instead apply the "narrow interpretation" which it had formerly adopted and seen applied by NGET[88] up until the Decision and which, consistently with the advice which NGET has received, is the correct construction in law.

[88] See, for example, NGET's 'Forecast TNUoS Tariffs for 2018/19' (October 2017), Table 13, p. 29 https://www.nationalgrid.com/sites/default/files/documents/October%20Forecast%20TNUoS%20Tariffs%20for%20201819%20Report.pdf, as explained further *Graham 1* at 6.1.

Ground 2: GEMA erred in fact in its evidential assessment of which charges should be within the exclusion for connection charges and committed other errors of fact

6.66 Further or alternatively, GEMA's evidential analysis of which costs properly fall within the exclusion for connection charges is flawed and constitutes an error within the meaning of section 175(4)(d) EA04.

6.67 In excluding local circuit, local substation and/or GOS charges from the €2.5/MWh transmission charge cap, GEMA has demonstrated a misunderstanding of the nature of those charges and the assets to which they relate. Local circuit, local substation and GOS charges are charges for the transmission of electricity across a particular and defined aspect of the network. They are not charges associated with connecting the generator to the GB National Electricity Transmission System ("NETS"),[89] but are variable charges levied by NGET on the basis of the *use* of its transmission network.

6.68 The costs allocated to the transmission system arise from costs allocated to the transmission of generated electricity (a cost to be allocated to Generators); and from costs allocated to the consumption of electricity (a cost to be allocated to Demand). This entails the G:D ratio found in the Binding Guidelines; as in what is not recovered from generation (G) must be recovered from demand (D). Those transmission charges are distinct from the connection charges paid in order to gain access to the transmission system in the first place: see the Commission's Impact Assessment at p. 12.[90]

6.69 The GB electricity transmission system is known as the NETS, to which generators apply to connect, as set out in paragraph 6.67. The NETS is made up of the Local network and the Main Integrated Transmission System ('MITS'). Section 2 of the CUSC, which deals with "Connections" refers only to the NETS. There is no mention of MITS at all (within Section 2), so in the context of GB charging the transmission system must be understood to mean NETS (i.e. including the Local network). This is explained further in *Graham 1* at 2.2 to 2.4. For that reason, charges which relate to

[89] The 'NETS' is the formal name for the transmission network to which generators apply to and are granted connection to under the CUSC as set out, for example, on the GEMA and NGET respective electricity 'connections' webpages. See *Graham 1* at 2.12.
[90] [B15]

the connection between local assets and the MITS node constitute transmission charges (because they are within NETS). This includes local circuit, local substation and GOS charges.

6.70 As explained at paragraphs 2.2 to 2.4 in *Graham 1*, local circuit and local substation charges are part of NETS. They are included in TNUoS charges which are levied for the building, operation and maintenance of the transmission system. Unlike connection charges, local circuit, local substation and/or GOS charges are not based on the depreciation of the asset, their finance, operation, maintenance or administrative costs. Rather, they are comparable to the main TNUoS calculation in that they adopt "*zonal marginal km expansion factors*".

6.71 NGET's 'Guide to Connection Assets'[91] (which GEMA has not questioned) describes connection charges as follows:

> "Connection charges enable National Grid to recover, with a reasonable rate of return the costs of installing and maintaining assets which connect individual users to the GB Transmission Network. Connection assets are non-sharable assets installed for and only capable of use by an Individual user and hence represent a shallow charging regime (known as PLUGs). All sharable assets are classed as Infrastructure assets and the costs associated with them are recovered through TNUoS charges."

6.72 This definition accords with the ordinary and natural meaning of the terms "connection charges" and "transmission charges" (which is the subject of Ground 1(d) above). Local circuit, local substation and GOS charges are not included as they are more properly described as relating to the *use* of the transmission system.

6.73 GEMA in its Decision contends that a "detailed comparison of the structure of the current 'connection' and 'local TNUoS' charges in the GB system demonstrates that they are all, in substance, very similar to each other" (p. 8).

6.74 Here GEMA's comparison reduces to whether the charges are derived from the capital costs of the assets or not. That is an unduly superficial analysis. This is demonstrated by an analysis of key features of connection charges and local circuit / local substation / GOS charges.[92] To take just one example, connection charges apply to sole use assets only, unlike local circuit / local substation / GOS charges. Any other Generator

[91] [B20]
[92] See *Graham 1* at 3.3.

could, for example, also branch into the transmission network at the same node point as EDF Energy or SSE and they would be subject to the appropriate local circuit / local substation / GOS charges. That demonstrates that these charges relate to transmission use of system and not connection, since two distinct connections would then be charged the same amount for transmission across that particular part of the NETS.

6.75 GEMA is therefore wrong to conclude that the structure of connection and local TNUoS charges in the GB system are very similar to each other, such that the latter fall within the "connection exclusion".

6.76 Separately, GEMA asserts that in Ireland, which has the same charge range as GB (at €0-2.50/MWh), comparable assets (to local assets) are paid for via connection charges and those charges are excluded for the purposes of calculating the annual average transmission charges under the Regulation. As a preliminary point, GEMA cannot establish a regular practice within other Member States by referring to only one of them. It is not clear to the Appellants on the face of the Decision why GEMA is drawing such a categorical conclusion in relation to the position in Ireland, given that relevant Irish documents suggest that the position is, at the very least, considerably more nuanced than GEMA suggests.[93]

Ground 3: The Decision constitutes an abuse of process and/or infringes the principle of regulatory consistency

6.77 The Decision constitutes an error of law within the meaning of section 175(4)(e) EA04 due to constituting an abuse of process and/or infringing the principles of regulatory consistency. GEMA has already taken a binding decision in CMP224 as to which costs are excluded, which NGET has applied. That approach has been confirmed by the policy which GEMA has adopted and put into practice prior to[94] and since that decision. The approach can only be changed, if at all, with prospective

[93] There is evidence to suggest that the Ofgem interpretation of the Ireland arrangements could be contradicted by the Ireland Grid Code and Charging documents which indicate partial charging of local assets as connections. See *Graham 1* at 4.4 to 4.7. Further, section 4 of the ACER Opinion of 15 April 2014 shows GB and Ireland as being categorised by ACER as using the same generation transmission charging methodologies [B25]

[94] By, for example, the analysis in the September 2011 GEMA Project Transmit Technical Working Group Initial Report – see paragraph **Error! Reference source not found.** above.

effect. Moreover, GEMA has in fact approved charging methodologies in place since at least 2008 which have consistently treated the costs associated with local circuits, local substations and GOS as being transmission costs, rather than connection costs.

6.78 NGET has been applying those methodologies in the charges it raises against Generators. GOS costs have been included in the invoices for transmission costs, not in the invoices for connection costs. As paragraph 7.1 of the CMP261 FMR (original and post send-back) for NGET observes:[95]

> "National Grid has followed an industry-agreed process to set the G:D split, established by the CMP 224 industry working group, and subsequently **ratified by the Regulator, to comply with EU Regulation 838/2010**." [Emphasis added]

6.79 GEMA, as the NRA is responsible for the supervision of GB transmission, has been supervising the proper implementation of the Regulation since its entry into force. Throughout that time, it has approved the application by NGET of the maximum cap on transmission costs by adopting an *ex ante* framework for charging. In order to derive the necessary ratio for the G:D calculation, GEMA must necessarily have considered which costs should be excluded from the basket of transmissions costs by virtue of paragraph 2 of the Binding Guidelines. It is only by determining which were the relevant costs to include as transmission costs that the appropriate formula could have been set.

6.80 At no stage prior to SSE's initiation of CMP261 did GEMA suggest it had been adopting a flawed approach to the Regulation. It does not appear that GEMA has ever recognised in any way that it has been mis-applying the Regulation up until this point. It has validly authorised the recovery of local circuit, local substation and GOS costs as transmission use of system costs, rather than connection costs. In the absence of any challenge to the regulatory decisions adopted by GEMA in deciding what charges should be included, those decisions are binding on the regulated parties, including NGET.

6.81 GEMA in the Decision has suggested that it did not reach a "concluded view" on which of the "broad" or "narrow" interpretation was correct in the course of CMP224. That is simply wrong. The issue of whether it was right to include GOS costs in the

[95] [B54], [B64]

formula was revisited as part of CMP224. The CMP244 legal text for the Original proposal approved by GEMA was based on the "narrow" (referred to as 'strict' in terms of CMP224) interpretation. Certain alternative modification proposals[96] before GEMA in CMP224, which were based on the "broad interpretation", contained additional text within the proposed CUSC amendments. Specifically, they included a provision for excluding the GOS forecast revenues from the calculation of the annual average transmission charges when assessing GB compliance with the €2.50/MWh cap in the context of the Regulation. Those "broad interpretation" modification options[97] were not approved by GEMA, further demonstrating that it rejected the inclusion of the broad construction at that stage.

6.82 If GEMA had felt that both the "broad" *and* "narrow" interpretation were correct it should have considered, at the time, either rejecting CMP224 (on the grounds that the "broad" *and* "narrow" interpretation were correct and the four options before GEMA did not reflect this) or, if appropriate, decided to 'send-back'[98] CMP224 to seek to have the GOS element included in the legal text, and thus in the CUSC, such that both the "broad" *and* "narrow" interpretation could apply. That is, the "broad" interpretation for the Regulation; and the "narrow" interpretation for the CUSC. That inconsistent approach could then have been subject to legal challenge by CUSC participants. GEMA did neither of those things. Instead it accepted, with its CMP224 decision, that the "narrow" interpretation alone was correct. In any event, GEMA cannot have continued to accept (and report annually to the Commission[99]) the application of the GB TNUoS charges year on year since 2010 without considering and agreeing the treatment applied to the transmission costs which went within them and the proper exclusion of connection charges from the calculation.

6.83 Nor is the consistent regulatory practice surprising, in the face of the consensus view from the industry that the narrow construction was appropriate. As long ago as 2004, NGET itself had proposed that recovery of costs associated with generation spur

[96] Specifically (CMP224) WACMs 2 and 3 [B26]
[97] CMP224, WACMs 2 and 3 [B26]
[98] As, for example, it did in February 2017 with CMP261.
[99] Via the annual UK 'National Report(s)'prepared by Ofgem for GB (and its equivalent for Northern Ireland)- see paragraph 6.53 above.

circuits should be through TNUoS charges rather than through connection charges, since this "results in greater consistency in treatment between users."[100]

6.84 CMP224 was itself raised by NGET to address the risk of the €2.50/MWh cap being breached. The modification proposal stated:[101]

"If in any given year the average annual generation transmission charges do not fall within this range [€0-2.5/MWh], National Grid runs the risk of being non-compliant with the regulation ... Therefore it is important that the average annual generation transmission charges remain within the current prescribed range ... The driver for this [CMP224] proposal is to counter the risk of non-compliance with the EC regulation if indeed a breach of the range applied on generation transmission charges becomes a possibility in future."

6.85 The CMP224 proposal also stated:[102]

"As specified in the EC regulation, the value for average annual transmission charges payable by generators is calculated by dividing the **total revenue collected from generation users through Transmission Network** Use of System (TNUoS) charges by the **total measured energy injected into the Transmission Network or simply the total demand for that year**. The total demand for any given year is an absolute number. However, the total generation TNUoS revenue can be adjusted to a level so that the average annual transmission charges payable by generators do not exceed the prescribed limit." [Emphasis in original]

6.86 CMP224 was approved by GEMA on 8 October 2014 and implemented on 22 October 2014. By that decision, the CUSC was modified to seek to comply with the Regulation and the Electricity Regulation by introducing an "error margin" to adjust the total TNUoS revenue from GB generators to ensure compliance with Part B of the Binding Guidelines. There was no appeal brought or judicial review commenced in respect of that decision by NGET, nor by any other interested CUSC party. In explaining its approval of the CMP224 modification proposal on 8 October 2014, GEMA stated:[103]

"The total costs that transmission network owners are allowed to recover each year via TNUoS charges are set by us using the price control process.

. . .

Charges for electricity transmission losses, ancillary services and **charges for physical assets required for connection to the system** or the upgrade of the

[100] See paragraph 5.15, p. 44 of "The Proposed Transmission Use of System Charging Methodology of the CB System Operator, an Impact Assessment", February 2005 (Document 25/05) published by GEMA in February 2005 [B5]
[101] [B21]
[102] [B21]
[103] [B28]

connection are excluded from this calculation, and so are not restricted by the Regulation."

6.87 In other words, the CMP224 decision properly applied the Regulation to the charging process. The approval for the inclusion of local circuit charges, local substations and GOS charges in the TNUoS charging formula necessarily required GEMA to have decided that they were *not* "charges for physical assets required for connection to the system" – not least because the opposite approach, that they *were* "charges for physical assets required for connection to the system" was also before GEMA[104] at the same time.

6.88 GEMA's decision on CMP224 also dealt with what was then termed "the strict interpretation" and "the broad interpretation". In its decision dated 8 October 2014, GEMA confirmed that proposals based on these different definitions had been submitted to it for "decision."[105] The broad interpretation would have seen the exclusion not only of connection charges under paragraph 2 of the Binding Guidelines, but also of "local charges for radial circuits that supply generators only (Generation Only Spurs)." In fact, GEMA decided not to exclude these local charges for GOS costs. Having made that decision, NGET did not seek to challenge it or appeal it. NGET has therefore charged annual total transmission tariff charges in GB which include GOS charges ever since.

6.89 Further, in adopting the then "strict" (now "narrow") interpretation, GEMA had in mind the very scenario that has given rise to the current appeal. It knew what it was deciding:[106]

"We note that under the current G:D split of 27:73, NGET's charges are forecast to exceed the Regulation *at some stage over the period 2015/16 to 2020/21, depending on the interpretation of Paragraph 2(1) Annex Part B of the Regulation*. This is due to increasing transmission costs relative to electricity demand."

6.90 GEMA directed that the original proposal in CMP224 should be implemented. That proposal favoured the so-called "strict" interpretation of "connection charges." At page 5 of that decision, it stated:[107]

[104] In the form of CMP224 WACMs 2 and 3 [B26]
[105] [B28]
[106] [B28]
[107] [B28]

"As discussed in the 'Impact and Legal Interpretation' section of our July consultation, we consider that Paragraph 2(1) in Annex Part B of the Regulation is ambiguous and that there is a risk that charges under options that use the broad interpretation are successfully challenged by generators. We therefore consider the options that use the strict interpretation (the original proposal and WACM1) better meet this objective when compared to the options that use the broad interpretation (WACM2 and WACM3)."

6.91 It is to be noted in particular that the original proposal for CMP224 was made by NGET itself. That original proposal favoured the so-called "strict" interpretation of "connection charges." In other words, NGET agreed with the construction which the Appellants support. NGET's opinion on the CMP224 industry consultation is summarised as follows:[108]

"National Grid believes that CMP224 better facilitates the Applicable CUSC Objectives as it takes into account the developments in the European legislation affecting the transmission licensee's transmission businesses and ensures that GB stays compliant with the legally binding Commission Regulation."[109]

6.92 GEMA now argues that CMP224 was a "pragmatic" approach. This is to ignore the process leading to and the wording of CMP224. In the consultation letter of 14 July 2014 leading to the CMP224 decision, GEMA stated:[110]

"it is our preliminary view that…the strict interpretation is the **better interpretation** of the Regulation and that the broad interpretation increases regulatory risk." (Emphasis added)

6.93 This preliminary view was consulted on and, as noted, reference made to the likely future breach.

6.94 GEMA's suggestion that it had not reached a concluded view on the issue is either advocate's licence or historical revisionism. Appendix 1 to the CMP224 Decision noted that one consultation respondent to the July 2014 consultation exercise that preceded the October 2014 decision had favoured the "broad" interpretation.[111] But that did not find favour with GEMA. It was rejected by the majority of consultation responses. A decision was made to proceed with the so-called "strict interpretation" and a legally binding decision was taken to that effect. There was no challenge to that

[108] [B26]
[109] [B26 / p. 4]
[110] [B27]
[111] [B26]

decision by the respondent who proposed a broad construction. The transmission costs used in the formula set by the Regulation were determined accordingly.

6.95 It would be an abuse of process on the part of GEMA to seek to resile from the CMP224 decision now. Any final determination which is unappealed ought, generally speaking, to be binding on both the regulator and the regulated entity. See, by analogy, Case C-310/97 P Commission v AssiDoman Kraft Products AB [1999] ECR I-5363, CJEU at [53] to [55] and [57] to [61]. The reason why it is important for administrative decisions to be challenged within the appropriate time limits is because "[t]he principle of finality and legal certainty is important" even if facts subsequently come to light which show that the decision was unsatisfactory for some reason: see the judgment of Vos LJ in Somerfield Stores Ltd v Office of Fair Trading [2014] EWCA Civ 400, CA at [41]-[43].

6.96 GEMA cannot lawfully re-open a decision so as to provide for a different regulatory treatment retrospectively: see, by analogy, Vodafone Ltd v British Telecommunications Plc [2010] EWCA Civ 391, per Richards LJ at [42] to [46]. If it wishes to change its approach now, it should consult on it and apply any changes with prospective effect only. See R (Homesun) v. Secretary of State for Energy and Climate Change [2011] EWHC 3575 (Admin), per Mitting J at [42]-[44].

6.97 Moreover, it would be capricious to change that established approach now, simply because it is necessary to have an *ex post* 'truing up' of values. There is no rational basis for distinguishing between the definition of the costs *ex post* and the definition *ex ante*. The Regulation does not prescribe whether or not an *ex ante* or an *ex post* approach should be adopted generally. But equally, GEMA cannot lawfully adopt one approach *ex ante* and then change that approach when it produces a result which (for irrelevant and misplaced policy reasons) it does not like. Furthermore, if CMP261 had been treated as urgent (as SSE, the proposer, requested) the 'truing up' of values would have been done in accordance with the established reconciliation process for charging year 2015/16 (which took place, as normal, in Spring 2016).

6.98 Furthermore, GEMA must treat like cases alike. Any decision which treats comparable costs differently without objective justification is vitiated by the inconsistency of treatment. See R (Middlebrook Mushrooms Ltd) v. Agricultural Wage Board of England and Wales [2004] EWHC 1447 (Admin), per Stanley

Burnton J at [74]; and R v. Inland Revenue Commissioners *ex parte* National Federation of Self-Employed and Small Businesses [1982] AC 617, per Lord Scarman at pp. 651-652. There is no objective justification for changing the construction of excluded costs simply because the regulatory focus changes from an *ex ante* to an *ex post* analysis.

6.99 Indeed, by CMP251, the issue of which transmission charges were to be included in the calculation had been taken as read. It is only now that a breach has been established on the basis of the existing methodology that GEMA and/or NGET is seeking to back-track and unpick that methodology to suit any aim of avoiding liability for its breach of EU law. The combination of the decision taken by GEMA in CMP224 and the same policy or practice adopted in CMP251 establishes a consistent and unambiguous policy statement of which costs were properly to be included in the G:D margin calculation. To depart from that practice would infringe the requirement of regulatory consistency found in section 3A(5A) EA89.

6.100 Moreover, departure from an established decision even on a prospective basis would require GEMA to show a material change in circumstances which justified such a departure. Here, none can be shown. GEMA, as a public body decision-maker, must follow its stated policy unless there are good reasons for not doing so. See R (Kambadzi) v. Secretary of State for the Home Department [2011] UKSC 23, [2011] 1 WLR 1299, per Lord Hope at [36] and [41]; and R (Davies and Gaines-Cooper) v. HMRC [2011] UKSC 47, [2011] 1 WLR 2625 per Lord Wilson at [27]-[29] and Lord Mance at [70]. GEMA cannot have a privately stated policy which is at odds with a publicly stated policy and which it follows in preference to the public statement of principle: see R (Lumba) v. Secretary of State for the Home Department [2011] UKSC 12; [2012] 1 AC 245, SC per Lord Dyson at [20] and [26]. In the latter paragraph, Lord Dyson stated:

> ". . [a] decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt: see *Wade & Forsyth, Administrative Law,* 10th ed (2009), p 316. As it is put in *De Smith's Judicial Review*, 6th ed (2007), para 12-039: "there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness." The decision of the Court of Appeal in R (Nadarajah) v Secretary of State for the Home Department [2004] INLR 139 is a good illustration of the principle. At para 68, Lord Phillips MR, giving the judgment of the

court, said that the Secretary of State could not rely on an aspect of his unpublished policy to render lawful that which was at odds with his published policy."

6.101 In addition, to the extent that GEMA has given any unambiguous and unequivocal statement to regulated entities or to industry participants as to how it intends to behave, it is required to follow such a statement: see R v North and East Devon Health Authority, *Ex p* Coughlan [2001] QB 213 CA, per Lord Woolf MR at [57]; R (Bancoult No 2) v. Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61, [2009] 1 AC 453, HL per Lord Hoffmann at [60]; Paponette v. AG of Trinidad and Tobago [2010] UKPC 32, [2012] 1 AC 1, per Lord Dyson at [37]-[38] and the case law cited therein found. In such circumstances, GEMA has engendered a procedural or a substantive legitimate expectation which it is required, as a matter of fairness, to respect: see R (Hely Hutchison) v. HMRC [2015] EWHC 3261 (Admin) per Whipple J at [42]-[43]. See also R (Nadarajah) v. Secretary of State for the Home Department [2005] EWCA Civ 1363, per Laws LJ at [68] and [69]; and R (BAPIO) v. Secretary of State for the Home Department [2008] UKHL 27, [2008] 1 AC 1003, per Lord Mance at [60].

6.102 A legitimate expectation may be recognised in public law even where no detrimental reliance on any unequivocal representation is shown. See R (Bancoult No 2) v. Secretary of State for Foreign and Commonwealth Affairs (*supra*) per Lord Hoffmann at [60]. Of course, if the assurances given as to certain treatment raise serious macro-economic or political issues, a government body may well be entitled to resile from them by changing its policy approach, but only prospectively. See The United Policyholders Group v. AG for Trinidad and Tobago [2016] UKPC 17 per Lord Neuberger at [39].

6.103 The Appellants also note that the Binding Guidelines have an in-built mechanism by which GEMA can raise concerns with the level of the cap:

"4. The Agency shall monitor the appropriateness of the ranges of allowable transmission charges, taking particular account of their impact on the financing of transmission capacity needed for Member States to achieve their targets under the Directive…".

6.104 The Appellants have not found any evidence in the public domain that (i) GEMA raised, with ACER[112] any concern(s) with regard to the level of the cap applicable to GB at the appropriate time; or (ii) that ACER ignored, if applicable, the concern(s) from GEMA when coming to their reasoned Opinion.[113]

6.105 For all of the above reasons, GEMA's *volte face* on the construction of the exclusion for "connection charges" amounts to an error of law within the meaning of section 175(4)(e) and should be quashed.

Ground 4: The Decision infringes a number of general principles of EU law and must be quashed or disapplied on that basis

6.106 The Decision constitutes an error of law within the meaning of section 175(4)(e) EA04, as it infringes a number of general principles of EU law. Since the regulation of the generation and supply of electricity falls within the scope of EU law, GEMA is subject to the general requirements of EU law, such as the need to comply with the principles of proportionality and the protection of legal certainty.[114] These general principles of EU law are also applicable by virtue of Article 6(3) of the Treaty on the European Union.[115]

6.107 The jurisprudence of the Court of Justice of the European Union establishes that general principles of EU law will require GEMA when acting as an NRA to:

(a) Respect the principle of legal certainty.[116] This will also mean that licence conditions with which a licensed entity is expected to comply should be prescribed by law in a clearly ascertainable manner.[117] As regards the principle of legal certainty, it must be observed all the more strictly in the case of rules

[112] Of which GEMA is one of the constituent 'members', as a National Regulatory Authority.
[113] See the ACER Opinion dated 15 April 2014 [B25]
[114] See Joined Cases C-20/00 and C-64/00 Booker Aquaculture [2003] ECR I-7411, CJEU at [46], [64] to [67], [88]
[115] R (Zagorski & Baze) v Secretary of State for Business, Innovation and Skills [2010] EWHC 3110 (Admin), Lloyd Jones J at [70] and [73]
[116] See Case C-384/04 Federation of Technological Industries and others [2006] ECR I-4191, CJEU at [29]
[117] See Fleming t/a Bodycraft v. HMRC [2008] UKHL 2, HL per Lord Hope at [10], Lord Scott at [21]-[22], Lord Walker at [64] and [68]; and Lord Neuberger at [79] This would also follow from the obligation imposed on GEMA to comply with Article 1 of Protocol 1 to the European Convention on Human Rights, which prevents the imposition of heavy financial sanctions except in accordance with law. Law for these purposes implies qualitative requirements, notably those of accessibility and foreseeability. See Hentrich v France (1994) 18 EHRR 40, ECtHR at [42]; and Spacek v. Czech Republic (2000) 30 EHRR 1010, at paragraph 54.

liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which such rules impose on them.[118]

(b) Respect the principle of proportionality. The measures adopted must be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it.[119]

(c) Respect the EU law principle of equality and the interrelated requirement of non-discrimination.[120] This means that persons in like situations should not be treated differently without objective justification; and persons in different situations should not be treated in the same way.

(d) Respect the principle of the effective protection of EU rights, including the right to recover charges paid under domestic law in breach of those EU law rights.[121] A national legal system cannot impose a requirement to obtain effective protection of an entity's EU law rights only through a multiplicity of different fora or procedures.[122] It is accordingly appropriate that the Appellants should be able to vindicate their claim for recovery of overpaid TNUoS charges, without being required to bring a parallel civil claim against NGET at the same time.

6.108 For many of the reasons set out above, the Decision violates each of the above general principles of law. Each will be addressed in turn.

(a) The principle of legal certainty

6.109 GEMA had adopted a clear construction of the connection exclusion which had been applied by it over a significant period of time. It is now seeking to change its construction and apply that change with retrospective effect to past charging periods.

[118] See Case C-409/04 Teleos plc and others v. The Commissioners of Customs and Excise [2007] ECR I-7797, CJEU at [48] This also chimes with the principle of good regulation of encouraging "regulatory certainty."
[119] See Joined Cases C-1/90 and C-176/90 Aragonesa de Publicidad Exterior and Publivía [1991] ECR I-4151, CJEU at [16]; Joined Cases C-369/96 and C-376/96 Arblade and Others [1999] ECR I-8453, at [34] and [35]; and Case C-165/98 Mazzoleni v. Inter Surveillance Assistance SARL [2001] ECR I-2189, at [24]
[120] See Joined Cases 201 and 202/85 Klensch [1986] ECR 3477, CJEU at [9]-[11]
[121] Case 199/82 Amministrazione delle Finanze dello Stato v. SpA San Giorgio [1983] ECR 359, CJEU at [12]; and Case C-94/10 Danfoss A/S [2011] ECR I-9963, CJEU at [21]-[25]
[122] See Case C-268/06 Impact [2006] ECR I-2483, CJEU at [50]-[55]

The retrospective impact of such a change is unlawful, as infringing the principle of legal certainty and the protection it confers on legitimate expectations.[123]

(b) The principle of proportionality

6.110 It is apparent from the Decision that GEMA has been motivated by a perceived desire to protect consumers from additional costs[124] and to avoid giving what it characterises as a 'windfall' to Generators. That does not represent a legitimate public interest in the context of a requirement to comply with EU legislation. EU legislation has already determined the boundaries within which generation charges must be set. GEMA cannot sensibly suggest that those boundaries are inappropriate, not least since neither it nor the UK Government challenged the Regulation as unlawful within the time allotted by Article 263 TFEU. Moreover, any attempt by GEMA through its Decision to re-calibrate the balance of interests between Generators and Suppliers or consumers would have a disproportionate impact on the interests of Generators. As set out above (and confirmed in *Cox 1* and *Graham 1*), existing investment decisions have been taken by Generators on the basis of the narrow interpretation of the Regulation previously supported by GEMA and NGET. As a result of the operation of the Capacity Market, Generators are locked into their investment decisions for some time. In contrast, rebated charges payable by NGET to Generators could be recovered by it over a longer charging period.

6.111 In any event, GEMA's suggestion that consumers would be better served by the "broad" interpretation is flawed. *Cox 1* at 8.2 to 8.4 explains how the impact per consumer of the narrow interpretation is in fact extremely small. Moreover, increased costs cannot be absorbed in full by generation indefinitely.

(c) The principle of non-discrimination

6.112 The effect of the Decision is to disadvantage GB Generation when compared with (a) generation in other Member States; and (b) generation within the Member State, namely in Northern Ireland. The high €2.5/MWh maximum level for transmission charges paid by GB generators set by the Binding Guidelines already disadvantaged GB generation in terms of: (i) competition (increases in electricity imports to GB and decreases of electricity exports from GB); and (ii) the effect on cross-border trade

[123] See Case C-62/00 Marks & Spencer plc v. HMRC [2003] QB 866, CJEU at [40] and [46]
[124] Assuming that the approach noted in paragraph 10.111, p. 124, of the FMR were not adopted [B64]

(likewise, in terms of increases in electricity imports to GB and decreases of electricity exports from GB). Evidence set out in the CMP261 FMR (post send-back)[125] shows that there were increased electricity import flows into GB during charging year 2015/16 due to electricity price differentials with other Member States.

6.113 In terms of the effect on cross-border trade, the interaction between such trade and the ranges set was noted by the Commission in its Staff Working Document.[126] This echoes a concern the Commission set out in their December 2008 consultation that a significant difference in charges between Member States could "distort cross-border trade and / or decisions about new plant location or existing plant retirement."[127]

6.114 GEMA at page 10 of the Decision takes only a cursory view of the competition aspects that arise from their Decision (by merely asserting that, as there has been no breach, the issue does not arise). However, GEMA also ignores the effect on cross-border trade that would arise from their Decision, such as the distorting effect the Commission highlighted. In this regard, it should be noted that Article 8(7) of the Electricity Regulation sets out that Member States have the right to establish national network codes (such as the CUSC in GB) as long as they do not affect cross-border trade. GEMA therefore failed properly to consider the discriminatory impact on competition and cross border trade arising from the Decision. For GEMA's construction to remove a basket of important costs from the calculation of the €2.50/MWh cap renders the playing field even less level, especially in the face of far lower transmission charges which are applied to generators in most other Member States.[128]

6.115 In addition, the Decision produces a discriminatory impact between transmission network generation and "embedded generation." Smaller embedded generators are treated as being part of the supply or distribution part of the network and accordingly do not have to pay transmission charges. This is explained in *Cox 1* at 5.1 to 5.3.

[125] See, for example, footnotes 130, 132, 137 and 138 [B64 / pp. 115-116]
[126] [B15 / p. 36]
[127] [B11]
[128] In the case of many Member States, €0.5/MWh transmission charges apply to generators. See *Graham 1* at 4.2.

(d) The principle of effective protection of EU law rights

6.116 The Appellants have a directly applicable right not to pay more than the cap of €2.5/MWh on an average annual basis. They have done so and must be entitled to claim the overpayment back, with interest, in order to ensure the effective protection of their EU law rights. It is incumbent on GEMA, as the NRA, to give effect to those rights. The modification suggested by SSE in its original proposal in CMP261 was a convenient and easy way to give effect to those rights. That approach was then modified with alternative proposals WACM1 and WACM2 in the course of CMP261.[129] Further details of the differences between the original and the alternative proposals in CMP261 are set out in the FMR (post send-back).[130] The Appellants agree that, in the light of the effluxion of time, WACM1 represents the best means of securing adequate redress. GEMA should therefore sanction that approach.

6.117 A failure to do so would risk requiring the Appellants to bring separate legal proceedings to vindicate their EU law rights. That would offend the principle of effectiveness. The EU law requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on EU law. See Case C-268/06 Impact [2006] ECR I-2483, CJEU at [47]. It is appropriate that the procedures of the CMA should be moulded or, if necessary, disapplied to give effect to the practical vindication of the Appellants' EU law rights.[131]

6.118 Accordingly, in the event that GEMA presents any perceived obstacle to the implementation of WACM 1, the appropriate course would be for the CMA to do so under section 175(6) EA04, which entitles the Appellants to have the decision quashed, for the CMA to direct GEMA that the CMP261 proposal should have been allowed and to direct NGET to repay the overcharged sums directly to the Generators,

[129] The CMP261 Original, WACM1 and WACM2 were the only options recommended by a majority of the CUSC Panel (summarised at p. 9 of the FMR (post send-back) [B64]) as better meeting the applicable CUSC Objectives. WACM3 was not so recommended by a majority of the CUSC Panel. As GEMA's Decision does not accord with the CUSC Panel majority recommendation in terms of the CMP261 Original, WACM1 or WACM2, an appeal to the CMA is permitted. However, as GEMA's Decision does accord with the CUSC Panel majority recommendation in terms of the CMP261 WACM3 an appeal to the CMA of that option is not permitted and thus cannot now be considered.

[130] [B64/ pp. 136-138]

[131] See HMRC v. Répertoire Culinaire [2017] EWCA Civ 1845, per Henderson LJ at [47] and [77]; Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs [2017] UKSC 62, per Lord Sumption at [78]

to be subject to a further hearing to determine the quantum of the repayment if not agreed. That direction operates as equivalent to an order of the Court and should therefore be capable of being enforced as a judgment debt. It is also appropriate, for reasons of equivalence and effectiveness, that interest should be paid on the overpaid sums on a compounded, alternatively a simple, basis. See Case C-295/04 Manfredi [2006] ECR I-6619, CJEU at [62] and [95]; and Sempra Metals v. HMRC [2007] UKHL 34; [2008] 1 AC 561.

6.119 Yet further or alternatively, the same direction to that sought in paragraph 6.118 above might be given by the CMA to GEMA, which in turn would be directed to require NGET to give effect to GEMA's direction to like effect. Since NGET has been notified of this application for permission to appeal and may participate in the appeal as an interested party, there can be no objection to such a course being taken on the grounds of procedural fairness.

7. RELIEF

7.1 For the above reasons, the Appellants respectfully contend that GEMA erred in finding that there was no breach of the Binding Guidelines such that none of the proposals developed by the CMP261 workgroup were required. If it had conducted a legally and factually correct analysis of the Regulation, it would have identified a breach of the €2.5/MWh cap. GEMA would then have been required to remedy that breach in accordance with its duty to give effective protection to the EU law rights held by the Appellants. That remedy is required to compensate generators for the losses caused by the breach of the Regulation.

7.2 The Appellants are agreed that WACM1 to the CMP261 proposal best gives effect to their right to recovery overpaid transmission charges. If any insuperable obstacle to WACM1 is identified, the simplest practical way of achieving that remedy other than through a formal WACM would be for the CMA to direct repayment by NGET to the Generators of their share of the £119.5 million, together with interest, or such sums to be determined, if not agreed.

7.3 Alternatively, the remedy might be in the form of rebate or other future adjustment to its charges, in accordance with one of the Workgroup's proposals. In that eventuality, the Appellants consider that GEMA's decision should be quashed and remitted so that

GEMA can reconsider its position and select an appropriate remedy from the three proposed.

7.4 The Appellants seek the following relief from the CMA:

(a) An order quashing the Decision;

(b) A direction that GEMA should approve WACM1 in the CMP261 FMR (post send-back);

(c) Alternatively, a direction for payment by NGET to the Appellants of sums (including interest on a compound, alternatively a simple, basis) to be determined at a further hearing, alternatively by GEMA, if not agreed;

(d) Further or alternatively, a direction by the CMA to GEMA that GEMA should direct NGET to pay to the Appellants an appropriate level of rebate on the overpaid sums (to include interest on a compound, alternatively a simple, basis), to be determined at a further hearing, alternatively by GEMA, if not agreed;

(e) Alternatively, an order remitting the matter back to GEMA for reconsideration and determination in accordance with the directions given by the CMA;

(f) An order that GEMA pays the Appellants their costs of this appeal;

(g) Such further or other relief as the CMA considers appropriate.

Kieron Beal QC, Blackstone Chambers
Keith Jones, Jennifer Reeves, Colm O'Grady
Baker McKenzie
6 December 2017

ANNEX A: THE LEGAL FRAMEWORK

A. Domestic legislation

1. Section 4(4) of the Electricity Act 1989 ('EA89') defines transmission and transmission system as follows:

> "'transmission', in relation to electricity, means transmission by means of a transmission system;
> 'transmission system' means a system which—
> (a) consists (wholly or mainly) of high voltage lines and electrical plant, and
> (b) is used for conveying electricity from a generating station to a substation, from one generating station to another or from one substation to another."

2. Section 3A(1) EA89 states:

> "The principal objective of the Secretary of State and the Gas and Electricity Markets Authority (in this Act referred to as 'the Authority') in carrying out their respective functions under this Part is to protect the interests of [existing and future] consumers in relation to electricity conveyed by distribution systems [or transmission systems]."

3. Section 3A(1B) requires GEMA to act in a way that is best calculated to further the principal objective, "wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the generation, transmission, distribution or supply of electricity or the provision or use of electricity interconnectors." Under section 3A(2)(b), GEMA must nonetheless have regard to the need to secure that licence holders are able to finance the activities which are the subject of obligations imposed by or under Part 1 EA89.

4. Section 3A(5A) provides that:

> "(5A) In carrying out their respective functions under this Part in accordance with the preceding provisions of this section the Secretary of State and the Authority must each have regard to—
> (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
> (b) any other principles appearing to him or, as the case may be, it to represent the best regulatory practice."

5. Section 4 EA89 prohibits the unlicensed generation, transmission, distribution or supply of electricity. Section 6 empowers GEMA to grant one of six classes of licence:
   5.1. A generation licence;
   5.2. A transmission licence;
   5.3. A distribution licence;
   5.4. A supply licence;
   5.5. An interconnector licence;
   5.6. A smart meter communication licence.

6. Section 7 empowers GEMA to set general conditions that will be applied to licensees under the licensing regime. Section 8A sets certain standard conditions identified by cross-reference to provisions found in section 33 of the Utilities Act 2000 and other provisions of the EA04. Sections 8A(2) and 11A confer on GEMA a power to modify the standard conditions.

7. Section 25 to 27 EA89 set out GEMA's enforcement powers. Section 25(1) and (4A) state:

> "(1) Subject to subsections (2)[, [(4A) to] (5A)] and section 26 below, where [the Authority] is satisfied that a [regulated person] is contravening, or is likely to contravene, any relevant condition or requirement, [it] shall by a final order make such provision as is requisite for the purpose of securing compliance with that condition or requirement.
> . . .
> [(4A) Before making a final order or making or confirming a provisional order, the Authority shall consider whether it would be more appropriate to proceed under the Competition Act 1998."

8. The relevant parts of section 27 read as follows:

> "(4) The obligation to comply with a final or provisional order shall be a duty owed to any person who may be affected by a contravention of the order.
>
> (5) Where a duty is owed by virtue of subsection (4) above to any person, any breach of the duty which causes that person to sustain loss or damage shall be actionable at the suit or instance of that person."

B. European Union legislation

9. Directive 2009/72/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC[132] contains a number of provisions governing the conduct of national regulatory authorities, such as GEMA, in their domestic electricity generation and distribution markets. The general objectives of GEMA as the national regulatory authority ("NRA") are also governed by Article 36 of this Directive. Article 37 sets out the duties and powers of the NRAs. Article 37(4)(a) of the Directive requires the UK as a Member State to ensure that GEMA as an NRA has a power "to issue binding decisions on electricity undertakings."

10. Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 ('the Electricity Regulation')[133] aims, by Article 1(1), to set fair rules for cross-border exchanges in electricity. Of particular relevance:

    10.1. Recital (11) recognises that TOs should be compensated for costs incurred as a result of hosting cross-border flows of electricity on their networks.
    10.2. Recital (12) then notes that payments and receipts from compensation should be taken into account when setting national network tariffs.
    10.3. Recital (13) confirms that a degree of harmonisation is required in charges for cross-border access in order to avoid distortions to trade.
    10.4. Recital (23) notes that the NRAs should ensure compliance with the rules contained in this Regulation and the Guidelines adopted pursuant thereto.
    10.5. Article 8(7) requires network codes to be developed for cross-border network and market integration issues, without prejudice to Member States' rights to establish national network codes which do not affect cross-border trade.
    10.6. Article 14 requires charges for access to networks to be transparent and to reflect the actual costs incurred insofar as they correspond to those of an efficient and structurally comparable network operator. They have to be applied in a non-discriminatory manner. Article 14(3) requires the charges for network access to take account of "actual payments made and received as well as payments expected for future periods of time, estimated on the basis of past periods."

[132] OJ [2009] L No. 211, 14.08.2009, p. 55.
[133] OJ [2009] L No 211, 14.8.2009, p. 15.

10.7. Article 19 requires the NRA to ensure compliance with this Regulation and with the Guidelines adopted pursuant to Article 18. By Article 18(2), those Guidelines may seek to achieve a measure of harmonisation in relation to national tariff systems for producers and consumers.

11. The Regulation was adopted under Article 18 of the Electricity Regulation. In material part:

11.1. Article 2 states that "charges applied by network operators for access to the transmission system shall be in accordance with guidelines set out in Part B of the Annex."

11.2. Part B contains the Guidelines for a Common Regulatory Approach to Transmission Charging ('the Binding Guidelines'), which are extracted below for completeness:

"1. Annual average transmission charges paid by producers in each Member State shall be within the ranges set out in point 3.

2. Annual average transmission charges paid by producers is annual total transmission tariff charges paid by producers divided by the total measured energy injected annually by producers to the transmission system of a Member State.

For the calculation set out at Point 3, **transmission charges shall exclude**:
(1) **charges paid by producers for physical assets required for connection to the system or the upgrade of the connection**;
(2) charges paid by producers related to ancillary services;
(3) specific system loss charges paid by producers.

3. The value of the annual average transmission charges paid by producers shall be within a range of 0 to 0,5 EUR/MWh, except those applying in Denmark, Sweden, Finland, Romania Ireland, Great Britain and Northern Ireland.

The value of the annual average transmission charges paid by producers in Denmark, Sweden and Finland shall be within a range of 0 to 1,2 EUR/MWh.
Annual average transmission charges paid by producers in Ireland, Great Britain and Northern Ireland shall be within a range of 0 to 2,5 EUR/MWh, and in Romania within a range of 0 to 2,0 EUR/MWh.

4. The Agency shall monitor the appropriateness of the ranges of allowable transmission charges, taking particular account of their impact on the financing of transmission capacity needed for Member States to achieve their targets under the Directive 2009/28/EC of the European Parliament and of the Council and their impact on system users in general.

5. By 1 January 2014 the Agency shall provide its opinion to the Commission as to the appropriate range or ranges of charges for the period after 1 January 2015." [Emphasis added]

C. Terms of the Transmission Licence

12. Condition C4 of NGET's Transmission Licence sets out the basis for the charging provisions for TNUoS charges which NGET may adopt. Under this condition, NGET:
    12.1. has to set a methodology which will be approved by GEMA.
    12.2. has to conform to the use of system charging methodology as modified in accordance with standard condition C5.

13. By Condition C5, NGET must at all times keep the use of system charging methodology under review[134]. Paragraph 2 of Condition C5 states:

"The licensee shall, subject to standard condition C10 (Connection and Use of System Code (CUSC)) and in accordance with the relevant provisions of the CUSC, make such modifications of the use of system charging methodology as may be requisite for the purpose of better achieving the relevant objectives."

14. The relevant objectives are defined in paragraph 5 as:

"(a) that compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;

(b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection);

(c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses;

(d) compliance with the Electricity Regulation and any relevant legally binding decisions of the European Commission and/or the Agency; and

[134] See footnote 12 of the CMP261 FMR (post send-back) [B64 / p. 13]

(e) promoting efficiency in the implementation and administration of the system charging methodology."

15. By Condition C5A(1), NGET has to publish a statement of its system of use charges (the TNUoS charges). GEMA must approve that statement before publication. The relevant parts of Condition C7 state:

"1. In the provision of use of system or in the carrying out of works for the purpose of connection to the national electricity transmission system, the licensee shall not discriminate as between any persons or class or classes of persons.

2. Without prejudice to paragraph 1 and subject to paragraphs 3 and 5, the licensee shall apply charges objectively and without discrimination. The licensee shall not make charges for provision of use of system to any authorised electricity operator or class or classes of authorised electricity operator which differ in respect of any item separately identified in the statement referred to at paragraph 2(b) of standard condition C4 (Charges for use of system) from those for provision of similar items under use of system to any other authorised electricity operator or class or classes of authorised electricity operator except in so far as such differences reasonably reflect differences in the costs associated with such provision.

. . .

4. The licensee shall not in setting use of system charges restrict, distort or prevent competition in the generation, transmission, supply or distribution of electricity or in the participation of the operation of an interconnector."

16. Condition C9 addresses the functions of GEMA under the CUSC. Condition C9(6) states:

"Where the licensee is party to a relevant agreement for connection and/or use of system which is other than in conformity with the CUSC, if either the licensee or other party to such agreement for connection and/or use of system proposes to vary the contractual terms of such agreement in any manner provided for under such relevant agreement, the Authority may, at the request of the licensee or other party to such agreement, settle any dispute relating to such variation in such manner as appears to the Authority to be reasonable having (in so far as relevant) regard to the consideration that the terms so settled are, in so far as circumstances allow, similar to the equivalent terms in the CUSC."

17. Condition C9(8) confers a similar power on GEMA where the relevant parties are in a dispute about the following matters:

"[whether] use of system charges made, or to be made, conform with the statement of the use of system charges furnished under paragraphs 2(b) or 8 of standard condition C4 (Charges for use of system), standard condition C4A (Charges for use of the licensee's transmission system) or standard condition C7 (Charges for Use of System)

(as appropriate) which applied or applies in relation to the period in respect of which the dispute arise."

18. By Condition C10, NGET is obliged to establish arrangements under the CUSC which facilitate the following objectives:

"(a) the efficient discharge by the licensee of the obligations imposed upon it under the Act and by this licence;
(b) facilitating effective competition in the generation and supply of electricity, and (so far as consistent therewith) facilitating such competition in the sale, distribution and purchase of electricity; and
(c) compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency,
(d) promoting efficiency in the implementation and administration of the CUSC arrangements,
and the licensee shall be taken to comply with this paragraph by modifying from time to time in accordance with the provisions of paragraphs 6 and 7 and the transition modification provisions, the document setting out the arrangements for connection and use of system which existed and which the licensee maintained pursuant to this licence immediately prior to the start of the transition period."

19. Condition C10 also requires NGET to establish a Code administrator and a CUSC Panel. The CUSC shall provide for the CUSC to be binding between NGET and any CUSC user. Condition C10(6) establishes a procedure by which modifications can be made to the CUSC and the charging methodology. GEMA can impose modifications where these are necessary for compliance with the Electricity Regulation.

D. The statutory appeal framework

20. Section 173 EA04 sets out the framework for appeals against decisions by GEMA in respect of licence conditions. It states in material part:

"(1) An appeal from a decision by GEMA to which this section applies [shall lie to the Competition and Markets Authority (in this Chapter referred to as "the CMA")].

(2) This section applies to a decision by GEMA if—
(a) it is a decision relating to a document by reference to which provision is made by a condition of a gas or electricity licence;

(b) that document is designated for the purposes of this section by an order made by the Secretary of State;[135]
(c) the decision consists in the giving or refusal of a consent by virtue of which the document has effect, or would have had effect, for the purposes of the licence with modifications or as reissued; and
(d) the decision is not of a description of decisions for the time being excluded from the right of appeal under this section by an order made by the Secretary of State.
. . .
(3) An appeal against a decision may be brought under this section only by—
(a) a person whose interests are materially affected by it; or
(b) a body or association whose functions are or include representing persons in respect of interests of theirs that are so affected.

(4) The permission of the [CMA] is required for the bringing of an appeal under this section.

(5) The [CMA] may refuse permission only on one of the following grounds—
(a) that the appeal is brought for reasons that are trivial or vexatious;
(b) that the appeal has no reasonable prospect of success.
. . .
(9) In this section—
"consent" includes an approval or direction;
"gas or electricity licence" means a licence for the purposes of section 5 of the Gas Act 1986 (c. 44) or section 4 of the 1989 Act (prohibition on unlicensed activities)."

21. Section 175 EA04 sets out the grounds for the determination of the appeal by the CMA. The relevant parts state:

"(1) This section applies to every appeal brought under section 173 of this Act.

(2) In determining the appeal the [CMA] must have regard, to the same extent as is required of GEMA, to the matters to which GEMA must have regard—
(a) in the carrying out of its principal objectives under [. . .] section 3A of the 1989 Act (principal objectives and general duties);
(b) in the performance of its duties under those sections; and
(c) in the performance of its duties under sections 4AB and 4A of that Act of 1986 and sections 3B and 3C of the 1989 Act (environmental and health and safety considerations).

(3) In determining the appeal the [CMA]—
(a) may have regard to any matter to which GEMA was not able to have regard in the case of the decision appealed against; but

[135] The relevant Order is the Electricity and Gas Appeals (Designation and Exclusion) Order 2014, SI 2014/1293. By Article 3(b) of that Order, a designated document includes "the Connection and Use of System Code, being the document of that title required to be prepared pursuant to Standard Condition C10 of a transmission licence." Article 6 excludes from the statutory appeal procedure a decision under the CUSC which "consists in the giving of a consent to a majority recommendation of Panel Members in the Modification Report."

(b) must not, in the exercise of that power, have regard to any matter to which GEMA would not have been entitled to have regard in that case had it had the opportunity of doing so.

(4) The [CMA] may allow the appeal only if it is satisfied that the decision appealed against was wrong on one or more of the following grounds—
(a) that GEMA failed properly to have regard to the matters mentioned in subsection (2);
(b) that GEMA failed properly to have regard to the purposes for which the relevant condition has effect;
(c) that GEMA failed to give the appropriate weight to one or more of those matters or purposes;
(d) that the decision was based, wholly or partly, on an error of fact;
(e) that the decision was wrong in law.

(5) Where the [CMA] does not allow the appeal, it must confirm the decision appealed against.

(6) Where it allows the appeal, it must do one or more of the following—
(a) quash the decision appealed against;
(b) remit the matter to GEMA for reconsideration and determination in accordance with the directions given by the [CMA];
(c) where it quashes the refusal of a consent, give directions to GEMA, and to such other persons as it considers appropriate, for securing that the relevant condition has effect as if the consent had been given.

(7) A person shall not be directed under subsection (6) to do anything that he would not have power to do apart from the direction.

(8) A person to whom a direction is given under subsection (6) must comply with it; and such a direction given to a person other than GEMA shall be enforceable as if it were an order of the High Court or (in Scotland) of the Court of Session.

(9) The decision of the [CMA] on the appeal—
(a) must be contained in an order made by [CMA];
(b) must set out the reasons for the decision;
(c) takes effect at the time specified in the order or determined in accordance with provision set out in that order;
(d) must be notified by [CMA] to the persons who (within the meaning of Schedule 22) were parties to the appeal; and
(e) must be published by [CMA] in such manner as it considers appropriate for bringing it to the attention of other persons likely to be affected by it.

(10) The [CMA] may exclude from what it publishes under subsection (9)(e) any information which it is satisfied is—
(a) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates;
(b) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests.

(11) In this section—

“consent” includes an approval or direction; and
“the relevant condition”, in relation to a decision, means the licence condition the provisions of which have effect by reference to the document to which the decision relates.”

SCHEDULE 1

LIST OF APPELLANT ENTITIES

1. EDF ENERGY ENTITIES

(a) EDF Energy (West Burton Power) Limited

(b) EDF Energy (Cottam Power) Limited[136]

(c) EDF Energy Nuclear Generation Limited

2. SSE ENTITIES

(a) SSE Generation Limited

(b) SSE Renewables (UK) Limited

(c) Griffin Windfarm Limited

(d) Keadby Windfarm Limited

(e) Keadby Developments Limited

(f) Medway Power Limited

(g) Abernedd Power Company Limited

[136] Jade Power Generation Limited held the generation licence for Cottam Power Station up until 1 November 2016. Jade Power Generation Limited has since been dissolved. The generation licence is now held by EDF Energy (Cottam Power) Limited.

SCHEDULE 2

LIST OF POTENTIALLY AFFECTED PARTIES

Affected Party	Contact Name and Email
British Gas	George Moran - George.moran@britishgas.co.uk
Drax Power Limited and Haven Power Limited	Stuart Cotten - stuart.cotten@draxpower.com
Eggborough Power Limited	Alastair Tolley -alastair.tolley@eggboroughpower.co.uk
Engie	Anton Smith - anton.smith@engie.com
Eon	Laurence Barrett - Laurence.Barrett@eon-uk.com
Calon Energy	Andrew Mackintosh - andrew.mackintosh@calonenergy.com
ESB	William Chilvers - William.chilvers@esb.ie
First Utility	Jeremy Guard - jeremy.guard@first-utility.com
Highlands and Island Enterprise	Audrey Maclver - Audrey.maciver@hient.co.uk
Intergen	Matthew Hulks - MHulks@intergen.com
National Grid	Louise Schmitz - louise.schmitz@nationalgrid.com
Npower	Daniel Wesley Hickman - Daniel.Hickman@npower.com
Opus Energy	Paul Bedford - Paul.bedford@opusenergy.com
Ovo Energy	Elizabeth Allkins - elizabeth.allkins@ovoenergy.com
RWE	Bill Reed - bill.reed@rwe.com
RWE Npower	Herdial Dosanjh - herdial.dosanjh@npower.com George Douthwaite - george.douthwaite@npower.com -
Scottish Power	James Anderson - james.anderson@scottishpower.com
Smartest Energy	Colin Prestwich - Colin-Prestwich@smartestenergy.com
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Uniper	Paul Jones - paul.jones@uniper.energy
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