

**An appeal under section 173 of the Energy Act 2004**

**EDF Energy (Thermal Generation) Limited/  
SSE Generation Limited v  
Gas and Electricity Markets Authority and National  
Grid Electricity Transmission PLC (Intervener)**

**Decision and Order**

Notified: 26 February 2018



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*Website:* [www.gov.uk/cma](http://www.gov.uk/cma)

**The appeal was heard by the following group of Competition and Markets Authority members:**

John Wotton (*Chair of the Group*)

Anne Fletcher

Jon Stern

**Chief Executive of the Competition and Markets Authority**

Andrea Coscelli

The Competition and Markets Authority has excluded from this published version of the report information which the Inquiry Group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂].

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# 1. Introduction

- 1.1 This is an appeal by EDF Energy (Thermal Generation) Limited and SSE Generation Limited, as well as a number of separate companies which are all licensed electricity generators within the EDF Energy and SSE company groups (together, 'the Appellants' - EDF Energy and SSE) against a decision (the [Decision](#)) of the Gas and Electricity Markets Authority (GEMA) dated 16 November 2017.
- 1.2 By that Decision, GEMA rejected an industry proposal to modify an industry code, the 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 per megawatt hour (MWh) annual average limit set in EU Regulation 838/2010 Part B (3)' (CMP261). In this Decision, we describe the relevant EU Regulation 838/2010 which is the subject of CMP261 as 'the Regulation'.
- 1.3 The appeal is made pursuant to section 173 of the Energy Act 2004 ([EA04](#)).
- 1.4 By a Notice of Appeal (the [NoA](#)) served on 6 December 2017, the Appellants sought permission to appeal against the Decision. The Competition and Markets Authority (CMA) granted the Appellants permission to appeal on 19 December 2017. On 10 January 2018, the CMA granted National Grid Electricity Transmission PLC (NGET) permission to intervene in the appeal.
- 1.5 Our decision is structured as follows:
  - (a) Introduction
  - (b) Legal framework
  - (c) Industry background
  - (d) Background to the CMP261 modification proposal and the appeal
  - (e) The Grounds of appeal:
    - (i) Ground 1: Errors of law in the construction of the Regulation
    - (ii) 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
    - (iii) Ground 3: The Decision constitutes an abuse of process and/or infringes the principle of regulatory consistency

- (iv) Ground 4: The Decision infringes a number of general principles of European Union (EU) law and must be quashed or disapplied on that basis
- (f) Relief
- (g) Order
- (h) Glossary.

## **Conduct of the appeal**

- 1.6 The Appellants' [NoA](#) was published on 13 December 2017. Also on 13 December the CMA appointed the [members of the appeal group](#) conducting the appeal.
- 1.7 On 19 December, we granted [permission](#) to the Appellants to bring the appeal against the Decision.
- 1.8 The [administrative timetable](#) for the appeal was published on our web page on 20 December 2017 and updated on 18 January 2018, when the decision was taken to extend the deadline by 10 working days to 26 February 2018.
- 1.9 On 29 December 2017, we received GEMA's [reply \(the Reply\) to the grounds in the NoA](#). This was published on the 12 January 2018.
- 1.10 On 8 January 2018, the Appellants submitted their response (the Response) to GEMA's Reply.
- 1.11 On the 8 January 2018, NGET made [an application](#) to become a party to the appeal pursuant to Rule 7 of the Energy Code Modification Rules 2005. Its application opposed the appeal for the reasons given by GEMA in its Reply, however it sought to make submissions on the scope and timing of relief. On 10 January 2018, the CMA granted NGET [permission](#) to intervene in the appeal.
- 1.12 We held Clarification Hearings with the Appellants and GEMA (the Parties) on 18 January 2018 in order to better understand the issues and facts. This was followed by Main Hearings on 8 February and a hearing on possible relief on 9 February 2018.
- 1.13 In the course of the appeal we considered a large number of documents, submissions and oral evidence from the Parties and sought advice from an independent technical expert. In support of the NoA, Reply and Response the Parties also filed supporting witness statements from Garth Graham

(Electricity Market Development Manager, SSE), Mark Cox (Head of Transmission and Trading Arrangements, EDF Energy), Andrew Wright (Senior Partner Energy Systems, Office of Gas and Electricity Markets (Ofgem)) and Frances Warburton (Partner Energy Systems, Ofgem). The Parties also submitted in excess of 50 supporting background documents as well as around the same number of supporting legislation and court authorities.

- 1.14 On 2 February 2018, the Parties also made submissions on relief. As part of the Appellants' submissions on relief, they applied to amend their NoA to include a request for relief to cover the repayment of overpaid transmission charges for the charging year 2014/15 and 2016/17 on the same basis as 2015/16.
- 1.15 We note at the outset that the Parties have advanced a large number of arguments during the course of this appeal, some of which have been expressed in multiple ways. We have carefully considered all of the arguments made, but in the interests of keeping our reasons for determining the appeal within manageable bounds we focus on what we consider to be the key points within the Parties' submissions.

## **2. Legal framework**

- 2.1 In this section, we first set out the legislative framework relevant to the electricity industry. We then set out the framework for appeals under Section 173 of EA04.

### **The legislation**

- 2.2 The Electricity Act 1989 privatised the electricity industry. It replaced the supply of electricity to consumers in Great Britain (GB) by state-controlled monopolies, and substituted a regulated market, divided into four components: generation, transmission, distribution and supply, which allowed for competition between Generators and also between suppliers.
- 2.3 The Utilities Act 2000 established GEMA. GEMA has been designated as the regulatory authority for GB in accordance with Article 35 of the Electricity Directive,<sup>1</sup> and operates through Ofgem.
- 2.4 Section 3A(1A) of the Electricity Act 1989 provides that the principal objective of GEMA in carrying out its functions is to protect the interests of existing and

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<sup>1</sup> Council Directive 2009/72/EC.

future consumers in relation to electricity conveyed by distribution systems or transmission systems.

- 2.5 Section 3A(1B) of the Electricity Act 1989 provides that GEMA must carry out its functions in the manner in which it considers 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.
- 2.6 Section 3A(5A) of the Electricity Act 1989 provides that in carrying out its functions, in accordance with the preceding provisions of section 3A, GEMA must have regard to—
- the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
- any other principles appearing to it to represent the best regulatory practice.
- 2.7 The Electricity Act 1989 sets out a licensing scheme for the industry. Section 6 provides that GEMA can grant licences, including generation and transmission licences. Section 7 allows GEMA to set general conditions and section 8A allows GEMA to set standard conditions. Section 11A gives GEMA power to modify standard conditions.
- 2.8 Under Condition C10 of NGET's transmission licence, NGET is required to establish arrangements under the industry code, the CUSC, to facilitate specified objectives, and the Secretary of State has designated<sup>2</sup> the circumstances in which an appeal against a decision of GEMA in respect of the CUSC may be appealed under section 173 of EA04 to the CMA. Under the conditions of NGET's transmission licence, NGET must also set out a methodology, as approved by GEMA, for calculating the Transmission Network Use of System Charges (TNUoS Charges) made under the CUSC arrangements.
- 2.9 On 13 July 2009, as part of the steps taken at EU level to establish the internal market in electricity, the European Parliament and Council adopted the Electricity Directive concerning common rules for the internal market in

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<sup>2</sup> [Electricity and Gas Appeals \(Designation and Exclusion\) Order 2014 \(2014/1293\)](#).

electricity<sup>3</sup> and Regulation 714/2009 on conditions for access to the network for cross-border exchanges in electricity (the Access Regulation).<sup>4</sup>

2.10 Article 18.2 of the Access Regulation provides that:

Guidelines may also determine appropriate rules leading to a progressive harmonisation of the underlying principles for the setting of charges applied to producers and consumers (load) under national tariff systems, including the reflection of the inter-transmission system operator compensation mechanism in national network charges, in accordance with the principles set out in article 14.

The Guidelines shall make provision for appropriate and efficient harmonised locational signals at Community level.

Any such harmonisation shall not prevent Member States from applying mechanisms to ensure that network access charges borne by consumers (load) are comparable throughout their territory.

2.11 The Guidelines referred to in Article 18.2 of the Access Regulation are set out in a 2010 European Commission (Commission) regulation (the Regulation),<sup>5</sup> Article 2 of which requires charges applied by network operators for access to the transmission system to be in accordance with guidelines set out in Part B of the Annex to the Regulation. As explained at paragraphs 4.3 to 4.14, Part B of the Annex to the Regulation requires annual average transmission charges paid by producers in GB to be within a range of €0 to €2.5/MWh (the Cap).

## The appeal provisions

2.12 This appeal is against the refusal by GEMA to approve a proposed modification to the CUSC.

2.13 Section 173 of EA04 allows for such an appeal to be made if certain conditions are satisfied. These conditions include that the appeal is brought by a person whose interests are materially affected by it, or by a representative body;<sup>6</sup> and that permission for the appeal has been given by the CMA.<sup>7</sup>

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<sup>3</sup> Directive 2009/72/EC of the European Parliament and of the Council, OJ (2009) L211/55.

<sup>4</sup> Regulation (EC) No 714/2009 of the European Parliament and of the Council OJ (2009) L211/15.

<sup>5</sup> Commission Regulation (EU) No 838/2010 OJ (2010) L250/5, made under the Access Regulation.

<sup>6</sup> Section 173(3), [EA04](#).

<sup>7</sup> Section 173(4), [EA04](#).

- 2.14 The Parties agreed that the relevant conditions were satisfied in the case of this appeal.
- 2.15 The relevant procedures for the appeal are set out in Schedule 22 to EA04, and the [CMA Energy Code Modification Rules CC10](#).
- 2.16 Section 175 of EA04 sets out how the CMA is to determine the appeal. The CMA, in particular, may allow the appeal only if it is satisfied that the decision appealed against was wrong on one or more specified grounds.<sup>8</sup> The grounds relied upon by the Appellants, were that the decision was based, wholly or partly, on an error of fact; and that the decision was wrong in law.
- 2.17 EA04 states that where the CMA does not allow the appeal, it must confirm the decision appealed against.<sup>9</sup> Where the CMA does allow the appeal, it must do one or more of the following:<sup>10</sup>
- (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 has quashed 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.
- 2.18 The decision of the CMA on the appeal must be contained in an order; must set out the reasons for its decision; and must be published by the CMA.<sup>11</sup>
- 2.19 The CMA is required to make its determination of the appeal before the end of thirty working days following the last day for the making of representations or observations by GEMA to the NoA.<sup>12</sup> But if the CMA is satisfied that there are good reasons for departing from the normal requirements in respect of an appeal, it may (on one occasion only) extend that period by not more than ten more working days.<sup>13</sup> As noted in paragraph 1.8, the CMA made such an extension.
- 2.20 In determining the appeal, the CMA must have regard, to the same matters to which GEMA must have regard in the carrying out of its principal objectives

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<sup>8</sup> Section 175(4), [EA04](#).

<sup>9</sup> Section 175(5), [EA04](#).

<sup>10</sup> Section 175(6), [EA04](#).

<sup>11</sup> Section 175(9), [EA04](#).

<sup>12</sup> Paragraph 6(1) of Schedule 22, [EA04](#).

<sup>13</sup> Paragraph 6(2) of Schedule 22, [EA04](#).

under section 3A of the Electricity Act 1989 and in the performance of its duties under that section.<sup>14</sup>

### 3. Industry background

#### Electricity generation and transmission

- 3.1 Electricity is produced at generating stations and consumed in homes and businesses. The infrastructure required to transport electricity comprises the transmission network and the distribution network. The transmission network comprises infrastructure to transport electricity at high voltages. The infrastructure that makes up the transmission network is owned, maintained and developed by transmission owners (TOs).<sup>15</sup>
- 3.2 Generators produce electricity through a variety of means, ranging from conventional coal and gas fired power stations to renewable generation such as wind and solar power. In GB, Generators can be connected either: (a) directly to the transmission network (Transmission-Connected Generators); or (b) directly to the distribution network (Embedded Generators); or (c) directly to a customer's premises.<sup>16</sup> For the purposes of this report, reference to 'Generators' means Transmission-Connected Generators unless otherwise specified.
- 3.3 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.<sup>17</sup>
- 3.4 The electricity transmission network in GB transmits high-voltage electricity from where it is produced to where it is needed throughout the country. It does so by transmitting electricity from Transmission-Connected Generators and interconnectors (the physical links which allow the transfer of electricity across borders) to transmission-connected customers<sup>18</sup> and for onward transport to consumers using lower voltage pieces of network known as the distribution network.

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<sup>14</sup> Section 175(2), [EA04](#).

<sup>15</sup> *Warburton*, paragraph 6.

<sup>16</sup> *Warburton*, paragraph 9.

<sup>17</sup> [NoA](#), paragraph 3.2.

<sup>18</sup> *Warburton*, paragraph 8.

- 3.5 The GB electricity transmission network is known as the National Electricity Transmission System (NETS), to which Generators apply to connect. The NETS is made up of the local network and the wider network, the latter of which is known as the Main Integrated Transmission System (MITS). A MITS node is a predetermined place on the transmission network at which local circuits can join.<sup>19</sup> Typically, a Transmission-Connected Generator will connect via a connection asset to a local substation. There is then a local circuit asset connecting into a MITS substation (the MITS node).
- 3.6 The distribution network is used to distribute electricity to distribution-connected consumers, either from the transmission system or directly from generators connected to the distribution network (Embedded Generators).<sup>20</sup>

## Offshore generation

- 3.7 In addition to the three onshore TOs, there are several Offshore Transmission Owners (OFTOs) who own the infrastructure linking an offshore windfarm to the onshore network. OFTOs are licensed by Ofgem through a competitive tender process, and receive a guaranteed stream of income from NGET, subject to meeting agreed performance standards, for a 20-year period. NGET in turn receives local charges from the Offshore Generator (ie the operator of the windfarm).<sup>21</sup>
- 3.8 The OFTO assets for all existing OFTOs were constructed by the windfarm developer at the same time as the windfarm was being built. Following construction the OFTO assets were sold to a transmission licensee appointed by Ofgem through a competitive tendering process.<sup>22</sup>
- 3.9 Currently, there are 15 licensed OFTOs which are or will be connected to the transmission system. 13 of these OFTOs each connect a single offshore Generator to the transmission system (but with multiple wind turbines per generating site). The other two OFTOs each have two Generators sited at the end of the spur, which are owned by the same parent companies. In these two cases, the two-Generator arrangement was planned from the outset of the project, and the assets installed were sized to accommodate the specific combined needs of the two Generators.<sup>23</sup>

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<sup>19</sup> *Graham*, paragraph 2.2.

<sup>20</sup> *Warburton*, paragraph 8.

<sup>21</sup> *Warburton*, paragraph 35.

<sup>22</sup> [Ofgem summary of the offshore transmission regime](#).

<sup>23</sup> *Warburton*, paragraph 36.

- 3.10 A typical OFTO's assets consist of (a) an offshore substation (the Offshore Local Substation); and (b) subsea cables, which run from the Offshore Local Substation to an onshore substation, from where electricity can be transmitted towards its ultimate users. Such a link, ie the Offshore Local Substation and the subsea cable, was referred to by the Parties as an Offshore Generation-Only Spur (Offshore GOS).<sup>24</sup>
- 3.11 OFTOs receive a revenue stream as set out in their licence following a competitive tender process run by Ofgem. This allowed revenue reflects the outcome of the OFTO tender process, subject to various adjustments. The revenue stream is intended to reflect the costs of building, operating and maintaining the offshore Generator for the 20-year period of the licence, along with a profit margin for the OFTO.
- 3.12 NGET recovers the revenue payable to OFTOs from TNUoS Charges, see paragraph 3.17-3.18.<sup>25</sup>

## **How transmission is operated and regulated**

- 3.13 The three separate onshore TOs, and the OFTOs, own and maintain the physical transmission infrastructure but they do not operate it. The system as a whole is operated by a single system operator (the Transmission System Operator - TSO). The TSO functions for the whole of GB, including offshore transmission, are performed by a separate system operator entity which is currently part of NGET.<sup>26</sup> The TSO makes decisions about long term development of the transmission infrastructure as well as coordinating the output of generating stations on a half hourly basis to maintain the physical balance of the supply and demand for electricity.
- 3.14 The CUSC is the contractual framework for connection to, and use of, the NETS. It is produced pursuant to the Transmission Licence under which NGET operates.<sup>27</sup> It is made contractually binding between NGET as the licensee and CUSC users, including EDF Energy and SSE, by a CUSC Framework Agreement. Part 2 of Section 14 of the CUSC provides the methodology for the calculation of TNUoS' charges.
- 3.15 The CUSC can be modified by means of a change control process set out in the CUSC. The CUSC modification process is designed to allow CUSC

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<sup>24</sup> [Reply](#), paragraph 1.4.

<sup>25</sup> [Wright](#), paragraph 14

<sup>26</sup> GEMA is currently implementing [measures to enhance the separation of the system operation function from NGET's TO activities](#).

<sup>27</sup> It is established by paragraph 2 of Standard Condition C10.

parties to propose changes to better facilitate the achievement of the applicable CUSC objectives. The proposals and any alternatives are reviewed by industry participants through a consultation process, including workgroups and then an industry panel (the CUSC Panel) formally recommends to Ofgem whether it should approve the proposed modification. All proposals other than *de minimis* modifications to the CUSC are submitted to Ofgem for approval.<sup>28</sup>

- 3.16 Ofgem decides whether or not to approve such industry-led CUSC modification proposals on the basis of the material placed before it. Ofgem must make its decision applying the test set out in Standard Licence Condition C10 paragraph 7(a): namely, whether the proposed modification ‘would, as compared with the then existing provisions of the CUSC and any alternative modifications set out in the Final Modification Report, better facilitate achieving the applicable CUSC objectives.’ The objectives relevant to the Decision are the CUSC Charging Objectives, which are set out in Standard Condition C5 of NGET’s Transmission Licence and replicated in paragraph 14 of Annex A to the Grounds. In making any code modification decision, GEMA must also act in accordance with its principal objective to protect the interests of existing and future consumers, and its statutory duties.<sup>29</sup> Under industry code governance processes Ofgem has the power to ‘send back’ a final modification report when it has found it to be deficient, thereby allowing the panel concerned to remedy, and then resubmit, a revised report.<sup>30</sup>

## Charges for transmission

- 3.17 The total costs of the transmission network are set by Ofgem each year. This is in the form of the allowed revenue that onshore TOs are allowed to recover each year via TNUoS Charges through the price control process (Allowed TNUoS Revenues).<sup>31</sup> NGET (as the TSO for GB) levies these charges annually on transmission connected users, such as Generators, Embedded Generators over a certain size, demand-users (ie suppliers, who buy electricity from generators and sell it to end-users), and directly connected demand.<sup>32</sup> NGET, in its capacity as the TSO, then pays the TOs (including the OFTOs) the share of the TNUoS Revenues that relates to each TOs’ transmission activities.

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<sup>28</sup> *Wright*, paragraph 25.

<sup>29</sup> *Wright*, paragraph 26.

<sup>30</sup> See [Ofgem Decision on CUSC – Code Governance Review: Send Back Process \(CAP186\)](#), 19 October 2010 for further details on ‘send back’.

<sup>31</sup> *Warburton*, paragraph 19.

<sup>32</sup> *NoA*, paragraph 1.5.

- 3.18 These charges are described in paragraphs 3.20 to 3.31. The ratio in which the recovery of TNUoS Charges is divided between generators (see paragraph 3.20) and demand-users is known as the 'G:D split'.<sup>33</sup>
- 3.19 Transmission-Connected Generators also pay connection charges as well as TNUoS Charges.<sup>34</sup> The contractual framework under which Generators are charged for connecting to and using the transmission system in GB is contained in the CUSC.

### ***Transmission network use of system charges and connection charges***

#### *Use of system versus connection charges*

- 3.20 Under the CUSC, Generator TNUoS Charges are paid by Transmission-Connected Generators and larger Embedded Generators (ie Embedded Generators with a capacity of at least 100MW).<sup>35</sup>
- 3.21 These Generator TNUoS Charges comprise Local Charges, Wider Locational Charges, and a Transmission Generator Residual charge (the Residual). All of these charges are levied on large Generators based on the maximum amount of power a Generator has a contractual right to put onto the transmission system at any one time (their Transmission Entry Capacity (TEC in MW)),<sup>36</sup> rather than on the basis of their actual output. Together these charges seek to recover the total cost of owning and operating the transmission infrastructure assets, including a rate of return.
- 3.22 CUSC Connection Charges are separate from TNUoS Charges, and apply to assets used by a single Generator and which could not generally be shared with another user. Assets which are shared, or could at least potentially be shared if another Generator submitted a connection application related to that connection site, are generally defined as 'transmission infrastructure assets', and are funded via TNUoS Charges, not CUSC Connection Charges. However, under the CUSC, even if a transmission cable is non-shareable (neither currently shared nor likely to be shared in the foreseeable future), it is only classed as a 'connection asset' if it is equal to or less than 2km in length.<sup>37</sup>

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<sup>33</sup> Warburton, paragraph 18.

<sup>34</sup> Wright, paragraph 15.

<sup>35</sup> Warburton, paragraph 17.

<sup>36</sup> Wright, paragraph 18.

<sup>37</sup> Warburton, paragraph 22 (referring to the CUSC, paragraph 14.2.6(c)).

- 3.23 Taken together transmission infrastructure assets and connection assets are referred to in the CUSC as transmission assets.

*Basis for charging: using TNUoS Charges to give signals to generators about how to and where to connect*

- 3.24 As discussed in 3.21, two of the charging types are Local Charges and Wider Locational Charges, and these two charging types, when considered together, are sometimes referred to as locational charges. The levels of both locational charges vary according to characteristics of the generator, including the location of the generator.<sup>38</sup> Local Charges are levied on Transmission-Connected Generators only, while the Wider Locational (as well as Residual charges) are levied on both Transmission-Connected Generators and larger Embedded Generators.

*Cost-reflective Local Charges*

- *The approach for generators located onshore*

- 3.25 Local Charges comprise a Local Substation charge (paid in respect of assets at the first transmission substation to which the Generator connects, which may or may not be a MITS substation), and a local circuit charge in respect of any transmission circuits required to connect to the MITS. These are intended to reflect the cost of assets (Local Assets) needed to connect the power station to the MITS.
- 3.26 Where the Local Assets needed are not fully utilised by an individual power station, the Generator pays only for the proportion of the assets that it does use, based on its TEC. For onshore Local Assets, these charges are calculated by reference to generic unit costs of assets of the relevant design and type rather than being calculated specifically for individual assets.<sup>39</sup> However, they are calculated taking account of the individual Generator's connection design and location.

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<sup>38</sup> 'Wider Locational Charges are calculated based on (i) the zone in which a Generator is located, i.e. like the cost-reflective element of pre-2008 TNUoS Charges and (ii) the Generator's capacity. GB is divided into 27 generation zones for the purposes of Wider Locational Charges which are calculated on the basis of cost modelling reflecting the incremental cost of a unit of generation output for each of the zones. Local Charges are calculated based on the cost of the assets (Local Assets) required to accommodate an individual generator's connection design and location relative to the pre-existing transmission system...' *Warburton*, paragraph 25-26.

<sup>39</sup> *Warburton*, paragraph 27.

- *The approach for generators located offshore*

- 3.27 The overarching approach for both connection and use of system charges is the same for both onshore and offshore Generators. Offshore GOS are treated as Local Assets for the purposes of transmission use of system charging. This means that the Generator at the end of an offshore transmission line pays a cost-based charge (in proportion to its use of the total capacity of that line)<sup>40</sup> to recover the costs associated with the offshore transmission assets which link the offshore Generator with the onshore transmission system.
- 3.28 There are local substation charges in respect of the offshore substation, and local circuit charges in respect of the cable from the offshore substation to the onshore substation.<sup>41</sup> Offshore Local Charges are derived using the same principles as under the onshore arrangements, but it also included the introduction of specific details necessary for calculating offshore tariffs. This reflects that OFTOs need to recover in aggregate the actual tender revenue under the mechanism described in paragraph 3.11. The Generator owns and pays for the assets within the windfarm up to the Offshore Local Substation.

*Charges designed to contribute to the recovery of the shared cost of the core network*

- 3.29 Wider Locational Charges relate to the use of the MITS itself and are levied on both onshore and offshore Generators. These charges are intended to recover the cost imposed on the broader network arising from the connection to that network of an individual Generator. In contrast to Local Charges, which are designed to recover the relevant portion of the cost of the network assets deployed, Wider Locational Charges are designed to recover the incremental impact on the cost of the MITS. As that incremental impact is to a large extent determined by the location of demand (ie end users) relative to supply (ie the power stations themselves), charges levied on individual Generators for a given TEC vary considerably, depending on the locational zone (or 'Generation Zones'<sup>42</sup>) in which the Generator is based.
- 3.30 A power station a long way from demand would incur higher charges than one located close to major centres of demand. NGET determines the level of Locational Charges for each Generator using a model which calculates

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<sup>40</sup> See first footnote to paragraph 5.85 for further detail.

<sup>41</sup> *Warburton*, paragraph 36.

<sup>42</sup> See for example Appendix E of NGET's 2017/18 Final TNUoS tariffs

[https://www.nationalgrid.com/sites/default/files/documents/8589938753-Final%20tariffs%202017\\_18%20v1.pdf](https://www.nationalgrid.com/sites/default/files/documents/8589938753-Final%20tariffs%202017_18%20v1.pdf)

charges to be cost-reflective based on the region in which a Generator is located, but not calculated on a bespoke basis for each connected Generator.<sup>43</sup>

*Basis for charging: ensuring costs of transmission infrastructure assets are fully recovered*

- 3.31 Local and Wider Locational Charges taken together, do not necessarily fully recover all the costs of transmission infrastructure the assets to which they relate. Residual charges on generation and demand are used to recover the difference between the total of all transmission charges and those recovered from Locational Charges, such that total TNUoS Charges meet the amounts allowed under the regulated price caps set by Ofgem. Historically the Residual (ie the residual charge on generators) has been set so that TNUoS Charges aligned with a 27:73 G:D split. However, this was potentially changed by the CMP224 Decision, see paragraphs 4.15 to 4.20.

***Illustrations of the link between assets and charges***

- 3.32 Figures 1 and 2 are provided for the purposes of illustrating, first, how the assets in the connection and transmission network correspond to relevant charges, and second, showing how the costs of each asset type are recovered through charges under the CUSC.

*Network view*

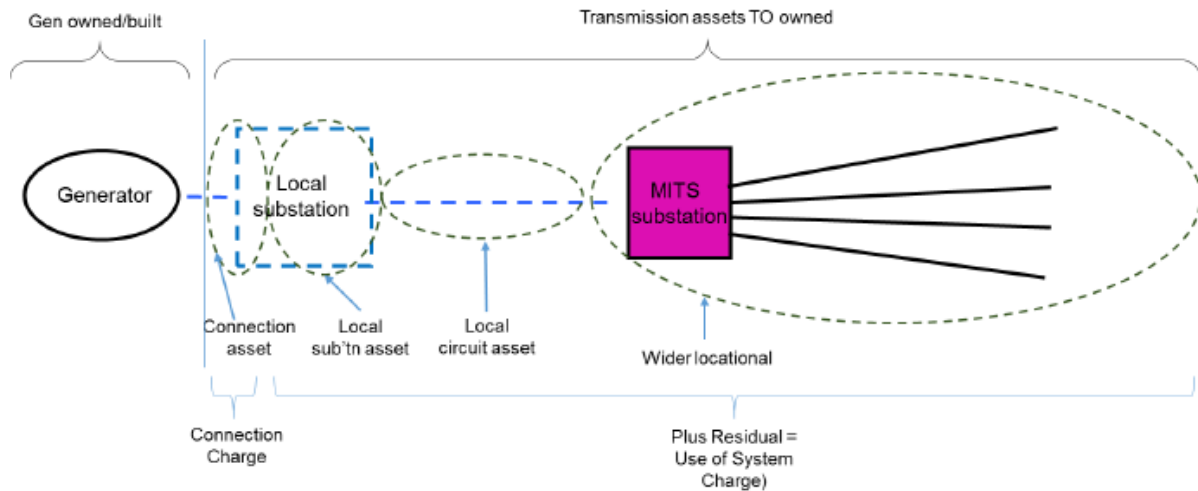
- 3.33 Figure 1 was submitted by GEMA, and illustrates the distinction between (a) assets built and owned by the Generator, in respect of which no charges are levied; (b) connection assets, which are owned by the transmission owner, and in respect of which CUSC Connection Charges are levied; (c) Local Assets, which are owned by the TO, and in respect of which Local Charges are levied; and (d) the MITS, which is owned by the TO, and in respect of which Wider Locational Charges are levied.

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<sup>43</sup> Wright, paragraph 22.

Figure 1

Depiction of the assets that comprise the transmission network and relevant charges



Source: Warburton, Figure 1 paragraph 28.

*CUSC charging view: mapping of network asset types to the different charges levied on generators*

3.34 Figure 2 shows how the costs of each asset type are recovered through charges under the CUSC. The key points from Figure 2 are as follows:

- (a) The assets owned by the Generator itself are not charged for by the TO;
- (b) Connection assets, which are owned by the TO but are sole use and less than 2km long, are charged for via the CUSC Connection Charges;
- (c) Local Assets encompass elements of the local substation and all of the local circuit. These assets are charged for as usage charges where they are potentially shareable or are longer than 2km. The charges for these assets are therefore levied by the TO through TNUoS, via Local Charges; and
- (d) Wider MITS assets which are shared across the Generators are also levied by the TO through TNUoS, via Locational and Residual charges.

Figure 2

### Charges by asset category under GB CUSC

Assets		Transmission assets (ie assets owned by the transmission system owner rather than the generator)					
		Transmission <i>infrastructure</i> assets					
		Generator	Connection	Local assets			MITS ie the core grid
Substation	Circuit to MITS			Other	MITS in zone	MITS out of zone	
CUSC distinction	sole use		(potentially) shareable			shared	
Assets included in any one zone		Assets in an individual generation charging zone (one of 21 charging zones)					
		Generation circuits					
<b>Recovery of costs from generators</b>							
Applicable charging scheme		[not applicable]	Connection	TNUoS (ie 'usage' charges for infrastructure assets)			
Charging elements			Connection	Local substation	Local circuit	Wider locational (dependent on zone)	
(be they be one off or recurring)						Residual charge (common balancing figure to cap total)	

Source: CMA analysis.

### Connection boundaries

- 3.35 In this section we summarise the concept of connection boundaries. This is based on descriptions provided in Frances Warburton's witness statement for GEMA, which have not been contested.
- 3.36 There is wide variation across the EU in how the cost of connecting a new power station to the network is covered. The concept of a 'connection boundary' is often used to refer to the distinction between costs charged directly to the individual Generator connecting to the network, and costs that are charged across a wider set of network users (eg through Use of System Charges).<sup>44</sup>
- 3.37 Connection boundaries are often categorised as 'deep' or 'shallow', although these terms are used differently across different Member States. In general, however, the concepts of deep and shallow are simply used to describe the extent to which the individual Generator connecting to the system must pay for any necessary reinforcements to the existing network which are required as a result of a new connection.<sup>45</sup>
- 3.38 Where the connection boundary is 'shallow', an individual Generator connecting to the network will generally only be required to pay connection charges for infrastructure that is specifically required to effect the connection. Where the connection boundary is deep, the individual Generator connecting to the system is also required to pay connection charges in respect of other costs occasioned by the new connection, eg work to reinforce existing

<sup>44</sup> Warburton, paragraph 10.

<sup>45</sup> Warburton, paragraph 11.

infrastructure. In practice, there are variations that sit between deep and shallow.<sup>46</sup>

- 3.39 GB has what is generally considered to be a shallow transmission connection boundary – ie what is described in the domestic system (the CUSC) as the Connection Charge does not cover any costs associated with reinforcing the existing network to allow a new connection to it.<sup>47</sup>

### **Size of charges**

- 3.40 Table 1 shows the composition of generation transmission revenues in GB in 2015/16 (the G:D split was 23.2% generation, 76.8% demand). This shows offshore Local Charges were greater than onshore local substation and local circuit charges. We understand that offshore Local Charges have increased and are expected to continue to increase as new offshore wind farms come online.

**Table 1: Generation transmission revenues (2015/16)**

	<i>£m</i>	<i>Per cent</i>
Offshore Local Charges	187.0	30.6
Locational generation wider charges	48.0	7.8
Onshore local substation charges	20.1	3.3
Onshore local circuit charges	13.8	2.3
Residual	343.0	56.1

Source: NGET Final TNUoS tariffs for 2015/16, 30 January 2015.

([https://www.nationalgrid.com/sites/default/files/documents/43163-Final%20Tariffs%2015\\_16%20Jan%202015.pdf](https://www.nationalgrid.com/sites/default/files/documents/43163-Final%20Tariffs%2015_16%20Jan%202015.pdf))

- 3.41 We also understand that the rates for Wider Locational Charges have increased in 2016/17 as NGET have implemented a change to the ways these charges are calculated and Residual Charges have fallen.

## **4. Background to the CMP261 modification proposal and the appeal**

- 4.1 Part B of the Annex to the Regulation prescribes permissible ranges for the ‘annual average transmission charges paid by producers’ in the EU Member States. The annual average transmission charge for each Member State is defined to be equal to the total transmission tariff charges paid by generators in that Member State in a given year, divided by the total output of those generators in that year.<sup>48</sup> For GB the Cap is set at €2.5/MWh.

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<sup>46</sup> Warburton, paragraph 12.

<sup>47</sup> Warburton, paragraph 14.

<sup>48</sup> NoA, paragraph 1.9 and Part B of the Regulation.

- 4.2 In the following sub-sections we briefly set out the salient points from the Regulation and the background to it; we then explain relevant regulatory background, including the prior CMP224 process, before summarising the CMP261 proposal itself and the CMP261 Decision.

## The Regulation

- 4.3 In 2003 the Commission started work to promote a single wholesale market in electricity across Europe. This ultimately led to the Regulation, which was intended to achieve the partial harmonisation of transmission charges applicable to generation in order to support the development of the single electricity market.
- 4.4 In their pleadings, both in written and oral submissions, the Appellants made extensive references to the *travaux préparatoires*, to which GEMA in turn responded both in its Reply and at the Hearings.
- 4.5 In this context *travaux préparatoires* (literally ‘preparatory work’) refer to preparatory reports and other materials leading up to the passing of European legislation, to which it is permissible to have regard in the event of there being an ambiguity with its interpretation.
- 4.6 To aid comprehension and provide a common language when referring to each of the documents which together comprise the *travaux préparatoires* we first set out a timeline of steps leading to the Regulation and outline these documents in Table 2.

**Table 2: Chronology of the *travaux préparatoires***

Date published	Document and CMA defined term
2 May 2005	ERREG - consultation on <a href="#">Guidelines on Transmission Tarification</a> accompanied by a <a href="#">draft explanatory note</a> (B5B) (ERREG Consultation). That explanatory note proposed harmonisation of Use of System charges for Generators.
18 July 2005	ERREG - <a href="#">Guidelines and Explanatory Note</a> (ERREG Guidelines). Alongside this it also published its ‘Evaluation of Comments Received’.
9 December 2008	Commission - consultation document on the Inter-TSO Compensation Mechanism and on harmonisation of transmission tariffication <i>Towards fair and non-discriminatory arrangements for trans-European cross-border power flows</i> (DG TREN/C2) (Commission Consultation).  This document amongst other things, sought views on its proposal to make ERREG Guidelines legally binding.
2 September 2010	Commission - draft regulation and accompanying draft ‘ <a href="#">Impact Assessment</a> ’. It also published a Summary Impact Assessment.
23 September 2010	Commission - Impact Assessment accompanying the Regulation adopted.

Source: NoA, Chronology.

- 4.7 In 2003, the European Regulators’ Group for Electricity and Gas (ERREG) was set up by the European Commission as its advisory body on internal

energy market issues. It is made up of the national energy regulatory authorities of the EU Member States. In the first instance, it was ERGEG, that was responsible for developing guidelines to harmonise transmission tariffs. The second (2003) Energy Directive<sup>49</sup> had envisaged the creation of a single market for wholesale electricity across Europe, a level playing field for wholesale supply which would be facilitated by common rules about the structure and level of transmission charges generators might face. After the third (2009) Energy Directive,<sup>50</sup> the Commission itself took over the reins from ERGEG with a view to imposing restrictions on the level of charges that Generators could face.

- 4.8 In July 2005, ERGEG issued non-binding guidelines, which adopted a €2.5/MWh cap for average annual transmission charges in GB.<sup>51</sup> The ERGEG Guidelines excluded three charge categories from the scope of transmission charges for calculating compliance with the Cap: charges for connection, ancillary services and system losses were all to be excluded.<sup>52</sup>
- 4.9 In December 2008, the Commission issued a consultation document on the Inter-TSO compensation mechanism and on increasing the extent of harmonisation of transmission tariffication: 'Towards Fair and Non-Discriminatory Arrangements for Trans-European Cross-Border Power Flows'. This consultation document was presented in the context of the preparation of binding guidelines on Inter-TSO compensation by the Commission. Its purpose was to outline specific issues on which the Commission sought stakeholder comments.<sup>53</sup> The document explained that one of its aims was that it 'provides for the harmonisation of transmission charges, especially those applicable to generation. The aim [...] is to support the development of the single electricity market by ensuring that decisions on cross border trade and on plant location and retirement are not distorted and that the costs of the transmission infrastructure are recovered from those responsible for its use.'
- 4.10 As noted at paragraph 2.9, the Access Regulation was adopted in 2009 and made provision for guidelines to be produced relating to (inter alia)

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<sup>49</sup> Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

<sup>50</sup> The package consists of two Directives, one concerning common rules for the internal market in gas (2009/73/EC), one concerning common rules for the internal market in electricity 2009/72/EC) and three Regulations, one on conditions for access to the natural gas transmission networks ((EC) No 715/2009), one on conditions for access to the network for cross-border exchange of electricity ((EC) No 714/2009) and one on the establishment of the Agency for the Cooperation of Energy Regulators ACER ((EC) No 713/2009) which replaced ERGEG. They were adopted in July 2009.

<sup>51</sup> The ERGEG Guidelines explain their purpose was to fulfil the requirements of the Regulation on Cross Border Electricity exchanges (Regulation 1228/03/EC). The ERGEG Guidelines state at section 2(i) 'To avoid distortions of competition, some harmonisation of the charges for access to networks of the generators, i.e. the 'G' charge is needed.'

<sup>52</sup> GEMA/Appellants Agreed Chronology, 18 July 2005.

<sup>53</sup> GEMA/Appellants Agreed Chronology, 9 December 2008.

transmission charges. In 2010, the Commission published a Staff Working Document – the Impact Assessment. The Staff Working Document found that there was no significant evidence in favour of adopting a different range of charges to the 2005 draft guidelines. It found it was not appropriate to make significant changes and noted the consultation process indicated support for formally adopting the 2005 draft guidelines. It therefore proposed adopting the ERGEG Guidelines in a binding legal measure as this ‘would serve to increase legal certainty for market participants increasing the coherence of the rules in the internal market without undermining existing current regimes’.

- 4.11 On 23 September 2010, the Regulation was published. This laid down arrangements for TOs to receive compensation for costs incurred as a result of hosting cross-border flows of electricity on their networks, and guidelines<sup>54</sup> on charges applied by network operators for access to the national transmission systems. The Regulation thus replaced the non-binding ERGEG Guidelines. The final version of the Impact Assessment was adopted at the same time.
- 4.12 The Regulation included the ranges for transmission charges for generators in EU Member States in Part B of its Annex. The average charge for each Member State was defined as being equal to the total transmission tariff 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 the Republic of Ireland, GB and Northern Ireland was set at €0-2.5/MWh. The range for most other EU countries was set at €0-0.5/MWh, with Romania €0-2/MWh and Denmark, Sweden and Finland €0-1.2/MWh. The Regulation applied from 3 March 2011.<sup>55</sup>
- 4.13 As with the ERGEG Guidelines, the Regulation (Paragraph 2 in part B of the Annex) excludes the following categories of charges from the calculation of annual average transmission charges:
- (1) Charges paid by producers for physical assets required for connection to the system or the upgrade of the connection (the ‘Connection Exclusion’);
  - (2) Charges paid by producers related to ancillary services;
  - (3) Specific system loss charges paid by producers.

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<sup>54</sup> As these ‘guidelines’ are set out in a Commission regulation, they have binding effect.

<sup>55</sup> GEMA/Appellants Agreed Chronology 23 Sept 2010 and 3 March 2011.

- 4.14 The first of these exclusions is the so-called Connection Exclusion, and its interpretation is at the heart of this appeal.

## **CMP224**

- 4.15 In September 2013, NGET proposed CUSC modification proposal CMP224: ‘Cap on the total TNUoS target revenue to be recovered from Generation Users.’ The modification stated ‘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.’ It noted that transmission revenues were recovered from Generators and suppliers in a 27:73 G:D split. It noted that the fixed rate of 27% recovery of TNUoS Charges from Generators risked putting NGET in breach of the threshold. It therefore proposed putting a cap on the annual generation TNUoS revenue, by modifying the G:D split ratio for any year accordingly, ie the ratio would be changed *ex ante* in Generators’ favour ahead of any charging year where it was forecast (on the basis of a particular interpretation of the Regulation) that otherwise the Regulation threshold would be exceeded.
- 4.16 We note that a key point in determining whether transmission revenues breached the Regulation in the relevant period is whether all transmission charges are included in the calculation given the Connection Exclusion (see paragraph 4.13(1)). The industry workgroup assessing CMP224 considered several potential interpretations of the Regulation, two of which were taken forward and were included in the proposals submitted to GEMA for decision:
- (a) Narrow (or strict) interpretation – only Connection Charges [under the CUSC] are excluded from the calculation of the average charge.
  - (b) Broad interpretation – Connection Charges [under the CUSC] as well as Local Charges for radial circuits that supply generators only (GOS) are excluded from the calculation of the average charge.
- 4.17 Four proposals were submitted by the workgroup for decision: two based on the strict interpretation and two based on the broad interpretation. At a meeting on 25 April 2014, a majority of the CUSC Panel voted in favour of options which were based on the strict interpretation, as better facilitating the relevant CUSC charging objectives when compared to the pre-existing arrangements.<sup>56</sup> On 14 July 2014, Ofgem published a consultation<sup>57</sup> setting out its minded-to position, to approve the original proposal (which was based

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<sup>56</sup> See also paragraph 3.15.

<sup>57</sup> Ofgem Consultation on CUSC modification proposal 224.

on the strict interpretation). In the 'Reasons for our Decision' section of its CMP224 Decision, GEMA said in relation to the Connection Exclusion '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'. In relation to the responses to the 14 July 2014 consultation, the document reports: 'The majority of responses agreed with our preliminary view that the strict interpretation of Paragraph 2(1) in Annex Part B of the Regulation is more persuasive and the potential for legal challenge and regulatory risk of taking a broader interpretation should be avoided.'

- 4.18 In its 'Impact and Legal Interpretation' section of the 14 July 2014 consultation, GEMA had stated:

Our preliminary view is that Paragraph 2(1) in Annex Part B of the Regulation is ambiguous and that both the strict interpretation and the broad interpretation constitute a reasonable interpretation. On balance, our preliminary view is that the strict interpretation of the regulation is more persuasive. We also note that because the regulation is ambiguous in this respect, there is a real risk that future charges under an option that uses the broad interpretation of the Regulation (WACM2 or WACM3) could be successfully challenged by generators. This would increase regulatory risk.

GEMA went on to state '...we are inclined to direct the implementation of the original proposal. This is based on our preliminary view that the strict interpretation is the better interpretation of the Regulation and that the broad interpretation increases regulatory risk.'

- 4.19 GEMA directed that this proposed modification be made by a decision dated 8 October 2014 ('the CMP224 Decision'). It took effect from 22 October 2014. The CMP224 Decision noted:

The proposals would set the [...] 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.

- 4.20 In summary, CMP224 was intended to set charging methodology *ex ante* with the intention that the Cap would not be breached, including an error margin to reduce the risk of any breach in practice.

## CMP261

- 4.21 The charges levied on generation are calculated in the following manner. The total to be collected from TNUoS is determined by Ofgem as the price control revenue agreed by Ofgem for the three onshore TOs and the offshore TOs with some adjustments. In 2015/16 this was determined at £2,636.7m.

- 4.22 The result of the CMP224 Decision, in terms of charging practices, was that NGET had to:

- (a) Forecast transmission output and exchange rates one year ahead;
- (b) Calculate what *ex ante* charges could be levied on Generators, such that the outturn charge in Euros per MWh was expected to be compliant with the Cap (calculated by reference to the narrow interpretation of the Connection Exclusion), where the *ex post* calculation would be as follows:

$$\text{€ per MWh} = (\text{Total TNUoS Charges levied on generators/transmission output}) * (\text{£:€ exchange rate})$$

- (c) Derive the appropriate G:D split on this basis, including an allowance for forecasting error.<sup>58</sup> NGET explained that 'This limit has been reduced to €2.34/MWh to incorporate a risk margin for forecasting error'.<sup>59</sup>
- 4.23 The amount of money to be recovered from generation in 2015/16 was therefore calculated as €2.34/MWh multiplied by 319.6TWh (being NGET's forecast of generation output) which gives €747.9m. Dividing by a forecasted exchange rate of €1.22/£, resulted in £612m of revenue to be recovered from generation. This equated to a G:D split of 23.2% generation and 76.8% demand.
- 4.24 The calculation which determined the proportion of costs to recover from Generators was based on forecasted transmission output and exchange rates. In practice, the outturn for 2015/16 was that transmission output was much lower than forecast at 259.0TWh, while the exchange rate was considerably higher than forecast at €1.36/£. Consequently, the actual average transmission charge for the year levied on Generators was higher,

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<sup>58</sup> CMP224 Decision, page 3.

<sup>59</sup> NGET's Tariff Information Paper - *Final TNUoS tariffs for 2015/16*, page 10.

and was estimated as part of the CMP261 process to be equivalent to €3.22/MWh, when calculated on the same basis as NGET's projected average transmission charge of €2.34/MWh.<sup>60</sup>

- 4.25 The Appellants told us that on a number of occasions during 2015 and 2016, the possibility of a breach of the Cap was raised with NGET by SSE, EDF Energy and others.<sup>61</sup>
- 4.26 In March 2016, SSE raised CMP261. This proposed a modification to allow a 'mid-year' tariff modification to enable a reconciliation payment in Spring 2016 if the transmission charges to Generators did *ex post* exceed that permissible under the Regulation.
- 4.27 The Appellants told us that 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. The aim was to try to ensure that there was a reconciliation of the TNUoS 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 adjustment (in effect a credit) levied on all GB Generators who paid TNUoS during the relevant period if necessary.<sup>62</sup>
- 4.28 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.<sup>63</sup> 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, based on the recommendation of the CUSC Panel that careful consideration and consultation was required and GEMA's view that this would not have a significant commercial

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<sup>60</sup> CMP261, [Final CUSC Modification Report](#), paragraph 2.6.

<sup>61</sup> [NoA](#), paragraph 3.16. The Appellants said the possibility of a breach, in charging year 2015/16 or beyond, of the €2.5/MWh threshold was raised in GEMA's Project Transmit Technical Working Group initial report, published in September 2011 ([NoA](#), paragraph 3.10).

<sup>62</sup> [NoA](#), paragraph 1.12.

<sup>63</sup> [NoA](#), paragraph 1.13.

impact on parties given that any rebate would necessarily be paid after the end of the charging year.<sup>64</sup>

4.29 In brief, the CMP 261 process proceeded as follows:

- (a) GEMA received the original Final Modification Report (FMR) on 30 November 2016 from the CUSC Panel (CMP261 FMR).
- (b) GEMA then issued a send-back letter to the CUSC Panel on 22 February 2017, setting out its decision to direct that the CMP261 FMR be revised and resubmitted.
- (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 the CMP224 Decision and proposing a mechanism by which compliance with the upper limit could be restored and maintained (CMP261 FMR (post send-back)).
- (d) By its Decision of 16 November 2017, GEMA rejected CMP261 (the CMP261 Decision).<sup>65</sup>

### ***GEMA's CMP261 Decision***

4.30 In the CMP261 Decision, GEMA said whether a breach of the Regulation had occurred in 2015/16 was dependent on the interpretation of the Regulation as to the charges which were intended to be excluded from the calculation of average annual transmission charges.

4.31 As explained in paragraph 4.16, at the time of the CMP224 Decision in 2014, GEMA considered there were two interpretations before it of the Connection Exclusion in the context of the system in GB. In the Decision, GEMA described these as follows:

- (a) narrow interpretation - only those charges classed in the CUSC as Connection Charges are within the connection exclusion.
- (b) broad interpretation - Connection Charges and most, if not all, Local Charges are within the Connection Exclusion (see the

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<sup>64</sup> *Wright*, paragraphs 53-55.

<sup>65</sup> *NoA*, paragraph 1.14.

nature of the underlying asset funded by the charge below for details).

4.32 GEMA noted that the CMP261 proposal was premised on the narrow interpretation. GEMA accepted that if the narrow interpretation were correct then the Cap had been exceeded and a breach of the Regulation has occurred in charging year 2015/16. Conversely, if the broad interpretation was correct, then the average transmission charge had not exceeded the Cap in charging year 2015/16. GEMA said in its CMP 261 Decision that the CMP261 proposal was premised on an interpretation whereby only charges that are categorised as Connection Charges under the CUSC fall within the Connection Exclusion.<sup>66</sup>

4.33 GEMA added that CMP261 was the first time that it had had to reach a concluded view about the correct interpretation of Connection Exclusion. GEMA stated that:

in our decision on CMP224 we clearly stated that the Regulation is ambiguous and that both the narrow and the broad interpretation constitute a reasonable interpretation. Our decision on CMP224 did not express any concluded view on the correct interpretation of the Regulation. Rather, as explained above, we took a pragmatic approach to favour options based on the narrow interpretation on grounds of legal risk.

Accordingly, we do not accept the suggestion that the Authority has previously made a binding determination on the scope of the connection exclusion, or that it is not open to the Authority at this stage to conclude that the broad interpretation is correct. In reaching such a conclusion, the Authority is not committing an abuse of process, or re-opening a decision so as to provide for a different regulatory treatment retrospectively. Further, even if the Authority had previously expressed a concluded view in favour of the narrow interpretation (which it did not), in any event there can be no legitimate expectation that the Authority would maintain an incorrect view of the law.<sup>67</sup>

4.34 GEMA noted in its CMP261 Decision that in relation to CMP224, it had consulted on the legal interpretation of the charges that fall within the Connection Exclusion, and in the consultation document, it had said that, on balance, its preliminary view was that the narrow interpretation was more

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<sup>66</sup> CMP261 Decision, page 5.

<sup>67</sup> CMP261 Decision, page 6.

persuasive. In relation to regulatory risk, it said the risk of successful challenge did not arise in relation to options using the narrow interpretation because they would be compliant with the Regulation regardless of which interpretation was correct. It said that it had not been necessary for the purposes of that decision (CMP224 Decision) for it to reach a concluded view on which interpretation was correct, and it had not done so. It said it had taken a pragmatic approach to favour options based on the narrow interpretation on grounds of legal risk.<sup>68</sup>

- 4.35 In the CMP261 Decision, GEMA concluded that a broad interpretation was correct for three reasons. We summarise these below, drawing on the text of the Decision itself.

*(i) The nature of the underlying asset funded by the charge (pages 7-8)*

- 4.36 GEMA noted that Connection Charges, as defined by the CUSC, clearly fell within the scope of the Connection Exclusion in the Regulation, and it took the view that the Connection Exclusion also covered most, if not all, Local Charges that are paid for Local Assets required to connect the Generator to the MITS. It came to this view on the basis that the Local Charges paid for Local Assets also amounted to ‘charges paid by producers for physical assets required for connection to the system’ within the meaning of the Regulation.
- 4.37 GEMA did not consider that the domestic demarcation (ie as defined in the CUSC) between CUSC Connection Charges and TNUoS Charges could in itself be determinative of the meaning of the Connection Exclusion, not least since the Regulation was a harmonising EU law measure which needed to be interpreted and applied consistently across all Member States. In order to apply the Connection Exclusion, it was therefore necessary to look at the nature of the underlying assets funded by Local Charges, not merely at their nominal classification within the domestic charging structure in GB.
- 4.38 GEMA explained that Local Assets built between a Generator and the pre-existing transmission system, including Offshore GOSs, were physical assets required for connection to the system. Such Local Assets provided the physical link from the Generator (and its connection assets under the CUSC) to the transmission system and, but for these Local Assets, the Generator would not be able to have connected to the transmission system.
- 4.39 GEMA had therefore satisfied itself that Local Charges in respect of (at least) Offshore GOSs fell within the Connection Exclusion. On that basis GEMA

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<sup>68</sup> CMP261 Decision, pages 5-6.

concluded that there had been no breach of the Cap for the charging year 2015/16.

*(ii) Nature of the charge (page 8)*

- 4.40 GEMA noted that the proposer of the code modification (SSE) had argued that an element of the *travaux préparatoires*, the 2005 ERGEG consultation, supported the view that the drafters of the Regulation only had intended to include assets paid for by one-off charges for initial connection to the grid within the Connection Exclusion.
- 4.41 GEMA explained that references to ‘one-off charges’ for ‘initial connection to the grid’ did not appear in the Regulation itself. As a result, GEMA was of the view that when determining what fell within the scope of the Connection Exclusion, the manner in which the charge would be paid (eg annually as part of TNUoS Local Charge, rather than ‘one-off’ or ‘initial’) would not be determinative. GEMA also considered that a detailed comparison of the structure of Connection Charges and Local Charges under the CUSC demonstrated that they were all, in substance, very similar to each other.

*(iii) The higher cap for Great Britain (page 9)*

- 4.42 GEMA noted that ERGEG’s evaluation of responses to its consultation on its proposed guidelines had identified that the reason that GB was given a more generous upper limit than most other Member States (with the exception of Northern Ireland, and the Republic of Ireland) as ‘corresponding to the expected situation in the UK and Ireland’. It noted SSE’s view that the generous upper limit must have been based on GB’s charging arrangements at the time, ie the fact that GB had at the time a shallow connection boundary, and therefore that the Connection Exclusion had only intended to cover the narrow category of Connection Charges prevailing in GB at that time (ie in 2005). In other words, that GB needed to have a higher cap because it needed to have higher charges to recover the cost of additional assets that were constrained by the charge range.
- 4.43 GEMA, however, disagreed with SSE’s line of argument. GEMA explained that the higher upper limit that had been given to GB had been, at least in part, intended to allow GB to continue with its system of Wider Locational Charges without at the same time giving rise to significant negative charges for transmission. GEMA concluded that its logic refuted SSE’s argument that a higher limit had been granted to reflect the inclusion of assets funded by Local Charges in the charge range.

## **Basis of the decision**

- 4.44 Pursuant to NGET's licence conditions, GEMA was required to take the Decision by reference to whether CMP261 'would, as compared with the then existing provisions of the CUSC and any alternative modifications set out in such report (i.e. the report proposing the modification), better facilitate achieving the applicable CUSC objectives'. The applicable CUSC objectives are, in summary, that the charging methodology should: (a) facilitate competition; (b) result in charges that, as far as reasonably practicable, reflect the costs incurred by TSOs; (c) take account of developments in TSOs' businesses; (d) comply with EU law; and (e) promote efficiency in the implementation and administration of the system charging methodology. GEMA also had regard to its principal objective (under section 3A of the Electricity Act 1989) to protect the interests of existing and future consumers, and to its other duties.
- 4.45 As we have explained above, GEMA said in taking the Decision, it first concluded that Local Charges in respect of (at very least) Offshore GOS fall within the Connection Exclusion; and that there had consequently been no breach of the Cap in 2015-16. It said that it went on to consider, on the premise that there had been no breach of the Cap, whether any of the proposals in CMP261 would better facilitate the applicable CUSC objectives and/or be consistent with its statutory duty to protect the interests of consumers. It concluded that this was not the case.<sup>69</sup>
- 4.46 Accordingly, GEMA directed that CMP261 not be made.

## **The appeal**

- 4.47 The Appellants appealed against the Decision on the following grounds:<sup>70</sup>
- (a) Ground 1: 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.

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<sup>69</sup> CMP261 Decision, pages 10-12.

<sup>70</sup> Summary of the [NoA](#), paragraph 1.7.

- (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 charges from the annual average transmission charge in GB in 2015/16 when seeking to determine if a breach had occurred.
- (b) Ground 2: GEMA erred in fact in treating generation only spur 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) Ground 3: 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. 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) Ground 4: 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.

4.48 The Appellants and GEMA told us they agreed on a number of aspects.<sup>71</sup> They told us it was common ground that:

- (a) The Regulation applies.
- (b) It imposes (in respect of GB) a cap of €2.5/MWh for ‘annual average transmission charges paid by producers’, as defined by the Regulation.
- (c) The Regulation provides that ‘charges paid by producers for physical assets required for connection to the system or the upgrade of the connection’ do not constitute transmission charges and therefore shall not count towards the Cap (the Connection Exclusion).
- (d) If transmission charges as defined by the Regulation equates with the TNUoS Charges levied on generators in the year 2015/16 and 2014/15 then the Cap has been exceeded.
- (e) If Local Charges in respect of Offshore GOSs lawfully fall within the Connection Exclusion then the Cap has not been exceeded in the year 2015/16 or 2014/15.
- (f) If the Cap has been exceeded, then a form of relief is appropriate.

4.49 In the next sections, we consider each of the Grounds of appeal.

## **5. Ground 1: Errors of law in the construction to the Regulation**

### **Introduction**

5.1 In this section we address Ground 1 of the NoA. This is that GEMA erred in law in its construction of the Regulation by excluding local circuit/local substation/GOS charges from the annual average transmission charge in GB in 2015/16 when assessing if a breach of the Regulation had occurred.<sup>72</sup>

5.2 We have structured this section as follows:

- (a) First, we set out in some detail the arguments in respect of Ground 1 provided by the Parties both in the NoA and the Reply but also in their other respective pleadings (paragraphs 5.3 to 5.737).

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<sup>71</sup> Appellants/GEMA *Suggested List of Matters Not in Dispute and List of Issues*.

<sup>72</sup> NoA, paragraph 6.7.

(b) Second, we assess this Ground (paragraphs 5.75 to 5.114).

## **Sub-Ground 1(a): GEMA should have adopted a teleological construction of the Regulation<sup>73</sup>**

### ***The Appellants' submissions***

5.3 The Appellants submitted that the objective of the Regulation was to achieve a certain degree of harmonisation in the EU electricity generation market, in order to (i) facilitate the efficient use of the interconnected transmission system and (ii) avoid distortion of investment decisions.<sup>74</sup> They submitted that GEMA's construction of the Regulation runs counter to these aims.<sup>75</sup> The Appellants cited the following pieces of evidence to support their view of the Regulation's objectives:

(a) First, the wording in the Regulation itself, which refers to the benefits of harmonisation and the legislative intent of the Regulation being to facilitate the creation of an internal market in electricity.<sup>76</sup>

(b) Second, the Commission's Impact Assessment that accompanied the draft legislation, which refers to the need for a harmonisation procedure for transmission charges.<sup>77</sup>

5.4 The Appellants submitted that the necessary corollary of the harmonisation objective is that exclusions from the transmission charges should be construed narrowly.<sup>78</sup> This is because a broad interpretation of available exclusions would give greater scope for divergence in charges.<sup>79</sup> Necessarily, the greater the exclusions from the annual transmission charge, the less relevance that charge has to overall transmission costs payable by Generators for their use of the system.<sup>80</sup> 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

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<sup>73</sup> In this context teleological means purposive, in other words having regard to stated objectives and the state of evolution of regulatory thinking at the date on which the Regulation was to be applied.

<sup>74</sup> NoA, paragraph 6.6 (a).

<sup>75</sup> NoA, paragraph 6.8.

<sup>76</sup> NoA, paragraphs 6.9 and 6.12.

<sup>77</sup> NoA, paragraph 6.14 (d).

<sup>78</sup> NoA, paragraph 6.15. Note under Ground 1(b) below, the Appellants make a separate case that all exceptions from EU law such as the Connection Exclusion should be interpreted narrowly.

<sup>79</sup> NoA, paragraph 6.15.

<sup>80</sup> NoA, paragraph 6.18.

as it bears little relation to the actual costs Generators must pay to use the system.<sup>81</sup>

- 5.5 Alongside, the harmonisation objective, the Appellants submitted that the clear aim of the Regulation was also to secure a degree of certainty for investment decisions in generation assets.<sup>82</sup> This is best assisted by adopting a narrow construction of the Connection Exclusion.<sup>83</sup>
- 5.6 The Appellants submitted that GEMA did not properly consider the internal market objective of the Regulation in its CMP261 Decision. Instead, GEMA only turned to this factor once it had determined that there was no breach in the context of the CUSC objectives.<sup>84</sup> In doing so, the Appellants considered that GEMA had its analysis 'back-to-front'. GEMA explained in its CMP261 Decision that the Cap had not been breached and therefore it did not consider adverse impacts on the competitive position of GB Generators within the internal market had arisen.<sup>85</sup> In the Appellants' view, GEMA should have had the internal market objective at the forefront of its considerations around the interpretation of the Regulation, not simply as a secondary consideration once the issue of interpretation had been addressed.<sup>86</sup>
- 5.7 In the Response to GEMA's Reply, the Appellants characterised their interpretation of the Connection Exclusion as a primary and secondary case. These different interpretations are encapsulated in the following:

What is the correct construction of the €2.5/MWh cap on transmission charges in GB imposed by the Regulation and what is the correct construction of the Connection Exclusion? The Appellants contend that the correct construction as a matter of EU law is that the cap applies to charges imposed for the use of the transmission network. These are charges that are to be distinguished from those initial or one-off charges which enable a generator to be connected to the network (or to have its existing connection upgraded). Only the latter connection charges fall within the scope of the Connection Exclusion.

To what extent do the charging practices in the Member States (including GB) determine the charges falling within the scope of the Connection Exclusion? The Appellants' primary case is that

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<sup>81</sup> NoA, paragraph 6.18.

<sup>82</sup> NoA, paragraph 6.19.

<sup>83</sup> *Ibid.*

<sup>84</sup> NoA, paragraph 6.22.

<sup>85</sup> NoA, paragraph 6.21.

<sup>86</sup> NoA, paragraph 6.22.

the Regulation, construed in the context of the *travaux préparatoires*, endorses a narrow construction of the Connection Exclusion without any need to consider the specific State practice. If, however, that is wrong, then the GB current charging practice should be applied in like manner for the domestic charging regime and for the concurrent application of the Regulation. GB charging practice should only be changed prospectively following a full evaluation of the options and industry consultation.<sup>87</sup>

- 5.8 Finally, the Appellants submitted that the apparent windfall to Generators may have wrongly influenced GEMA's Decision.<sup>88</sup> They contended that (a) there had been no such windfall and (b) a 'windfall' would be irrelevant to the proper construction of the Regulation.<sup>89</sup>

### **GEMA's submissions**

- 5.9 GEMA submitted that the Commission's goal was not to promote harmonisation for its own sake, but to facilitate competition.<sup>90</sup> In fact the Commission rejected maximum harmonisation.<sup>91</sup>
- 5.10 GEMA submitted that its interpretation of the Connection Exclusion is consistent with the Commission's goal to facilitate competition.<sup>92</sup> This is because the broader Connection Exclusion reflects the principle of cost-reflective charging, which is conducive to competition.<sup>93</sup> The narrow interpretation, on the other hand, would be likely to distort competition, for the following reasons:
- (a) It is likely that it would result in a substantial portion of onshore Generators' TNUoS Charges becoming negative overall.<sup>94</sup> The undesirability of negative charges is highlighted in the Impact Assessment.<sup>95</sup>
  - (b) An alternative to negative charging would be to reduce the costs currently borne by offshore Generators due to their location.<sup>96</sup> This would be

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<sup>87</sup> Response, paragraphs 5.1 and 5.2.

<sup>88</sup> NoA, paragraph 6.23.

<sup>89</sup> NoA, paragraph 6.23.

<sup>90</sup> Reply, paragraph 4.14.

<sup>91</sup> Reply, paragraph 4.13.

<sup>92</sup> Reply, paragraph 4.14.

<sup>93</sup> Reply, paragraph 4.14.

<sup>94</sup> Reply, paragraph 4.8(c).

<sup>95</sup> Reply, paragraph 4.8(c) and Impact Assessment, page 25.

<sup>96</sup> Reply, paragraph 4.8(d).

contrary to the principle in the *travaux préparatoires* that National Regulatory Authorities (NRAs) should be able to set tariffs in such a way as to provide locational signals.<sup>97</sup>

- 5.11 During the Main Hearing, Counsel to GEMA, Mr Maclean QC expanded further on the issue of cost reflectivity, in response to a question on whether cost reflectivity is an objective of the Regulation. Mr Maclean QC stated the following:

The answer is that it [cost reflectivity] is not expressly, as it were, hammered into the text of the regulation as being one of its objectives. One does not find it referred to in the recital; you do not find it referred to in the body of the regulation as such...

...That is a long way of saying, yes, it is one of the underpinning principles of the regulation. It is not itself expressly referred to in the regulation but you only have to go back as far as the consultation document from the Commission which it was, of course, the draftsman of the statute to see that that is part of the background.

- 5.12 GEMA disagreed with the Appellants' submission that a broad interpretation would increase the gap between the charges in GB and other Member States, thus precluding GB Generators from competing on a level playing field,<sup>98</sup> for the following reasons:

- (a) The Connection Exclusion must have the same meaning across all Member States and a consistent interpretation of the Connection Exclusion is conducive to fair competition.<sup>99</sup>
- (b) The adoption of a narrow interpretation would not cure any competitive disadvantage, as the same narrow interpretation would apply across the EU.<sup>100</sup>
- (c) The Appellants failed to demonstrate that GB Generators had suffered a competitive disadvantage, as a result of having a higher cap.<sup>101</sup>
- (d) Any disadvantage resulting from the higher cap could only be addressed by interpreting the Connection Exclusion more narrowly in GB than in

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<sup>97</sup> Reply, paragraph 4.8(d).

<sup>98</sup> Reply, paragraph 4.15.

<sup>99</sup> Reply, paragraph 4.15(a).

<sup>100</sup> Reply, paragraph 4.15(b)(i).

<sup>101</sup> Reply, paragraph 4.15(b)(iii) and (iv).

other Member States. However, it would be wrong to depart from the principle of uniform interpretation.<sup>102</sup>

- 5.13 GEMA disagreed with the Appellants' submission that the broad interpretation means that a significant proportion of transmission charges are not covered by the Cap.<sup>103</sup> This is because GEMA does not agree that the charges in issue are, by definition, transmission charges.<sup>104</sup>
- 5.14 GEMA also disagreed that a narrow interpretation of the Connection Exclusion was necessary to provide certainty for investment decisions.<sup>105</sup> GEMA submitted that Offshore Local Charges are calculated with reference to the assets installed and can therefore be predicted with reasonable confidence from the outset of a project. GEMA submitted that it was not therefore necessary to construe the Connection Exclusion narrowly, in order to avoid uncertainty.<sup>106</sup>
- 5.15 GEMA disagreed with the Appellants submission that the CMP261 Decision addressed the intention of the Regulation only in the context of the CUSC charging objectives.<sup>107</sup> GEMA highlighted that the CMP261 Decision included a page-long section headed Intent of the Regulation, where GEMA analysed why its interpretation of the Connection Exclusion was consistent with the purpose of the Regulation.<sup>108</sup>
- 5.16 Finally, GEMA submitted that there was no basis for the Appellants' claim that GEMA adopted the broader interpretation, in order to shield customers from having a windfall for Generators.<sup>109</sup> Rather, GEMA first concluded, without reference to the implications for consumers, that the Cap had not been breached. It then considered consumers' interests at the second stage of its analysis.<sup>110</sup>

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<sup>102</sup> [Reply](#), paragraph 4.15(b)(ii).

<sup>103</sup> [Reply](#), paragraph 4.16(e).

<sup>104</sup> [Reply](#), paragraph 4.16(e).

<sup>105</sup> [Reply](#), paragraph 4.17(a).

<sup>106</sup> [Reply](#), paragraph 4.17(a).

<sup>107</sup> [Reply](#), paragraph 4.17(c).

<sup>108</sup> [Reply](#), paragraph 4.17(c).

<sup>109</sup> [Reply](#), paragraph 4.17(d).

<sup>110</sup> [Reply](#), paragraph 4.17(d).

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

### ***The Appellants' submissions***

5.17 The Appellants submitted that as a matter of general principle, exclusions from EU law are to be construed narrowly.<sup>111</sup> They argued the Cap is an exclusion from a category of charges which are otherwise due to be harmonised across the Member States.<sup>112</sup> This exclusion should therefore be construed narrowly. As, in the CMP261 Decision, GEMA adopts a broad rather than narrow interpretation, the Appellants submitted that GEMA's construction was vitiated by an error of law.<sup>113</sup>

### ***GEMA's submissions***

5.18 GEMA disagreed with the Appellants' submission that the Connection Exclusion is an exception to the Cap and should therefore be construed narrowly.<sup>114</sup> GEMA submitted that the characterisation of the Connection Exclusion as an exception is incorrect.<sup>115</sup>

5.19 GEMA submitted that cases, such as C-175/09 *AXA UK v HMRC*<sup>116</sup> and C-304/15 *Commission v UK*,<sup>117</sup> both cited by the Appellants in support of their submissions, concerned exceptions or derogations from general rules. However, the Regulation does not provide for an exception or derogation from transmission charges. Rather, the exclusions serve a definitional purpose. The Regulation does not therefore create a derogation from a general rule, so the principle of narrow construction is inapplicable.<sup>118</sup>

5.20 Notwithstanding the above, GEMA submitted that there is precedent from the Court of Justice of the European Union (CJEU) that the principle that exceptions to general rules should be construed narrowly 'must not deprive the exception in question of its intended effect'.<sup>119</sup> GEMA submitted that the

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<sup>111</sup> NoA, paragraph 6.25.

<sup>112</sup> NoA, paragraph 6.26.

<sup>113</sup> NoA, paragraph 6.27.

<sup>114</sup> Reply, paragraph 4.16.

<sup>115</sup> Reply, paragraph 4.16.

<sup>116</sup> [2010] ECR I-10701.

<sup>117</sup> [2016] ECLI:EU:C:2016:706.

<sup>118</sup> Reply, paragraph 4.16(a) to (d).

<sup>119</sup> Reply, paragraph 4.16(f), Case C-175/09 *AXA v HMRC* [2010] ECR I-10701, paragraph 25 and C-461/08 *Don Bosco Onroerend Goed BV v Staatssecretaris van Financiën* [2009] ECR I-11079, paragraph 25.

Impact Assessment indicates that the Commission did not intend the Regulation to preclude deep connection boundaries.<sup>120</sup>

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

### ***The Appellants' submissions***

5.21 The Appellants submitted that the correct construction of the Regulation could be ascertained by a consideration of the *travaux préparatoires* and the legislative history.<sup>121</sup> That analysis demonstrated that:

- (a) connection charges had been understood to mean one-off charges for an initial connection even if some of those one-off charges might have constituted items of capital expenditure which, in accordance with accounting principles, would have been subject to depreciation and therefore amortised over many years;<sup>122</sup> and
- (b) the Regulation had been based on an expected treatment of transmission charges in GB which held true today, and which should therefore be respected when applying the Cap.<sup>123</sup>

5.22 The Appellants explained that genesis of the Regulation was to be found in the ERGEG Guidelines.<sup>124</sup> The Regulation effectively put on a formal legislative basis the 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 (ie charges for connection, ancillary services and system losses).<sup>125</sup>

5.23 The Appellants submitted that the Commission in finalising the Regulation had seen no reason to depart from the approach to tariff harmonisation in the ERGEG Guidelines. The Commission had explicitly recognised<sup>126</sup> the extensive consultation processes involved in the development of the ERGEG Guidelines. In the Appellants' view, it was therefore highly relevant to determine how ERGEG had developed the ERGEG guidelines.

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<sup>120</sup> [Reply](#), paragraph 4.16(f).

<sup>121</sup> [NoA](#), paragraph 6.29.

<sup>122</sup> [NoA](#), paragraph 6.29(b).

<sup>123</sup> [NoA](#), paragraph 6.29(a).

<sup>124</sup> [NoA](#), paragraph 6.30.

<sup>125</sup> [NoA](#), paragraph 6.30.

<sup>126</sup> [Impact Assessment](#), pages 36 & 37.

- 5.24 The Appellants developed their narrative regarding the relevance of the *travaux préparatoires* under a number of headings:
- (a) The ERGEG Guidelines;
  - (b) The Commission's adoption of the Regulation;<sup>127</sup>
  - (c) The 'expected situation' in GB; and
  - (d) Connection charges as one-off or initial charges for connection to the transmission system.

### *The ERGEG Guidelines*

#### *Relevance of ERGEG's assessment of the then current approaches to setting transmission tariffs across Member States*

- 5.25 By way of introduction, the Appellants observed that the ERGEG Guidelines published in 2005 had found that most Member States' transmission tariffs fulfilled the existing criterion set out in the then (2003) Regulation on Cross Border Electricity Exchanges,<sup>128</sup> namely that 'the majority of the charges fall on load [ie retailers] rather than generation and that the major part of the electricity produced in the internal electricity market (IEM) is subject to a G charge regime which may put G at or very near zero.'<sup>129</sup>
- 5.26 The Appellants further observed that the ERGEG Guidelines then described two further features of transmission tariffs:<sup>130</sup>

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

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<sup>127</sup> The [NoA](#) (page 32) refers to the Commission's adoption of the Binding Guidelines. As the ERGEG Guidelines were given binding effect through the Regulation, we have chosen to refer to the Binding Guidelines as the Regulation throughout this determination.

<sup>128</sup> [NoA](#), paragraphs 32 and 33.

<sup>129</sup> [NoA](#), paragraph 6.33.

<sup>130</sup> [NoA](#), paragraph 6.33.

charges are not, however, considered to be part of the G charge for the purpose of these Guidelines.<sup>131</sup>

5.27 The Appellants concluded from these passages that the ERGEG Guidelines themselves had drawn a distinction between the initial (ie one-off) charge of connection to the transmission system and the subsequent transmission charges that a TSO would levy: the latter but not the former, would be included in the calculation of the G Charge.<sup>132</sup>

5.28 The Appellants noted that the harmonising objective of setting G charges had been explained in the following terms:<sup>133</sup>

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 practices according to whether a generator is responsible for paying the costs connected to production related network components.<sup>134</sup>

5.29 According to the Appellants ERGEG had been fully cognisant of the approach used to set generation tariffs in GB at the time, and had been aware of the then (and current) connection charging boundary whereby local circuit charges were categorised as transmission charges.<sup>135</sup>

5.30 Furthermore, when consulting on these guidelines,<sup>136</sup> ERGEG had noted that its proposals catered for differences between the continental EU electricity systems<sup>137</sup> and the Nordel, UK and Irish systems, the latter being interconnected to the former by DC submarine cables, rather than being part

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<sup>131</sup> NoA, paragraph 6.33 and ERGEG Guidelines, page 2.

<sup>132</sup> NoA, paragraph 6.34.

<sup>133</sup> NoA, paragraph 6.34.

<sup>134</sup> NoA, paragraph 6.34 and ERGEG Guidelines, *Harmonisation of network access charges for generators*, page 2.

<sup>135</sup> NoA, paragraph 6.35.

<sup>136</sup> Consultation on [Guidelines on Transmission Tarification](#), bottom of page 2.

<sup>137</sup> Also referred to within the Explanatory Note (B6) as the Union for the Coordination of the Transmission of Electricity <https://www.entsoe.eu/news-events/former-associations/ucte/Pages/default.aspx>, the body which coordinated the operation and development of the electricity transmission grid for the Continental European synchronously operated transmission grid.

of one pan-European synchronous operational zone. As a consequence, ERGEG's proposal had been that different ranges for the 'national average G' could be applied across the different operational zones and these ranges would be re-examined at a later stage. The approach adopted to harmonising G charges should not be inconsistent with sending appropriate locational signals to producers and consumers.<sup>138</sup>

5.31 The Appellants cited the following sentence in the ERGEG Guidelines:<sup>139</sup>

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.<sup>140</sup> [Emphasis added by the Appellants]

5.32 The Appellants explained that this citation was relevant in that ERGEG had not proposed an exclusion for charges associated with 'production related network components'. This wording had been chosen despite ERGEG recognising that the costs for such components were sometimes reflected in a separate charge to producers. The Appellants noted that ERGEG had instead, adopted the expression highlighted in bold in the citation above.<sup>141</sup>

5.33 The Appellants submitted that ERGEG must have assessed the information regarding the charging situation in the UK and other Member States during the consultation process. Prior to the adoption of the ERGEG Guidelines in 2005, the GB charging structure had included local circuit and GOS in the calculation of transmission charges under CUSC. ERGEG had therefore set the 'generous' GB Cap on that basis, with the Commission seeing no reason subsequently to change that approach (or amend the upper level of the Cap).<sup>142</sup>

5.34 The Appellants told us that 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 Regulation. If those sort of charges had been meant to have been excluded from the ambit of the Cap, they should not have been levied by NGET as TNUoS Charges in the first place. Had these charges been excluded, the upper level of the Cap would

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<sup>138</sup> NoA, paragraph 6.35.

<sup>139</sup> NoA, paragraph 6.36.

<sup>140</sup> ERGEG Guidelines, page 4.

<sup>141</sup> NoA, paragraph 6.37.

<sup>142</sup> NoA, paragraph 6.38.

accordingly have been lower than the €2.5/MWh rate at which it had in fact been set.<sup>143</sup>

### *The Commission's adoption of Regulation*

- 5.35 When subsequently consulting on legally restricting the transmission charges levied on generators, the Appellants noted, the Commission had set out three options for consideration, namely (a) keep the existing arrangements (b) adopt the ERGEG Guidelines un-amended and (c) undertake further work with a view to amending the ERGEG Guidelines.<sup>144</sup> The Commission, furthermore, had recognised<sup>145</sup> that the ERGEG Guidelines produced in 2005 had themselves been the subject of public consultation.<sup>146</sup>
- 5.36 The Commission had, the Appellants continued, then issued a proposed text,<sup>147</sup> which then became the Regulation, to settle the issue of whether to legally restrict the transmission charges borne by generation. Alongside the Regulation issued on 23 September 2010, the Commission published an updated version of the Impact Assessment that had initially accompanied the proposed text.<sup>148</sup>
- 5.37 That Impact Assessment, the Appellants explained,<sup>149</sup> had made clear that:
- (a) differences in how network charges are set, and in particular the charges faced by generators for using the system could affect the effective functioning of the internal market;<sup>150</sup>
  - (b) a key aspect of the regulatory regime was that non-discriminatory and transparent prices for network access should be approved in advance by NRAs;<sup>151</sup> and
  - (c) tariff harmonisation had been aimed at the charges for local system users for the '**use** of the transmission system'. and these tariffs were paid to the transmission system operator (TSO) to whose system the user was connected.<sup>152</sup> [Emphasis added by the Appellants]

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<sup>143</sup> NoA, paragraph 6.38.

<sup>144</sup> Commission Consultation, page 24.

<sup>145</sup> Commission Consultation, page 4.

<sup>146</sup> NoA, paragraph 6.39.

<sup>147</sup> NoA, paragraph 6.40.

<sup>148</sup> NoA, paragraph 6.40.

<sup>149</sup> NoA, paragraph 6.40 (c), (d) & (e).

<sup>150</sup> Impact Assessment, page 7.

<sup>151</sup> Impact Assessment, page 7.

<sup>152</sup> Impact Assessment, page 12.

- 5.38 The Appellants submitted that the wording set out in paragraph 5.37(c) strongly implied that transmission charges were distinct from the connection charges paid in order to gain access to the transmission system in the first place.<sup>153</sup>
- 5.39 The Impact Assessment, the Appellants continued, had made clear that:<sup>154</sup>
- (a) the harmonisation of G Charges had been recommended in the ERGEG Guidelines;
  - (b) the ERGEG Guidelines had specified a range for G Charges for GB and certain other Member States distinct from those applicable to mainland Europe;
  - (c) the Commission had focussed on the ‘absolute value of charges, rather than harmonising the basis on which costs were calculated and/or the proportion of costs allocated to generators’ in line with the approach recommended by the ERGEG Guidelines; and
  - (d) the Commission had reasoned that such an approach allowed local circumstances to be taken into account.<sup>155</sup>
- 5.40 The Commission, the Appellants continued,<sup>156</sup> had concluded that:
- (a) it would be appropriate for it (the Commission) to adopt binding levels for G Charges in place of the previously existing voluntary guidelines;<sup>157</sup>
  - (b) the case had not been made out for departing from the range of allowable G-Charges set by the ERGEG Guidelines;<sup>158</sup> and
  - (c) the adoption of those guidelines by a formal legal measure would improve legal certainty, but beyond that NRAs would be best placed to set the appropriate level of transmission tariff for the systems which they oversaw.<sup>159</sup>

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<sup>153</sup> NoA, paragraph 6.40 (e).

<sup>154</sup> Impact Assessment, page 13.

<sup>155</sup> Impact Assessment, page 13.

<sup>156</sup> NoA, paragraph 6.40 (g) & (i).

<sup>157</sup> Impact Assessment, page 14 (top).

<sup>158</sup> Impact Assessment, page 36.

<sup>159</sup> Impact Assessment, page 36.

5.41 The Appellants noted the following text set out in Annex F of the Impact Assessment titled *Pricing principles for the use of electricity network infrastructure*.<sup>160</sup>

Both producers and consumers can affect total transmission costs through the **initial** costs associated with connecting them to the network, and through the manner in which they use the system. Consequently, charges faced by users can be both for the actual use of the system and the costs of connecting to the system.<sup>161</sup> [emphasis added by the Appellants]

5.42 The Appellants also drew attention<sup>162</sup> to the Commission's exposition in the same Annex of the difference between shallow connection charges and deep connection charges. Those responsible for determining generator transmission charges, the Commission had explained, often preferred a shallow connection charging regime because it reduced the risk of the initial connector to the system bearing an undue level of costs for the system as a whole. That, the Commission went on, would encourage free-riding of investments by subsequent connectors whereas a shallow connection charging regime meant that **only costs exclusively associated with the new connection** would be charged as connection charges.<sup>163</sup> [emphasis added by the Appellants]

5.43 On the basis of the Commission's reasoning, set out in paragraph 5.42, the Appellants submitted that this suggested that the Commission envisaged that the bulk of the network infrastructure costs incurred by a TSO would be recovered through transmission charges, rather than through connection charges.<sup>164</sup>

5.44 The Appellants noted<sup>165</sup> that the Commission had observed that insufficient evidence had been put forward as part of the consultation process to indicate a need at that point to adopt a different range of allowable G-charges than those provided for in the 2005 ERGEG Guidelines.<sup>166</sup> The Commission therefore proposed the incorporation of the ERGEG Guidelines in a binding legal measure.<sup>167</sup>

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<sup>160</sup> NoA, paragraph 6.40 (j) and [Impact Assessment](#), page 51.

<sup>161</sup> [Impact Assessment](#), page 51.

<sup>162</sup> NoA, paragraph 6.40 (k).

<sup>163</sup> [Impact Assessment](#), page 51.

<sup>164</sup> NoA, paragraph 6.40 (k).

<sup>165</sup> NoA, paragraph 6.41.

<sup>166</sup> [Impact Assessment](#), page 36.

<sup>167</sup> NoA, paragraph 6.41.

- 5.45 The Appellants submitted that the test in the 2005 ERGEG Guidelines and the Regulation were as a result virtually identical,<sup>168</sup> and produced a table setting out the 'before' and 'after' versions for key aspects of the restrictions on the levels of generator transmission charges.<sup>169</sup>
- 5.46 To conclude their pleadings regarding the relevance of the development of the Regulation, the Appellants submitted that the intended meaning behind the ERGEG Guidelines was 'plainly relevant'.<sup>170</sup> For the purposes of their appeal, that included:
- (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.<sup>171</sup>

*ERGEG had appreciated the charging structure in place in GB at the time of its consideration of the level of the Cap (ie the expected situation in GB)*

- 5.47 The Appellants submitted that the Cap set for GB reflected the expected situation for GB ie the existing charging arrangements at the time which reflected a shallow connection boundary. Therefore, the Appellants submitted, the Connection Exclusion for GB had only been intended to cover the narrow category of connection charges prevailing at the time.<sup>172</sup>
- 5.48 The Appellants contested the reasoning that GEMA had given in its CMP261 Decision to reject this argument. Whereas GEMA had attributed the high level (ie the €2.5/MWh) of the Cap given for GB to allow GB to continue with its system of Wider Locational Charges,<sup>173</sup> the Appellants submitted that there was little relationship between the levels of the caps given to individual member states and whether they operated a system of locational charging.<sup>174</sup> Regarding GEMA's contention that the Commission would not have intended that domestic charging arrangements to have been frozen in time,<sup>175</sup> the Appellants submitted that, although there had been some changes to the

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<sup>168</sup> NoA, paragraph 6.42. See table at 6.52 setting out the 'before' and 'after' text for the measure.

<sup>169</sup> NoA, pages 34 and 35.

<sup>170</sup> NoA, paragraph 6.43.

<sup>171</sup> NoA, paragraph 6.43.

<sup>172</sup> NoA, paragraph 6.44.

<sup>173</sup> NoA, paragraph 6.44(a).

<sup>174</sup> NoA, paragraph 6.46.

<sup>175</sup> NoA, paragraph 6.45(b).

GB's charging methodology under the CUSC,<sup>176</sup> what had not changed was the connection boundary itself.<sup>177</sup> Thus the basis on which the Cap had been set for GB was equally valid today.<sup>178</sup>

*Connection charges as one-off or initial charges for connection to the transmission system*

- 5.49 The Appellants noted that the explanatory notes to ERGEG's Guidelines (the Explanatory Note) had described connection charges as 'a one-off charge for their initial connection to the grid'.<sup>179</sup> The Appellants submitted therefore there was nothing to indicate that the Commission had intended to give a drastically broader construction to the concept of connection charges when it had excluded connection charges from the transmission charges covered by the Regulation. Indeed, the Appellants continued, the Commission's decision to formally adopt the ERGEG Guidelines, in almost identical terms, strongly suggested that the Commission had not intended (having consulted stakeholders) to depart from ERGEG's approach.<sup>180</sup>
- 5.50 The Appellants further noted<sup>181</sup> that in its Impact Assessment the Commission had expressed the view that formally adopting the ERGEG Guidelines would not adversely affect the ability of TSOs and NRAs to include effective locational signals within their territory. The Commission went on to state that adopting the measure would 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 prevailing situation where there was a wide degree of discretion for national regulators.<sup>182</sup>
- 5.51 Responding to the emphasis that GEMA had placed in its CMP261 Decision on the fact that connection charges were no longer preceded by the word one-off (and therefore the 'manner in which the charge is paid' was not determinative, rather the nature of the assets in question<sup>183</sup>), the Appellants submitted that GEMA had ignored the legislative history of the measure which shed light on the proper construction to be given to the terms used. In the

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<sup>176</sup> The Appellants describe these changes in paragraphs 6.50 to 6.54 of NoA.

<sup>177</sup> NoA, paragraph 6.55.

<sup>178</sup> NoA, paragraph 6.55.

<sup>179</sup> NoA, paragraph 6.56.

<sup>180</sup> NoA, paragraph 6.56.

<sup>181</sup> NoA, paragraph 6.56.

<sup>182</sup> Impact Assessment, page 36.

<sup>183</sup> See paragraphs 4.40-4.41.

Appellants' view, in taking such an approach GEMA had committed an error of law.<sup>184</sup>

### **GEMA's submissions**

5.52 GEMA submitted that its conclusion in the CMP261 Decision that Offshore GOS Charges fell within the Connection Exclusion was consistent with the context and purpose of the Regulation, viewed in the light of the *travaux préparatoires*.<sup>185</sup> In Table 3 we set out references to the *travaux préparatoires* that GEMA relied upon to support the basis on which it rejected CMP261.

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<sup>184</sup> [NoA](#), paragraph 6.57.

<sup>185</sup> [Reply](#), paragraph 4.8. See also Section 4, paragraphs 4.4-4.14 and Table 2.

**Table 3: Extracts from the *travaux préparatoires* selected by GEMA to support its reasoning in its CMP261 Decision**

Ref*	Extracts from the <i>travaux préparatoires</i> referred to by GEMA	GEMA's explanation of the extract's relevance to its CMP261 Decision
(a)	In the introduction to its 2008 consultation document the Commission stated that one of its two aims was 'to support the development of the single electricity market by ensuring that the costs of the transmission infrastructure were recovered from those responsible for its use'. [Commission Consultation, page 3.]	That text was consistent with Article 14 of the Regulation which declared that charges applied by network operators should 'reflect actual costs incurred'. [Reply, paragraph 4.8(a).] The principle of cost reflectivity was consistent with the Regulation's objective of promoting competition. [Reply, paragraph 4.8(a).]
(b)	In the introduction to its 2008 consultation document the Commission stated that one of its two aims was 'to support the development of the single electricity market by ensuring that the costs of the transmission infrastructure were recovered from those responsible for its use'. [Reply, paragraph 4.8(a). Note paragraph 4.8(b) of the Reply appears to be addressing the Commission's quote in paragraph 4.8(a), hence the same quote is copied here.	The existence of the Connection Exclusion reflects that principle of cost reflectivity. The costs of installing a connection to the pre-existing transmission system would vary substantially from case to case. The costs were likely to be relatively low if a generator chose to construct a power station adjacent to the pre-existing system. The costs would be much higher if (for example) a generator chose to locate offshore, and thus required the installation of long subsea cables to connect to the pre-existing system. The purpose of the Connection Exclusion was to ensure that the costs of installing a connection were met by the generator which caused those costs to be incurred, and which would benefit from the installation. It was therefore wholly consistent with the purpose of the Connection Exclusion that Offshore Local Charges should fall within it. [Reply, paragraph 4.8(b).]
(d)	The <i>travaux préparatoires</i> emphasised repeatedly that NRAs should be able to set tariffs in such a way as to provide locational signals – ie to ensure that a generator's decision about where to locate a power station takes proper account of the costs occasioned by that decision. [Reply, paragraph 4.8(d).]	If Offshore Local Charges were deemed to fall outside the Connection Exclusion, one obvious alternative to negative charging for onshore generators would be to reduce the extent to which offshore generators were required to contribute to the very high costs occasioned by their choice to generate offshore.  Reducing the extent to which offshore generators were required to contribute to their very high costs would be contrary to the principle of cost reflectivity. [Reply, paragraph 4.8(d).]
(e)	The Impact Assessment also stated that 'Connection charges can be either shallow or deep'. The Impact Assessment noted that 'shallow or shallowish charging is often preferred'. [Impact Assessment, page 52.]	The Commission did not in fact express a preference in its Impact Assessment and it was implicit that it considered that the Regulation did not preclude deeper connection boundaries.  Given that GB's transmission network currently has a shallow connection boundary, it followed that there was scope for the boundary to be deepened, without infringing the Regulation (although the Decision did not change GB's connection boundary). [Reply, paragraph 4.8(e).]
(f) & g)	The Impact Assessment stated that:  In order to ensure competitive neutrality between generators in different countries, there is a need for a <i>certain degree of harmonisation</i> [proportion] of total network costs borne by generators. [Impact Assessment, page 12.]  The [draft] guideline prepared by ERGEG represent the consensus view as to the <i>appropriate level of harmonisation</i> . [Impact Assessment, page 13.]  Separately it [= the section] considers the policy options in relation to <i>the degree of harmonisation</i> of transmission tariffs. [Impact Assessment, page 17.]	By approving ranges of acceptable charges (including wider ranges for certain Member States including GB), the Commission had not intended to achieve the maximum harmonisation possible and therefore had not prescribed a single inflexible model that all Member States had to adopt. [Reply, paragraph 4.8(f).]  The Appellants' position appeared to be that the Connection Exclusion should be construed as narrowly as possible, in order to minimise the scope for charges that were not subject to harmonisation. That would, GEMA submitted, imply that connection boundaries should be super-shallow in all Member States. The Commission's implicit acceptance of the legitimacy of deeper as well as shallow connection boundaries, and its rejection of a maximum harmonisation approach, indicated that such a legislative intent did not lie behind the Regulation. [Reply, paragraph 4.8(g).]

Source: CMA analysis based on the Reply, paragraph 4.8.

Note: \* Reference refers to subparagraphs of paragraph 4.8 to the Reply.

- 5.53 GEMA submitted that, for the reasons set out in Table 3, it had been right to conclude that charges in respect of Offshore GOS fell within the Connection Exclusion, and that there has therefore been no breach of the Cap.<sup>186</sup>
- 5.54 GEMA submitted that the explanation that the Appellants had given that the Cap set for GB reflected the current connection boundary and therefore should be respected, was flawed.<sup>187</sup> That explanation, GEMA submitted, was primarily based on a statement within ERGEG's response to the consultation on its proposed guidelines that the setting the level of the Cap for GB had corresponded to the expected situation in GB. However, GEMA pointed out, that statement, along with the rest of the *travaux préparatoires*, had made no reference to connection charges at all, let alone suggested that the €2.5/MWh cap had been set by reference to connection charges.<sup>188</sup>
- 5.55 In respect of the case that the Connection Exclusion was intended to take account of charges that were one-off, GEMA submitted that the Appellants' arguments were inconsistent. The Appellants appeared to submit that the *travaux préparatoires* indicated that the Connection Exclusion should be construed as narrowly as possible, but also that the Connection Exclusion should cover whatever was defined domestically as a connection charge in each Member State at the time the caps had been set. However, the Appellants also made the inconsistent submission that only a one-off charge fell within the Connection Exclusion, as this was the natural and ordinary meaning of the expression. Moreover, GEMA noted that under domestic arrangements the CUSC Connection Charges were sometimes defined to include ongoing payments.<sup>189</sup>
- 5.56 GEMA submitted that the Appellants had therefore failed to put forward a coherent account of what the Connection Exclusion had been intended to cover.<sup>190</sup>

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<sup>186</sup> [Reply](#), paragraph 4.9.

<sup>187</sup> [Reply](#), paragraph 4.19.

<sup>188</sup> [Reply](#), A10, paragraph 4.19 (a).

<sup>189</sup> [Reply](#), A10, paragraphs 4.10 (b) and 4.10(c).

<sup>190</sup> [Reply](#), A10, paragraph 4.11.

## **Sub-Ground 1(d): GEMA failed to give the expression ‘charges paid by producers for physical assets required for connection to the system or upgrade of the connection’ its natural and ordinary meaning**

### ***The Appellants’ submissions***

- 5.57 The Appellants submitted that 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.<sup>191</sup> The Appellants submitted that the intention of the ERGEG Guidelines was that the exclusion from G charges would apply to any charges paid by generators for physical assets required for the generators' connection to the system (or the upgrade of the connection).<sup>192</sup> The Appellants submitted that the emphasis should be on the act of connecting a particular generator to the transmission network.<sup>193</sup>
- 5.58 The Appellants submitted that the intention of the ERGEG Guidelines was that 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 and referenced the Commission’s Impact Assessment in support of this view.<sup>194</sup> The Appellants supported this submission by highlighting that the Impact Assessment stated that tariff harmonisation was aimed at the charges for local system users for the *use* of the transmission system.<sup>195</sup>
- 5.59 The Appellants submitted that the distinction between connection and use of system charges was consistent with the legal advice which NGET procured and received as Code Administrator for the CUSC Working Group under CMP261.<sup>196</sup> The Appellants drew attention to a passage from this legal advice which noted that GOS were treated as part of the transmission system in GB and TNUoS Charges included charges for the use of such spurs and that it is reasonable that such spurs should be included within the average G charges calculation.<sup>197</sup>
- 5.60 The Appellants submitted that GEMA was wrong to suggest that the natural and ordinary meaning of the words used provided much assistance in

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<sup>191</sup> NoA, paragraph 6.60.

<sup>192</sup> NoA, paragraph 6.61.

<sup>193</sup> NoA, paragraph 6.61.

<sup>194</sup> NoA, paragraphs 6.61 and 6.62.

<sup>195</sup> NoA, paragraph 6.62.

<sup>196</sup> NoA, paragraph 6.63.

<sup>197</sup> NoA, paragraph 6.63.

determining the scope of application of the Connection Exclusion in this case.<sup>198</sup> The Appellants referred, instead, to the purpose behind the Regulation and stated that it was to pursue a single market objective and remove impediments to the cross-border provision of electricity.<sup>199</sup>

- 5.61 The Appellants expanded on this point by stating that the intention was to put a cap on charges paid for the *use* of the transmission system, while allowing charges to continue to be charged for the *connection* of the generator to that system in the first place.<sup>200</sup> The Appellants used this distinction to contend that once a generator has paid for connection any subsequent charges are for use of the network and that this accords with the natural and ordinary meaning of the words used in the Connection Exclusion, in their proper context.<sup>201</sup>
- 5.62 The Appellants stated that local circuits and Local Substations can and do connect more than one Generator to the MITS. The Appellants further stated that whilst an asset may currently only connect one Generator it may be capable of being shared between more than one Generator and referenced GEMA's consideration of this point in the CMP224 Decision.<sup>202</sup>
- 5.63 The Appellants submitted that GEMA sought to introduce a new test, the 'but-for' test.<sup>203</sup> The Appellants submitted that the adoption of the but-for test by GEMA was an error of law.<sup>204</sup> Taken to its logical extreme, the costs of constructing a transmission system itself could be construed as connection charges on this analysis, since but for the transmission system a Generator would not be able to connect to it and provide electricity across it.<sup>205</sup>
- 5.64 The Appellants described a situation in which multiple new connections resulted in a new segment of transmission system being constructed. The Appellants contended that GEMA's construction of the Connection Exclusion would:
- (a) Deem an entire new segment of transmission system to be a connection asset; and<sup>206</sup>

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<sup>198</sup> Response, paragraph 40.

<sup>199</sup> Response, paragraph 40.

<sup>200</sup> Response, paragraph 40.

<sup>201</sup> Response, paragraph 40.

<sup>202</sup> Response, paragraph 44.

<sup>203</sup> Response, paragraphs 9 and 42.

<sup>204</sup> Response, paragraph 42.

<sup>205</sup> Response, paragraph 42.

<sup>206</sup> Response, paragraph 46.

(b) Imply that the whole system should be in the Connection Exclusion, as at some point each piece of network was required for connecting a Generator to the transmission system.<sup>207</sup>

5.65 At the Clarification Hearing, Counsel to the Appellants, Mr Beal QC, explained the Appellants' views on the 'but-for' test as follows:

GEMA falls back on the 'but-for' test because the but-for test simply means that but-for that asset existing there would be no means of transmitting electricity from generator through supplier to end user. Same would go for the main grid. That actually collapses in to an absurd argument because all of the network architecture from start to finish is designed to get electricity from generator to final customer. Therefore the 'but-for' test simply encapsulates too much architecture.<sup>208</sup>

5.66 Mr Beal QC went on to say at the Main Hearing that the but-for test was 'practically unworkable.'<sup>209</sup> Mr Beal QC described a hypothetical example to demonstrate that the but-for test was 'unworkable':

Think of 7500 generators offshore, onshore, all of whom have joined at different times over different periods, successive companies, earlier companies. People would turn around and say: 'Well I am not responsible for that bit of the infrastructure'. People will end up having a bidding war as to who should have to pay for what.<sup>210</sup>

### ***GEMA's submissions***

5.67 GEMA submitted that whilst Ground 1(d) concerned whether GEMA has given to the phrase 'charges paid by producers for physical assets required for connection to the system or the upgrade of the connection' its natural and ordinary meaning, the NoA did not actually contain any analysis of what the Appellants considered the natural and ordinary meaning to be.<sup>211</sup>

5.68 GEMA provided its interpretation of what it considered to be the natural and ordinary meaning of the phrase 'charges paid by producers for physical assets required for connection to the system or the upgrade of the

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<sup>207</sup> Response, paragraph 42.

<sup>208</sup> The Appellants Clarificatory Hearing, Mr Beal QC.

<sup>209</sup> The Appellants Main Hearing, Mr Beal QC.

<sup>210</sup> The Appellants Main Hearing, Mr Beal QC.

<sup>211</sup> [Reply](#), paragraph 4.22.

connection'. GEMA submitted that the natural and ordinary meaning covers charges paid by Generators in respect of tangible infrastructure, but for which a generating station would not be connected to the pre-existing transmission system.<sup>212</sup> GEMA further noted that SSE, in a 2008 consultation response,<sup>213</sup> described the assets in respect of which Local Charges are levied as 'the physical link between the generator and the transmission system'.<sup>214</sup>

- 5.69 GEMA submitted that the Appellants endorsed a position in which, at the moment connection is first effected, the infrastructure installed to link a generating station to the pre-existing transmission system becomes part of the system itself, and that this must mean that it ceases to be a connection.<sup>215</sup>
- 5.70 GEMA analysed the wording of the Connection Exclusion and drew a distinction between the wording 'physical assets required for connection' and charges for 'the act of connecting' or 'connection'. GEMA illustrated the point by describing a scenario in which a Generator is connected by the installation of connecting equipment and that equipment was subsequently removed. GEMA noted that the Generator would no longer be connected which, GEMA contended, demonstrated that the equipment is required for connection to the transmission system. GEMA submitted that this is evidence that ongoing charges for such equipment fall within the Connection Exclusion.<sup>216</sup>
- 5.71 GEMA also submitted that the phrase 'upgrade of the connection' used in the wording of the Connection Exclusion, indicated that the equipment installed to effect a connection continued to be a connection after the initial act of connecting had taken place.<sup>217</sup> GEMA submitted that if such equipment ceased to be a connection once the act of connecting had taken place, a connection could never be upgraded.<sup>218</sup>
- 5.72 GEMA submitted that if it is accepted that connecting equipment may continue to be classified as a connection beyond the initial point of connection then the Appellants' distinction between 'connection' and 'use' collapses.<sup>219</sup> GEMA highlighted that when a connection is intended to be used on an ongoing basis, ie. to enable electricity to flow from the generating station to

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<sup>212</sup> [Reply](#), paragraph 4.23.

<sup>213</sup> [SSE response to Ofgem consultation on GB ECM11 \(4 December 2008\)](#) page 3.

<sup>214</sup> [Reply](#), paragraph 4.23.

<sup>215</sup> [Reply](#), paragraph 4.24.

<sup>216</sup> [Reply](#), paragraph 4.25 (a).

<sup>217</sup> [Reply](#), paragraph 4.25 (b).

<sup>218</sup> [Reply](#), paragraph 4.25 (b).

<sup>219</sup> GEMA indicated that the Appellants made this distinction at paragraph 6.62 of the [NoA](#).

the pre-existing transmission system, it is not possible to sensibly distinguish between charges for connection and charges for use.<sup>220</sup>

- 5.73 During the Main Hearing, Mr Maclean QC addressed the Appellants' submission that the but-for test is unworkable,<sup>221</sup> stating the following:

It is not, with respect, right to say that our "but-for" test would catch a whole transmission system; nor is it right that the "but-for" test has somehow been dreamt up for reverse-engineering purposes; nor is it the case that it only applies to the offshore scenario. It does not. It is a principled approach to the question that arises for construing the regulation and applying the words of the regulation, applying the legal test to the particular factual circumstances.<sup>222</sup>

- 5.74 Mr Maclean QC went on to say:

I do not understand why it is practically unworkable. (a) what other test does he suggest and (b) what other test does he suggest that would be practically workable?<sup>223</sup>

## Our decision on Ground 1

### *Introduction*

- 5.75 It was common ground that if charges for Offshore GOS lawfully fell within the Connection Exclusion then the Cap would not be exceeded in 2015/16.<sup>224</sup> We have therefore considered the Appellants' case on Ground 1 primarily with reference to the treatment of charges for Offshore GOS. It was also common ground that if GEMA's interpretation of the Connection Exclusion were to be the correct one, then Offshore GOS do fall within the Connection Exclusion; and, conversely, that if the narrow interpretation were to be correct, then they did not.<sup>225</sup> Accordingly, the proper interpretation of the Connection Exclusion, as it relates to Offshore GOS, is central to the determination of this appeal.

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<sup>220</sup> Reply, paragraph 4.25 (d).

<sup>221</sup> See paragraph 5.66.

<sup>222</sup> Mr Maclean QC, GEMA Main Hearing.

<sup>223</sup> Mr Maclean QC, GEMA Main Hearing.

<sup>224</sup> *Suggested List of Matters Not in Dispute and List of Issues*, paragraph 2.5.

<sup>225</sup> See for example paragraph 2.4, in the *Suggested List of Matters Not in Dispute and List of Issues*, where it is agreed that if transmission charges as defined by the Regulation equate to TNUoS (which includes charges for Offshore GOS) ie the narrow interpretation, there is a breach.

We note in passing that its interpretation has not been considered by the CJEU or, so far as we are aware, any domestic court in the EU.<sup>226</sup>

- 5.76 The proper approach to interpreting a provision of EU law such as the Connection Exclusion was also common ground:
- (a) Where EU legislation uses an expression which is not defined, the expression's meaning 'must be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is a part'.<sup>227</sup>
  - (b) Recourse may be had to the *travaux préparatoires* in order to shed light on the purpose of a measure.<sup>228</sup>
- 5.77 In line with that approach, we proceed as follows:
- (a) First, we consider the natural and ordinary meaning of the Connection Exclusion; and
  - (b) Second, we consider whether the context, legislative purpose and objectives of the Regulation, informed by the *travaux préparatoires*, support that meaning or in fact suggest a different meaning.
- 5.78 As a preliminary point, we observe that in their written pleadings the Appellants advanced two interpretations of the Connection Exclusion.<sup>229</sup> These were characterised by the Appellants as a 'primary case' and 'secondary case' at the Main Hearing (see paragraph 5.7 for how these two cases were put in their Response to GEMA's Reply).
- 5.79 It is convenient to deal with the Appellants' secondary case at the outset.
- 5.80 The secondary case gives particular weight to the GB domestic charging practice for transmission,<sup>230</sup> which distinguishes between transmission connection charges and transmission use of system charges (TNuOS).<sup>231</sup>

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<sup>226</sup> At the Main Hearing, the Appellants drew our attention to a decision of the Brussels Court of Appeal released on 11 February 2013, cases 2012/AR/205, 2012/AR/217 and 2012/AR/220, but Counsel for the Appellants accepted that this decision did not seek to interpret the Connection Exclusion.

<sup>227</sup> Case C-568/15 *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV v comtech GmbH*, ECLI:EU:C:2017:154, paragraph 19.

<sup>228</sup> See eg Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625, paragraph 59; Case C-477/13 *Angerer*, ECLI:EU:C:2015:239, paragraph 33.

<sup>229</sup> Response, paragraphs 5.1 and 5.2.

<sup>230</sup> Response, paragraph 5.2.

<sup>231</sup> See paragraph 3.22.

- 5.81 The Regulation did not intend to harmonise the charging practices in each Member State.<sup>232</sup> That remains a matter for domestic policy.<sup>233</sup> The recovery in GB of the cost of Offshore GOS through TNUoS Charges (as opposed to through connection charges or even through Generators buying and owning the assets in question) is therefore permissible under the CUSC.<sup>234</sup> This flexibility afforded to Member States is evidenced by the range of different connection boundaries across the EU.<sup>235</sup>
- 5.82 The parties agreed that the interpretation of an EU instrument could not ordinarily depend on the approach taken in domestic law. We were referred to the *Monsanto* judgment of the CJEU, in which it was said that:<sup>236</sup>
- The need for the uniform application of Community law and the principle of equality require that the terms of a provision of Community law which...makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, which must take into account the context of that provision and the purpose of the legislation in question (see, to that effect, in particular Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43).
- 5.83 Accordingly, if the Appellants are contending, as part of their secondary case, that the Connection Exclusion should be interpreted consistently with domestic charging practice, then we reject that contention. Neither the Connection Exclusion itself nor the Regulation more generally makes reference to domestic law or practice, and we see no other reason to depart from the general approach outlined in *Monsanto*. As we explain at paragraphs 5.106 and 5.107, we do not accept that the *travaux préparatoires* compel a different conclusion.
- 5.84 We also note that the Appellants' secondary case, if correct, would prohibit charges levied through TNUoS in GB from being included in the Connection Exclusion. In the case of Offshore GOS, such a prohibition would run counter to the underlying economics of the infrastructure, as explained below.

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<sup>232</sup> See for example see Section 5.2 of the Impact Assessment, under the title Economic Impacts, pages 25 and 26. See also recital 10 of the Regulation.

<sup>233</sup> The CUSC defines GB charging and the EU Regulation sets caps, or more strictly ranges only. It does not prescribe charging methodology.

<sup>234</sup> See for example, Response, paragraph 16.

<sup>235</sup> [ACER Opinion](#), B25, 15 April 2014, Table 8 *Connection Charges* and CEPA slides titled 'European transmission tariff structures', dated 24 March 2015, slide 20. See also paragraphs 3.35 to 3.39.

<sup>236</sup> Case C-236/01 *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri*, ECLI: EU: C: 2003:431, paragraph 72.

- 5.85 In this case, Offshore GOS assets have the same characteristics as connection assets, in that they are also required for connecting a specific Generator to the transmission system, and the costs are primarily met by the Generator which caused the costs to be incurred.<sup>237</sup> We consider that Offshore GOS represent an example of a type of asset where a policy choice has been made in GB<sup>238</sup> to recover their costs through usage charges, rather than through connection charges, notwithstanding the fact that the assets are currently sole use assets.
- 5.86 To understand the rationale behind this policy choice, it is important to understand what distinguishes, under the CUSC, usage charges on the one hand from connection charges on the other. Under the CUSC, the distinguishing factor is that, for charges levied as usage charges, the identity of the individual network users (here Generators) on whom the charges are levied can, and typically does, change over time.<sup>239</sup> In contrast, connection charges are, and can only be, levied on the Generator who requested connection to the network in the first place.<sup>240</sup> Thus, with usage charges, as the network evolves, subsequent joiners to the network would be able to contribute fairly to the recovery of the cost of the network.
- 5.87 However, for the purposes of the Connection Exclusion, a distinction needs to be made, at any particular point in time, between those assets required by individual Generators for connection to the system and those assets deployed in the transmission network for purposes other than being required for connection to the system. This distinction does not depend on whether the charges levied under the CUSC are in practice levied on connection or usage.
- 5.88 The focus, therefore, is on whether Offshore GOS are required by Generators for connection to the system at any relevant point in time. It would be wrong in principle to seek to define the Connection Exclusion instead by reference to the extant GB domestic charging structure.

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<sup>237</sup> Local charges such as the costs associated with Offshore GOS are levied on the basis of the generating capacity of the windfarm eg if a windfarm had a generating capacity of 95MW and the link had a capacity of 100MW, the Generator pays for 95% of the costs. The simple average of the TEC as a proportion of the link's capacity for the 15 Offshore GOS was 94%. See for example Table 1, page 14 of *Warburton*. The remaining costs are recovered via the Residual Charge, see for example *Warburton*, paragraph 38.

<sup>238</sup> See [Regulation of Offshore Electricity Transmission, Government Response to the joint DTI/Ofgem Public Consultation](#), undated. In this document, at page 10 for example, it is stated that recovering the costs of connection via the regulated price control approach [ie recovering costs through TNUoS Charges] improved the overall economics of the projects.

<sup>239</sup> See paragraph 3.22.

<sup>240</sup> *Ibid.*

5.89 Having rejected the Appellants' secondary case, we now consider what the correct autonomous interpretation of the Connection Exclusion is, having regard to the rival interpretations advanced by the Parties.

***The natural and ordinary meaning of the Connection Exclusion***

5.90 As set out at paragraph 4.13, the Regulation provides that 'transmission charges' shall exclude, among other things, 'charged paid by producers for physical assets required for connection to the system or the upgrade of the connection'. This is the Connection Exclusion.

5.91 We note that the phrase 'the system' (by which is meant the transmission system)<sup>241</sup> is not defined in the Regulation. Nor is that expression defined in other relevant EU legislation:

- (a) Commission Regulation (EU) No 774/2010,<sup>242</sup> which is referred to in the recitals to the Regulation, does not define 'transmission system' either, but does incorporate by cross-reference the definitions used in Directive 2009/72/EC.<sup>243</sup>
- (b) Directive 2009/72/EC does not define 'transmission system' but does include definitions of 'transmission', 'transmission system operator' and 'interconnected system' as follows:
  - (i) 'transmission' is defined as 'the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply';
  - (ii) 'transmission system operator' is defined as 'a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity';

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<sup>241</sup> See the reference to 'the transmission system' in paragraph 2 of Annex B to the Regulation.

<sup>242</sup> Commission Regulation (EU) No 774/2010 of 2 September 2010 on laying down guidelines relating to inter-transmission system operator compensation and a common regulatory approach to transmission charging (2010) OJ L233/1.

<sup>243</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (2009) OJ L211/55.

(iii) 'interconnected system' is defined as 'a number of transmission and distribution systems linked together by means of one or more interconnectors'.

- 5.92 These definitions are, for present purposes, circular: 'transmission' refers to the transport of electricity on the interconnected system, but 'interconnected system' refers simply to 'transmission...systems'.
- 5.93 Accordingly, little assistance is to be gleaned from the legislation as to what is meant by 'the system' in the Connection Exclusion. We therefore consider the matter at the level of principle.
- 5.94 It seems to us that 'the system' here must mean the system as it exists at the point that a new Generator wishes to be connected to it. Any assets that are then required by that new Generator for connection to that pre-existing system (such as Offshore GOS in the case of a new windfarm) are ones that fall within the Connection Exclusion, and such assets continue to be required by that Generator for connection to the pre-existing system even once the Generator is operational. We therefore accept GEMA's submission that connecting equipment continues after the initial act of connecting to be 'required for connection to the system'.<sup>244</sup>
- 5.95 The Appellants' primary case is that 'charges paid ... for physical assets required for connection to the system' are charges paid for the initial act of connecting, and transmission charges are for the ongoing use of the network assets.<sup>245</sup> The necessary implication of the Appellants' suggested construction is that the ambit of 'the transmission system' widens immediately upon the act of connecting, such that an Offshore GOS falls within it despite, prior to construction, clearly being an asset required for connection to the system. This cannot, in our view, be correct, based on the natural and ordinary meaning of the words of the Connection Exclusion. Once a Generator has been connected to the transmission system, via the Offshore GOS, the Offshore GOS is still 'required for' connection to the system and the charges therefore still fall within the Connection Exclusion.
- 5.96 We therefore accept GEMA's submission that connecting equipment does not cease to be an asset required for connection, following the initial act of connecting.<sup>246</sup> Once this is recognised, the Appellants' distinction between the connection and use cannot be a valid one.

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<sup>244</sup> See paragraph 5.70.

<sup>245</sup> See paragraph 5.7.

<sup>246</sup> See paragraph 5.70.

5.97 The Appellants criticised GEMA's approach based on a 'but-for' test (or, as Counsel for GEMA put it at the Main Hearing, a 'required for' test) as being unworkable.<sup>247</sup> They submitted that the 'but-for' test would deem a new segment of transmission system to be a connection asset; they contended that, 'taken to its logical extreme, the costs of constructing a transmission system itself could be construed as connection charges...since but for the transmission system a generator would not be able to connect to it and provide electricity across it'.<sup>248</sup>

5.98 We disagree with this criticism of the 'but-for' test applied by GEMA in the CMP261 decision, for the following reasons:

(a) First, the Regulation necessarily pre-supposes that a transmission system is in existence to which a Generator may seek to be connected. The question is simply whether it should be confined to the pre-existing system as faced by a Generator wishing to connect to it (GEMA's position) or include the infrastructure put in place to connect the Generator to the pre-existing system, once the act of connecting that Generator has taken place (the Appellants' position). We cannot see how GEMA's interpretation, which requires asking what assets are required for the connection of that new Generator to the extant system, could (as the Appellants submit) lead to almost all charges paid by Generators being capable of falling within the Connection Exclusion.

(b) In 2015/16, 13 of the 15 Offshore GOS were used by a single windfarm.<sup>249</sup> The remaining two Offshore GOS connected two windfarms, which was planned from the outset of the project.<sup>250</sup> Offshore GOS did not therefore represent a new segment of transmission system. Rather, the assets were constructed because they were required for the purpose of connecting a generator to the pre-existing transmission system.

5.99 Both in correspondence and at the Main Hearings there was some debate among the Parties as to how Offshore GOS would be categorised in the event that, at some future point in time, a radial link were to be built, connecting a second offshore Generator to an offshore local substation built for the purposes of an initial offshore Generator, and whether this was informative of the correct interpretation of the Connection Exclusion. We did not find this debate particularly illuminating.<sup>251</sup> In any event, it is unnecessary for us to

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<sup>247</sup> See paragraph 5.66.

<sup>248</sup> Response, paragraph 42.

<sup>249</sup> See paragraph 3.9.

<sup>250</sup> *Ibid.*

<sup>251</sup> See for example, pages 2 and 3 of GEMA's response to CMA's factual questions, dated 7 February 2018 and GEMA's Clarification Hearing.

express a view as to the categorisation of the various offshore assets vis-à-vis that second Generator (or indeed the first, in that scenario) for the simple reason that those were not the facts in 2015/16, the charging year with which CMP261 was concerned.

5.100 The Appellants put forward a number of arguments regarding the risks of free-riding arising from a broad interpretation of the Connection Exclusion and the associated impacts on Generators' investment decisions.<sup>252</sup> As we have already explained, the interpretation of the Connection Exclusion is separate from the approach of domestic charging in GB.<sup>253</sup> Interpreting the Connection Exclusion in a broad rather than narrow fashion does not therefore change domestic charging practice.<sup>254</sup> We therefore do not consider that the issue of free-riding or its associated impact on investment decisions is relevant to our decision on this case.

5.101 In our view, therefore, the 'but-for' (or 'required-for') test is consistent with the wording of the Connection Exclusion. Applying that test, it is clear that Offshore GOS were constructed for the purpose of connecting the relevant generation assets to the then pre-existing transmission system and so - subject to our consideration of the legislative purpose, below - charges relating to them in 2015/16 are properly treated as falling within the Connection Exclusion.

***Does the purpose of the rules of which the Connection Exclusion forms part, as informed by the travaux préparatoires, lead to a different conclusion?***

5.102 In view of the CJEU jurisprudence cited at paragraph 5.76, we have considered the Parties' arguments under Ground 1(a) and (c) together.

5.103 Starting with the Regulation itself, it is evident that the primary objective of the Regulation was partial harmonisation of transmission charges across the EU so as to avoid undermining the internal market. Recital 10 to the Regulation states that:

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

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<sup>252</sup> See for example, [NoA](#), paragraph 6.40(k).

<sup>253</sup> See paragraph 5.81.

<sup>254</sup> Whilst not impacting the charging practice, the direct impact on TNuoS Charges paid by Generators in 2015/16 of either the narrow or the broad interpretation of the Connection Exclusion would be a change to the size of Residual Charge. It would also affect the distribution of charges between generation and supply due to more network charges being shared with supply under the narrow approach.

network in Member States should be kept within a range which helps to ensure that the benefits of harmonisation are realised.

5.104 The Appellants submitted that a broad interpretation of what fell within the Connection Exclusion would give greater scope for divergence across the domestic charging practices of Member States, which did not support harmonisation.<sup>255</sup> The Appellants further submitted that if a significant proportion of the charges a Generator must pay to use the transmission system were not covered by Cap, the Cap would become largely meaningless as a harmonising measure.<sup>256</sup> However, we do not think that this is the case, for the following reasons:

- (a) First, harmonisation in the Regulation goes no further than setting permissible ranges for average transmission charges. That of course begs, rather than answers, the question of what is excluded from transmission charges, ie (for relevant purposes) what is meant by the Connection Exclusion. The Regulation does not otherwise harmonise Member States' charging practices,<sup>257</sup> and indeed permits the charging of different transmission charges to different generators in any given Member State, provided that the average charge is within the permissible range.
- (b) Secondly, harmonisation is not itself an end pursued by the Regulation: it is a means to furthering the internal market objective. The narrow interpretation advocated by the Appellants would certainly reduce the level of charges that could be levied on Generators in GB, but that would not in itself further the achievement of the internal market.
- (c) Thirdly, whichever is the correct interpretation of the Connection Exclusion will by definition apply across the EU.

5.105 According to the Appellants, the *travaux préparatoires* show 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 cap; and (b) connection charges were understood to mean one-off charges for

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<sup>255</sup> See paragraph 5.4.

<sup>256</sup> *Ibid.*

<sup>257</sup> The CUSC defines GB charging and the EU Regulation sets caps, or more strictly ranges only. It does not prescribe charging methodology. See for example see Section 5.2 of the Impact Assessment, under the title Economic Impacts, pages 25 and 26.

an initial connection, even if some of those one-off charges might constitute items of capital expenditure....<sup>258</sup>

- 5.106 As to the first of these contentions, we have already explained that there is nothing in the Regulation itself indicating that the Connection Exclusion should be interpreted in line with domestic charging practices. In line with the CJEU judgment in *Monsanto*, that should be the end of the matter.
- 5.107 We accept that there are limited indications in the *travaux préparatoires* that the permissible ranges of average transmission charges were set by reference to the connection boundaries in each Member State at the time of the ERGEG Guidelines. In the face of different domestic charging practices across Member States, however, no guidance was given in any of the *travaux préparatoires* regarding what would be considered within the Connection Exclusion for the purposes of the Regulation, and the *travaux préparatoires* certainly do not provide any unambiguous support for the idea that the Connection Exclusion was to be defined by reference to the position obtaining in each Member State.
- 5.108 In support of their argument, the Appellants also made reference to a 2014 ACER opinion on the appropriate range of transmission charges paid by electricity producers. According to the Appellants, the opinion lends support to their argument that the Connection Exclusion should be interpreted in line with domestic charging practices. We do not accept, however, that the ACER opinion can be read in this way. The data cited in the opinion on G charges in GB, on which the Appellants rely, was taken from GEMA's annual reporting to ACER, which – as we explain at paragraph 7.31(b) under Ground 3 – was simply based on GEMA's own prudent approach. We consider the following extract from the opinion to be the most relevant:

As connection charges are exempted from the allowed ranges, Regulation (EU) No 838/2010 can lead to a different treatment of costs caused by generators. If the main infrastructure costs of the transmission grid stems from the physical connection facilities to the grid, the charges are excluded from harmonisation. If the costs are imposed by the future need for reinforcement within a meshed transmission grid, the charges are limited to the set ranges. As the Agency opinion proposes not to restrict power-based charges, National Regulatory Authorities could implement a more consistent charging setup.<sup>259</sup>

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<sup>258</sup> NoA, paragraph 6.29.

<sup>259</sup> Second paragraph of Section 4.1, page 19, Annex B of the 2014 [ACER opinion](#), dated 16 April 2014.

5.109 In our view, this extract provides the clearest indication of ACER's view of the Connection Exclusion. Its view was that under the Regulation, different costs caused by a (new) generator can be treated in different ways: costs stemming from the generator's physical connection to the grid are within the Connection Exclusion, whereas costs relating to the reinforcement of the meshed grid are not. That much is clear from the second and third sentences. Whilst the expression 'connection charges' in the first sentence introduces a degree of ambiguity in view of the way that expression is used earlier in the opinion, we do not accept that ACER thereby meant 'connection charges as defined in domestic practice': that would be fundamentally incompatible with the following two sentences of the extract. Further and in any event, (i) we note that this opinion post-dates the Regulation and so is not part of the *travaux préparatoires*; and (ii) the Monsanto test outlined at paragraph 5.82 would still not be satisfied, even if the Appellants' reading of the opinion were correct.

5.110 We therefore reject the Appellants' first contention as to the *travaux préparatoires*.

5.111 As to the Appellants' second contention, it is correct to say that our attention was drawn to certain materials, in particular, the Explanatory Note to the ERGEG Guidelines, which referred to one-off charges for initial connection to the grid as being usually known as connection charge, which were not considered to be part of the G charge for the purpose of the ERGEG Guidelines.<sup>260</sup> However, we do not consider that these references are sufficient to affect our view as to the correct interpretation of the Connection Exclusion, for the following reasons:

- (a) First, the Explanatory Note assumed, without analysis, that connection charges would be one-off, but the ERGEG Guidelines did not limit connection charges to one-off charges.<sup>261</sup>
- (b) Secondly, there is nothing in the later *travaux préparatoires* (ie materials actually emanating from the Commission, which are more likely to be informative of legislative purpose), or in the Regulation itself, to suggest that the Connection Exclusion is limited to one-off charges.
- (c) Thirdly, the Explanatory Note to the ERGEG Guidelines was prepared at a time when Offshore GOS did not exist at their current scale and the costs associated with them were, therefore, minimal. Although there was some recognition within the *travaux préparatoires* to the rollout of offshore

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<sup>260</sup> See for example, page 2 of the Explanatory Note to the ERGEG Guidelines, dated 18 July 2005.

<sup>261</sup> ERGEG Guidelines, paragraph 1.1, page 4.

transmission networks, it was envisaged that a specific solution would be found in due course.<sup>262</sup>

- (d) Finally, we note that even Connection Charges under the CUSC, are not as a matter of fact all levied on a one-off basis (see paragraph 5.55). In addition, to the extent that ‘one-off’ relates to the timing of charges, it would be irrational if whether an asset is paid for upfront or over time was determinative of the scope of the Connection Exclusion. This is in itself an indication that the Connection Exclusion cannot be limited to one-off, initial charges.

5.112 For all the foregoing reasons, therefore, our view is that the legislative purpose of the Regulation, viewed in light of the *travaux préparatoires*, does not compel us to interpret the Connection Exclusion in the ways suggested by the Appellants.

***The principle that exclusions from the application of EU law should be construed narrowly is not relevant to this case***

5.113 Under sub-Ground 1b, the Appellants contend that GEMA should have interpreted the Connection Exclusion narrowly, on the basis that it is an exclusion from the application of EU law.<sup>263</sup>

5.114 We do not accept this contention. Annex B to the Regulation provides that average transmission charges shall be within specified ranges, but specifically excludes certain charges from the ambit of average transmission charges. We agree with GEMA’s submission<sup>264</sup> that the exclusions, including the Connection Exclusion, serve a definitional purpose rather than derogate from a general rule. Accordingly the case law cited by the Appellants, which concerned derogations from general rules,<sup>265</sup> does not assist.

***Our conclusion on Ground 1***

5.115 For the reasons given above, we reject Ground 1.

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<sup>262</sup> Impact Assessment, page 10, sentence beginning ‘Increasing amounts of wind’ including footnote 9.

<sup>263</sup> See paragraph 5.17.

<sup>264</sup> See paragraphs 5.18-5.20.

<sup>265</sup> Case C-175/09 *HMRC v AXA UK plc* [2010] ECR I-10701; Case C-304/15 *Commission v UK*, ECLI:EU:C:2016:706.

## 6. Ground 2: Error of fact in GEMA's evidential assessment of which charges should be within the Connection Exclusion and other errors of fact

### Introduction

- 6.1 In this section we address Ground 2 of the Appellants' NoA, namely that GEMA erred in fact in its evidential assessment of which charges should be within the Connection Exclusion.<sup>266</sup>

### The Appellants' submissions

#### *The transmission system is the NETS, not the MITS*

- 6.2 The Appellants submitted that the charges that GEMA were deeming to fall within the Connection Exclusion, including charges in relation to Offshore GOS, were charges for the transmission of electricity across a particular and defined aspect of the network.<sup>267</sup> Under the CUSC, they were not charges associated with connecting the Generator to the GB NETS, but instead were variable charges levied by NGET on the basis of the use of its transmission network.<sup>268</sup>
- 6.3 The Appellants continued that under the CUSC the recovery for charges for the use of the transmission system was split between users of the system, ie between Generators (G) and Demand (D).<sup>269</sup> That meant that what was not recovered from Generators (G) would have to be recovered from Demand (D). Those transmission charges, the Appellants submitted, were distinct from the connection charges paid, in order to gain access to the transmission system in the first place.<sup>270</sup>
- 6.4 The GB electricity transmission system, the Appellants explained, was known as the NETS, to which Generators applied to connect.<sup>271</sup> The NETS was made up of the local network and the MITS.<sup>272</sup> The separate section of the

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<sup>266</sup> NoA, page 46.

<sup>267</sup> NoA, paragraph 6.67.

<sup>268</sup> NoA, paragraphs 6.67 to 6.69. We note that NGET in its TSSO role levies and collects transmission charges. NGET is also the main owner of the GB transmission network but other parts of this network are owned by other operators, not least the OFTOs. See paragraph 3.17 for further explanation.

<sup>269</sup> NoA, paragraph 6.68 and Impact Assessment, page 12: 'An important element of the structure of national tariff systems in the context of cross-border trade is therefore the ratio between the costs allocated to generation and the costs allocated to consumption.'

<sup>270</sup> NoA, paragraph 6.68.

<sup>271</sup> NoA, paragraph 6.69.

<sup>272</sup> NoA, paragraph 6.69.

CUSC dealing with 'Connections'<sup>273</sup> referred only to connecting with the NETS and made no reference to the MITS.<sup>274</sup> The Appellants submitted that in the context of GB charging, the transmission system had to be understood to mean the NETS (ie including the local network).<sup>275</sup> For that reason, charges which related to the recovery of Local Assets providing the connection to the MITS node constituted transmission use of system charges (because they were within NETS). These charges included local circuit, Local Substation and GOS<sup>276</sup> Charges.<sup>277</sup>

- 6.5 The Appellants submitted that unlike connection charges, local circuit, Local Substation and/or GOS Charges were not based on the depreciation of the asset, their finance, operation, maintenance or administrative costs. Rather, they were comparable to the main TNUoS calculation in that they adopt zonal marginal km expansion factors.<sup>278</sup>
- 6.6 Furthermore, the Appellants submitted, that ever since the introduction in 2004 of the shallow connection boundary in GB, it was only connection assets that were non-shareable. All other assets were classed as infrastructure assets the costs of which were recovered through TNUoS Charges.<sup>279</sup> The Appellants referred to NGET's briefing paper on *Connection Charging*<sup>280</sup> as supporting evidence for this view.<sup>281</sup>
- 6.7 The Appellants submitted that NGET's view on connection charging for the purposes of the CUSC accorded with the natural and ordinary meaning of the terms connection charges and transmission charges (as per Ground 1(d)).<sup>282</sup> Local circuit, Local Substation and GOS Charges, the Appellants continued, were not to be included within the Connection Exclusion as they were more properly described as relating to the *use* of the transmission system.<sup>283</sup>

### ***Lack of similarity between connection and local usage charges***

- 6.8 The Appellants disagreed with GEMA's contention<sup>284</sup> set out in its CMP261 Decision that connection and TNUoS Charges were in substance very similar

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<sup>273</sup> Section 2 of the CUSC.

<sup>274</sup> NoA, paragraph 6.69.

<sup>275</sup> NoA, paragraph 6.69.

<sup>276</sup> We note that charges for GOS, including Offshore GOS, comprise local substation and local circuit charges.

<sup>277</sup> NoA, paragraph 6.69 to 6.70.

<sup>278</sup> NoA, paragraph 6.70.

<sup>279</sup> NoA, paragraph 6.51

<sup>280</sup> Connection Charging Brief, dated 11/04/2012.

<sup>281</sup> NoA, paragraph 6.71.

<sup>282</sup> NoA, paragraph 6.72.

<sup>283</sup> NoA, paragraph 6.72.

<sup>284</sup> CMP261 Decision, page 8.

to each other.<sup>285</sup> For example, they explained, connection charges under the CUSC applied to sole use assets only, whereas it was open to any other Generator to branch into the transmission network at the same node point used by an existing Generator and be subject to the appropriate local circuit/Local Substation/GOS Charges.<sup>286</sup>

- 6.9 GEMA was therefore wrong to conclude that the structure of the two sets of charges were very similar to each other, such that the latter (local transmission usage charges) fell within the Connection Exclusion.<sup>287</sup>

***Ireland would only be one relevant comparator when ascertaining practice in other member states***

- 6.10 The Appellants noted that GEMA had asserted that in Ireland, which had the same charge range as GB (at €0-2.5/MWh), comparable assets (to local assets) were paid for via connection charges and those charges were excluded for the purposes of calculating the annual average transmission charges under the Regulation.<sup>288</sup> The Appellants submitted that GEMA would not be able to establish a regular practice within other Member States by referring to only one of them. Furthermore, it had not been clear to the Appellants from the CMP261 Decision why GEMA had drawn such a categorical conclusion in relation to the position in Ireland, given, according to the Appellants, the relevant Irish documents suggested that the position was, at the very least, considerably more nuanced than GEMA had suggested.<sup>289</sup>

**GEMA's submissions**

- 6.11 By way of introduction, GEMA submitted that whilst Ground 2 purported to be an argument that it had erred in fact, the bulk of the Appellants' submission was, however, directed to the question of how charges should be categorised. That, GEMA argued, was an issue of law, not of fact.<sup>290</sup> Much of the ground overlapped with that of Ground 1(d).<sup>291</sup>
- 6.12 GEMA then sought to rebut each of the arguments the Appellants had put forward<sup>292</sup> as explained below.

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<sup>285</sup> NoA, paragraphs 6.73 and 6.74.

<sup>286</sup> NoA, paragraph 6.74.

<sup>287</sup> NoA, paragraph 6.75.

<sup>288</sup> NoA, paragraph 6.76.

<sup>289</sup> NoA, paragraph 6.76.

<sup>290</sup> Reply, paragraph 5.1.

<sup>291</sup> Reply, paragraph 5.2.

<sup>292</sup> Reply, paragraph 5.2.

### ***The definition of the transmission system in GB is not relevant***

- 6.13 GEMA agreed that the GB transmission system was defined domestically as the NETS, and that GOS (whether Offshore or Onshore) formed part of the domestically-defined NETS. However, GEMA submitted that the Appellants had missed the point and that the ways in which different pieces of infrastructure were labelled for domestic purposes was immaterial to the proper construction of a harmonising EU measure: how the ‘transmission system’ might be understood ‘in the context of GB charging’ did not determine what constituted ‘physical assets required for connection to the system’ within the meaning of the Regulation.<sup>293</sup>
- 6.14 GEMA noted that NGET’s briefing paper on Connection Charging (see paragraph 6.56), referred to connection charges, in relation to the costs of installing and maintaining assets. The reference to maintenance, GEMA submitted, contradicted the Appellants’ assertion that connection charges could only relate to a one-off act of connecting.<sup>294</sup>
- 6.15 GEMA challenged the Appellants’ assertion that the NGET summary description accorded with the ordinary and natural meaning of the term connection charges. GEMA submitted that the Appellants had provided no reasoning in support of that assertion. In any event, GEMA observed, the Connection Exclusion did not use the term connection charges – that was not the expression whose natural and ordinary meaning needed to be identified.<sup>295</sup>

### ***GEMA’s case did not rely on the concept of shareability***

- 6.16 GEMA disagreed with the distinction that the Appellants had drawn between assets which were considered under the CUSC to be sole use (ie connection assets) and those that were considered to be shareable (ie transmission infrastructure assets).<sup>296</sup> GEMA explained itself as follows:
- (a) The Regulation had not identified shareability as a criterion for whether a charge fell within the Connection Exclusion. That an asset might be shareable did not preclude its being ‘required for connection to the system’;<sup>297</sup>

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<sup>293</sup> [Reply](#), paragraph 5.2 (a).

<sup>294</sup> [Reply](#), paragraph 5.2 (c).

<sup>295</sup> [Reply](#), paragraph 5.2 (d).

<sup>296</sup> [Reply](#), paragraph 5.3.

<sup>297</sup> [Reply](#), paragraph 5.3 (a) (i).

- (b) Shareability did not mark a clear dividing line between assets in respect of which CUSC Connection Charges and Local Charges were levied. Even if a transmission cable were to be non-shareable, it would only be classed as a connection asset if it equalled to or less than 2km in length.<sup>298</sup> That 2km cut-off, GEMA explained, was arbitrary, and underlined that the distinction between connection and local charges under the CUSC did not provide any principled basis upon which to determine what fell within the Connection Exclusion;<sup>299</sup>
- (c) All but two existing Offshore GOS were in fact not currently shared. The two Offshore GOS that were shared had each from the outset been planned as joint projects to serve two specific Generators. In GEMA's view, the assets installed in these two cases had also been required for those Generators' connection to the pre-existing system;<sup>300</sup> and
- (d) The likelihood of any existing Offshore GOS being shared (or further shared) was very low, given that such spurs had been installed to meet the needs of a specific project, with minimal spare capacity.<sup>301</sup>

### ***Similarity of connection and local usage charges***

- 6.17 GEMA disagreed with the view articulated by the Appellants as set out in paragraph 6.5. Whereas Wider Locational Charges were calculated on a zonal basis, Local Charges were not. Local Charges recovered the specific cost of the assets installed.<sup>302</sup>
- 6.18 GEMA reiterated that, as explained in its CMP261 Decision, there were in fact several similarities between connection and local usage charges, not least that both included recovery of both a capital and a non-capital element.<sup>303</sup>

### ***Variation in charging practices across member states***

- 6.19 GEMA explained that it had not suggested that the comparison with Ireland (see paragraph 6.10) established a regular practice, rather that variation in what would be classed as a connection charge in different Member States underlined the need to focus on the assets to which a charge related, rather than the domestic label that it happened to be given.<sup>304</sup>

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<sup>298</sup> CUSC, paragraph 14.2.6(c).

<sup>299</sup> Reply, paragraph 5.3 (a) (ii).

<sup>300</sup> Reply, paragraph 5.3 (a) (iv).

<sup>301</sup> Reply, paragraph 5.3 (a) (v) and page 76 of the Main Party Hearing lines 8 to 13.

<sup>302</sup> Reply, paragraph 5.3 (b).

<sup>303</sup> Reply, paragraph 5.3 (c).

<sup>304</sup> Reply, paragraph 5.4 (a).

## **Our decision on Ground 2**

- 6.20 We agree with GEMA that the arguments raised by the Appellants under Ground 2 overlap with the Appellants' submissions in Ground 1, and that the allegation that GEMA made an error of fact under Ground 2 is premised on the question of how charges should be categorised which is a question of law to be determined under Ground 1.<sup>305</sup>
- 6.21 Accordingly, given our conclusion on Ground 1, we consider that the same conclusion is appropriate for Ground 2.
- 6.22 As concluded under Ground 1 and explained in paragraphs 5.80 to 5.89, we do not agree with the Appellants that what distinguishes connection charges from usage charges under the CUSC is the same as what determines charges that fall within the scope of the Regulation. Whilst there are some differences between the way connection charges and Local Usage charges for Offshore GOS are levied, we are of the view that both sets of charges recover the cost of assets required for connection to the system for the purposes of the Connection Exclusion.
- 6.23 Further, as concluded on Ground 1, GEMA was right to use the 'required for' (or 'but-for') test, to determine whether Offshore GOS were covered by the Connection Exclusion. Under the but-for test, charges for Offshore GOS and connection charges under the CUSC are similar because they are both charges for assets 'required for' connection to the system. Both charges for Offshore GOS and connection charges under the CUSC are therefore included in the Connection Exclusion.
- 6.24 It was not disputed that different Member States have different boundaries regarding what costs are recovered through connection charges on the one hand and usage charges on the other hand.<sup>306</sup> As concluded under Ground 1 and explained in 5.83, however, the Connection Exclusion is an EU law concept with an autonomous meaning.

## ***Our conclusion on Ground 2***

- 6.25 For the reasons given above, we reject Ground 2.

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<sup>305</sup> See paragraph 6.11.

<sup>306</sup> CEPA slides titled 'European transmission tariff structures', dated 24 March 2015, slide 20.

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

### **Introduction**

7.1 In this section we address Ground 3 of the NoA. This is that GEMA's CMP261 Decision constituted an abuse of process and/or infringed the principle of regulatory consistency.<sup>307</sup>

### **The Appellants' submissions**

7.2 The Appellants submitted that GEMA's suggestion in the CMP261 Decision that it did not reach a 'concluded view' in the CMP224 Decision was wrong for the following reasons:

- (a) The CMP224 Decision approved the inclusion of local circuit charges, Local Substations and Offshore GOS Charges in the TNUoS. This necessarily required GEMA to have decided that they were not 'charges for physical assets required for connection to the system'.<sup>308</sup>
- (b) Adopting the narrow interpretation was an integral part of the CMP224 Decision and the Decision could not have proceeded on the basis of the broad interpretation.<sup>309</sup>
- (c) GEMA stated that the narrow interpretation was 'the better interpretation' in its CMP224 Decision.<sup>310</sup> GEMA considered certain alternative modification proposals based on the broad interpretation of the Connection Exclusion during the CMP224 consultation but these were not approved.<sup>311</sup>
- (d) If GEMA thought both interpretations were correct, it should have considered rejecting CMP224 or sent it back to ensure that both interpretations were included in the CUSC.<sup>312</sup>

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<sup>307</sup> NoA, page 48.

<sup>308</sup> NoA, paragraph 6.87.

<sup>309</sup> Response, paragraphs 73 and 74.

<sup>310</sup> NoA, paragraph 6.92, CMP224 GEMA Consultation letter, page 5.

<sup>311</sup> NoA, paragraphs 6.81 and 6.88.

<sup>312</sup> NoA, paragraph 6.82.

- (e) GEMA accepted the GB TNUoS Charges each year from 2010 and reported these annually to the Commission. These charges and reporting were both done on the basis of the narrow interpretation.<sup>313</sup>
- (f) There was a consensus view in the industry that the narrow approach was appropriate.<sup>314</sup> For example, in CMP251, an ongoing CUSC modification proposal, GEMA adopted the same policy and practice.<sup>315</sup>
- (g) NGET itself proposed that Offshore GOS Charges should be collected through TNUoS Charges.<sup>316</sup> Indeed it was NGET who raised CMP224 to address the risk of breaching the Cap set by the Regulation.<sup>317</sup> NGET had been charging annual TNUoS Charges, which included Offshore GOS Charges.<sup>318</sup>
- (h) GEMA necessarily reached a concluded view on how to interpret the Regulation, because the CMP224 Decision had the effect of suppliers being charged more by way of transmission charges than would have been the case under the broad interpretation.<sup>319</sup>

- 7.3 On the basis that GEMA made a decision that the narrow interpretation was appropriate in its CMP224 Decision, the Appellants submitted that it would be an abuse of process for GEMA to resile from that decision in its CMP261 Decision.<sup>320</sup> To depart from the narrow interpretation would infringe the requirement of regulatory consistency under section 3A (5A) of the Electricity Act 1989.<sup>321</sup> The Appellants referred to settled case law to support their argument that the CMP224 Decision was binding.<sup>322</sup>
- 7.4 The Appellants submitted that there can be no rational basis to have a different definition of costs on an *ex post* and *ex ante* basis.<sup>323</sup>
- 7.5 The Appellants further submitted that there was an established reconciliation process for 2015/16, which took place in Spring 2016. If CMP261 had been

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<sup>313</sup> NoA, paragraph 6.82.

<sup>314</sup> NoA, paragraph 6.83.

<sup>315</sup> NoA, paragraph 6.99 and CMP251 FMR: 'Removing the error margin in the Cap on total TNUoS recovered by generation and introducing a new charging element to TNUoS to ensure compliance with European Commission Regulation 838/2010'.

<sup>316</sup> NoA, paragraph 6.84.

<sup>317</sup> NoA, paragraph 6.84.

<sup>318</sup> NoA, paragraph 6.88.

<sup>319</sup> Response, paragraph 74.

<sup>320</sup> NoA, paragraph 6.95.

<sup>321</sup> NoA, paragraph 6.99.

<sup>322</sup> For instance, Case C-310/97P *Commission v AssiDomän Kraft products AB* [1999] ECR I-5363, paragraphs 53-55 and 57-61 and *Vodafone v BT* [2010] EWCA Civ 391 paragraphs 42-46.

<sup>323</sup> NoA, paragraph 6.97.

fast tracked, the necessary ‘truing up of values’ would have been done as part of that reconciliation process.<sup>324</sup>

- 7.6 The Appellants said that in order to depart from an established decision on a prospective basis GEMA would need to show that there had been a material change in circumstances.<sup>325</sup>
- 7.7 According to the Appellants, to the extent that GEMA had given any unambiguous and unequivocal statement to the regulated entities or industry participants as to how it intended to behave, it was required to follow such a statement.<sup>326</sup>
- 7.8 The Appellants added that where a procedural or substantive legitimate expectation has been set, as in this case, it must be respected as a matter of fairness.<sup>327</sup> The Appellants further submitted that a legitimate expectation may be recognised in law even where no detrimental reliance is shown.<sup>328</sup>
- 7.9 The Appellants submitted that the option was open to GEMA to raise any concerns it had with the level of the Cap with the ACER.<sup>329</sup> The Appellants stated that they had found no evidence of GEMA raising concerns with ACER or of ACER ignoring concerns raised by GEMA when coming to its opinion on the GB cap level.<sup>330</sup>
- 7.10 The Appellants stated that in their view, GEMA could resile from its stated policy approach if adopted in error but with prospective effect only.<sup>331</sup>
- 7.11 Finally, the Appellants submitted that GEMA changed a material fact or base assumption that underpinned the bids entered by Generators in the Capacity Market.<sup>332</sup> The nature of the Capacity Market was that Generators are locked-in to contracts for four years, based on bids already submitted and

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<sup>324</sup> NoA, paragraph 6.97.

<sup>325</sup> NoA, paragraph 6.100. The following cases were cited as precedent that a public body decision maker must follow its stated policy unless there are good reasons for not doing so: *Kambadzi v. Secretary of State for the Home Department* [2011] UKSC 23, paragraphs 36 and 41; *Davies and Gaines-Cooper v HMRC* [2011] UKSC 47 paragraphs 27-29 and 70; *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, paragraphs 20 and 26.

<sup>326</sup> NoA, paragraph 6.101. The Appellants relied, amongst other caselaw, on *Paponette v AG of Trinidad and Tobago* [2010] UKPC 32, paragraphs 37-38.

<sup>327</sup> *Ibid*, and *R (Hely-Hutchinson) v HMRC* [2015] EWHC 3261 (Admin) paragraphs 42-43, *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363, paragraphs 68-69.

<sup>328</sup> NoA, paragraph 6.102 and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, paragraph 60.

<sup>329</sup> NoA, paragraph 6.103.

<sup>330</sup> NoA, paragraph 6.104 and *ACER Opinion* dated 15 April 2014.

<sup>331</sup> NoA, paragraph 6.102 and Response, paragraph 78. The Appellants relied on *Samarkand Film Partnership No 3 v HMRC* [2017] STC 926, paragraphs 115, 117-119 and *Biffa v HMRC* [2016] EWHC 1444 (Admin), paragraphs 78-83 and 144 in support of their proposition.

<sup>332</sup> NoA, paragraph 5.7.

accepted.<sup>333</sup> It follows that the Generators cannot adjust their bids to reflect GEMA's change in position and offset the overcharge caused by the breach of the Regulation via adjustments to their capacity bids.<sup>334</sup>

## GEMA's submissions

- 7.12 GEMA submitted that, as a matter of fact, the Appellants were wrong to assert that GEMA reached a concluded view as to the correct interpretation of the Connection Exclusion in its CMP224 Decision.<sup>335</sup> It was not part of the CMP224 Decision that any particular interpretation of the Connection Exclusion was correct in law.<sup>336</sup>
- 7.13 Notwithstanding the above, GEMA considered that as a matter of law, even if it had made a decision on the correct interpretation of the Connection Exclusion, this did not preclude it from taking a different view in its CMP261 Decision.<sup>337</sup>
- 7.14 GEMA made the following submissions to support its view that no decision on the correct interpretation of the Connection Exclusion was made:
- (a) GEMA quoted the text from the CMP224 Decision document, including GEMA's statements that (i) 'the Regulation is ambiguous with respect to the connection exclusion'<sup>338</sup> and (ii) 'both the strict [or narrow] interpretation and the broad interpretation constitute a reasonable interpretation.'<sup>339</sup>
  - (b) NGET consulted on the proposed modification to the CUSC. The consultation document made it clear that the assessment that there might in future be a breach of the Cap was built on the interpretation of the Connection Exclusion being narrow and that the precise interpretation was uncertain.<sup>340</sup>
  - (c) The CMP224 proposal was intended to ensure compliance with the Regulation *ex ante*.<sup>341</sup> The proposal aimed to 'counter the risk of non-

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<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid.*

<sup>335</sup> Reply, paragraph 6.2.

<sup>336</sup> Reply, paragraph 6.28.

<sup>337</sup> Reply, paragraph 6.45.

<sup>338</sup> Reply, paragraph 6.4 and CMP224 Decision, page 6.

<sup>339</sup> Reply, paragraph 6.22 and CMP224 consultation letter, page 4.

<sup>340</sup> Reply, paragraph 6.13 and CMP224 Code Administrator Consultation, paragraph 4.4.

<sup>341</sup> Reply, paragraph 6.8.

compliance' rather than consider what charges should be included in the Connection Exclusion.<sup>342</sup>

- (d) The CUSC Panel determined that the CMP224 proposal should be considered by a workgroup.<sup>343</sup> This CMP224 workgroup specifically developed and considered modified proposals based on the broad interpretation – ie where TNUoS Charges associated with Offshore GOS would be treated as falling within the Connection Exclusion.<sup>344</sup>
- (e) The CUSC workgroup established to determine the outcome of CMP224 contained eight members. Three out of the eight members supported a modification that excludes 'for assets that are charges part of a spur connection for the sole purpose of connecting generation to the MITS' from TNUoS Charges. The Appellants are therefore wrong to suggest that there was a consensus view in the industry.<sup>345</sup>
- (f) GEMA was not required to reach a concluded view on the interpretation of the Connection Exclusion in the context of CMP224.<sup>346</sup> The Cap sets an *ex ante* maximum annual average transmission charge.<sup>347</sup> It follows that GEMA was able to take a prudent approach as to how the Connection Exclusion might be interpreted, so that the Cap would not be breached even on the most limited view of what the Connection Exclusion covers.<sup>348</sup> According to GEMA, it was only when CMP261 was proposed that it needed to reach a concluded view.<sup>349</sup>
- (g) €2.5/MWh is a cap, rather than a target. GEMA does not have a policy of imposing the maximum transmission charges possible under the Regulation.<sup>350</sup> GEMA submitted that it had been seeking to prevent a breach of the Cap rather than aim for a charge of €2.5/MWh. It follows that there has been no misapplication of the Regulation, as submitted in the NoA.<sup>351</sup>

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<sup>342</sup> Reply, paragraph 6.7.

<sup>343</sup> Reply, paragraph 6.9.

<sup>344</sup> Reply, paragraph 6.10.

<sup>345</sup> Reply, paragraphs 6.16 and 6.17.

<sup>346</sup> Reply, paragraphs 6.30 and 6.37.

<sup>347</sup> Reply, paragraph 6.30.

<sup>348</sup> *Ibid.*

<sup>349</sup> Reply, paragraph 6.31.

<sup>350</sup> Reply, paragraphs 6.33 and 6.34. GEMA cited two pieces of evidence that it does not have a policy of imposing maximum transmission charges on the generators – its approval of CMP255 the object of which was to address the risk of a sudden increase in the G proportion of the G:D split and its ongoing Significant Code Review 'Targeted Charging Review'.

<sup>351</sup> Reply, paragraph 6.33.

- 7.15 GEMA addressed the Appellants' argument that it had approved charging methodologies in the CUSC, which adopted the narrow interpretation of the Connection Exclusion.<sup>352</sup> GEMA agreed with the Appellants that this was the case, but did not consider that the definition of connection charges in GB in the CUSC, was determinative of the meaning of the Connection Exclusion under EU law.<sup>353</sup>
- 7.16 GEMA addressed the Appellants' argument that in an ongoing CUSC Modification Proposal, CMP251, GEMA adopted the same approach.<sup>354</sup> GEMA submitted that it had not yet reached a decision on CMP251, hence the Appellants could not rely on a policy or practice adopted in CMP251 to found a legitimate expectation.<sup>355</sup>
- 7.17 GEMA addressed the Appellants' claim that the ongoing reporting to the Commission using the narrow interpretation supported the notion that GEMA made a decision with respect of the correct interpretation of the Connection Exclusion.<sup>356</sup> GEMA submitted that this annual reporting to the Commission proceeded on the same basis as the CMP224 Decision, namely that the narrow interpretation 'might' be correct.<sup>357</sup> It therefore added nothing to the suggestion that GEMA reached a concluded view.<sup>358</sup>
- 7.18 Notwithstanding GEMA's position that it did not conclude on the correct interpretation of the Connection Exclusion, GEMA considered that even if it had made a decision on the correct interpretation of the Connection Exclusion, this did not preclude it from taking a different view in its CMP261 Decision.<sup>359</sup> This was supported by the following:
- (a) GEMA was not required to make a policy decision on how to interpret the Connection Exclusion.<sup>360</sup> The correct interpretation of the Connection Exclusion is a matter of law, not regulatory judgement.<sup>361</sup> A public authority cannot be bound to maintain an incorrect view of the law.<sup>362</sup>

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<sup>352</sup> Reply, paragraph 6.40.

<sup>353</sup> *Ibid.*

<sup>354</sup> *NoA*, paragraph 6.99.

<sup>355</sup> Reply, paragraph 6.43.

<sup>356</sup> *NoA*, paragraph 6.82.

<sup>357</sup> Reply, paragraph 6.44.

<sup>358</sup> Reply, paragraph 6.44.

<sup>359</sup> Reply, paragraph 6.45.

<sup>360</sup> Reply, paragraph 6.47.

<sup>361</sup> Reply, paragraph 6.48.

<sup>362</sup> *Ibid.*

- (b) A claim to a legitimate expectation can only be based upon a representation which is clear, unambiguous and devoid of relevant qualification. The Appellants' claim fails in this regard.<sup>363</sup>
- (c) A legitimate expectation cannot require a public authority to act contrary to statute and/or to maintain an unlawful stance. GEMA cited the following cases as precedent of this:<sup>364</sup> *Albert Court Residents' Association v Westminster City Council*;<sup>365</sup> *Environment Agency v Anglian Water Services*;<sup>366</sup> *R (Aggregate Industries UK) v English Nature*;<sup>367</sup> and *R (Thompson) v Secretary of State for the Home Department*.<sup>368</sup> GEMA submitted that none of the cases put forward by the Appellants involved a public authority taking a decision that was premised on an incorrect view of the law.<sup>369</sup>
- (d) Given that there is only one correct interpretation of the Connection Exclusion and that is the broad interpretation, any rebate would effectively amount to requiring third parties to make payments for which there is no sound legal basis.<sup>370</sup>
- (e) There would be a substantial burden on consumers collectively, predominantly on individuals and small businesses.<sup>371</sup>
- (f) GEMA rejected the case law submitted by the Appellants in support of the proposition that a public body may in certain circumstances be precluded from frustrating a legitimate expectation that it will apply legislation in a particular way (see paragraph 7.8). GEMA submitted that the context and facts of these cases are different and do not provide any support for the proposition that an erroneous statement or breach of duty by a public body could give one private party an entitlement (whether under English law or EU law) to obtain a payment from another private party (which would not otherwise be liable to make the payment).<sup>372</sup>

## Our decision on Ground 3

7.19 The two issues that arise under Ground 3 are as follows:

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<sup>363</sup> Reply, paragraph 6.49.

<sup>364</sup> Reply, paragraphs 6.49-6.52.

<sup>365</sup> [2011] EWCA Civ 430, paragraph 35.

<sup>366</sup> [2002] EWCA Civ 5, paragraph 31.

<sup>367</sup> [2002] EWHC 908 (Admin), paragraph 117.

<sup>368</sup> [2003] EWHC 538 (Admin), paragraph 49.

<sup>369</sup> Reply, paragraph 6.56.

<sup>370</sup> Reply, paragraph 6.54.

<sup>371</sup> *Ibid.*

<sup>372</sup> GEMA Supplementary submission on relief, paragraphs 14-15.

- (a) whether GEMA did, as the Appellants contend, reach a concluded view in its CMP224 Decision as to the interpretation of the Connection Exclusion; and
- (b) if so, whether GEMA was precluded from reaching a different view in the CMP261 Decision from the (*ex hypothesi*) incorrect view in its CMP224 Decision.

7.20 The Appellants must succeed on both of these issues in order for us to uphold Ground 3.

***Did GEMA arrive at a definitive interpretation of the Connection Exclusion in the CMP224 Decision?***

- 7.21 Whether the Appellants' argument is framed in terms of an abuse of process or legitimate expectation, the argument cannot succeed unless it is demonstrated that GEMA reached a concluded view on the meaning of the Connection Exclusion in its CMP224 Decision, to the effect that only CUSC Connection Charges fell within its scope. For example, a public law legitimate expectation can only be said to arise if a public authority has made a representation that is 'clear, unambiguous and devoid of relevant qualification'.<sup>373</sup>
- 7.22 We do not understand the Appellants to argue otherwise. The Appellants' case is simply that GEMA did reach such a concluded view. In our view, the Appellants are wrong in their contention, for the following reasons.
- 7.23 As explained at paragraphs 4.15 to 4.20, CMP224 was raised by NGET in 2014. It was concerned that, as things then stood, it risked breaching the Cap at some point between 2015/16 and 2020/21. That concern was based on NGET's (then) understanding of the scope of the Connection Exclusion and the extant G:D split (27:73).
- 7.24 In CMP224, NGET proposed to reduce the G:D split to the lower of either 27% or the maximum amount that resulted in average transmission charges not exceeding the Cap (again, based on its (then) understanding of the Connection Exclusion).<sup>374</sup>
- 7.25 Of the four proposals formulated at the workgroup stage (NGET's original proposal, WACM1, WACM2 and WACM3), the first two were based on the

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<sup>373</sup> See eg *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, at paragraph 60.

<sup>374</sup> Page 1 under the heading The proposals, of GEMA's CMP224 Decision.

‘strict’ (or narrow) interpretation of the Connection Exclusion (ie only CUSC Connection Charges fell within its scope) and the remaining two were based on the broad interpretation (ie both CUSC Connection Charges and Local Charges for Offshore GOS fell within its scope).<sup>375</sup>

- 7.26 GEMA subsequently decided to direct the implementation of NGET’s original proposal. In the reasons for its CMP224 Decision, GEMA assessed the various options against the relevant CUSC charging objectives. Under *Objective (d) compliance with the Electricity Regulation and any relevant legally binding decisions of the European Commission and/or the Agency*, GEMA said:

This modification has been brought forward to ensure transmission charges in GB do not exceed the upper limit set by the Regulation. The Regulation (i.e. Regulation No. 838/2010) has been adopted by the European Commission pursuant to Article 18 of the Electricity Regulation<sup>8</sup> in order to set guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging. We therefore consider that all the proposals better meet this objective compared to the current baseline.

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).<sup>376</sup>

- 7.27 Accordingly, GEMA specifically highlighted the uncertainty surrounding the interpretation of the Regulation, recognising that there was a real risk of legal challenge if it were to direct the implementation of one of the workgroup proposals based on the broad interpretation. But GEMA did not need to form a concluded view on the correct interpretation of the Connection Exclusion because in any event the (more conservative) proposal initially made by NGET would be less likely to lead to a breach of the Cap and so would better

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<sup>375</sup> CMP224 Decision, page 3, figure 1.

<sup>376</sup> CMP224 Decision, page 5 (emphasis added).

meet the objective of compliance with relevant EU law than the options based on the broad interpretation.<sup>377</sup>

- 7.28 This point was also made in GEMA's consultation letter of 14 July 2014 stating that it was minded to direct the implementation of NGET's initial proposal. Having pointed out that on balance its preliminary view was that the narrow interpretation was more persuasive, it went on to say:

Charges under [the options that use a narrow interpretation of the Connection Exclusion] will comply with the regulation regardless of which interpretation of the regulation applies.<sup>378</sup>

- 7.29 We are satisfied, therefore, that GEMA did not reach a concluded view on the interpretation of the Connection Exclusion. We agree with GEMA's submission<sup>379</sup> that it was not required to reach a concluded view in circumstances where the context for its CMP224 decision was the *ex ante* setting of charges. GEMA was entitled to adopt a prudent approach to how the Connection Exclusion might be interpreted by a court and approve a CMP accordingly. It was only when GEMA was faced with CMP261, in which SSE sought an *ex post* reconciliation of Generator charges on the basis that Generators had been overcharged, that GEMA was required to reach a concluded view. Whilst it is perhaps unfortunate that GEMA's 'preliminary view' formed during the CMP224 process differed from its subsequent concluded view to contrary effect in the CMP261 Decision, that does not alter the fact that GEMA did not reach a concluded view in its earlier CMP224 Decision.

- 7.30 We therefore reject the Appellants' contention that GEMA took a 'binding' decision in respect of CMP224 as to which costs fell within the Connection Exclusion; and nor was such a decision 'necessarily' part of the CMP224 Decision, as the Appellants allege. Even if the effect of the CMP224 Decision was that Generators were charged less and suppliers were charged more than they would have been if GEMA had directed the implementation of one of the workgroup options based on the broad interpretation, there is nothing unlawful about that: unlike charges levied on generators, there is no cap under EU law on the charges that can be levied on suppliers and the lower

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<sup>377</sup> See also page 1 of the decision, where GEMA pointed out that *National Grid Electricity Transmission (NGET) raised CMP224 in September 2013 with the aim of adjusting the G:D split each year to mitigate the potential risk of exceeding the upper limit on average Generator charges set by the Regulation* (emphasis added).

<sup>378</sup> CMP224 Consultation letter, page 4, footnote 10.

<sup>379</sup> See paragraph 7.14(f).

limit on average transmission charges paid by producers under the Regulation is zero.<sup>380</sup>

7.31 The Appellants' other arguments on this issue are also misplaced:

- (a) GEMA plainly did not, as the Appellants allege at one point in their pleadings, form the view that both the broad and narrow interpretations were correct.
- (b) GEMA's annual reporting to ACER as to transmission charges for Generators does not, either expressly or by necessary implication, indicate the GEMA had formed a concluded view as to the interpretation of the Regulation. Whilst the Appellants were correct to point out at the Main Hearing that, after the CMP224 Decision, GEMA reported the annual average transmission charges paid by Generators for the charging year 2014/15 on the basis that the narrow interpretation applied, we do not see this as 'evidence of an internal mindset within the regulator that a decision has been taken', as the Appellants put it at the hearing. We see it as consistent with the prudent approach that GEMA had adopted in the CMP224 Decision.<sup>381</sup>
- (c) The view of industry participants cannot alter the nature of the CMP224 Decision and so is irrelevant.

*Can GEMA take a different position in its CMP261 Decision with retrospective effects?*

7.32 Our conclusion on the first issue under Ground 3 is sufficient, in itself, for us to reject Ground 3. However, for completeness we address the issue of whether GEMA could resile from an erroneous concluded view as to the interpretation of the Connection Exclusion, had it come to one in its CMP224 Decision.

7.33 This part of the Appellants' case was, at least in the NoA, based on the premise that GEMA's interpretation of the Connection Exclusion was a matter of policy.<sup>382</sup> As we have already explained under Ground 1, however, the

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<sup>380</sup> See paragraph 2.11.

<sup>381</sup> In the course of preparing its Response, GEMA identified that its reporting of revenue collected from Generators and total generation output in respect of 2014/15 was incorrect (see *Wright*, footnote 20). However, such inaccuracies, regrettable as they may be, have no bearing on the issue here.

<sup>382</sup> See eg *NoA*, paragraph 6.99 ('[t]he 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') and paragraph 6.100 ('GEMA, as a public body, must follow its stated policy unless there are good reasons for not doing so...').

interpretation of the Connection Exclusion is a matter of EU law, and there is one legally correct interpretation.

- 7.34 Had GEMA reached the concluded view that the narrow interpretation was correct, that would have been wrong as a matter of law. There is ample authority for the proposition that there can be no legitimate expectation that a public authority will act contrary to statute.<sup>383</sup> None of the authorities relied on in the NoA challenged that proposition.
- 7.35 In their NoA and later in their Response, the Appellants relied on two cases in support of their contention that GEMA was entitled to amend an erroneous construction of legislation but only with prospective effect. Those two cases were *Samarkand* and *Biffa*, cited at paragraph 7.10.
- 7.36 Those two cases were in the field of taxation. They concerned situations in which HMRC had made statements, in guidance documents, about how it would or might apply certain taxation legislation when assessing taxpayers' liabilities. Those statements were, for the purposes of the judgments in each case, assumed to be erroneous, the legislation in fact entitling HMRC to collect more tax than the statements had suggested. It was argued by the taxpayers that they had a substantive legitimate expectation that HMRC would follow its own (erroneous) guidance, such that it was prevented from collecting the full amount of tax to which it was otherwise entitled under the legislation.
- 7.37 In *Samarkand*, the Court of Appeal pointed, at paragraph 118, to the 'pioneer decision in this area', *R v IRC, ex p MFK Underwriting Agencies Ltd*.<sup>384</sup> In the *MFK* case, the Divisional Court rejected the Inland Revenue's argument that no legitimate expectation could arise in such a situation. As Leggatt J (as he then was) noted in *R (GSTS Pathology LLP & Ors) v Commissioners for Revenue & Customs*, the Divisional Court did so

on the basis that the Revenue has a managerial discretion to decide on the best way of carrying out its duty to collect tax and that it is within the scope of that discretion for the Revenue to give advice and guidance to the public as to what it believes the tax position to be, by which the Revenue may be bound even if it results in the Revenue forgoing tax which is legally due.<sup>385</sup>

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<sup>383</sup> See eg *R (Albert Court Residents' Association) v Westminster City Council* [2011] EWCA Civ 430, paragraph 35.

<sup>384</sup> [1990] 1 WLR 1545.

<sup>385</sup> [2013] EWHC 1801 (Admin), paragraph 76.

7.38 In *GSTS Pathology*, Leggatt J also cited from the Supreme Court judgment in *R (Davies and Anor) v Commissioners of Revenue & Customs*.<sup>386</sup> Under the heading Revenue guidance, Lord Wilson said as follows:

25. There can be no better introduction to this section than in the words of Moses LJ in his judgment in the decision under appeal:

12. The importance of the extent to which thousands of taxpayers may rely upon guidance, of great significance as to how they will manage their lives, cannot be doubted. It goes to the heart of the relationship between the Revenue and taxpayer. It is trite to recall that it is for the Revenue to determine the best way of facilitating collection of the tax it is under a statutory obligation to collect. But it should not be forgotten that the Revenue itself has long acknowledged that the best way is by encouraging co-operation between the Revenue and the public... Co-operation requires fair dealing by the Revenue, and frank and open dealing by the public. Of course the Revenue may refuse to give guidance and re-create a situation in which the taxpayers and their advisers are left to trawl through the authorities to find a case analogous to their own, or, if they are fortunate, a statement of principle applicable to their circumstances. But since 1973, in a field fraught with borderline cases relating to an enormous variety of circumstances, the Revenue has chosen to confer what presumably it regarded as a benefit on taxpayers who wished to know whether they were likely to be treated as resident or not.

26. The primary duty of the Revenue is to collect taxes which are properly payable in accordance with current legislation but it is also responsible for managing the tax system: section 1 of the Taxes Management Act 1970. Inherent in the duty of management is a wide discretion. Although the discretion is bounded by the primary duty (*R(Wilkinson) v Inland Revenue Comrs* [2005] 1 WLR 1718, para 21 per Lord Hoffmann), it is lawful for the Revenue to make concessions in relation to individual cases or types of case which will, or may, result in the non-collection of tax lawfully due provided that they are made with a view to obtaining overall for the national exchequer the highest net practicable return: *Inland Revenue Comrs v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617, 636 per Lord Diplock. In particular the Revenue is entitled to

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<sup>386</sup> [2011] UKSC 47.

apply a cost-benefit analysis to its duty of management and in particular, against the return thereby likely to be foregone, to weigh the costs which it would be likely to save as a result of a concession which cuts away an area of complexity or likely dispute.

- 7.39 It will be immediately apparent that the situation in taxation cases is very different from the situation here. Here, GEMA did not have any discretion when determining CMP261: it could only (and indeed was obliged to) uphold that proposal if it agreed with SSE that NGET's charges had breached EU law.
- 7.40 We agree with GEMA's submission that neither *Samarkand* nor *Biffa* provide any support for the proposition that an erroneous prior statement of the law by a public authority could give one private party an entitlement to obtain payment from another private party which, *ex hypothesi*, has not acted unlawfully. It is one thing to require HMRC to adhere to incorrect guidance if that has the effect of HMRC not receiving as much tax from the taxpayer who relied on that guidance as it would be entitled to under statute; it is quite another to require GEMA to adhere to an incorrect interpretation of EU law and thereby require GEMA to direct NGET, a third party, to pay a significant rebate to GB Generators. In our view, no legitimate expectation arises in this latter situation.
- 7.41 We did not consider that the impact of GEMA's alleged change of position in the CMP261 Decision on the Generators' bids in the Capacity Market was directly relevant to the question in this appeal. CMP261 was raised to address an alleged breach of the Regulation. Whether a breach had occurred depended on the correct interpretation of the Connection Exclusion in 2015/16. The assumptions behind Generators' Capacity Market bids are not informative of the correct interpretation of the Connection Exclusion in the Regulation. It follows that bids in Capacity Market auctions are not determinative of whether GEMA was right to reject CMP261.
- 7.42 Accordingly, even if GEMA had come to an erroneous concluded view on the interpretation of the Connection Exclusion in the CMP224 Decision, this did not preclude it from taking a different, legally correct view in its CMP261 Decision. The Appellants did not have a legitimate expectation that GEMA would act contrary to legislation. We therefore reject Ground 3 on this basis, too.

### ***Our conclusion on Ground 3***

- 7.43 For the reasons given above, we reject Ground 3.

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

### **Introduction**

8.1 In this section, we address Ground 4 of the appeal. Ground 4 concerns whether GEMA's CMP261 Decision infringed a number of general principles of EU law.

### ***Outline of Ground 4 as pleaded***

8.2 Under Ground 4, the Appellants argue that GEMA's Decision infringes the following principles of EU law:

- (a) The principle of legal certainty;
- (b) The principle of proportionality;
- (c) The principle of non-discrimination;
- (d) The principle of effectiveness.

### **The principle of legal certainty**

#### ***The Appellants' submissions***

8.3 The Appellants submitted that GEMA had adopted a clear construction of the Connection Exclusion referred to in the Regulation which had been applied over a significant period of time and that it now seeks to depart from this construction and apply the change with retrospective effect.<sup>387</sup>

8.4 This change and its retrospective effect infringes the principles of legal certainty and the protection on legitimate expectations.<sup>388</sup>

#### ***GEMA's submissions***

8.5 GEMA submitted that the Appellants' argument regarding legal certainty is based on the same false premises as Ground 3, namely (a) that GEMA

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<sup>387</sup> NoA, paragraph 6.109.

<sup>388</sup> *Ibid.*

reached a concluded view as to the correct interpretation of the Connection Exclusion in its CMP224 Decision, and (b) that a prior concluded view on the interpretation issue would preclude GEMA from taking a different view.<sup>389</sup>

- 8.6 GEMA rejected caselaw cited by the Appellants in support of their argument submitting that none of these cases involved a public authority taking a decision that was premised on an incorrect view of the law and thereafter being precluded from recognising that that view was incorrect and from applying the law correctly.<sup>390</sup>

## The principle of proportionality

### *The Appellants' submissions*

- 8.7 The Appellants submitted that GEMA has also breached the principle of proportionality which requires that 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.<sup>391</sup>
- 8.8 The Appellants argued that GEMA in its CMP261 Decision has been motivated by a perceived desire to protect consumers from additional costs and this does not represent a legitimate public interest in the context of a requirement to comply with EU legislation.<sup>392</sup>
- 8.9 The Appellants added that GEMA's attempt to re-calibrate the balance of interests between Generators and suppliers or consumers would have a disproportionate impact on the interests of Generators in the light of the fact that existing investment decisions have been taken by Generators on the basis of the narrow interpretation of the Regulation previously supported by GEMA.<sup>393</sup>
- 8.10 In any event, the Appellants rejected GEMA's suggestion that consumers would be better served by the 'broad' interpretation. The Appellants submitted witness evidence which illustrated that the impact per consumer of the narrow interpretation is small.<sup>394</sup>

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<sup>389</sup> Reply, paragraph 7.2.

<sup>390</sup> Reply, paragraph 7.3.

<sup>391</sup> NoA, paragraph 6.107(b).

<sup>392</sup> NoA, paragraph 6.110.

<sup>393</sup> *Ibid.*

<sup>394</sup> NoA, paragraph 6.111 and Cox, paragraphs 8.2-8.4.

## **GEMA's submissions**

- 8.11 GEMA asserted that it first concluded that there had been no breach of the Regulation, and then in accordance with its statutory duty it considered consumer interests.<sup>395</sup>
- 8.12 GEMA added that if its interpretation of the Regulation is correct, it was entirely proper and in no way disproportionate for GEMA to reject CMP261 and that there is no reason why consumers should finance an ex post rebate to Generators, in circumstances where *ex hypothesi* the charges were lawful.<sup>396</sup>
- 8.13 GEMA replied to the Appellants' argument about investment decisions being taken on the basis of the narrow interpretation by suggesting that the Appellants did not act prudently enough.

## **The principle of non-discrimination**

### ***The Appellants' submissions***

- 8.14 The Appellants submitted that the effect of the CMP261 Decision is to disadvantage GB Generators when compared with generation in other Member States. The Appellants in particular highlighted that GB Generators are disadvantaged in terms of competition and the effect on cross-border trade, as a result of increases in electricity imports to GB and decreases of electricity exports from GB.<sup>397</sup>
- 8.15 In relation to the impact on competition between GB and other Member States' generators, the Appellants argued that GEMA's construction of the regulation removes a significant sum of costs from the calculation of the Cap which gives rise to an uneven playing field.<sup>398</sup>
- 8.16 The Appellants also submitted that the CMP261 Decision produces a discriminatory impact between transmission network generation and embedded generation,<sup>399</sup> given that Embedded Generators are treated as

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<sup>395</sup> Reply, paragraph 7.4.

<sup>396</sup> Ibid.

<sup>397</sup> NoA, paragraph 6.112.

<sup>398</sup> NoA, paragraph 6.114.

<sup>399</sup> Those generators that are connected directly to a distribution network, rather than the transmission network. This is also referred to as 'distributed generation'. Embedded Generators tend to be lower voltage than transmission generators. See paragraphs 3.2 and 3.20.

part of the distribution segment of the network and therefore do not have to pay transmission charges.<sup>400</sup>

- 8.17 In their Response to GEMA's [Reply](#), the Appellants also added that in circumstances where GEMA has acknowledged that two competing constructions of the Regulation are open to it, the choice of which construction to favour can be constrained by general principles of law relating to non-discrimination.<sup>401</sup>

### ***GEMA's submissions***

- 8.18 GEMA submitted that it cannot be discriminating by correctly applying the law.<sup>402</sup> GEMA also considered that this argument was flawed in principle given that the Regulation itself provides for differential caps.
- 8.19 Moreover, GEMA said that the Appellants have failed to demonstrate how they are disadvantaged by the Cap.<sup>403</sup>
- 8.20 Regarding the smaller Embedded Generators argument, GEMA submitted that the Appellants argument is in reality a complaint about the fact that such generators do not pay TNUoS Charges at all and that this fact is a feature of the existing CUSC provisions, which neither the CMP224 Decision nor the CMP261 Decision sought to change.<sup>404</sup>

## **The principle of effectiveness**

### ***The Appellants' submissions***

- 8.21 The Appellants submitted that a breach of the Regulation or of a relevant principle of EU law by GEMA must be afforded an effective remedy through this appeal.<sup>405</sup>
- 8.22 The Appellants explained that, in practical terms, they have a directly applicable right not to pay more than the Cap on an average annual basis and since they have done so they must be entitled to claim the overpayment back,

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<sup>400</sup> [NoA](#), paragraph 6.115.

<sup>401</sup> Response, paragraph 82.

<sup>402</sup> Reply, paragraph 7.8.

<sup>403</sup> Reply, paragraph 7.10(a).

<sup>404</sup> Reply, paragraph 7.10(b).

<sup>405</sup> [NoA](#), paragraphs 6.116-6.117 and Response, paragraph 83.

with interest, in order to ensure the effective protection of their EU law rights.<sup>406</sup>

- 8.23 GEMA, as the NRA, should therefore give effect to those rights and a failure to do so would risk requiring the Appellants to bring separate legal proceedings. That would offend the principle of effectiveness.<sup>407</sup>

### ***GEMA's submissions***

- 8.24 GEMA replied that the Appellants' argument is highly dependent on the Appellants succeeding on Grounds 1 and 2.
- 8.25 GEMA added that the Appellants' submissions as to the appropriate means of remedying any breach of the Cap cannot provide any free-standing basis for impugning the decision under challenge and instead, those submissions should be considered in relation to relief.<sup>408</sup>

### **Our decision on Ground 4**

- 8.26 Ground 4 is premised on the assumption that there has been a breach of the Regulation and an unlawful interpretation of the Connection Exclusion and therefore is dependent on our conclusion on Ground 1 of this appeal.
- 8.27 Ground 4 also rests on our conclusion on Ground 3 and whether GEMA in its CMP224 Decision made a definitive interpretation of the Connection Exclusion from which it seeks to depart retrospectively in its CMP261 Decision.
- 8.28 Given our conclusions on Grounds 1 and 3, we have determined that GEMA's CMP261 Decision does not infringe the EU law principles of legal certainty, proportionality, non-discrimination and the right to effective protection of EU law rights as alleged in Ground 4.

### ***Our conclusion on Ground 4***

- 8.29 For the reasons given above, we reject Ground 4.

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<sup>406</sup> NoA, paragraph 6.116.

<sup>407</sup> NoA, paragraph 6.117 and cited cases Case 199/82 *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* [1983] ECR 3595, paragraph 12 and Case C-94/10 *Danfoss A/S* [2011] ECR I-9963, paragraphs 21-25.

<sup>408</sup> Reply, paragraph 7.11.

## 9. Relief

- 9.1 Both Parties agreed that if a breach of the Cap has occurred, there should be a form of relief determined by the CMA.
- 9.2 The Appellants and GEMA made written and oral submissions as to the appropriate form of relief. NGET also made submissions on the scope and timing of the appropriate relief.
- 9.3 During the appeal process, the Appellants sought permission to make an application to amend the NoA to extend the relief sought from the CMA mainly in two ways:
- (a) to cover reimbursement by NGET to the Appellants of any overpaid transmission charges for each of the charging periods 2014/15<sup>409</sup> to 2016/17 inclusive; and
  - (b) to claim compound interest at an annual rate of 3.5%.
- 9.4 The Appellants in their written submissions on relief and their oral submissions at the relief hearing, advocated for a 'one-stop shop' for relief, including for years not directly addressed by CMP261 to avoid the costs and expenses of bringing separate legal proceedings.
- 9.5 They submitted that this was mandated by the EU law principles of effectiveness and equivalence which mean that 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.<sup>410</sup>
- 9.6 GEMA and NGET made submissions in oral and writing opposing the Appellants' application.
- 9.7 GEMA submitted that the CMA's jurisdiction is constrained by CMP261 and that the facts of the cases relied upon by the Appellants regarding the EU law principles of effectiveness and equivalence are very different from the facts of this case.<sup>411</sup>
- 9.8 NGET submitted that this is a statutory appeal governed by the strict statutory provisions that govern the Group's jurisdiction and that the Group is statutorily

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<sup>409</sup> The Appellants claimed that they became aware of the 2014/2015 overcharge during the course of these proceedings.

<sup>410</sup> NoA, para 6.117 and Appellants' submissions on relief, paragraph 18. The Appellants relied on Case C-268/06 *Impact* [2008] ECR I-2483 and *HMRC v Répertoire Culinaire* [2017] EWCA Civ 1845.

<sup>411</sup> GEMA's submissions on Appellants application for permission to amend, paragraph 4.2.

prohibited from granting any remedy to the Appellants outside the exercise of its purely corrective jurisdiction.

- 9.9 NGET in particular added that there is nothing that compels a Member State to confer a reparation jurisdiction on a particular body merely because that body is deciding questions that engage EU Law.

### ***Our decision on Relief***

- 9.10 Given our decision to reject the appeal we do not need to consider relief nor reach a concluded view on the Appellants' application to extend the relief sought.
- 9.11 Notwithstanding this, we wish to make the following comments on the Appellants' application to amend their NoA and extend the relief.
- 9.12 We agree with NGET that in this appeal the Group's powers to grant relief, in the event that the appeal was allowed, are strictly those set out in section 175(5) EA04.
- 9.13 We consider the proposed amendments to enlarge relief to cover other charging years to be inconsistent with the powers given to us in EA04 (see paragraph 2.17). We consider that the CMA does not have the jurisdiction to take remedial action in respect of matters outside the scope of the decision appealed against, including remedial action in respect of charges paid by Generators in other charging years. Proposal CMP261, and GEMA's decision on it, concern the charging year 2015/16.
- 9.14 We would also not accept the argument raised by the Appellants that EU law, and specifically the principle of effectiveness and equivalence, supports the requested amendments. As accepted by the Appellants during the relief hearing, in case of a breach there would be alternative forms of redress for an aggrieved person to have recourse to, for example by way of a further modification proposal or judicial review.
- 9.15 In our view, none of these alternative forms of redress would be liable to render excessively difficult the exercise of the Appellants' EU law rights.<sup>412</sup>
- 9.16 For these reasons, we would be minded to reject the Appellants' application for permission to amend the NoA with regard to the extent of the request relief if the Cap had been breached.

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<sup>412</sup> Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 55.

## **10. Order**

- 10.1 It is ordered that the appeal be dismissed and GEMA's Decision dated 16 November 2017 rejecting CUSC CMP261 be confirmed.
- 10.2 Costs are reserved.