

BEFORE THE COMPETITION AND MARKETS AUTHORITY
IN THE MATTER OF AN APPEAL UNDER SECTION 173 ENERGY ACT 2004

B E T W E E N:

(1) SSE GENERATION LIMITED

(2) THE ENTITIES LISTED IN SCHEDULE 1 TO THE NOTICE OF APPEAL

Appellants

-and-

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

RESPONDENT'S REPLY TO NOTICE OF APPEAL

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An electronic copy of this Reply and accompanying documents has been sent to the persons listed in Schedule 2 to the Notice of Appeal.

References

References in the form “NoA §*” are to paragraph * of the Notice of Appeal.

References in the form “Graham §*”, “Tindal §*” and “Self §*” are to paragraph * of the witness statement of the individual named.

References in the form [A1], [B2] etc are to the Appellants’ electronic bundle of documents, as updated by the Respondent (see the revised Index to the bundle). Where a specific page number is indicated (e.g. [A1/p1]), it is to the relevant page of the electronic version of the document; this may differ from any pagination printed on the document.

A. INTRODUCTION

1. The Gas and Electricity Markets Authority (“**GEMA**”) is the gas and electricity markets regulator for Great Britain (“**GB**”). GEMA is established under s.1 of the Utilities Act 2000. Its principal objective, in relation to electricity transmission, is “to protect the interests of existing and future consumers”: see s.3A Electricity Act 1989 [**C1**].
2. It is common to refer collectively to the civil servants employed by GEMA as “**Ofgem**” (i.e. the Office of Gas and Electricity Markets), and the terms “**GEMA**” and “**Ofgem**” are often used interchangeably. Ofgem does not have any independent legal personality.
3. The Competition and Markets Authority (“**the CMA**”) has granted the Appellants permission to appeal against two related decisions of GEMA, both dated 17 December 2020 (“**the Decisions**”). The effect of the Decisions was, in broad terms, to approve a proposal to modify the contractual framework which governs charging for electricity transmission in GB. In so doing, GEMA rejected various other modification proposals, including some put forward by representatives of the Appellants.
4. GEMA invites the CMA to dismiss the appeal for the reasons set out below and in the Decisions themselves.
5. This Reply is structured as follows:
 - 5.1. Section B provides a high-level summary of GEMA’s case.
 - 5.2. Section C sets out the factual background to the Decisions.
 - 5.3. Section D summarises GEMA’s reasoning in the Decisions.
 - 5.4. Section E identifies the relevant legal framework for the appeal.
 - 5.5. Sections F-L address the Appellants’ Grounds 1-6.
 - 5.6. Section M deals with the appropriate remedy, should the CMA uphold the appeal.
6. At the time of the Decisions, GEMA was not aware of the information which has been redacted from the non-confidential version of Mr Tindal’s witness statement, since that information is not in the public domain and the Appellants did not provide it to GEMA until after they had commenced this appeal. GEMA does not consider that the information of which it was unaware would have had a material bearing upon the outcome of the Decisions.

B. SUMMARY

7. The Decisions relate to the mechanism, known as the “**CUSC Calculation**” which is intended to secure compliance with a legal requirement that “*annual average transmission charges*” paid by generators in GB fall within a range between €0/MWh and €2.50/MWh (the “**Permitted Range**”). This requirement was laid down by Commission Regulation (EU) 838/2010 (“**the ITC Regulation**”), which continues to apply in GB pursuant to s.3 of the European Union (Withdrawal) Act 2018, subject to amendments which are not material. The ITC Regulation stipulates that, for the purposes of calculating “*annual average transmission charges*”, no account is to be taken of “*charges paid by producers for physical assets required for connection to the system or the upgrade of the connection*” (the “**Connection Exclusion**”) and “*charges paid by producers related to ancillary services*” (the “**Ancillary Services Exclusion**”).¹
8. There are four key elements of context to this appeal:
 - 8.1. First, many of the same Appellants appealed to the CMA in 2017 against a previous decision of GEMA relating to the ITC Regulation. The CMA dismissed that appeal in February 2018, and in so doing held that (as GEMA had concluded) the CUSC Calculation is based on an erroneous interpretation of the Connection Exclusion. This gives rise to a risk that the CUSC Calculation may not be effective in securing compliance with the Permitted Range. Under the *status quo*, the risk of a breach of the Permitted Range is high.
 - 8.2. Second, the procedure by which the relevant domestic GB charging rules may be amended involves proposals being developed by industry representatives, and submitted to GEMA for consideration. GEMA can approve one of the proposals submitted, reject them all, or send them back for further consideration. GEMA cannot, however, simply impose a proposal of its own devising.
 - 8.3. Third, the transmission charging arrangements currently applicable in GB include a flat negative charge, known as the “*Transmission Generation Residual*” (“**the TGR**”). The TGR is received by some, but not all, generators, and thus tends to distort competition. GEMA concluded in 2019 (i) that the TGR should therefore be removed, subject to a mechanism to adjust charges insofar as

¹ There is also a third exclusion, which is not relevant to this appeal.

necessary to avoid a breach of the Permitted Range; and (ii) that this change should be implemented in April 2021. Neither the Appellants nor anyone else challenged that decision, which is known as the “TCR Decision”.

- 8.4. Fourth, this appeal relates to GEMA’s decisions in respect of proposals formulated by industry with a view (at least ostensibly) to (i) giving effect to GEMA’s decision that the TGR should be removed; and (ii) amending the CUSC Calculation so that it is no longer based on an erroneous interpretation of the ITC Regulation. The Appellants challenge GEMA’s decision to approve one of the proposals that was submitted to it, rather than the proposals that they would have preferred to see implemented.
9. GEMA concluded that none of the proposals submitted to it are based on a correct interpretation of the ITC Regulation, but that the proposal approved would give rise to only a low risk of a breach of the Permitted Range, at least in the next few years. GEMA therefore concluded that the best course of action was (i) to approve the proposal, rather than allow the *status quo* to remain in place, with its associated high risk of breach of the Permitted Range; and (ii) to indicate that further proposals should be formulated, with a view to reflecting the correct interpretation of the ITC Regulation in the CUSC Calculation from 2022 onwards.
10. The Appellants challenge the Decisions on six grounds:
 - 10.1. First, the Appellants allege that GEMA erred in its interpretation of the Connection Exclusion. Much of this argument is directed towards showing that the proposal that GEMA approved does not correctly reflect the Connection Exclusion. The Appellants thereby erect and attack a straw man, since GEMA expressly concluded that all of the options presented to it were based on erroneous interpretations of the Connection Exclusion. The Appellants fail to show any error in GEMA’s interpretation, and ignore conclusions that the CMA reached in 2018.
 - 10.2. Second, the Appellants allege that GEMA breached various “*public law principles*” by approving a proposal which did not reflect the correct interpretation of the Connection Exclusion. This argument is wrong, since GEMA’s choices were limited to the options presented to it, none of which reflect the correct

interpretation of the Connection Exclusion. GEMA selected the best of the imperfect options available, and did not commit any public law error in so doing.

- 10.3. Third, the Appellants allege that GEMA erred in its interpretation of the Ancillary Services Exclusion. This argument is hopeless, not least since the provisions of EU law on which it rests (which do not appear in the ITC Regulation itself) have been materially amended in GB with effect from the end of the Transition Period. The Appellants simply ignore the most important of these amendments.
- 10.4. Fourth, the Appellants allege that GEMA underestimated the detriment to generators associated with the Decisions, and overestimated the benefit to consumers. These arguments are wrong, and rest on (i) an assertion that GEMA has caused vast losses to generators, when what it has in fact done is fail to provide them with benefits that they had no reasonable grounds to expect; and (ii) unwarranted manipulations of forecasts of consumer benefits (e.g. disregarding two years' worth of benefits).
- 10.5. Fifth and sixth, the Appellants allege that GEMA was wrong to reject proposals which would, in effect, reintroduce the TGR by the back door and/or partially postpone its removal beyond April 2021. Such arguments amount to a collateral attack on the TCR Decision, which the Appellants did not challenge at the relevant time, and should be dismissed for that reason alone. To do otherwise would be contrary to principles of legal certainty, since market participants will have organised their affairs on the footing that time for any challenge to the TCR Decision has long ago expired. The Appellants' arguments in favour of the back-door reintroduction of the TGR and/or the partial postponement of its removal are in any event without merit, and demonstrate no error (still less any material error) in the Decisions.

C. BACKGROUND

Introduction

11. The Notice of Appeal includes 39 pages of factual, procedural and legal background, much of which (i) is of little or no relevance to the issues that arise on this appeal; and/or (ii) may be difficult to follow for a reader who does not already have a close familiarity

with the technicalities and jargon of the electricity industry. The same is true of much of the voluminous bundle of documents that the Appellants have submitted to the CMA.²

12. GEMA therefore seeks to assist the CMA by setting out, in this section of its Reply, a concise and accessible overview of those aspects of the background which it submits are of key relevance to the issues that the CMA actually needs to determine.
13. The account of the background that the Appellants have given contains various erroneous and/or tendentious statements. GEMA does not seek to correct each such statement here, since to do so would involve lengthy digressions from the issues that the CMA needs to consider. The fact that GEMA does not expressly dispute a statement made by the Appellants should not be taken to signify agreement thereto.

Basic concepts

14. Several parties are involved in the processes by which electricity is produced and delivered to its ultimate end users:³
 - 14.1. The terms “**producer**” and “**generator**” are synonymous. Both refer to a natural or legal person who generates electricity, e.g. the operator of a power station. The Appellants in these proceedings are producers/generators.
 - 14.2. The “**transmission system**” comprises infrastructure to transport electricity at high voltages. A generator whose generating plant is directly connected to the transmission system is known as a “**transmission-connected generator**”. The transmission system is used to transport electricity from transmission-connected generators to the distribution system, and to the few customers (e.g. some steel plants) who are directly connected to the transmission system. The transmission system in GB is operated by National Grid Electricity System Operator Ltd (“**NGESO**”), although the infrastructure which makes up the transmission system is owned by other entities. The onshore part of the transmission system

² The Appellants’ bundle is swollen not only by numerous irrelevant documents, but also by duplicate copies of certain documents (e.g. the same 61-page document appears at [A34] and [A37], the same 13-page document appears at [A38] and [A54], the same 10-page document appears at [A60] and [A79], [A56] is a 139-page document that also appears in more up-to-date form at [A5/pp456-590] etc).

³ Self §§8-12, 16-19. Many of the key terms are defined in Article 2 of Regulation (EU) 2019/943 [A64] (as modified, with effect from 31 December 2020, by the Electricity and Gas (Internal Markets and Network Codes) (Amendment etc) (EU Exit) Regulations 2020/1006 [C11]) and/or s.4 of the Electricity Act 1989 [C2]. Regulation (EU) 2019/943 as it now applies in GB is at [C10].

is owned by the three entities referred to at NoA §12. There are a further 20 entities (known as “**Offshore Transmission Owners**” or “**OFTOs**”) which each own part of the offshore transmission network, e.g. links which run from offshore windfarms to the onshore transmission network.

- 14.3. The “**distribution system**” comprises lower voltage infrastructure to transport electricity. A generator whose plant is directly connected to the distribution system is known as a “**distribution-connected generator**” or an “**embedded generator**” – both expressions mean the same thing. The distribution system is used to transport electricity to consumers, either from the transmission system or from distribution-connected generators.
 - 14.4. The “**grid**” is an informal term for all of the infrastructure by which electricity is transported, i.e. the transmission system and the distribution system combined.
 - 14.5. A “**supplier**” sells or re-sells electricity to the ultimate end users thereof. A supplier need not have had any role in generating the electricity or providing the infrastructure by which it is transported from the generation site to the end user. Suppliers, and others who draw electricity from the system, are sometimes referred to as “**demand**”.
15. The transmission system in GB is known as the National Electricity Transmission System (“**the NETS**”), which includes both onshore and offshore transmission infrastructure. A considerable quantity of offshore transmission infrastructure has been installed in recent years, in order to connect offshore windfarms to the pre-existing transmission system.⁴
 16. The NETS is linked by subsea cables to the transmission networks of France, Belgium, the Netherlands, Northern Ireland and the Republic of Ireland. These links between the NETS and non-GB transmission systems are known as “**interconnectors**”. Interconnectors are not part of the NETS; rather, they connect the NETS to other transmission systems.⁵
 17. The core part of the NETS is known as the Main Integrated Transmission System (“**the MITS**”). In broad terms, the MITS is the part of the NETS which is heavily “*meshed*”, i.e. there are multiple paths by which electricity could flow between any two points on the

⁴ Self §13.

⁵ Self §14.

MITs. By contrast, the non-MITs parts of the NETS are less meshed, and in many cases there would only be one route by which electricity could flow between two points.⁶

Charges paid by generators in GB

18. The charges paid by generators in GB which are relevant to these proceedings are summarised in the paragraphs which follow. These charges are calculated in accordance with the Connection and Use of System Code (“**the CUSC**”) and the Balancing and Settlement Code (“**the BSC**”), to which the Appellants and other relevant industry participants are bound as a matter of contract.⁷
19. “**CUSC Connection Charges**” are paid by transmission-connected generators in accordance with the CUSC. CUSC Connection Charges relate to the provision and maintenance of assets which were installed to connect a generator to a local substation, and are not generally shared. CUSC Connection Charges are not, however, levied in respect of all such assets. Thus, for example, CUSC Connection Charges would not apply where a cable longer than 2km is installed to connect a generator: see §14.2.6(c) of the CUSC [[A5/p459](#)].⁸
20. **Transmission Network Use of System Charges (“TNUoS Charges”)** are levied in accordance with the CUSC, and relate to the cost of the installation and maintenance of the transmission system. For present purposes, the key points about TNUoS Charges are as follows:
 - 20.1. TNUoS Charges are paid by suppliers/demand and some, but not all, generators. The generators that are liable for TNUoS Charges are (i) transmission-connected generators; and (ii) distribution-connected generators with a capacity in excess of 100MW, known as “**Large DG**”. Distribution-connected generators with a capacity below 100MW, known as “**Small DG**”, do not pay TNUoS Charges.⁹
 - 20.2. The total amount to be collected via TNUoS Charges in each charging year is set by GEMA. Historically, 27% of TNUoS Charges were collected from generators, and the remaining 73% from demand. Since 2014, however, the proportion of

⁶ Self §15.

⁷ Self §21.

⁸ Self §§23-24.

⁹ Self §§10, 25.

TNUoS Charges payable by generators each year has been set via a formula which aims to ensure that average TNUoS Charges paid by generators do not exceed €2.50/MWh in any charging year. This has resulted in generators paying significantly less than 27% of total TNUoS Charges, and demand paying a correspondingly larger proportion.¹⁰ The reasons why the formula exists are discussed below.

20.3. The TNUoS Charges paid by generators comprise:

20.3.1. **“Local Charges”**, which relate to the cost of installing and maintaining those assets which link one or more generators to the MITS, and are not the subject of CUSC Connection Charges. The following points should be noted:

20.3.1.1. The components of Local Charges are known as **“Local Circuit Charges”** and **“Local Substation Charges”**.¹¹

20.3.1.2. Many of the assets in respect of which Local Charges are levied will have been installed for the specific purpose of connecting a particular generator to the NETS – thus, for example, Local Charges would be levied if a cable over 2km was installed to connect a generator to the NETS.¹²

20.3.1.3. Local Charges are calculated by reference to the particular assets to which they relate, and are intended to be cost-reflective.¹³

20.3.1.4. To the extent that an asset has capacity beyond the generating capacity of a generator that uses it, that generator’s Local Charges in respect of the asset are calculated proportionally – i.e. if a 100MW cable were to be installed to connect a power station with a generating capacity of 95MW, the generator would (broadly speaking) pay for 95% of the costs associated with the cable. The remained 5% of the costs would be borne by all demand users across GB.¹⁴

¹⁰ Self §27.

¹¹ Self §30.

¹² Self §30.

¹³ Self §30.

¹⁴ Self §31.

20.3.2. **“Wider Locational Charges”**, which relate to the cost of installing and maintaining the assets which make up the MITS. Wider Locational Charges are not calculated on the basis of a generator’s specific connection design or location, but vary depending on the region in which a generator is located. This reflects that generators which choose to locate in regions far from centres of demand for electricity are, in effect, likely to cause greater costs to the transmission system than generators which locate close to centres of demand.¹⁵

20.3.3. The **“TGR”** (Transmission Generation Residual), which is a flat charge that (as things stand) is levied on all generators liable for TNUoS Charges, based on their capacity. If the total amount of TNUoS Charges to be collected from generators in a given charging year exceeds the sum of the Local Charges and Wider Locational Charges payable, then a positive charge is levied by way of the TGR, to cover the difference. Where the amount *prima facie* payable by way of Local Charges and Wider Locational Charges is greater than the total amount of TNUoS Charges to be paid by generators in the relevant charging year, a negative charge is applied by way of the TGR. The TGR has been negative since the 2017/18 charging year.¹⁶

21. **Balancing Services Use of System Charges (“BSUoS Charges”)**. In order to maintain safe operation of the grid, the amount of electricity being injected into and withdrawn from it must be balanced, and the amounts of electricity being transported across particular pieces of infrastructure must be kept within relevant operational limits. NGENSO monitors how much electricity is being injected/withdrawn from the grid, and how much electricity is being transmitted on different parts of the GB grid. Where necessary, NGENSO takes steps to ensure that the system as a whole remains in balance, and that the limits applicable to particular pieces of infrastructure are not exceeded, e.g. NGENSO may pay particular generators to reduce or increase their output. NGENSO recovers the cost of taking such steps via BSUoS Charges, which are levied on both generators and demand in accordance with the CUSC.¹⁷

¹⁵ Self §33.

¹⁶ Self §34.

¹⁷ Self §§36-44.

22. **Balancing and Settlement Code Charges (“BSC Charges”).** There is sometimes a disparity between the amount of electricity that a generator has agreed to inject into the grid, and the amount that it in fact injects. Similarly, a supplier may draw from the grid more or less electricity than it had contracted to. There is a financial settlement process which seeks to ensure that generators and suppliers are compensated/charged for the actual volumes of electricity that they inject/withdraw from the system. The settlement process is administered by Elexon Ltd (“**Elexon**”), a not-for-profit company, in accordance with the Balancing and Settlement Code. Elexon’s costs of performing this role are recovered from generators and demand via BSC Charges.¹⁸

The ITC Regulation

23. The issues raised by this appeal relate in large part to the proper interpretation, as a matter of law, of the ITC Regulation, which was adopted by the EU Commission pursuant to Article 18(5) of Regulation (EC) 714/2009 (“**the 2009 Regulation**”) [C5/p12].
24. Most of the ITC Regulation relates to a mechanism for transmission system operators to receive compensation from a EU-wide fund in respect of costs incurred as a result of cross-border flows of electricity. This is not relevant to these proceedings (and the provisions in question ceased to apply in GB at the end of the post-Brexit Transition Period).
25. The sections of the ITC Regulation which are relevant to these proceedings are Article 2 and (especially) Part B of the Annex. Article 2 simply stipulates “Charges applied by network operators for access to the transmission system shall be in accordance with guidelines set out in Part B of the Annex”, and remains in force unchanged in GB. Part B now applies with amendments which came into force at the end of the Transition Period.¹⁹ Part B is set out below; text which is struck through no longer applies in GB, and underlined text was inserted with effect from the end of the Transition Period.

1. *Annual average transmission charges paid by producers in ~~each Member State~~ Great Britain shall be within the ~~ranges~~ range set out in point 3.*

¹⁸ Self §§45-56.

¹⁹ The amendments were made by the Electricity Network Codes and Guidelines (Markets and Trading) (Amendment) (EU Exit) Regulations 2019/532 [C9]. The full text of the ITC Regulation as it now applies in GB is at [C6].

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

For the calculation set out at Point 3, transmission charges shall exclude:

- (1) charges paid by producers for physical assets required for connection to the system or the upgrade of the connection;*
 - (2) charges paid by producers related to ancillary services;*
 - (3) specific system loss charges paid by producers.*
3. *The value of the annual average transmission charges paid by producers shall be within a range of 0 to 0,5 EUR/MWh, except those applying in Denmark, Sweden, Finland, Romania Ireland, Great Britain and Northern Ireland.*

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

Annual average transmission charges paid by producers in ~~Ireland, Great Britain and Northern Ireland~~ shall be within a range of 0 to ~~2,5EUR/MWh~~ 2.5 euros per megawatt hour, and in Romania within a range of 0 to 2,0 EUR/MWh.
 4. *The Agency shall monitor the appropriateness of the ranges of allowable transmission charges, taking particular account of their impact on the financing of transmission capacity needed for Member States to achieve their targets under the Directive 2009/28/EC of the European Parliament and of the Council and their impact on system users in general.*
 5. *By 1 January 2014 the Agency shall provide its opinion to the Commission as to the appropriate range or ranges of charges for the period after 1 January 2015.*

26. There are four key points to note about the ITC Regulation:

- 26.1. First, the amendments which came into force at the end of the Transition Period do not change the substance of how Part B applies in GB. Rather, they simply (i) make Part B GB-specific, by removing provisions which relate to places other than GB; and (ii) remove provisions about “the Agency”, i.e. the Agency for the Cooperation of Energy Regulators (“ACER”, an EU body).
- 26.2. Second, the ITC Regulation does not prescribe or prohibit any particular system by which charges paid by generators are to be levied. The obligation imposed by Part B is simply that “annual average transmission charges paid by producers” in GB should fall within the range of €0-€2.50/MWh, i.e. the “Permitted Range”.
- 26.3. Third, that obligation imposes a floor as well as a cap. It would be just as much a breach of the ITC Regulation if “annual average transmission charges paid by producers” dropped below €0/MWh (i.e. if transmission charges paid by producers were negative overall) as if they exceeded €2.50/MWh.

26.4. Fourth, when assessing whether “*annual average transmission charges paid by producers*” fall within the Permitted Range, no account is to be taken of (i) “*charges paid by producers for physical assets required for connection to the system or the upgrade of the connection*” (i.e. the “**Connection Exclusion**”); and (ii) “*charges paid by producers related to ancillary services*” (i.e. the “**Ancillary Services Exclusion**”). The scope of these two exclusions is central to the issues in this appeal. (The third exclusion, relating to “*specific system loss charges*”, is not in issue.)

The CUSC Calculation

27. The CUSC has since 2014 included a provision which aims to ensure that average TNUoS Charges paid by generators do not exceed €2.50/MWh in any charging year, using the formula referred to at §20.2 above, i.e. the “**CUSC Calculation**”. See §14.14.5(v) of the CUSC [[A5/p487](#)].

28. The CUSC Calculation was introduced with the aim of avoiding a breach of the upper limit of the Permitted Range. Five points should be noted about the CUSC Calculation as it currently stands:

28.1. First, the CUSC Calculation proceeds on the assumption that “*annual average transmission charges paid by producers*” (which the ITC Regulation caps at €2.50/MWh) equate to annual average TNUoS Charges paid by producers (which the CUSC Calculation seeks to keep below €2.50/MWh). As explained below, the CMA held in 2018 that this assumption is wrong as a matter of law (and the Appellants do not challenge that conclusion).

28.2. Second, the fact that the CUSC Calculation is based on an erroneous understanding of the law does not necessarily mean that there has been (or will be) a breach of the ITC Regulation. As explained above, the obligation imposed by the ITC Regulation is simply that “*annual average transmission charges paid by producers*” (within the meaning of the ITC Regulation) fall somewhere within the Permitted Range. It is possible for them to do so, notwithstanding the erroneous assumption made by the CUSC Calculation. Thus, for example, if “*annual average transmission charges paid by producers*” (within the meaning of the ITC Regulation) are €1/MWh, there is no breach of the ITC Regulation, notwithstanding that annual average TNUoS Charges are €2/MWh (or indeed €2.60/MWh).

- 28.3. Third, the CUSC Calculation does not guarantee that average TNUoS Charges paid by generators will stay below €2.50/MWh. This is because the calculation is performed prospectively, on the basis of forecasts of generation output and exchange rates for the forthcoming charging year. The CUSC Calculation does, however, incorporate an error margin, with the aim that average TNUoS Charges paid by generators should not exceed €2.50/MWh even if there are some deviations from the forecasts.
- 28.4. Fourth, the CUSC Calculation does not incorporate any retrospective reconciliation mechanism to make adjustments in the event that (notwithstanding the error margin) average TNUoS Charges paid by generators end up exceeding €2.50/MWh in any charging year.
- 28.5. Fifth, the CUSC Calculation is aimed at avoiding a breach of the upper limit of the Permitted Range. There is no provision in the CUSC aimed at avoiding a breach of the lower limit.

CMP261 and the CMA Decision of 26 February 2018

29. In the course of the charging year 2015-16, it became apparent that average TNUoS Charges paid by generators in respect of that charging year might exceed €2.50/MWh. The Appellants (and/or other entities in their corporate group) assumed that, if this happened, it would entail a breach of the upper limit of the Permitted Range. They therefore proposed that the CUSC be modified in such a way that (in broad terms) generators would receive rebates, to the extent that average TNUoS Charges paid by generators exceeded €2.50/MWh.²⁰ This proposal to modify the CUSC was known as “**CMP261**”.
30. GEMA rejected CMP261, by a decision dated 16 November 2017 (“**the CMP261 Decision**” [[A53](#)]). In broad terms, GEMA’s reasoning was as follows:

²⁰ Self §64. At §35 of the Grounds, the Appellants say that “*the prediction of a breach was dependent on forecast figures which applied...the correct legal construction of the ITC Regulation*”. This is wrong. As explained below, the prediction of a breach was predicated on an interpretation of the ITC Regulation (in particular the Connection Exclusion) which the CMA held to be incorrect.

- 30.1. How a charge is labelled as a matter of domestic law/practice cannot be determinative of whether it is a “*transmission charge*” within the meaning of the ITC Regulation.
- 30.2. As a matter of law, Local Charges in respect of at least the assets known in GB as “**offshore generation-only spurs**”, i.e. assets of the sort by which all offshore windfarms then in existence were connected to the MITS, fell within the Connection Exclusion.
- 30.3. On that basis, there was no breach of the Permitted Range in 2015-16 (or any other year), and no reason why generators should receive a rebate.
- 30.4. GEMA expressly left open the possibility that at least some Local Charges in respect of assets other than offshore generation-only spurs also fell within the Connection Exclusion. See especially pages 7-8 of the CMP261 Decision.
31. Various entities in the Appellants’ corporate group appealed to the CMA against the CMP261 Decision (along with EDF Energy (Thermal Generation) Ltd and related entities). By a decision dated 26 February 2018, the CMA dismissed their appeal (“**the CMA Decision**” [C20]). The Panel is respectfully requested to read the CMA Decision in full. In summary, however, the CMA’s reasoning was as follows:
- 31.1. The ITC Regulation does not define the Connection Exclusion. The meaning of the Connection Exclusion must therefore 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 forms a part*”: see the judgment of the Court of Justice of the European Union (“**CJEU**”) in C-568/15 *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV v Comtech GmbH* [2017] Bus LR 1232 [C19] at §19, cited in the CMA Decision at §5.76.
- 31.2. The ITC Regulation, as an EU law instrument, must be given an autonomous and uniform interpretation across the EU. The question of what falls within the Connection Exclusion therefore cannot be determined by reference to what happens to be labelled as a “*connection charge*” as a matter of domestic law/practice in GB. See the judgment of the CJEU in C-236/01 *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri* [C16] at §72, cited in the CMA Decision at §§5.82-5.83.

- 31.3. In the context of the Connection Exclusion, *“the system”* must mean *“the system as it exists at the point that a new Generator wishes to be connected to it”* (CMA Decision, §5.94). When deciding whether or not a charge falls within the Connection Exclusion, it is necessary to ask whether the physical asset to which it relates was *“required for”* the generator to connect to *“the system”* as it existed at that point. This is the same as asking whether, *“but for”* the asset, the generator would be connected to *“the system”* (CMA Decision, §§5.94, 5.97-5.98, 6.23).
- 31.4. Equipment by which a connection to *“the system”* is effected continues to be *“required for”* connection to *“the system”* after the initial act of connecting, and charges in respect of such equipment continue to fall within the Connection Exclusion. The CMA rejected the contention that a charge could only fall within the Connection Exclusion if it was levied on a one-off basis (CMA Decision, §§5.94-5.96, 5.111, 6.23).
- 31.5. All offshore generation-only spurs which were in use in 2015-16 (i.e. the relevant charging year) had been *“constructed for the purpose of connecting the relevant generation assets to the then pre-existing transmission system”*, and GEMA had therefore been correct to conclude in the CMP261 Decision that charges in respect of them fell within the Connection Exclusion. Of the 15 offshore generation-only spurs which were in use in 2015-16, 13 were used by a single generator. The other two were each shared by two generators, and had been planned from the outset to connect both of the relevant generators to the MITS. Local Charges in respect of both the shared and the unshared offshore generation-only spurs fell within the Connection Exclusion (CMA Decision, §§5.98(b), 5.101). As such, there had been no breach of the Permitted Range (*cf* CMA Decision, §4.48(e)).²¹
- 31.6. The CMA rejected the contention that the CMP261 Decision constituted an abuse of process, infringed the principle of regulatory consistency and/or breached various general principles of EU law (CMA Decision, §§7.1-8.29).
32. Had the Appellants disagreed with the CMA Decision, it would have been open to them to seek judicial review thereof. They did not do so. The present appeal should therefore proceed on the footing that the CMA Decision was correct. Indeed, the Appellants

²¹ Mr Graham refers at §1.2 of his witness statement to *“the breach of the €2.50/MWh cap in 2015/16”*. This is surprising (to put it mildly), given that the CMA held that there was no such breach.

expressly state that they do not seek to impugn the CMA's previous findings (see NoA, §150).

The Targeted Charging Review

33. In August 2017, GEMA commenced a review of various aspects of electricity network charging, including the TGR.²² This review was known as the **"Targeted Charging Review"** ("the TCR").
34. Following the CMA Decision, GEMA circulated an open letter on 4 May 2018, which indicated that GEMA considered (i) that there was no need for an immediate change to the CUSC Calculation in light of the CMP261 Decision and the CMA Decision, providing there continued to be no breach of the Permitted Range; and (ii) that it would make sense to consider the possibility of any change to the CUSC Calculation alongside the TCR, which was then ongoing [A78].
35. GEMA published its decision in respect of the TCR on 21 November 2019, i.e. the **"TCR Decision"** [A20], along with an impact assessment [A80]. The TCR Decision, and the process leading up to it, are summarised at §§67-76 of Mr Self's witness statement, but four key points should be particularly noted:
 - 35.1. First, GEMA decided that the TGR should be set to zero, subject to an adjustment mechanism to ensure compliance with the ITC Regulation. Specifically, GEMA said: *"this should be achieved by charging generators all applicable charges (having factored in the correct interpretation of the connection exclusion as set out in [the ITC Regulation]), and adjusted if needed to ensure compliance with the 0-2.50 EUR/MWh range"* (TCR Decision, §4.16).
 - 35.2. Second, the rationale for setting the TGR to zero (subject to any adjustment required to comply with the ITC Regulation) was, in broad terms, that (i) the TGR had become a negative charge, i.e. a payment to generators; (ii) such payments only went to transmission-connected generators and Large DG, since Small DG are not liable for TNUoS Charges; and (iii) the TGR therefore tended to distort competition between differently sized generators.

²² Self §67.

- 35.3. Third, GEMA considered the timescale for the implementation of the changes that it had decided should be made, and whether implementation should be phased. GEMA decided that the reform of the TGR should be implemented in full in April 2021, without phasing. See especially chapter 6 of the TCR Decision.
- 35.4. Fourth, the Appellants repeatedly make reference to §4.79 of the TCR Decision (NoA, §§53-54, 150, 162-163, 170), in which GEMA said the following [[A20/p125](#)]:

“We think that generators should face transmission charges for:

- *off-shore local charges,*
- *on-shore local charges (less those which fall into the ‘Connection Exclusion’), and*
- *wider locational charges.”*

The Appellants have chosen, for the purposes of this appeal, to construe this as a statement by GEMA that no offshore Local Charges fall within the Connection Exclusion, and to suggest that GEMA has now adopted an inconsistent position. This point is opportunistic, and wholly without merit. When §4.79 of the TCR Decision is read in the context of the CMA Decision, which held that all offshore Local Charges levied in 2015-16 came within the Connection Exclusion, it is obvious that the words in brackets are intended to apply to both the first and second bullet points (rather than the second bullet point only). It is plain that the Appellants did not understand GEMA to be saying that no offshore Local Charges fall within the Connection Exclusion, since the CUSC modification proposals that the Appellants’ representatives have put forward (discussed further below) treat many offshore Local Charges as falling within the Connection Exclusion. This is also the case for all other CUSC modification proposals that other industry participants have put forward.

36. Also on 21 November 2019, GEMA issued a direction to NGESO to raise one or more proposals to modify the CUSC to give effect to the TCR Decision (“**the CUSC Direction**” [[A21](#)]). The CUSC Direction specifically directed NGESO to “*raise the necessary code modification proposal(s) in sufficient time to enable the modifications to be effective as of 1 April 2021*” [[A21/p1](#)], and included the following at §45:

“The Proposal(s) must set out proposals to modify the Use of System Charging Methodology, Section 14 of the CUSC to set the TGR to £0, subject to ensuring ongoing compliance with EU Regulation 838/2010 (in particular, the requirement that average transmission charges paid by producers in each Member State must be within prescribed ranges – which for Ireland, Great Britain and Northern Ireland is 0 to 2.50

EUR/MWh). This should be achieved by charging generators all applicable charges (having factored in the correct interpretation of the connection exclusion as set out in EU Regulation 838/2010), and adjusted if needed to ensure compliance with the 0 to 2.50 EUR/MWh range.”

37. It would have been open to the Appellants (and/or other industry participants) to seek judicial review of the TCR Decision, Impact Assessment and/or the CUSC Direction, had they considered any aspect of them to be unlawful. The Appellants did not do so (and nor did anyone else). The time limit for any judicial review has long since passed, and the present appeal must therefore proceed on the footing that the TCR Decision and the CUSC Direction were lawful. This is not just a technical procedural point: there are obvious policy reasons why it is important that any challenges be brought at the appropriate point, so that (i) all market participants can plan their affairs on a solid footing as to when a decision is no longer vulnerable to challenge; and (ii) subsequent decision-making can proceed on the basis that (absent a material change of circumstances) earlier decisions do not need to be revisited.

The CUSC modification process

38. Under §6 of Condition C10 of its transmission licence, NGENSO is required to “*establish and operate procedures for the modification of the CUSC*” [A4/p212]. The relevant procedures are set out in Section 8 of the CUSC [A5/pp250-313]. Five points are particularly important in the present context:
- 38.1. First, once a modification proposal has been raised, the process by which it is considered is overseen by a panel on which industry representatives sit (“**the CUSC Modifications Panel**”). The process is relatively elaborate, and may – as in this case – involve detailed consideration by workgroups.
- 38.2. Second, a workgroup may formulate one or more alternative proposals for modification of the CUSC – known as “**Workgroup Alternative CUSC Modifications**” or “**WACMs**” – to be considered alongside the original proposal.
- 38.3. Third, proposals for modification of the CUSC are to be evaluated by reference to whether they would, if implemented, be better than the *status quo* at facilitating the “**Applicable CUSC Objectives**” (“**the ACOs**”). The ACOs are set out in NGENSO’s transmission licence, and are addressed further below.

- 38.4. Fourth, subject to exceptions which are not relevant here, no proposal for modification of the CUSC can take effect without GEMA's approval. The CUSC Modifications Panel is required to submit a report to GEMA, setting out both the original proposal that was made and any WACMs (excluding any proposals that have been withdrawn), along with an evaluation thereof. See especially §8.23 of the CUSC [A5/pp287-293].
- 38.5. Fifth, GEMA has power to direct NGENSO to modify the CUSC in accordance with a modification proposal set out in the report if, but only if, GEMA "*is of the opinion that a modification set out in such report would, as compared with the then existing provisions of the CUSC and any alternative modifications set out in such report, better facilitate achieving the applicable CUSC objectives*".²³ If, however, GEMA believes that neither the original modification proposal nor any of the WACMs in the report would better facilitate achievement of the ACOs, "*then there will be no approval*". See §7(a) of Licence Condition C10 [A4/p222] and §8.23.7 of the CUSC [A5/p291]. As such, GEMA's options when a report is submitted to it are: (i) to approve one of the proposals in the report, i.e. the original proposal or a specific WACM; (ii) to reject all of the proposals, and thus leave the CUSC unchanged; or (iii) to require the report to be revised and re-submitted, with the CUSC remaining unchanged in the interim (see §8.23.12 of the CUSC [A5/p293] for this last option, which is only available where the report is such that GEMA "*cannot properly form an opinion*"). It is not open to GEMA to "*pick and mix*" between elements of different WACMs, or otherwise impose an amendment of its own devising that has not been through the process of consideration by the CUSC Modifications Panel.²⁴
39. As noted above, GEMA is required to assess modification proposals by reference to whether they would better facilitate achievement of the ACOs. These are defined in §15

²³ Even a marginal improvement, by comparison with the *status quo* and other modification proposals, is sufficient to satisfy this requirement.

²⁴ At §110 of the Grounds, the Appellants say that "*GEMA can impose modifications where these are necessary for compliance with the Electricity Regulation 2009 (now the Recast Electricity Regulation)*". This appears to be a reference to GEMA's power to make a proposal for a modification (see §6H of Licence Condition C10 [A4/pp221-222] and §8.17A of the CUSC [A5/pp273-274]). Such a proposal would be considered by the CUSC Modifications Panel, before a report is submitted to GEMA for consideration.

of Licence Condition C10 [A4/p227], and the key set of ACOs for present purposes are those at §5 of Licence Condition C5 [A4/pp189-190].²⁵ These are:

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

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

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

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

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

The proposals at issue in this appeal

40. Prior to the CUSC Direction, NGENSO had raised a proposal to modify the CUSC in light of the CMA Decision [A60]. This proposal was known as “CMP317”. Following the CUSC Direction, NGENSO raised a further proposal, which was intended to give effect to GEMA’s decision (in the TCR Decision) that the TGR should be set to zero [A46]. This second proposal was known as “CMP327”. In view of the overlap in the issues with which CMP317 and CMP327 were concerned, GEMA gave consent for them to be amalgamated on 29 January 2020 [A22].
41. The deliberations of the CUSC Modifications Panel and the workgroup that was set up to consider the proposals are summarised in the report at [A23], which was submitted to GEMA on 13 August 2020. In addition to NGENSO’s original proposal (“**the Original Proposal**”), no fewer than 83 WACMs were put forward, although neither the Original

²⁵ The ACOs set out in §5 of Licence Condition C5 apply where a proposal relates only to a proposed modification of the “*use of system charging methodology*” (see §15 [A4/p227]). This is the case with the proposals that were the subject of the main decision under challenge in these proceedings (i.e. the decision on CMP317/327). A broadly similar set of ACOs applied to the subsidiary decision on CMP339 (which, as explained below, relates to consequential amendments to the definitions section of the CUSC), but these are not set out here since it is common ground that the outcome on CMP317/327 dictates the outcome on CMP339. The ACOs applicable to CMP339 are at §1 of Licence Condition C10 [A4/p210].

Proposal nor any of the WACMs commanded the support of the majority of the CUSC Modifications Panel. 20 of the WACMs were put forward by representatives of the Appellants.²⁶

42. All of the proposals would set the TGR to zero, as required by the CUSC Direction. The differences between the Original Proposal and the various WACMs relate to the following issues, and the plethora of WACMs reflects the various ways in which the options on each issue could be combined:
 - 42.1. Whether certain **BSC Charges** (“**the Relevant BSC Charges**”), which are not currently taken into account in the CUSC Calculation, should be taken into account in that Calculation.
 - 42.2. Whether **BSUoS Charges** relating to “*congestion management*” (a concept discussed further below), which are not currently taken into account in the CUSC Calculation, should be taken into account in that Calculation.
 - 42.3. If any element of BSC Charges and/or BSUoS Charges is to be taken into account in the CUSC Calculation, whether there should be a **two-step adjustment process** to set and, in certain circumstances, adjust charges to be paid in an upcoming charging year.
 - 42.4. Whether there should be **phased implementation** and, if so, over what period.
 - 42.5. Whether the CUSC Calculation should seek to **target a specific value** within the Permitted Range (and, if so, what the target should be) or instead should include an **error margin**.
 - 42.6. **The scope of the Connection Exclusion.** The various proposals reflect three different interpretations.
43. The various proposals in CMP317/CMP327 would require amendments to the list of defined terms in section 11 of the CUSC [[A5/pp347-431](#)]. The amendments required would depend on which (if any) of the proposals in CMP317/327 was approved. Proposals for each potential set of definitional amendments were put forward in a separate modification report, known as “**CMP339**”, which was submitted to GEMA on the same day as the CMP317/327 report [[A26](#)].

²⁶ Graham §2.11 and fn 22.

D. THE DECISIONS

44. On 17 December 2020, GEMA decided to approve: (i) the Original Proposal in CMP317/327 [A27]; and (ii) the corresponding set of definitional changes in CMP339 [A25]. It is those two decisions that are the subject of this appeal. The focus of the argument is, however, on the first decision, since it is common ground that the outcome on CMP317/327 dictates which set of definitional amendments is appropriate (*cf* NoA, §6).
45. GEMA respectfully requests that the CMA read the two decisions under challenge in full. In summary, however, GEMA's reasoning in its decision on CMP317/327 ("**the CMP317/327 Decision**") was as follows:
- 45.1. After setting out the relevant background, GEMA first considered the question of whether the **Relevant BSC Charges** should be taken into account in the CUSC Calculation. The proposal that the Relevant BSC Charges should be taken into account was premised on the proposition that such charges do not fall into the Ancillary Services Exclusion (or any other exclusion). GEMA concluded that, as a matter of law, the Relevant BSC Charges do fall within the Ancillary Services Exclusion. On that basis, there was no reason to include the Relevant BSC Charges in the CUSC Calculation, and to do so would not better facilitate any of the ACOs. GEMA therefore rejected proposals which would include the Relevant BSC Charges in the CUSC Calculation. The Appellants challenge this element of the CMP317/327 Decision under Ground 3(b).
- 45.2. GEMA then considered the question of whether **BSUoS Charges relating to "congestion management"** should be taken into account in the CUSC Calculation. Again, the proposal to take such charges into account was premised on the proposition that they do not fall into the Ancillary Services Exclusion (or any other exclusion), and GEMA concluded that they do fall within the Ancillary Services Exclusion. There was therefore no reason to take them into account, and to do so would not serve any of the ACOs. GEMA also noted that the proposal was defective since it would have introduced the concept of "*congestion management*" into the CUSC without any definition of that term. GEMA therefore rejected proposals which would include any portion of BSUoS Charges in the

CUSC Calculation. The Appellants challenge this element of the CMP317/327 Decision under Ground 3(a).

- 45.3. GEMA then noted that the proposals in relation to a **two-step adjustment process** were only present in proposals which would have taken certain BSC Charges and/or BSUoS Charges into account in the CUSC Calculation. Since GEMA had already decided to reject all such proposals, this issue did not require further consideration.
- 45.4. GEMA then considered the question of whether there should be **phasing of implementation**. GEMA concluded that there should be no phasing, consistent with the TCR Decision and CUSC Direction (which, as noted above, the Appellants did not challenge) that the changes should be implemented in April 2021. GEMA considered that generators had had ample notice of the changes envisaged by the TCR Decision and CUSC Direction, and that options without phasing would better facilitate the ACOs than options that incorporated phasing (broadly because phasing would delay the full implementation of changes which the TCR Decision had identified as desirable). GEMA therefore rejected proposals that incorporated phasing. The Appellants challenge this element of the CMP317/327 Decision under Ground 6.
- 45.5. GEMA then considered whether the CUSC Calculation should **target a specific value** within the Permitted Range, or instead include an **error margin**. GEMA concluded that there should be an error margin, but that no specific value should be targeted. GEMA noted that the introduction of a target would in substance be a self-imposed lowering of the upper end of the Permitted Range. GEMA considered that this would (i) be contrary to the (unchallenged) TCR Decision that generators should be charged "*all applicable charges*", subject only to such adjustment as is required to comply with the Permitted Range; (ii) not better facilitate the ACOs; and (iii) be detrimental to consumers (whose interests GEMA has a statutory obligation to protect), who would be required to "*pick up*" charges that would otherwise be paid by generators. The Appellants challenge this element of the CMP317/327 Decision under Ground 5.
- 45.6. The consequence of the foregoing elements of GEMA's decision was that only three modification proposals remained under consideration, namely the Original Proposal (raised by NGESO), WACM7 and WACM14 (both raised by Mr

Graham, a representative of the Appellants [**Graham §2.11 fn 22**]). The differences between these proposals related to the **scope of the Connection Exclusion**. On this issue, which is the subject of the Appellants challenges under Grounds 1 and 2, GEMA's reasoning was (in summary) as follows:

- 45.6.1. GEMA explained its analysis of the proper interpretation of the Connection Exclusion, and noted that neither the *status quo* nor any of the three options embodied in the modification proposals correctly reflected that interpretation.
- 45.6.2. GEMA noted that under the *status quo* there is a serious and imminent risk of a breach of the lower end of the Permitted Range. GEMA therefore concluded that it would be preferable to approve a proposal that would reduce the risk of non-compliance with the ITC Regulation than to allow the *status quo* to persist (whether by rejecting all proposals or directing that the modification report be revised and resubmitted).
- 45.6.3. GEMA examined the ways in which the three proposals under consideration diverged from what it considers to be the correct interpretation of the Connection Exclusion. There were certain similarities between WACM7 and WACM14 and, of those two proposals, GEMA concluded that WACM7 was the closer to the correct interpretation. GEMA therefore decided to reject WACM14.
- 45.6.4. GEMA noted that in the next 3 charging years both the Original Proposal and WACM7 would involve only small divergences from the correct interpretation of the Connection Exclusion, and that under both options the risk of a breach of the Permitted Range during that period was low. The risk of a breach would, however, rise in subsequent years. GEMA therefore considered that neither option represented an acceptable long-term solution, and that whichever was adopted would only be a temporary stop-gap pending a further modification (to reflect the correct interpretation of the Connection Exclusion).
- 45.6.5. GEMA considered it desirable that this temporary stop-gap be administratively simple to implement, especially since it would only be in place for a short period. GEMA considered that the Original Proposal

would be less complex than WACM7 to implement, since the Original Proposal would simply treat all Local Charges as falling within the Connection Exclusion, whereas WACM7 would require an exercise to identify whether particular assets were or were not shared between generators. GEMA also noted that the Original Proposal would be marginally better for consumers than WACM7.

- 45.7. GEMA therefore decided (i) to approve the Original Proposal; but (ii) to indicate that it expects NGESO to bring forward a further modification proposal, in time for implementation from 1 April 2022, which would properly reflect the correct interpretation of the Connection Exclusion (and also to address an issue relating to the CUSC Calculation's treatment of Large DG).
46. GEMA's decision on CMP339 ("**the CMP339 Decision**") was the logical consequence of the CMP317/327 Decision. In short, having decided to approve the Original Proposal, it followed that GEMA should approve the corresponding set of definitional changes.

E. THE FRAMEWORK FOR THE APPEAL

47. The appeal is brought under s.173 of the Energy Act 2004 ("**EA 2004**") [C3/pp1-2]. Section 175 EA 2004 provides as follows:

- (1) *This section applies to every appeal brought under section 173 of this Act.*
- (2) *In determining the appeal the CMA must have regard, to the same extent as is required of GEMA, to the matters to which GEMA must have regard –*
 - (a) *in the carrying out of its principal objectives under ... section 3A of the [Electricity Act 1989] (principal objectives and general duties);*
 - (b) *in the performance of its duties under those sections; and*
 - (c) *in the performance of its duties under ... sections 3B and 3C of the [Electricity Act 1989] (environmental and health and safety considerations).*
- (3) *In determining the appeal the CMA –*
 - (a) *may have regard to any matter to which GEMA was not able to have regard in the case of the decision appealed against; but*
 - (b) *must not, in the exercise of that power, have regard to any matter to which GEMA would not have been entitled to have regard in that case had it had the opportunity of doing so.*
- (4) *The CMA may allow the appeal only if it is satisfied that the decision appealed against was wrong on one or more of the following grounds –*
 - (a) *that GEMA failed properly to have regard to the matters mentioned in subsection (2);*

- (b) that GEMA failed properly to have regard to –
 - (i) the purposes for which the relevant condition has effect (in the case of an appeal by virtue of section 173(2)), or
 - ...
 - (c) that GEMA failed to give the appropriate weight to one or more of those matters or purposes;
 - (d) that the decision was based, wholly or partly, on an error of fact;
 - (e) that the decision was wrong in law.
- (5) Where the CMA does not allow the appeal, it must confirm the decision appealed against.

48. The nature of an appeal under s.173 was considered by the Competition Commission (i.e. the predecessor of the CMA) in *E.ON UK Plc v GEMA* (10 July 2007) at §§5.1-5.19 [C17/pp25-28]. The Competition Commission reached the following important conclusions about its role (which the CMA has inherited) when hearing appeals under s.173:

- 48.1. *“leaving to one side errors of law, it is not our role to substitute our judgment for that of GEMA simply on the basis that we would have taken a different view of the matter were we the energy regulator”* (§5.11).
- 48.2. *“Under section 175, our role is to determine whether GEMA’s decision is wrong, because it has failed properly to have regard to, or failed to give the appropriate weight to, the matters to which GEMA must have regard, or because GEMA has erred in law or in fact. In our view, this test clearly admits of circumstances in which we might reach a different view from GEMA but in which it cannot be said that GEMA’s decision is wrong on one of the statutory grounds. For example, GEMA may have taken a view as to the weight to be attributed to a factor which differs from the view we take, but which we do not consider inappropriate in the circumstances”* (§5.12).
- 48.3. *“...GEMA, as the specialist regulator may well have an advantage over the CC in finding the relevant primary facts...GEMA...has an advantage of experience, and will often have the benefit of having conducted a consultation with the industry, as it did in the present case. For these reasons, the CC will be slow to impugn GEMA’s findings of fact...”* (§5.16).
- 48.4. *“In considering whether GEMA’s decision is wrong for an error of fact, the words “based...on” in section 175(4)(d) must be accorded their full weight. It is not enough to succeed under that section for an appellant to demonstrate that some error of fact, whether*

consequential or inconsequential, has been made by GEMA in its decision. Rather, an appellant will need to demonstrate that the error was material to the outcome of the decision. Only if the error was material in this way will we regard the decision as 'wrong' under section 175(4)(d)" (§5.17).

49. It follows that, to succeed on their appeal, the Appellants must show that the CMP317/327 Decision and/or the CMP339 Decision were “*wrong*” on one or more of the grounds specified in s.175(4). It would not be enough merely (i) for the Appellants to show that GEMA has made an error that is immaterial to the outcome; and/or (ii) for the CMA to consider that, had it been the primary decision-maker, it would have reached a different view from GEMA.

F. GROUND 1 - ALLEGATION THAT GEMA MADE AN “ERROR OF LAW AND/OR FACT IN RELATION TO CONSTRUCTION AND/OR APPLICATION OF THE CONNECTION EXCLUSION”

Introduction

50. Ground 1 occupies some 25 pages of the Notice of Appeal, and the arguments advanced are frequently hard to follow. In broad terms, however, the Appellants assert that GEMA has misconstrued the Connection Exclusion.
51. The target of much of the Appellants’ argument is the Original Proposal, which they contend to be based on an incorrect interpretation of the Connection Exclusion. The Appellants thereby erect and attack a straw man. GEMA expressly said in the CMP317/327 Decision that it considered the Original Proposal to be based on an erroneous understanding of the Connection Exclusion, and explained why the Original Proposal was nonetheless the best of the imperfect options available. The Appellants fail to engage with that reasoning. There is nothing unlawful about a decision-maker selecting from a range of imperfect options; indeed, it is common for regulators and other public bodies to have to do so. Compare the remarks of Lord Fraser in *G v G* [1985] 1 WLR 647, at 652 [C12]: “*the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible*”.

52. The Appellants' assertion that the adoption of the Original Proposal "*will lead*" to a breach of the Permitted Range (NoA, §115) is unexplained, and wrong: the fact that the CUSC Calculation is based on an erroneous interpretation of the ITC Regulation does not necessarily result in a breach of the Permitted Range (see §28.2 above), and the risk of breach associated with the Original Proposal is low (see pages 22 and 24 of the CMP317/327 Decision [[A27/pp22, 24](#)], and §91 of Mr Self's witness statement).
53. In this section of its Reply, GEMA (i) explains what it considers to be the correct interpretation of the Connection Exclusion; (ii) explains the respects in which each of the available options diverge from that interpretation; and (iii) responds in turn to the various sub-sections of Ground 1.

The correct interpretation of the Connection Exclusion

54. The following points are understood to be common ground:
- 54.1. The meaning of the Connection Exclusion 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 forms a part*": *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, §19, cited in the CMA Decision at §5.76 [[C20/p61](#)]. Cf. NoA, §116.
- 54.2. The Connection Exclusion must have "*an autonomous and uniform interpretation*" throughout the EU, and it would therefore be wrong to seek to define it "*by reference to the extant GB domestic charging structure*": CMA Decision, §§5.82, 5.88, citing *Monsanto*, §72. Cf. Ground 1(a), which alleges that GEMA failed to give the Connection Exclusion "*an autonomous EU law meaning*", and thereby accepts that it should be given such a meaning.
- 54.3. The CMA Decision is the only authority on the proper interpretation of the Connection Exclusion, and the Appellants do not dispute that the CMA was right to reach the conclusions that it did (albeit that they frequently ignore those conclusions).
55. The Connection Exclusion applies to "*charges paid by producers for physical assets required for connection to the system or the upgrade of the connection*". The CMA reached the following key conclusions about the meaning of these words:

- 55.1. The fact that, as a matter of domestic GB labelling, a charge is classed as a TNUoS Charge rather than a CUSC Connection Charge is irrelevant to whether it falls within the Connection Exclusion. See, e.g., CMA Decision, §§5.88, 5.106.
- 55.2. In the context of the Connection Exclusion, “*the system*...*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...are ones that fall within the Connection Exclusion, and such assets continue to be required by the Generator for connection to the pre-existing system even once the Generator is operational...connecting equipment continues after the initial act of connecting to be “required for connection to the system”*”: CMA Decision, §5.94.
56. The CMA based these conclusions on the natural and ordinary meaning of the words of the Connection Exclusion. The CMA considered and rejected arguments that the purpose of the ITC Regulation (as informed by the *travaux préparatoires*) should lead to a different conclusion: CMA Decision, §§5.102-112, which rejects (*inter alia*) the argument that a charge could only fall within the Connection Exclusion if it was levied on a one-off basis. Indeed, a purposive approach to the ITC Regulation reinforces the conclusions that the CMA reached:
- 56.1. The *travaux préparatoires* indicate that the Commission considered it desirable that charges should be cost reflective. The consultation document which preceded the ITC Regulation indicates that one of the Commission’s central aims was to ensure that “*the costs of the transmission infrastructure are recovered from those responsible for its use*” [A36/p3]. This is consistent with the 2009 Regulation, Article 14 of which stipulates that charges applied by network operators should “*reflect actual costs incurred*” [C5/p9].²⁷
- 56.2. The cost of connecting a generator to the pre-existing transmission system will vary depending on where the generator chooses to locate (e.g. in a remote part of the sea, as opposed to adjacent to existing transmission infrastructure). The Impact Assessment which the Commission published prior to the entry into force of the ITC Regulation (“**the ITC Regulation Impact Assessment**”) repeatedly refers to the importance of national regulatory authorities being able to set tariffs in such a way as to provide locational signals, i.e. to encourage generators, when

²⁷ The same principle is articulated in Article 18(1) of the subsequent recast of the 2009 Regulation [A64/p29].

deciding where to locate a power station, to take proper account of the costs occasioned by that decision [A30/pp13, 26, 27, 37].

- 56.3. It is consistent with the principle of cost reflectivity that Member States should be able (should they so choose) to adopt charging structures under which a generator would bear the costs directly occasioned by its choice to locate in a particular place, without charges intended to recover such costs being constrained by a cap.
57. GEMA therefore considers that, consistent with the CMA Decision, all charges paid by a generator in respect of assets (whether shared/shareable or otherwise) that were required to connect the generator in question to the system (i.e. the NETS, in the context of GB) as it existed at the time the generator wished to connect fall within the Connection Exclusion, as do charges in respect of any upgrade of that connection.
58. By contrast, charges paid by a generator in respect of assets which already existed at the point at which the generator wished to connect do not fall within the Connection Exclusion – from the perspective of that generator, such assets are part of “*the system*”, rather than being required for the generator’s connection thereto. This interpretation closely follows the words of the Connection Exclusion itself, giving them their natural and ordinary meaning, in accordance with *Zentrale zur Bekämpfung unlauteren Wettbewerbs*.
59. The application of GEMA’s interpretation of the Connection Exclusion can be illustrated by some examples:
 - 59.1. Suppose that a cable is installed in order to connect a single generator to the NETS. Charges in respect of that cable will fall within the Connection Exclusion: this is plain from the CMA Decision.
 - 59.2. Suppose that a cable is installed in order to connect two generators to the NETS at the same time. The CMA held that charges paid by both generators in respect of the cable will fall within the Connection Exclusion: see §§5.98(b) and 5.101 of the CMA Decision.²⁸ It follows that the fact that an asset is shared by two (or indeed more) generators does not preclude charges in respect thereof being within the Connection Exclusion. This is consistent with the wording of the ITC

²⁸ The Appellants accept this at NoA §141 fn 90 and §142 fn 91.

Regulation, which says nothing to suggest that the fact that an asset is shared or shareable is determinative of whether charges in respect thereof fall within the Connection Exclusion.

- 59.3. Suppose that (i) a cable with a capacity of 200MW is installed to connect to the NETS a generator with a maximum output of 100MW; (ii) another power station is built nearby at some later stage; and (iii) that second power station makes use of the spare capacity on the cable. In this situation, (i) from the perspective of the first generator, the cable is an asset “*required for connection to the system*”, and remains as such after the moment of connection; but (ii) from the perspective of the second generator, the cable is simply part of “*the system*”. As such, charges paid by the first generator in respect of the 100MW of cable capacity that it uses would fall within the Connection Exclusion (both before and after the second generator begins to generate),²⁹ but charges paid by the second generator would not. This reflects that (i) the installation of 100MW worth of cable capacity was required to connect the first generator to the NETS as it existed at the time that the first generator wished to connect, and was occasioned by that generator’s choice to locate where it did; but (ii) the whole cable existed (with 100MW of spare capacity) and formed part of the NETS at the time when the second generator wished to connect, and its installation was not the consequence of any choice on the second generator’s part. As well as reflecting the words of the Connection Exclusion, this outcome is economically efficient – it provides scope for national authorities to adopt charging structures which would incentivise generators to locate in places where they can make use of existing spare capacity on the network.
- 59.4. Suppose that (i) there is a cable which had been installed many years ago to connect a power station to the then pre-existing system; (ii) the power station is closed down, such that the cable is lying unused; (iii) a new power station is then built next to the site of the old power station; and (iv) the new generator makes use of the cable (without the need for it to be upgraded). Charges paid by the new generator in respect of the cable would not fall within the Connection

²⁹ Note that the first generator would only be charged for the proportion of the cable that it used (Self §31). There is thus no issue with the second generator “*free-riding*” on the first, contrary to the suggestion at Graham §4.11.

Exclusion, since (i) the cable was part of the NETS as it existed at the point when the new generator wished to connect; and (ii) the cost of providing the cable was not occasioned by the decision to locate the new power station in the place where it is.

60. The Appellants refer (generally in vague terms) to hypothetical scenarios in which non-MITS assets could be used by both a generator and demand (NoA §§124, 140, 142 143, 145, 148, 149, 150, 151, 152). Contrary to the impression that the Appellants may create, this is extremely rare in practice: see Self §32. In any event, however, the introduction of a demand-user does not change the analysis above:
 - 60.1. Suppose that a cable is installed in order to connect a generator to the NETS. A demand-user connects to the NETS by the same cable, either at the same time or subsequently. The addition of the demand-user into the scenario does not affect that the cable was “*required for*” the generator’s connection to the NETS. Charges paid by the generator in respect of the cable will therefore fall within the Connection Exclusion.
 - 60.2. Suppose that a cable is installed in order to connect a demand-user to the NETS. Later, a generator builds a power station next to the cable, and makes use of it. This scenario is, in substance, the same as that at §59.4 above: the cable already existed and formed part of the NETS at the time the generator wished to connect, and charges paid by the generator in respect of the cable therefore fall outside the Connection Exclusion.
 - 60.3. The ITC Regulation is not concerned with the question of what, if any, charges a demand-user, or indeed a generator, should pay in any particular scenario. Rather, the ITC Regulation sets parameters within which average “*transmission charges*” paid by generators collectively must fall. It would be open to GB to structure its domestic charging arrangements in many different ways, e.g. to make demand-users pay Local Charges in respect of non-MITS assets that they share with generators.³⁰ For present purposes, however, the important point is simply that, insofar as GB’s domestic charging arrangements impose charges on a generator in respect of an asset that was “*required for*” that generator’s connection to the NETS, those charges fall within the Connection Exclusion.

³⁰ At present, Local Charges are not payable by demand-users: Self §32.

The flaws in the *status quo*, the Original Proposal, WACM7 and WACM14

61. As explained above, (i) the Original Proposal, WACM7 and WACM14 represent the three different interpretations of the Connection Exclusion on the basis of which CUSC modification proposals were made; and (ii) GEMA concluded that neither the *status quo* nor any of these proposals reflect the correct interpretation of the Connection Exclusion. Each option is in one or more respects under-inclusive and/or over-inclusive in its approach. The implications of under- and over-inclusion are as follows:
- 61.1. If the CUSC Calculation is premised on an under-inclusive view of what falls within the Connection Exclusion, the effect of the error is to make it less likely that there will be a breach of the upper end of the Permitted Range. The error may, however, lead to an increased risk of a breach of the lower limit, e.g. if a negative adjustment charge (like the TGR) is only counterbalanced by positive charges which the CUSC Calculation incorrectly assumes to be outside the Connection Exclusion (e.g. Local Charges paid by offshore generators, which the CMA has held to be within the Connection Exclusion).
- 61.2. The opposite would apply if the CUSC Calculation is premised on an over-inclusive view of what falls within the Connection Exclusion. In such a scenario, the risk of a breach of the upper limit of the Permitted Range would rise, and the risk of a breach of the lower limit would fall.
62. The *status quo* assumes that no TNUoS Charges fall within the Connection Exclusion. This approach to the Connection Exclusion is under-inclusive: for the reasons above, a great many TNUoS Charges do fall within it. Indeed, the Local Charges which the CMA expressly held to fall within the Connection Exclusion totalled £187m in 2015/16, representing approximately 85% of all Local Charges paid in that charging year (CMA Decision, §§3.40, 5.101). The equivalent figure (i.e. Offshore Local Charges) for 2020/21 is £342m [A55/p26].
63. The **Original Proposal** assumes that all Local Charges fall within the Connection Exclusion, and therefore only takes Wider Locational Charges into account in the CUSC Calculation ([B8] and [B9]). This approach to the Connection Exclusion is over-inclusive, since not all Local Charges are in respect of assets that were required to connect the

generator paying the charge to the NETS, as it existed at the time when the generator wished to connect: generators are sometimes able to make use of existing assets.

64. As to **WACM7**:

64.1. WACM7 treats the Connection Exclusion as covering “*Connection Charges and charges in respect of an Onshore local circuit and Onshore local substation, where they form part of an Onshore Generator Only Spur and charges in respect of an Offshore local circuit and Offshore local substation where they form part of an Offshore Generator Only Spur*” ([B8] and [B10]). This involves two subsidiary definitions:

64.1.1. “*Offshore Generator Only Spurs: These consist of (a) an Offshore substation (the Offshore local substation) where that sub-station is not shared with demand or another Generator; and (b) cable(s), (where those cable(s) are not shared with demand or another Generator) which run from the Offshore local substation to an Onshore substation*”.

64.1.2. “*Onshore Generator Only Spurs: These consist of (a) an Onshore substation (the Onshore local substation) where that sub-station is not shared with demand or another Generator; and (b) underground cable(s), or overhead line(s) (that are not shared with demand or another Generator), which run from the Onshore local substation to an Onshore substation*”.

64.2. The effect of these definitions is to treat the Connection Exclusion as comprising (i) CUSC Connection Charges; and (ii) Local Charges in respect of assets which are not shared.

64.3. This approach to the Connection Exclusion is under-inclusive in some respects (albeit to a lesser extent than the *status quo*), since it assumes that charges in respect of shared assets cannot come within the Connection Exclusion. That assumption is incorrect: see §§59.2-59.3 above.

64.4. WACM7 is also over-inclusive in some respects, since the mere fact that an asset is unshared does not necessarily mean that it falls within the Connection Exclusion: see §§59.4 and 60.1 above.

65. As to **WACM14**:

65.1. WACM14 treats the Connection Exclusion as covering “*Connection Charges and charges in respect of an Onshore local circuit, Onshore local Substation, Offshore local circuit and Offshore local substation except for those charges that are for Shared Assets*”

or *Pre-Existing Assets*” ([B8] and [B11]). WACM14 involves two subsidiary definitions:

65.1.1. *“Shared Assets”* are defined as *“An Onshore local circuit and/or Onshore local substation and/or Offshore local circuit and/or Offshore local substation that are or could be used without the need for new assets or could be used just by switching, by either (i) more than one Generator or (ii) a single Generator and demand that is not Station Demand for that Generator”*.

65.1.2. *“Pre-Existing Assets”* is defined as *“in respect of a Generator Onshore local circuit and/or Onshore local substation and/or Offshore local circuit and/or Offshore local substations that existed prior to the connection of that Generator to the NETS”*.

65.2. The effect of these definitions is to treat the Connection Exclusion as covering:

65.2.1. CUSC Connection Charges; and

65.2.2. Local Charges in respect of assets (i) which are neither shared nor shareable; and (ii) which did not exist *“prior to the connection of [the generator paying the charges] to the NETS”*.

65.3. The definition of *“Pre-Existing Assets”* refers to assets which existed at the time of a generator’s *“connection”* to the NETS, not assets which existed at the time that the generator wished a connection to be put in place. If read literally, the definition of *“Pre-Existing Assets”* would treat very few (if any) TNUoS Charges as falling within the Connection Exclusion, since at the moment of connection the assets (or virtually all of the assets) required for connection (and requested by the generator for that purpose) will have been installed.³¹ This would result in WACM14 being under-inclusive to much the same extent as the *status quo*.

65.4. Even if the words *“prior to the connection of that Generator to the NETS”* are construed as meaning *“prior to that Generator requesting connection to the NETS”*, WACM14 would still involve an under-inclusive approach to the Connection Exclusion, since it assumes that charges in respect of shared and shareable assets

³¹ NoA §144 misunderstands the point. It is plain from the CMA Decision that the Connection Exclusion covers assets installed to give effect to a generator’s wish to connect (see especially CMA Decision, §5.94). Those assets will be installed after the generator expresses the wish to connect. By the moment at which connection is actually accomplished, however, all (or virtually all) of the assets in question will already have been installed.

cannot come within the Connection Exclusion. In this regard, WACM14 would be less under-inclusive than the *status quo* (which treats all Local Charges as outside the Connection Exclusion), but more under-inclusive than WACM7 (which does not treat charges in respect of shareable assets as outside the Connection Exclusion unless the assets are in fact shared).³²

Ground 1(a) - allegation that GEMA failed “to give an autonomous EU law meaning to the Connection Exclusion” (NoA, §§116-121)

66. The assertion that GEMA failed “to give an autonomous EU law meaning to the Connection Exclusion” is nonsense. The essence of ascribing an autonomous EU law meaning to a concept is to define the concept in such a way that the definition can be applied throughout the EU, rather than defining it by reference to domestic law or practice (see *Monsanto*, §72 [C16] and CMA Decision, §§5.82-5.83 [C20/p62]). That is precisely what GEMA has done. GEMA’s interpretation of the Connection Exclusion (see §57 above) is formulated by reference to the assets to which charges relate, and could be applied anywhere in the EU. GEMA’s definition is not formulated by reference to concepts which are peculiar to GB (e.g. TNUoS Charges).
67. However, the substance of the Appellants’ complaint is not in fact that GEMA failed to give an autonomous EU law meaning to the Connection Exclusion. Rather, their complaint is that they do not like GEMA’s conclusion as to what that autonomous EU law meaning is. Indeed, it is the Appellants who fail to give an autonomous EU law meaning to the Connection Exclusion – thus, for example, one of their attacks on the Original Proposal is that it “deviated from definitions given in the CUSC and the NGESO Transmission Licence” (NoA, §117). The Appellants thereby suggest that the Connection Exclusion should be defined by reference to domestic GB concepts. This is the very approach that the CMA has rightly condemned as “wrong in principle” (CMA Decision, §5.88). For the same reasons, Mr Graham’s lengthy description in his witness statement of what is classed as a “connection asset” in the domestic GB charging framework is irrelevant to the question of how the Connection Exclusion should be interpreted.

³² The “shareability” criterion would capture a great deal. A cable with a capacity of 100MW that is used by a generator with a capacity of 99MW is, in principle, shareable.

68. In any event, the focus of Ground 1(a) is on attacking the Original Proposal's interpretation of the Connection Exclusion. Ground 1(a) fails to engage with, let alone show any error in (i) GEMA's interpretation of the Connection Exclusion, which differs from that in the Original Proposal; or (ii) GEMA's reasoning as to why approving the Original Proposal (as a stop-gap measure) was the best of the imperfect options available.

Ground 1(b) - allegation that "GEMA's construction fails to give a teleological interpretation or take sufficiently into account the travaux préparatoires for the ITC Regulation" (NoA, §§122-139)

69. Part B of the Annex to the ITC Regulation had its origins in a set of non-binding guidelines published, with an explanatory note, by the European Regulators' Group for Electricity and Gas ("EREG") in 2005 ("the EREG Guidelines") [A29]. The ITC Regulation Impact Assessment indicates that Part B of the Annex to the ITC Regulation was intended to adopt the EREG Guidelines without any substantive modification, and make them binding [A30/pp37-38]. Ground 1(b) largely consists of lengthy, but selective, paraphrases and quotations from the EREG Guidelines and the ITC Regulation Impact Assessment.
70. Ground 1(b) is directed at an argument that only "one-off" charges fall within the Connection Exclusion and that this is supported by the *travaux préparatoires* for the ITC Regulation. This argument has already been considered and (rightly) rejected by the CMA, for the reasons at §5.111 of the CMA Decision. The argument is also inconsistent with the proposals that the Appellants themselves put forward: both WACM7 and WACM14 would treat many TNUoS Charges (which are not one-off) as falling within the Connection Exclusion.
71. The Appellants also assert that the Connection Exclusion covers only "charges incurred in relation to physical assets used for the act of connection", which they seek to distinguish from "charges associated with physical assets used for transmission" (NoA, §138). Similarly, they appear to suggest that at some ill-defined point a "connection asset" (whatever that may be) ceases to be so, and becomes a "transmission asset" (NoA, §124). The CMA has

also considered and (rightly) rejected this analysis.³³ See §§5.94-5.96 of the CMA Decision, where the CMA said:

“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. Once this is recognised, the Appellants’ distinction between the connection and use cannot be a valid one.”

72. Further, and in any event, Ground 1(b) is (like Ground 1(a)) focused on attacking the Original Proposal, rather than comparing it with the other options that were available to GEMA (see especially NoA, §139). Ground 1(b) fails to engage with, let alone show any error in, GEMA’s reasoning as to why approving the Original Proposal was the best of the imperfect options available.

Ground 1(c) - allegation that “GEMA’s construction is wrong in principle and/or based on errors in its factual appraisal” (NoA, §§140-152)

73. Ground 1(c) is, with respect, extremely hard to follow. The Appellants fail to set out any clear explanation of what they consider the Connection Exclusion to cover, or why. All that is clear is that the Appellants dislike GEMA’s interpretation.

74. The Appellants’ position appears to be that the Connection Exclusion should only cover charges in respect of “GOS”. This term appears at various points in the Notice of Appeal, and “Offshore GOS” was used in the CMP261 appeal as a shorthand for the assets on which that case focused. The Appellants do not, however, provide any clear or precise definition of what they mean by “GOS” in the context of the present appeal. At some points, they appear to suggest that “GOS” only exist in offshore contexts (e.g. NoA §14 says that “GOS assets are owned...by an Offshore Transmission Network Owner”), but they elsewhere refer to “Offshore GOS” (e.g. NoA, §124), implying that some GOS are onshore.

75. “Offshore generator only spurs” and “onshore generator only spurs” were (as noted at §64.1 above) defined terms for the purposes of WACM7, but the Appellants present a quite different definition of “GOS” in their glossary. There, they define “GOS” as “generation

³³ The Appellants seek to avoid the implications of the CMA Decision by saying that the assets with which it was concerned “never became part of a formal transmission system” (Grounds, §124). The CMA did not say this. There is no reference to a “formal transmission system” (whatever that may be) in the CMA Decision, and the offshore generation-only spurs with which the CMA Decision was concerned are part of the NETS (i.e. GB’s transmission system).

only spurs which are local charges for radial circuits that supply generators only [A2]. It is hard to see how a “spur” (which appears to refer to a physical asset) could be a “charge”, no definition of “radial circuits” is provided, and it is unclear what it means for a “radial circuit” (however defined) to “supply” a generator. Mr Graham gives yet another definition of “GOS” at §3.4 of his witness statement.³⁴ In short, the Appellants fail to identify with precision what charges they say are covered by the Connection Exclusion.

76. In the course of Ground 1(c), the Appellants suggest that, in general, a charge should not fall into the Connection Exclusion if it relates to an asset that is shared (NoA, §§141, 142, 148, 150). This compounds the lack of clarity as to the Appellants’ position on the scope of the Connection Exclusion:

76.1. It is unclear how (if at all) the Appellants’ focus on whether an asset is shared is supposed to relate to the definition of “GOS” in their glossary, which definition would appear to include “local charges” for a “radial circuit” that “suppl[ies]” more than one generator.

76.2. The Appellants expressly accept (as they must, in light of the CMA Decision) that the fact that an asset is shared does not preclude TNUoS Charges in respect thereof falling within the Connection Exclusion (NoA, §141 fn 90, §142 fn 91, §150). The Appellants do not, however, identify with any precision which charges in respect of shared assets they say would fall within the Connection Exclusion.

76.3. It does, however, follow from the Appellants’ acceptance that some TNUoS Charges in respect of shared assets fall within the Connection Exclusion that they must accept that neither WACM7 nor WACM14 represents the correct interpretation of the Connection Exclusion. As explained at §§64-65 above, WACM7 and WACM14 treat all Local Charges in respect of shared assets as falling outside the Connection Exclusion.

77. Whatever the Appellants’ position (or variety of positions) on the proper interpretation of the Connection Exclusion may be, they fail to provide any coherent analysis as to why GEMA’s interpretation is wrong, and/or why their interpretation is right:

³⁴ “GOS’ describe transmission network assets that are being utilised largely by generation, either predominantly for production and, possibly, for consumption.”

- 77.1. As explained above, the meaning of the Connection Exclusion 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 forms a part”: *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, §19, cited in the CMA Decision at §5.76. Cf. NoA, §116.
- 77.2. There is nothing whatsoever in the words of the ITC Regulation (giving them their “usual meaning in everyday language”) which provides any support for the proposition that the Connection Exclusion is to be defined by reference to whether assets are shared. It will often be the case that assets installed to connect a generator to the NETS (and “required for” that generator’s connection) are used solely by that generator, but the words of the Connection Exclusion say nothing to suggest that whether an asset is shared is in itself a relevant criterion.
- 77.3. The Appellants do not identify anything in the *travaux préparatoires* which would support their interpretation (and GEMA has not identified anything either). For the reasons at §§56 and 59 above, GEMA’s interpretation of the Connection Exclusion is consistent with the purposes of the legislation (as reflected in the *travaux*), and there are sound economic reasons why it makes sense that certain charges in respect of shared assets should fall within the Connection Exclusion.
- 77.4. The Appellants appear to assume at various points that an asset must be classified as either a “connection asset” or a “transmission asset” (e.g. NoA, §§15, 142, 145, 149, 150, 152). While these expressions are used domestically in GB, and may be a convenient shorthand in that context, the ITC Regulation does not draw such a distinction – the Connection Exclusion applies to charges, not to assets *per se*. As explained at §59.3 above, it is entirely consistent with the wording and purpose of the Connection Exclusion to have a situation in which (i) two generators both pay TNUoS Charges in relation to a particular asset; (ii) the TNUoS Charges paid by one of the generators fall within the Connection Exclusion; and (iii) the TNUoS Charges paid by the other generator do not.
- 77.5. The Appellants refer to certain hypothetical examples (e.g. in relation to Salisbury Plain, Shetland and/or a “meshed” offshore network), but the assumed facts are described in vague terms, and as such do not provide a useful basis for analysis. The Appellants appear particularly concerned about scenarios in which

an asset is shared by a generator and a demand-user; for the reasons at §60 above, this is something of a red herring.

78. The Appellants assert (*“in the alternative”* to their primary case, whatever that primary case may be) that GEMA’s construction *“fails to draw relevant distinctions between the first use of a Local Asset to connect a Generator to the NETS and one or more subsequent network users”* (NoA, §151). This is wrong. GEMA’s interpretation of the Connection Exclusion does distinguish between the first and subsequent users. As explained at §59.3 above, and in the CMP317/327 Decision itself, TNUoS Charges paid by the first user will fall within the Connection Exclusion, and those paid by subsequent users will not. Yet again, the real target of the Appellants’ attack is the Original Proposal, which does not draw such a distinction, and which GEMA expressly did not endorse as a long-term solution. Ground 1(c) fails to engage with, let alone show any error in, GEMA’s reasoning as to why approving the Original Proposal was the best of the imperfect options available.

Ground 1(d) – allegation that “GEMA’s favoured construction fails to comply with the principles of proportionality and non-discrimination” (NoA, §§153-155)

79. Ground 1(d) asserts that GEMA’s decision failed to comply with two general principles of EU law, namely *“the principle of proportionality”* and *“the principle of equality and the interrelated requirement of non-discrimination”* (NoA, §153). This is hopeless for the following four reasons.
80. First, the vague invocation of general principles of proportionality and equality cannot be used to construe the Connection Exclusion in a way which has no support in the words of the ITC Regulation itself. Cf §§8.7-8.20, 8.26-8.29 of the CMA Decision.
81. Second, the factual premise of the Appellants case (as set out in the first sentence of NoA §153) is wrong. The Appellants say that *“the outcome of GEMA’s construction is that a far higher level of charges for the use of assets that transmit electricity are paid by Generators than would otherwise be the case”*. The Appellants accept, however, that the financial difference (in terms of what is treated as falling within the Connection Exclusion) between the Original Proposal and their favoured approach is only £3m in the charging year 2021/22 (and, as explained above and in the CMP317/327 Decision, GEMA does not envisage

the Original Proposal being in place for more than one year).³⁵ The financial difference between GEMA's interpretation of the Connection Exclusion and the Appellants' approach is even less.³⁶ Given that total TNUoS Charges paid by generators in 2021/22 are projected to be £813m [A73/p5], £3m is *de minimis*.

82. Third, GEMA's interpretation of the Connection Exclusion does not involve any unequal treatment as between generators in GB and generators in EU Member States:

82.1. The Connection Exclusion is an autonomous EU law concept, and has the same meaning across the EU and in GB. The Appellants' complaint appears to be that the upper end of the Permitted Range is higher in GB than in EU Member States (except Ireland), but this is an inherent feature of the ITC Regulation as enacted by the Commission (and retained without material amendment following the end of the post-Brexit Transition Period), not a consequence of GEMA's interpretation of the Connection Exclusion.

82.2. The fact that interconnectors (and thus importers of electricity) do not pay Local Charges does not provide a relevant point of comparison, since (i) an importer of electricity will have to pay the cost of such connection and/or transmission charges as apply in the Member State from which it is importing electricity; and (ii) generators in GB do not have to pay those charges.

83. Fourth, generators are not in a relevantly comparable position to suppliers/demand, since suppliers/demand have no role in deciding where new generating facilities are located, and are thus not in a position to influence the cost of connecting a new generator to the NETS. The suggestion that TNUoS Charges paid by generators are in some unexplained way "*disproportionate*" to those paid by demand should in any event be seen in the context that demand is forecast to pay over three times as much as generators in TNUoS Charges in 2021/22 (£2,596.5m, as against £813m) [A73/pp5-6]. The Appellants' arguments on Ground 4, to which NoA §155 alludes, are addressed below.

³⁵ See Tindal §7.11.

³⁶ Self §91.1.

Ground 1(e) - allegation that GEMA failed “to comply with principles of legal certainty and regulatory consistency” (NoA, §§156-163)

84. The Appellants assert that GEMA “has sought to advance a “short run” policy goal of avoiding a breach of the statutory range at the expense of the wider structural security for generation, as well as undermining the internal market” (NoA, §156). As to this:
- 84.1. The Appellants offer no coherent explanation as to how GEMA has undermined “wider structural security for generation” or the internal market. Indeed, as explained at §81 above, the difference in financial terms between the competing interpretations of the Connection Exclusion is relatively small.
- 84.2. In any event, (i) the proper interpretation of the ITC Regulation is a matter of law, not policy (see CMA Decision, §7.33); and (ii) compliance with the Permitted Range is a legal obligation, not a mere “policy goal”. It would not have been properly open to GEMA to pursue non-statutory objectives at the expense of compliance with the Permitted Range.
85. The Appellants also accuse GEMA of being inconsistent in its interpretation of the Connection Exclusion (NoA, §§157-163). There is no proper basis for the allegation of inconsistency:
- 85.1. The Appellants describe various changes in how the costs associated with transmission infrastructure have been recovered as a matter of domestic GB law/practice, e.g. changes in whether particular costs were recovered via TNUoS Charges as opposed to CUSC Connection Charges (NoA, §§158-160). This is a matter of domestic classification, and did not involve GEMA making any statement about the interpretation of the Connection Exclusion. Indeed, much of the history that the Appellants recount relates to the period prior to the entry into force of the ITC Regulation.
- 85.2. GEMA did not express any concluded view on the interpretation of the Connection Exclusion in its decision on CMP224, to which the Appellants refer at NoA §157 (and in greater detail at NoA §§26-31). See CMA Decision, §§7.21-7.31.
- 85.3. In the CMP261 Decision, GEMA said that there is “no reasonable justification for treating most, if not all, local charges differently from charges that are labelled as

connection charges in the context of the connection exclusion” [A53/p8].³⁷ GEMA also identified that the relevant question is whether an asset was required for a generator’s connection to the system. That is entirely consistent with the conclusion that GEMA set out in the CMP317/327 Decision.

- 85.4. The argument based on §4.79 of the TCR Decision (advanced at NoA, §§162-163) is without merit. It appears that the Appellants have decided, for the purposes of this appeal, wilfully to misinterpret what GEMA said in the TCR Decision: see §35.4 above.
86. Even if GEMA had been inconsistent (which, for the reasons set out above, it has not), this would be irrelevant to the proper interpretation of the Connection Exclusion. The Connection Exclusion can only have one correct meaning, which must be the same throughout the EU, and is incapable of being affected by statements of a regulator in a single (former) Member State. Even if GEMA had previously adopted an incorrect interpretation of the Connection Exclusion, that would not stop it from adopting the correct interpretation now: CMA Decision, §§7.32-7.42 and the authorities cited there.
87. Ground 1 should therefore be dismissed.

G. GROUND 2 (NoA §§164-171)

88. Ground 2 is an assertion that the CMP317/327 Decision is unlawful because GEMA concluded that the Original Proposal was based on an erroneous interpretation of the Connection Exclusion, but nonetheless approved it. This assertion is wholly without merit.
89. The following eight points are important:
- 89.1. First, as explained at §35.4 above, the ITC Regulation simply imposes an obligation that *“annual average transmission charges paid by producers”* fall within the Permitted Range. The ITC Regulation thus imposes an obligation of result, but no obligation as to the mechanism by which that result is to be achieved. As such, the fact that the CUSC Calculation is formulated on the basis of an

³⁷ The Appellants state that in the CMP261 appeal GEMA’s position was that *“the Connection Exclusion did not extend to charging for Local Circuits and Local Assets”* (Grounds, §157). That is simply untrue. The diagram to which the Appellants refer illustrates which assets are the subject of CUSC Connection Charges and which are the subject of TNUoS Charges. It thus relates to domestic GB practice, and says nothing about the scope of the Connection Exclusion.

erroneous understanding of the ITC Regulation is not itself unlawful. There will only be a breach of the ITC Regulation if the consequence of the error is that “*annual average transmission charges paid by producers*” (within the meaning of the ITC Regulation) fall outside the Permitted Range.

89.2. Second, Ground 2 falls to be considered on the footing that the Appellants’ favoured interpretation of the Connection Exclusion is incorrect (as the Appellants accept at NoA, §164). It is in any event clear that neither the *status quo* nor any of the modification proposals is based on the correct interpretation of the Connection Exclusion:

89.2.1. The *status quo* assumes that no TNUoS Charges fall within the Connection Exclusion. The CMA has already held that that assumption is incorrect.

89.2.2. It is common ground that the Original Proposal is based on an incorrect interpretation of the Connection Exclusion (albeit that GEMA and the Appellants disagree as to what the correct interpretation is).

89.2.3. As explained at §76.2 above, it follows from the Appellants’ acceptance that TNUoS Charges in respect of some shared assets fall within the Connection Exclusion that neither WACM7 nor WACM14 represents the correct interpretation of the Connection Exclusion.

89.3. Third, as explained at §38.5 above, the only options open to GEMA were (i) to approve one of the modification proposals; (ii) to reject all of the proposals, and thereby retain the *status quo*; or (iii) to direct that the modification report be revised and resubmitted, with the *status quo* remaining in place in the meantime.

89.4. Fourth, there is a serious and imminent risk of a breach of the lower limit of the Permitted Range under the *status quo*. Indeed, as Mr Self explains at §94 of his witness statement, it has become apparent in recent weeks (after GEMA asked NGENSO to check the position) that there may even be a breach in the current charging year (2020/2021). The Appellants are wrong to say (at NoA §164) that the risk of breach arises because of GEMA’s decision to set the TGR to zero (i.e. the TCR Decision). Under the *status quo*, the TGR is not set to zero.

89.5. Fifth, GEMA concluded that, under the Original Proposal, the risk of a breach of the Permitted Range would be low in each of the next three years: see pages 22

and 24 of the CMP317/327 Decision [[A27/pp22, 24](#)], and §91 of Mr Self's witness statement. The Appellants do not suggest that that conclusion was in any way erroneous.

- 89.6. Sixth, as explained above and set out in the CMP317/327 Decision, GEMA only envisages the Original Proposal remaining in force for one charging year, and has indicated that it expects NGENSO to bring forward a further modification proposal to amend the CUSC Calculation so that it properly reflects the correct interpretation of the Connection Exclusion.
 - 89.7. Seventh, GEMA concluded that the Original Proposal would be administratively simpler to implement than the other proposals, and thus the most suitable option to adopt as a stop-gap measure: see pages 23-24 of the CMP317/327 Decision [[A27/pp23-24](#)]. Again, the Appellants do not suggest that GEMA was wrong to conclude that the Original Proposal would be the administratively simplest proposal to implement.
 - 89.8. Eighth, GEMA considered the option of sending the modification report back for revision and resubmission, but decided not to take that course since it would result in the *status quo* remaining in force for the time being, with the concomitant risk of breach of the Permitted Range: see page 20 of the CMP317/327 Decision [[A27/p20](#)], which expressly refers to and rejects the option of send-back, and §90.5 of Mr Self's witness statement.³⁸
90. In light of the above, GEMA's decision to approve the Original Proposal (as a stop-gap) was unimpeachable. The Appellants' arguments to the contrary are misconceived:
- 90.1. The Appellants say that the CMP317/327 Decision was "*internally inconsistent*" (NoA, §164). It was not. There is nothing inconsistent about concluding (i) that the Original Proposal is based on an erroneous interpretation of the Connection Exclusion; and (ii) that it is better than the *status quo*, and the other imperfect options available.
 - 90.2. The Appellants say that the CMP317/327 Decision was "*procedurally flawed*" (NoA, §164), but do not identify the procedural flaw alleged. There was none.

³⁸ It is questionable whether the power to send back would have been available in any event, since it can only be exercised where the report that has been submitted is such that GEMA "*cannot properly form an opinion*" on the proposals [[A5/p293](#)].

- 90.3. The Appellants say that the CMP317/327 Decision was “*motivated by an improper purpose of avoiding a breach of the ITC Regulation at all costs, rather than applying the legally correct definition and making appropriate adjustments other than through the TGR*” (NoA, §164). The aim of securing compliance with the ITC Regulation (i.e. a legal obligation) is not remotely improper, and none of the options available to GEMA would have applied the correct interpretation of the Connection Exclusion.
- 90.4. The Appellants’ reference in NoA §164 to “*the Adjustment Mechanism now found in CUSC condition 14.14.5*” does not represent some alternative means of securing compliance with the ITC Regulation:
- 90.4.1. The reference is to the part of the CUSC which contains the CUSC Calculation. The existing CUSC Calculation is based on an erroneous interpretation of the Connection Exclusion and (as explained above) does not provide effective protection against the immediate risk of a breach of the ITC Regulation.
- 90.4.2. It appears from NoA §5 and footnote 8 that the Appellants are referring to the revised version of condition 14.14.5 that would be introduced under each of the proposed modifications. Condition 14.14.5 would be the same under all three options, but the way in which it would operate would differ between them, since (i) it incorporates defined terms (e.g. “*Charges for Physical Assets Required for Connection*”); and (ii) the definitions of those terms vary between the three options ([B8], [B9], [B10], [B11]). This adjustment mechanism would not come into effect unless GEMA approved one of the modification proposals. It is not an alternative to approval of a modification proposal.
- 90.4.3. Whichever modification proposal GEMA approved, the adjustment mechanism would operate to ensure “*compliance*” with that proposal’s erroneous interpretation of the ITC Regulation. It would not guarantee compliance with the ITC Regulation, correctly construed (albeit that under both the Original Proposal and WACM7 the risk of non-compliance would be low in the short term).

- 90.5. The Appellants say that it was “*illogical and procedurally improper*” to approve the Original Proposal “*when there were other ways of avoiding the breach of the statutory range which would work (as, for example, SSE proposed in WACM14, or as Uniper proposed in WACM72)*” (NoA, §165). This (i) fails to recognise that these other options were, like the Original Proposal, based on erroneous interpretations of the Connection Exclusion (see §89.2 above);³⁹ and (ii) fails to engage with GEMA’s reasoning as to why the Original Proposal was the best of the imperfect options available. The evaluation of which of a series of imperfect options is best is a matter of regulatory judgement, with which an appellate tribunal should be slow to interfere: see §§48-49 and 51 above.
- 90.6. The Appellants assert that the adoption of the Original Proposal was somehow contrary to EU law (in the form of the ITC Regulation), and that GEMA sought to balance compliance with EU law against other considerations (NoA §§166-168). This is wrong, since (i) the ITC Regulation only imposes an obligation of result (i.e. that “*annual average transmission charges paid by producers*” fall within the Permitted Range), and the mere fact that the CUSC Calculation is based on an erroneous interpretation of the Connection Exclusion does not constitute non-compliance with the ITC Regulation; (ii) none of the options available to GEMA would have produced a CUSC Calculation formulated on the basis of the correct interpretation of the Connection Exclusion; and (iii) GEMA selected an option which poses only a low risk of a breach of the Permitted Range (unlike the *status quo*, which would have been perpetuated had GEMA exercised its send-back powers, as the Appellants appear to suggest it should have done). GEMA did not use any statutory power otherwise than for its intended purpose, let alone “*use...unlawful means to achieve a desired outcome*”, as the Appellants appear to suggest at NoA §166.
- 90.7. The Appellants appear to suggest that GEMA ought not to have evaluated the proposals by reference to the ACOs (NoA, §§167-168). The Appellants fail to recognise that GEMA was obliged by the terms of the CUSC and NGESO’s transmission licence to evaluate the proposals by reference to the ACOs (which

³⁹ WACM72 adopted the same (erroneous) approach to the Connection exclusion as WACM7. Unlike WACM7, WACM72 incorporated a target of €0/MWh, and included certain BSUoS Charges and BSC Charges in the CUSC Calculation [B13].

include whether a proposal would better facilitate compliance with EU law). See §38.5 above.

- 90.8. The Appellants do not explain the alleged relevance of *R (Goodman) v London Borough of Lewisham* [2003] EWCA Civ 140, [2003] Env LR 28 [C15], to which they refer (with an incorrect citation) at NoA §169. That case illustrates the principle that the question of how a statutory provision is to be construed is not a matter of discretion. GEMA does not suggest that it had any discretion as to the correct interpretation of the ITC Regulation.
- 90.9. The assertion that GEMA acted inconsistently with the TCR Decision (NoA, §170) is wrong for the reasons at §35.4 above.
- 90.10. The assertion that GEMA “unlawfully fettered its discretion” by failing to consider the possibility of exercising its send-back powers (NoA, §171) is wrong. GEMA did consider whether to exercise its send-back powers, and decided not to do so for the reasons stated in the CMP317/327 Decision: see §89.8 above.
91. Ground 2 should therefore be dismissed.

H. GROUND 3(a) (NoA, §§173-195)

Introduction

92. Ground 3(a) alleges that GEMA made an error of law in concluding that all BSUoS Charges fall within the Ancillary Services Exclusion, and therefore that the CUSC Calculation should not be amended in such a way as to take them into account. The Appellants contend that BSUoS Charges relating to what they describe as “*Congestion Management*” fall outside the Ancillary Services Exclusion.
93. The nature of BSUoS Charges is described at §21 above, and at §§36-44 of Mr Self’s witness statement. In brief summary, BSUoS Charges relate to the costs incurred by NGENSO in taking steps to ensure that the amounts of electricity being injected into and withdrawn from the GB grid are kept in balance, and that the amounts of electricity being transported across particular pieces of infrastructure within the GB grid are kept within relevant operational limits (sometimes known as “*constraints*”). The steps that NGENSO takes in this regard include, e.g., paying particular generators to reduce or increase their output.

94. There are also limits to the amount of electricity that interconnectors (i.e. links between the GB transmission system and transmission systems elsewhere) can safely transport. Where demand for use of an interconnector exceeds its capacity, this is dealt with by a process known as “**capacity allocation**”, in which available capacity on the interconnector is allocated to the highest bidder wishing to use it to transmit electricity. The costs of administering the auction process are not funded from BSUoS Charges, and the auction process only applies in respect of capacity on interconnectors. Auctions are not used to allocate available capacity on any part of the GB grid itself.⁴⁰
95. The WACMs which proposed that BSUoS Charges in respect of “*Congestion Management*” be included in the CUSC Calculation provided no definition of “*Congestion Management*”.⁴¹ GEMA considers that, quite apart from the more fundamental objections set out in the CMP317/327 Decision and below, the failure to include a definition of “*Congestion Management*” meant that the proposals in question were not in a state where they could sensibly have been approved.
96. The Appellants’ position on what is encompassed by “*Congestion Management*” is also unclear. The Notice of Appeal does not set out any definition, and the definition in the Appellants’ glossary is inconsistent with what Mr Tindal says in his witness statement.⁴² It is, however, apparent that the Appellants are using “*Congestion Management*” to refer to at least some of the steps taken by NGENSO to ensure that the amounts of electricity being transmitted across particular pieces of equipment in GB stay within safe limits (but not steps taken to ensure that the system as a whole remains in balance).

⁴⁰ Self §44.

⁴¹ See, for example, CMP339 WACM 21 which relates to CMP317/327 WACM 72 [B12]

⁴² The Appellants’ Glossary defines “*Congestion Management*” as “*services to address situations where trading across network areas cannot be accommodated because they would significantly affect the physical flows on network elements which cannot accommodate those flows through payments to compensate a Generator who is prevented from accessing the network*” [A2]. On this definition, “*Congestion Management*” would not include payments to generators who agree to increase their output. By contrast, Mr Tindal says the following at §2.1 of his witness statement (underlining added): “*Congestion management services...address situations where trading across network areas cannot be accommodated because they would significantly affect the physical flows on network elements which cannot accommodate those flows. The resulting detriment is met through payments to compensate Generators who are prevented from accessing the market due to network constraints and to remunerate other Generators who make up any shortfalls that arise*”.

The Ancillary Services Exclusion and “Congestion Management”: definitions

97. The Ancillary Services Exclusion covers “charges paid by producers related to ancillary services”. The ITC Regulation does not itself define “ancillary services”, but the expression was defined in the 2009 Regulation (which, as noted above, empowered the Commission to adopt the ITC Regulation). The 2009 Regulation was repealed and recast by Regulation (EU) 2019/943 (“the 2019 Regulation”) [A64], which came into force on 1 January 2020. Following the end of the Transition Period, the 2019 Regulation continues to apply in GB, subject to certain modifications.⁴³
98. The key definitions are set out below, as they appear in both the 2009 Regulation and the 2019 Regulation. Text in the 2019 Regulation which no longer applies in GB is struck through, and underlined text was inserted with effect from the end of the Transition Period.

Defined term	2009 Regulation ⁴⁴	2019 Regulation ⁴⁵
“ancillary service”	“a service necessary for the operation of a transmission or distribution system”	“a service necessary for the operation of a transmission or distribution system, including balancing and non-frequency ancillary services, but not including congestion management” ⁴⁶
“congestion”	“a situation in which an interconnection linking national transmission networks cannot accommodate all physical flows resulting from international trade	“a situation in which all requests from market participants to trade between network areas cannot be accommodated because they would significantly affect the physical flows on network elements which cannot accommodate these flows <u>an interconnection linking the Great Britain transmission network with the</u>

⁴³ The 2019 Regulation as it now applies in GB is at [C10].

⁴⁴ The definitions are in Article 2. Some are incorporated by reference to Directive 2009/72/EC [C4].

⁴⁵ The definitions are in Article 2. Some are incorporated by reference to Directive (EU) 2019/944 [A63].

⁴⁶ The 2019 Regulation defines “balancing” as “all actions and processes, in all timelines, through which transmission system operators ensure, in an ongoing manner, maintenance of the system frequency within a predefined stability range and compliance with the amount of reserves needed with respect to the required quality” and “non-frequency ancillary service” as “a service used by a transmission system operator or distribution system operator for steady state voltage control, fast reactive current injections, inertia for local grid stability, short-circuit current, black start capability and island operation capability”. These two definitions continue to apply in GB. The 2009 Regulation did not define “balancing” or “non-frequency ancillary service”.

Defined term	2009 Regulation ⁴⁴	2019 Regulation ⁴⁵
	<i>requested by market participants, because of a lack of capacity of the interconnectors and/or the national transmission systems concerned</i>	<u><i>transmission network of another country or territory cannot accommodate all physical flows resulting from international trade required by market participants, because of a lack of capacity of the interconnectors or the transmission systems concerned</i></u>

99. The following three points should be noted in relation to these definitions:

- 99.1. First, the definition of “*ancillary service*” was changed in the 2019 Regulation, such that it is specified that “*congestion management*” does not constitute an “*ancillary service*”. This is the basis of the Appellants’ case.
- 99.2. Second, “*congestion management*” is not defined in either the 2009 Regulation or the 2019 Regulation. The 2019 Regulation’s use of the expression “*congestion management*” should, however, be construed in accordance with the definition of “*congestion*” in the 2019 Regulation.
- 99.3. Third, the definition of “*congestion*” in the 2019 Regulation as it now applies in GB is expressly confined to the context of interconnections between GB and other countries/territories. This is a key point with which the Appellants fail to engage.

All BSUoS Charges fall within the Ancillary Services Exclusion

100. The short answer to the Appellants’ case is that (i) it relies on the definition of “*ancillary service*” in the 2019 Regulation, which stipulates that “*congestion management*” is not an “*ancillary service*”; but (ii) ignores the definition of “*congestion*” contained in the version of the 2019 Regulation that has applied in GB since 31 December 2020.
101. As explained below, GEMA considers that the Appellants are wrong to seek to interpret the ITC Regulation by reference to the 2019 Regulation (as opposed to the 2009 Regulation). However, even if the 2019 Regulation were relevant, the Appellants’ case is hopeless:

- 101.1. The services to which BSUoS Charges relate are essential to the safe operation of the GB transmission system, as Mr Self explains at §§36-37 of his witness statement. This is true both as regards the steps that NGENSO takes to keep the grid as a whole in balance, and also as regards the steps that it takes to ensure that the operational limits applicable to particular pieces of equipment are not exceeded. The Appellants do not suggest otherwise, nor do they identify any way in which the GB transmission system could safely operate if the services to which BSUoS Charges relate ceased to be provided. Those services are therefore “*necessary for the operation of [the GB] transmission...system*”. They would thus fall within the 2019 Regulation’s definition of “*ancillary service*”, unless they constitute “*congestion management*”.
- 101.2. The definition of “*congestion*” in the version of the 2019 Regulation that now applies in GB is specific to “*a situation in which an interconnection linking the Great Britain transmission network with the transmission network of another country or territory cannot accommodate all physical flows resulting from international trade required by market participants*”.
- 101.3. As explained at §94 above, situations in which an interconnector cannot accommodate all physical flows are managed through a process under which available capacity on the interconnector is allocated to the highest bidder. The services to which BSUoS Charges relate do not include the running of that auction process. Thus, even if (as the Appellants contend) the definition in the 2019 Regulation were relevant, the services to which BSUoS Charges relate do not constitute “*congestion management*” within the meaning of the 2019 Regulation. That is sufficient to dispose of the Appellants’ case on Ground 3(a).
102. However, even if the definition of “*congestion*” in the 2019 Regulation were to apply in unamended (i.e. pre-31 December 2020) form, which it does not, the same conclusion would apply, notwithstanding the absence of express reference to interconnectors in the unamended definition:
- 102.1. The 2019 Regulation is in large part concerned with “*bidding zones*”, and defines a “*bidding zone*” as “*the largest geographical area within which market participants are able to exchange energy without capacity allocation*” (Article 2(65)). As explained at §94 above, “*capacity allocation*” is a process by which available capacity is allocated to the highest bidder wishing to use it to transmit electricity. The

process is set out in Article 16 of the 2019 Regulation. GB is a single bidding zone, and “*capacity allocation*” is not used within GB itself.⁴⁷

102.2. The 2019 Regulation repeatedly links “*capacity allocation*” and “*congestion management*”. Thus, for example, Article 16 is headed “*General principles of capacity allocation and congestion management*”, and treats “*capacity allocation*” as the means by which “*congestion management*” is carried out. The strong linkage between these concepts is also seen in Commission Regulation (EU) 2015/1222 (the title of which is “*establishing a guideline on capacity allocation and congestion management*”) [C7], to which the 2019 Regulation repeatedly refers.⁴⁸

102.3. It is thus apparent that, when the 2019 Regulation uses the expression “*congestion management*”, it is not referring to steps taken to manage constraints on infrastructure within a “*bidding zone*”, such as GB. Thus, even prior to the amendment made with effect from the end of the Transition Period (which simply serves to put the point beyond doubt) the services to which BSUoS Charges relate would not have constituted “*congestion management*” within the meaning of the 2019 Regulation.

103. Further and in any event, the Ancillary Services Exclusion should be construed by reference to the definition of “*ancillary service*” in the 2009 Regulation, not the definition in the 2019 Regulation (whether amended or otherwise):

103.1. The ITC Regulation was made pursuant to the 2009 Regulation, and the drafter of the ITC Regulation can be taken to have had in mind the definitions it contains. It cannot sensibly be suggested that the drafter of the ITC Regulation, when using the expression “*ancillary services*”, would have had in mind a definition that would be introduced in 2019, i.e. nine years after the ITC Regulation.

103.2. Neither the 2019 Regulation nor the directive which accompanied it (Directive (EU) 2019/944, together “**the 2019 Legislation**”) refer to the ITC Regulation, and GEMA has found no indication in the *travaux préparatoires* that the 2019 Legislation was intended to alter the ITC Regulation’s effect.

103.3. The Appellants quote selectively from section 4.3 of the Impact Assessment published by the Commission in respect of the 2019 Legislation [A41/pp29-41]:

⁴⁷ Self §44. For the avoidance of doubt, “*capacity allocation*” has nothing to do with the “*capacity market*”.

⁴⁸ Commission Regulation (EU) 2015/1222, as it now applies in GB, is at [C8]

see NoA §§185-186 and Tindal §§3.9-3.12. In that section, the Commission considered 4 options in relation to tariff structures, namely maintaining the *status quo* (“Option 0”), prohibiting certain charges being levied on generators (“Option 1”); instructing ACER to develop further non-binding principles on the setting of tariffs (“Option 2”), and full harmonisation (“Option 3”). In the event, the Commission endorsed Option 2 (see especially [A41/p39]), and thereby indicated that it did not intend to introduce any legally binding change in the parameters for setting tariffs (whether by changing the scope of the Ancillary Services Exclusion or otherwise). Much of what the Appellants quote comes from the discussion of the option of full harmonisation, i.e. a course that the Commission decided not to adopt.

- 103.4. Mr Tindal sets out at length a theory as to why the EU legislature might have chosen to remove “*congestion management*”, in the sense that the Appellants use that term, from the scope of the Ancillary Services Exclusion (Tindal §§5.1-5.26).⁴⁹ Mr Tindal’s theory is based on the increased use of wind generation in recent years and/or “*a trade-off between incremental congestion/constraints and network reinforcement*”. There is nothing in the *travaux préparatoires* to suggest that the amended definition of “*ancillary services*” in the 2019 Regulation had anything to do with Mr Tindal’s theory.
- 103.5. The simple and obvious explanation for why the 2019 Regulation adopted a definition which explicitly excludes “*congestion management*” is that (i) the 2019 Regulation uses “*congestion management*” to refer specifically to the process by which capacity constraints between bidding zones are to be addressed; (ii) the 2019 Regulation makes detailed provision about that process, i.e. how “*capacity allocation*” is to be carried out; and (iii) it therefore made sense to clarify that services in respect of “*congestion management*” (i.e. “*capacity allocation*”) are separate from the more generic category of “*ancillary services*”.
- 103.6. The Appellants repeatedly suggest, without explanation, that the ITC Regulation would somehow be “*ultra vires*” if it used the expression “*ancillary services*” in a different way from the (much later) 2019 Regulation (NoA, §§176, 190, 195). This

⁴⁹ Mr Tindal also discusses at length whether BSUoS Charges (i.e. a particular set of domestic GB charging arrangements) are effective at sending appropriate price signals (Tindal §§5.9-5.17). This is irrelevant to the proper interpretation of the Ancillary Services Exclusion.

is wrong. Article 18(5) of the 2009 Regulation, which conferred the power under which the ITC Regulation was made, did not say that expressions used in any subordinate legislation must have the same meaning as in later versions of the parent legislation [C5]. Nor does the 2019 Regulation say that subordinate legislation (whether previously enacted or otherwise) must use expressions in the same way as they appear in the 2019 Regulation.

103.7. None of the authorities which the Appellants cite assist them:

103.7.1. The Appellants cite *C-491/01 R v Secretary of State for Health ex p British American Tobacco (Investments) Ltd* [2003] 1 CMLR 14 [C14] for the proposition that EU legislation is to be construed in context (NoA, §189). The 2019 Regulation was not, however, part of the context of the ITC Regulation, which long preceded it.

103.7.2. The Appellants cite *C-357/13 Drukarnia Multipress SP. Z O.O. v Minister Finansów* [2015] 3 CMLR 27 [C18] for the proposition that legislation should be construed in light of case law relating to predecessor (i.e. earlier) legislation (NoA, §189). That is the reverse of what the Appellants seek to do here, i.e. to construe the ITC Regulation in light of later legislation.

103.7.3. *C-677/18 Amoena Ltd v HMRC* (cited at NoA, §176 fn 111) [C22] concerned (i) legislation which assigned different levels of customs duty to brassières and medical appliances that are worn/carried; and (ii) implementing legislation which set out in detail into which of these categories mastectomy bras fell. The question was whether the implementing legislation correctly gave effect to the distinction required by the principal legislation. The case has nothing to do with the situation here, i.e. where subordinate legislation uses a term that also appears (with a definition) in parent legislation, and the parent legislation is later recast.

103.7.4. *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 (CA) [C13] (cited at NoA, §195) concerned secondary legislation which had the effect of frustrating rights conferred by statute, and was thus unlawful. Again, that has nothing whatsoever

to do with the situation here. GEMA's construction of the ITC Regulation does not have the effect of frustrating any right conferred by either the 2009 Regulation or the 2019 Regulation.

104. The services to which BSUoS Charges relate plainly fall within the definition of "*ancillary service*" in the 2009 Regulation, i.e. "*a service necessary for the operation of a transmission or distribution system*": see §101.1 above. The drafter of the ITC Regulation must therefore be taken to have intended that services of the sort to which BSUoS Charges relate should fall within the Ancillary Services Exclusion. This conclusion is reinforced by reference to the *travaux préparatoires*: see the passages cited and analysed at pages 30-32 of the CMP317/327 Decision [[A27/pp30-32](#)].⁵⁰
105. The suggestion at NoA §174 that GEMA should not have evaluated the proposals about BSUoS Charges against the ACOs is wrong for the reasons at §90.7 above.
106. Ground 3(a) should therefore be dismissed.

I. GROUND 3(b) (NoA, §§196-202)

107. Ground 3(b) alleges that GEMA made an error of law in concluding that the Relevant BSC Charges fall within the Ancillary Services Exclusion, and therefore that (as is presently the case) they should not be taken into account in the CUSC Calculation.
108. The nature of the Relevant BSC Charges is described at §22 above, and at §§45-56 of Mr Self's witness statement. In brief summary, the charges relate to the administration of the settlement process by which generators and suppliers are compensated/charged for the actual volumes of electricity that they inject/withdraw from the system, as opposed to the volumes that they had agreed to inject/withdraw. The settlement process is designed to create a financial incentive for generators and suppliers to be "*balance responsible*", i.e. to match their actual volumes with their agreed volumes.
109. GEMA was correct in concluding that these charges fall within the Ancillary Services Exclusion:
 - 109.1. As explained above, (i) the Ancillary Services Exclusion covers "*charges paid by producers related to ancillary services*"; and (ii) "*ancillary service*" is defined in the

⁵⁰ The passages in question are in the ERGEG Guidelines [[A29](#)] and the ITC Regulation Impact Assessment [[A30](#)].

2009 Regulation as “a service necessary for the operation of a transmission or distribution system”. Even if (contrary to the above) the definition in the 2019 Regulation were relevant, this would not affect the argument on Ground 3(b), since (i) the 2019 Legislation defines “ancillary service” in the same way, save for the stipulation that “congestion management” is not an “ancillary service”; and (ii) the Appellants do not suggest that the Relevant BSC Charges relate to “congestion management”.

- 109.2. As GEMA explained at pages 29-30 of the CMP317/327 Decision [[A27/pp29-30](#)], the transmission system could not reliably be kept in balance, and thus operate safely, without a settlement process of the sort that is funded through the Relevant BSC Charges. This is because, without such a process, (i) a generator would have no obvious incentive to ensure that it injected into the system as much electricity as it had said it would; and (ii) a supplier would have an incentive to under-forecast its withdrawals. The Appellants do not challenge this analysis, nor do they identify any way in which the GB transmission system could be safely operated without such a process. Indeed, they describe the services to which the Relevant BSC Charges relate as “a primary activity of the operation of the transmission system” and “integral to network management” (NoA, §202).
- 109.3. As such, the services to which the Relevant BSC Charges relate are “necessary for the operation of [the GB] transmission...system”. The Relevant BSC Charges therefore fall within the Ancillary Services Exclusion, and GEMA was right to conclude that they should not be taken into account in the CUSC Calculation.
110. The Appellants’ argument is, in essence, that the Relevant BSC Charges relate to services that are non-optional, i.e. that they are not services that a generator wishing to inject electricity onto the GB transmission system could decline to use and pay for. The Appellants say that such services are not “ancillary”. This is wrong:
- 110.1. The Appellants appear to be using the word “ancillary” to mean something like “optional” or “unimportant”. This ignores the definition of “ancillary service”, i.e. “a service necessary for the operation of a transmission or distribution system”

(underlining added).⁵¹ The fact that the services to which the Relevant BSC Charges relate are essential to the operation of the transmission system (rather than some sort of add-on that a generator could decline to use) underlines that they constitute “*ancillary services*”, within the meaning of the ITC Regulation.

110.2. For the same reasons, the Appellants are wrong to suggest that there is any inconsistency between the CMP317/327 Decision and a previous decision (known as P396 [A72]) in which GEMA observed that the Relevant BSC Charges relate to services which are not optional (NoA §§200-202).

110.3. The Appellants suggest that the Relevant BSC Charges cannot fall within the Ancillary Services Exclusion because they relate to services which are “*administrative*” in nature (NoA §201). The question of whether a service is “*administrative*” (whatever that may mean) is irrelevant. The relevant question is whether the service is “*necessary for the operation of a transmission or distribution system*”. The services to which the Relevant BSC Charges relate answer to that description, and the Relevant BSC Charges therefore fall within the Ancillary Services Exclusion.

110.4. The suggestion at NoA §202 that GEMA should not have evaluated the proposals about BSC Charges against the ACOs is (i) predicated on the erroneous assertion that the Relevant BSC Charges do not fall within the Ancillary Services Exclusion; and (ii) in any event wrong for the reasons at §90.7 above.

111. Ground 3(b) should therefore be dismissed.

J. GROUND 4 (NoA, §§203-204)

Introduction

112. By Ground 4, the Appellants contend that GEMA has “*significantly overstated the Consumer benefit and understated the Generator detriment, including the detriment to the long-term generation of renewable energy, which would arise from the contested Decision*” (NoA, §203). The NoA fails to specify which of the available grounds of review, as set out in s.175(4) of EA 2004 [C3/pp4-6], is/are said to be engaged by Ground 4, but the summary

⁵¹ “*Ancillary services*” are “*ancillary*” in the sense that they relate to the operation of the transmission system, rather than its construction or maintenance.

allegation (at NoA, §§203 and 204.8) appears to be of an error of fact as to the impacts of the CMP317/327 Decision on generators and/or consumers. For the reasons below, GEMA has not made any such error of fact.

113. Further and in any event, any error of fact would only provide a basis for appeal if it were material to the decision under challenge: see §§48-49 above. The Appellants fail to explain the materiality of any alleged error of fact.

Impact on generators

114. The Appellants' argument is, in summary, (i) that the CMP317/327 Decision will cause generators to have "*additional costs in the order of £639 million in the charging year 2021/22 alone*" (and greater amounts in subsequent years); (ii) that generators have organised their businesses on the footing that they would not need to bear such costs, and could not have foreseen that they would need to bear them; and, relatedly, (iii) that the allegedly unexpected imposition of additional costs in this way will create uncertainty, deter future investment and increase the cost of capital. See NoA §§204.1-204.3, 204.6.
115. The basis of the assertion that the CMP317/327 Decision will cause additional costs to generators of £639m in 2021/22 (and more in later years) at NoA §204.1 is unclear. Mr Tindal gives a different figure in his witness statement, in which he says that GEMA's decision will result in "*increased generation costs*" of £656.5m in 2021/22, and characterises this figure as a "*loss*" (Tindal §§7.1, 7.11). Mr Tindal reaches the figure of £656.5m by reference to four elements of the CMP317/327 Decision, which elements he labels as Decisions 1-4:
- 115.1. Decision 1 is the decision to approve the Original Proposal, rather than WACM7. Mr Tindal quantifies the effect of this decision at £3.0m in 2021/22. He acknowledges that this amount is "*relatively small*", albeit that he projects an increase in the financial difference between the Original Proposal and WACM7 from 2024/25 onwards (Tindal §§7.14-7.15).
- 115.2. Decisions 2 and 3 are, respectively, the decisions that no element of BSUoS Charges and/or BSC Charges should be taken into account in the CUSC Calculation. Mr Tindal quantifies the effect of these decisions in the charging year 2021/22 at £255.2m and £33.9m respectively (Tindal §§7.17-7.22).

- 115.3. Decision 4 is the decision not to set a target at the bottom of the Permitted Range. Mr Tindal quantifies the effect of this decision in the charging year 2021/22 at £364.4m (Tindal §§7.23-7.24).
- 115.4. Mr Tindal then adds these four sums (£3.0m + £255.2m + £33.9m + 364.4m) to produce a total of £656.5m.
116. It is misleading to characterise the Decisions 1-4 as causing “increased generation costs” or a “loss” of £656.5m:
- 116.1. The *status quo* is that the CUSC Calculation does not (i) include any element of BSUoS Charges; (ii) include any element of BSC Charges; or (iii) target the bottom of the Permitted Range. Thus, Decisions 2-4 do not involve any change from the *status quo*. Only Decision 1 involves a change from the *status quo* (i.e. it changes the CUSC Calculation to take account of certain charges that were previously left out of account).⁵²
- 116.2. Accordingly, the purported generation cost increase or “loss” attributed by Mr Tindal to Decisions 2-4, i.e. £653.5 million out of a total £656.5 million in 2021/22, is not a cost increase or loss at all. Instead, what Mr Tindal has quantified is the potential reduction in generation costs that would have resulted from certain WACMs. His real complaint is not that GEMA has imposed additional costs on generators, but that it has failed to deliver them a windfall.
- 116.3. In relation to Decision 1:
- 116.3.1. Mr Tindal acknowledges that the £3m difference that would arise in 2021/22 is “relatively small” (Tindal §7.14). He is right to do so, given that total TNUoS Charges paid by generators in 2021/22 are projected to be £813m [A73/p5]. £3m represents less than 0.4% of this amount.
- 116.3.2. The increase in the difference between the impact of the Original Proposal and WACM7 that Mr Tindal projects from 2024/25 onwards is not relevant, in light of GEMA’s indication that a further CUSC modification proposal should be brought forward to replace the Original Proposal from the 2022/23 charging year onwards.

⁵² The CMP317/327 Decision also changes the *status quo* by setting the TGR to zero, but the Appellants expressly do not complain about that: NoA §§5, 69, 230.

117. For the reasons above, Decisions 1-4 do not result in any material increase in generator charges in 2021/22. Insofar as the CMP317/327 Decision will increase generator charges, that is a result of (i) the removal of the TGR, about which the Appellants do not complain; and (ii) the amendment of the CUSC Calculation so that it operates on a basis significantly closer to the correct interpretation of the Connection Exclusion (both the Original Proposal and WACM7 being much closer to the correct interpretation than the *status quo*).
118. As to the assertion that generators have organised their businesses on the footing that they would not need to bear the alleged “costs” identified by Mr Tindal, and could not have foreseen that they would need to bear them:
- 118.1. As to Decision 1, and the amendment of the CUSC Calculation so that it operates on a basis significantly closer to the correct interpretation of the Connection Exclusion:
- 118.1.1. Generators have known since at least the time of the CMP224 decision in 2014 that there was doubt as to whether the CUSC Calculation was correct to assume that all TNUoS Charges fell within the Connection Exclusion. In that decision, GEMA identified that there were competing interpretations of the Connection Exclusion [\[A10\]](#).
- 118.1.2. Generators have known since 16 November 2017, i.e. the date of the CMP261 Decision [\[A53\]](#), that GEMA considers the CUSC Calculation to be based on an erroneous interpretation of the Connection Exclusion.
- 118.1.3. Generators have known since 26 February 2018, i.e. the date of the CMA Decision, that the CUSC Calculation is indeed based on an erroneous interpretation of the Connection Exclusion.
- 118.1.4. Generators have known since 4 May 2018, i.e. the date of the letter referred to a §34 above [\[A78\]](#), that as part of the TCR GEMA would be considering the possibility of changes to the CUSC Calculation in light of the CMA Decision.
- 118.1.5. Generators have known since 21 November 2019, i.e. the date of the TCR Decision, that GEMA expected changes to be made to the CUSC Calculation, with effect from 2021, in light of the CMA’s elucidation of the correct interpretation of the Connection Exclusion.

- 118.1.6. In light of the foregoing, any reasonably prudent generator (i) would since at least 2014 have taken into account the possibility that the CUSC Calculation would at some point be revised to reflect a broader view of the Connection Exclusion; and (ii) would since at least February 2018 have taken into account the likelihood that this would happen in the coming years. If, as Mr Tindal suggests, the Appellants failed to factor the possibility of such changes into their bids in Capacity Market auctions in February 2018 and January 2020 (Tindal §§7.28-7.34), they were imprudent.
- 118.2. As to Decisions 2-4, GEMA has never suggested that (i) any part of BSUoS Charges and/or BSC Charges should be taken into account in the CUSC Calculation; and/or (ii) the CUSC Calculation should target the bottom of the Permitted Range. No sensible generator would have conducted its business on the footing that GEMA would approve such changes.
- 118.3. In light of the above, and the Appellants' acceptance that the setting of the TGR to zero was foreseeable (NoA §222), there is no proper basis for the allegation that the CMP317/327 Decision has inflicted on generators vast costs that they could not reasonably have anticipated. The premise for the allegation that the CMP317/327 Decision gives rise to regulatory uncertainty, increases the cost of capital and/or will deter investment (whether in renewable energy generation or otherwise) therefore falls away.
119. Further and in any event, Ground 4 falls to be assessed on the footing that the Appellants have failed on Grounds 1, 2 and/or 3, i.e. that the CMA has rejected their interpretation of the Connection Exclusion and the Ancillary Services Exclusion. In those circumstances, it is irrelevant that applying a different, incorrect, interpretation of the ITC Regulation would have led to a more financially advantageous outcome for generators.

Impact on consumers

120. At NoA §204.4, the Appellants contend that GEMA has (wrongly) claimed that the CMP317/327 Decision will deliver consumer benefits of £300 million per year. There is nothing in this point. Page 1 of the CMP317/327 Decision is very clear that £300 million

per annum is GEMA's estimate of the consumer benefit of implementing "the Directions" to give effect to the TCR Decision, not just CMP317/327 in isolation. The CMP317/327 Decision does not attempt to disaggregate the consumer benefits of the changes that it implements from the consumer benefits of the TCR reforms more generally. It was reasonable for GEMA not to seek to disaggregate the consumer benefits specifically associated with the CMP317/327 Decision, since that decision implements an essential part of the wider package of changes required to give effect to the TCR Decision (which the Appellants did not challenge). GEMA had well in mind that that the consumer benefits of the CMP317/327 Decision would be significantly less than £300 million per annum, but significantly greater than zero: see Self §105.

121. The Appellants' attempts to play down the consumer benefits of the CMP317/327 Decision are misplaced:

121.1. Mr Tindal asserts that there is "no material customer benefit at all" from the CMP317/327 Decision (Tindal §7.56). Mr Tindal's reasoning is as follows (Tindal §§7.42-7.56):

121.1.1. Mr Tindal starts from GEMA's Impact Assessment of the "Embedded Benefits" element of the TCR Decision, which projected net consumer benefits of between £3.3bn and £4.1bn in the period to 2040 [A80/p20].

121.1.2. Mr Tindal then takes the figure at the bottom of this range (i.e. £3.3bn), and makes three adjustments to it. These adjustments (i) take account of the fact that the reform is being implemented in 2021 rather than 2020; (ii) seek to strip out the benefits associated with reforms that are not implemented via the CMP317/327 Decision; and (iii) ignore the consumer benefits in the years 2021/22 and 2022/23.

121.1.3. Having made these adjustments, Mr Tindal calculates that the annual, levelized customer benefit is £33m (which figure is quoted at NoA §204.4).

121.1.4. Mr Tindal appears to regard an annual, levelized customer benefit of £33m as "no material customer benefit at all".

121.2. Mr Tindal's reasoning is flawed:

121.2.1. Even if the annual, levelized customer benefit was only £33m, this would still be a material customer benefit.

121.2.2. Mr Tindal’s calculations are all based on the figure at the bottom end of GEMA’s forecast (i.e. £3.3bn). Had Mr Tindal worked from the upper end of the range (i.e. £4.1bn), or the mid-point, his figure for annual levelized customer benefit would have been substantially greater.

121.2.3. There is no proper basis for ignoring the customer benefits expected in the years 2021/22 and 2022/23. See §108.3 of Mr Self’s witness statement. Had Mr Tindal not made that adjustment, his figure for annual levelized customer benefit, based on the bottom end of the forecast range, would have been £87m (not £33m).

121.3. The Appellants allege the CMP317/327 Decision will lead to higher costs for consumers in the long run, as a result of regulatory uncertainty, investment risk and increased costs of capital (NoA, §§204.3, 204.6, 204.8). This argument is based on a flawed premise (i.e. that the CMP317/327 Decision will give rise to regulatory uncertainty etc – see §118.3 above), and is accordingly wrong.

Other issues raised

122. The Appellants say that “*Ofgem’s own modelling showed that the impact of the contested Decision on total system value overall is either £zero, or detrimental*” (NoA, §204.5). No citation is given for this statement, but it appears to be an allusion to GEMA’s projection in the TCR Decision, and accompanying Impact Assessment, that the reforms to “*non-locational Embedded Benefits*” (which includes setting the TGR to zero) would result in additional “*system costs*” of between zero and £0.3bn in the period to 2040 [[A20/p143](#); [A80/p20](#)]. As to this:

122.1. “*System costs*” represent the cost of running the system, and do not take account of the benefit to consumers of any reduction in their bills.⁵³ The Appellants fail to mention that GEMA projected that the same reforms would reduce consumer bills by £3.3bn-£4.1bn over the same period. As is plain from the TCR Decision and accompanying Impact Assessment, GEMA had due regard to the projected increase in system costs associated with the relevant part of the TCR Decision

⁵³ See [[A20/p143 fn 141](#)].

(which the CMP317/327 Decision implements in part), and concluded that they were outweighed by the forecast benefits to consumers [A20/p143; A80/p20].

- 122.2. It is unclear what error is being alleged at NoA, §204.5. If it is contended that GEMA ought not to have adopted an approach that was projected to reduce consumer bills but increase system costs, the Appellants should have sought judicial review of the TCR Decision. They did not do so, and cannot now seek to challenge the TCR Decision by the back door.
123. The Appellants suggest that, in the context of the TCR Decision, GEMA failed to take into account the implications for the cost of capital (NoA §204.6). That is incorrect. See §§4.56-4.59 of the TCR Decision [A20/pp115-116].
124. The Appellants also make vague assertions about an alleged failure to follow “*the correct principles of cost reflectivity*” (NoA §204.6) and alleged detriment to competition with non-GB generators (NoA §204.7). These assertions (which are without merit) appear to be based on arguments that the Appellants advance under Ground 5, and are addressed in that context below.
125. For the reasons above, Ground 4 should be dismissed.

K. GROUND 5 (NoA, §§205-218)

Introduction

126. By Ground 5, the Appellants allege that GEMA should have selected an option which would have targeted “*annual average transmission charges*” (within the meaning of the ITC Regulation) paid by generators at or towards €0/MWh. The Appellants thereby challenge GEMA’s decision not to set a target for any particular point within the Permitted Range.
127. Ground 5 is a collateral attack on the TCR Decision, which the Appellants did not challenge at the relevant time, and should be dismissed for that reason alone:
- 127.1. As noted at §35 above, GEMA decided in the TCR Decision that the TGR should be removed (i.e. set to zero), subject to an adjustment mechanism to ensure compliance with the ITC Regulation. Specifically, GEMA said: “*this should be achieved by charging generators all applicable charges (having factored in the correct interpretation of the connection exclusion as set out in [the ITC Regulation]), and*

adjusted if needed to ensure compliance with the 0-2.50 EUR/MWh range” (TCR Decision, §4.16 [[A20/p104](#)]). The CUSC Direction was to similar effect [[A21/p8](#)].

- 127.2. As explained at §35.2 above, the rationale for removing the TGR was to end a feature of the current charging arrangements which distorts competition between different sizes of generator. In short, since the TGR has become a negative charge, it represents a benefit for those generators who are liable for TNUoS Charges (i.e. transmission-connected generators and Large DG), which other generators (i.e. Small DG) do not receive. GEMA recognised that there would still be a need for an adjustment mechanism to secure compliance with the Permitted Range, but was clear (i) that the starting point is that generators should be charged *“all applicable charges”*; and (ii) that the adjustment mechanism should only be applied *“if needed”* to ensure compliance with the Permitted Range.
- 127.3. To set a target of zero (or some value tending towards zero) would in effect reintroduce the TGR by the back door and dilute the benefits that its removal was intended to deliver. The introduction of a target of zero would result in (i) a negative adjustment being made to TNUoS Charges in circumstances where no adjustment was needed to ensure compliance with the Permitted Range; or (ii) a larger negative adjustment than necessary being made in circumstances where *“annual average transmission charges” prima facie* exceeded the Permitted Range (e.g. if the average unadjusted charge was €3/MWh, a target of zero would result in a negative adjustment of €3/MWh, notwithstanding that a negative adjustment of €0.50/MWh would be sufficient to secure compliance with the ITC Regulation). This would tend to distort competition between those generators who are liable for TNUoS Charges and those generators who are not, in much the same way as the TGR.
- 127.4. To set a target of zero (or some value tending towards zero) would thus be contrary to the TCR Decision and the CUSC Direction. The Appellants could have, but did not, seek judicial review of the TCR Decision and/or the CUSC Direction. It is impermissible for the Appellants to use this appeal to mount an out-of-time attack on the TCR Decision and/or the CUSC Direction, and Ground 5 should therefore be dismissed.

- 127.5. In this regard, it should be noted that, in the absence of any judicial review of the TCR Decision and/or the CUSC Direction, other industry participants are likely to have organised their businesses on the footing that the TCR Decision and the CUSC Direction were lawful, and would be given effect, i.e. that generators would be charged “*all applicable charges*”, with a negative adjustment only being applied if and insofar as necessary to achieve compliance with the Permitted Range. This is of particular relevance to suppliers, who in effect pick up the cost of negative adjustments to generator charges. Indeed, some suppliers would be put at serious risk of insolvency if a target of €0/MWh was now imposed without warning: see §114 of Mr Self’s witness statement.
128. GEMA responds to the substance of Ground 5 in the paragraphs below, without prejudice to the overriding contention that it is impermissible for the Appellants to advance it. If, notwithstanding the above, the CMA decides to consider the substance of Ground 5, it should be borne in mind (i) that Ground 5 involves a challenge to a multi-factorial evaluation undertaken by a specialist regulator; and (ii) an appellate tribunal should be slow to interfere with such an evaluation (see §§48-49 above).⁵⁴

The “*de facto target*” argument

129. The Appellants assert that the effect of GEMA’s decision not to set a target of a specific point within the Permitted Range is, *de facto*, to set a target at the top of the Permitted Range (NoA, §§205, 210.1, 211). That is incorrect, as Mr Self explains at §§115-116 of his witness statement:

- 129.1. Under all of the proposals that were presented to GEMA, the first step is (in effect) to identify what “*annual average transmission charges*” (under the relevant proposal’s understanding of the ITC Regulation) paid by generators would be, if no adjustment were applied. If no target is set, an adjustment is only applied if and insofar as “*annual average transmission charges*” are forecast to fall outside the

⁵⁴ At NoA §210.5, the Appellants suggest that it was inaccurate for the CMP317/327 Decision to describe Workgroup members’ views as to whether there should be a target as “*mixed*”. This characterisation was entirely appropriate. See §3.1.14 of the CMP317/327 final modification report, which states: “*Whilst most Workgroup members agreed with the principle and wider benefits of targeting €0/MWh (or another value close to €0/MWh), others disagreed*” [[A23/p26](#)].

Permitted Range (or, more precisely, if they are forecast to fall outside a narrower range than reflects the application of an error margin).

- 129.2. Based on current projections, it is likely that “*annual average transmission charges*” (whether under the correct interpretation of the Connection Exclusion, or any of the approaches adopted in the various proposals) would exceed €2.50/MWh in the coming years, if no adjustment were applied. The trend for unadjusted charges to increase reflects that generators have been choosing to locate new generating capacity far from centres of demand, and that they therefore face higher locational charges than would otherwise be the case. Whether unadjusted “*annual average transmission charges*” consistently remain above €2.50/MWh in future years will depend primarily on the choices that generators make. If generators choose to locate new generating capacity closer to centres of demand, this would have the effect of decreasing unadjusted “*annual average transmission charges*”, potentially to the extent that they fall below €2.50/MWh (and the error margin). In such circumstances, no adjustment would apply.
- 129.3. It is therefore wrong to characterise the CMP317/327 Decision as introducing a *de facto* target of €2.50/MWh.
130. At NoA §210.2, the Appellants suggest that fixing a target would (i) enable generators to bid for contracts “*at more economical rates, since the pricing for risk could be reduced*”; and (ii) “*facilitate the building of flexible dispatchable generation in GB to deliver security of supply*”. As to this:
- 130.1. The claim that it is necessary to set a target to reduce pricing risk is inconsistent with the assertion that the result of the CMP317/327 Decision is, *de facto*, to set a target.
- 130.2. Setting a target for average charges would not significantly reduce pricing risk, since (i) the charges that any individual generator would face could be either above or below the target; and (ii) it is an individual generator’s own charges, not average charges, which are relevant to the pricing risk faced by the generator in question. See Self §117.2.
- 130.3. There is no basis for the Appellants’ unexplained assertion that fixing a target would facilitate the building of more flexible dispatchable generation (i.e. generation which can be turned on or off quickly, or rapidly increase or decrease

output), and there is in any event no reasonably foreseeable threat to security of electricity supply in GB: Self §117.3.

ACO (a) – facilitation of competition

131. The Appellants’ argument on Ground 5 focuses on whether introduction of a target of €0/MWh would better facilitate competition, i.e. ACO (a).
132. As explained at §127 above, (i) the object of removing the TGR was to address a distortion of competition between those generators who pay TNUoS Charges (i.e. transmission-connected generators and Large DG) and those who do not (i.e. Small DG); and (ii) setting a target of zero for “*annual average transmission charges*” (within the meaning of the ITC Regulation) would in effect reintroduce the TCR by the back door, and perpetuate the same distortion of competition.
133. The Appellants do not appear to challenge this. Rather, their position appears to be that certain other alleged distortions of competition, particularly as regards competition with generators outside GB, could be ameliorated by setting a target of zero (NoA, §§205, 207, 210.3 211-212). The Appellants’ case in this regard is presented at a high level of abstraction, and they fail to provide any specific evidence of (i) any detriment to cross-border (or other) competition that arises from the absence of a target, or (ii) the extent to which setting a target of zero would improve competition. Nor do they offer any analysis of why the alleged benefits to (in particular) cross-border competition of adopting a target of zero would outweigh the harms (which they do not dispute) to competition as between those generators who pay TNUoS Charges and those who do not.
134. The Appellants assert that GEMA failed to consider the alleged benefits to cross-border competition of setting a target of €0/MWh (NoA, §§207, 212). That is wrong: see §119 of Mr Self’s witness statement. The benefits to cross-border competition would be minimal, for the reasons explained by Mr Self at §120 of his witness statement. In summary:
 - 134.1. Setting a target of €0/MWh would have limited, if any, impact on the competitiveness or otherwise of existing power stations, since (i) the competitiveness or otherwise of a power station depends on the lowest price at which its operator is willing to sell electricity that it generates; (ii) an economically rational operator of an existing power station will generate and sell

electricity, providing it can obtain a price which exceeds the marginal cost of doing so; (iii) TNUoS Charges are a fixed cost levied on the basis of a generator's capacity, not the amount of electricity it actually generates; and (iv) the level of TNUoS Charges therefore does not affect the marginal costs of generating and selling electricity.

134.2. The possibility that the level of generator TNUoS Charges could influence decisions about whether to open/close plants in GB, as opposed to neighbouring markets, is theoretical, rather than something that is likely to happen in practice. In practice, any generator considering where to locate a plant intended to serve the GB market is highly likely to situate it in GB, since (i) overseas generators cannot bid for Capacity Market contracts or Contracts for Difference, which underpin most major investment in new generating facilities; and (ii) the scope to serve the GB market from power stations located elsewhere is necessarily constrained by limited interconnector capacity.

134.3. The ITC Regulation expressly envisages "*annual average transmission charges*" paid by generators being higher in GB than in most Member States. That the Commission was content for this to be so reflects that, for the reasons above, it is unlikely to give rise to significant distortions in competition.

135. At NoA §213, the Appellants suggest that there is some contradiction between (i) GEMA concluding that charges paid (and volumes produced) by Large DG should not be taken into account when assessing compliance with the Permitted Range; and (ii) aiming to remove distortions in competition between Large DG and Small DG. This is nonsense:

135.1. As pages 25-26 of the CMP317/327 Decision indicate, GEMA considers that, on the correct interpretation of the ITC Regulation, only charges paid (and volumes produced) by transmission-connected generators should be taken into account when calculating "*annual average transmission charges paid by producers*". This is because (i) the calculation prescribed by Part B of the Annex to the ITC Regulation refers to "*energy injected annually by producers to the transmission system*"; (ii) distribution-connected generators do not inject energy to the transmission system (and the energy that they inject to the distribution system may never flow onto the transmission system); and (iii) the *travaux préparatoires* indicate that ERGEG specifically considered and rejected a suggestion that the calculation should take into account the charges paid (and volumes produced)

by generators connected otherwise than to the transmission network [[A32/pp9-10](#)].

- 135.2. Nothing in that analysis affects any of the following: (i) Large DG (and transmission-connected generators) pay TNUoS Charges, and Small DG do not; (ii) the TGR tends to distort competition between those generators who are liable for TNUoS Charges, and those who are not; (iii) setting a target of zero would distort competition in much the same way; and (iv) it is desirable to remove a distortion of competition, as between generators who do or do not pay TNUoS Charges.
136. At NoA §§214-15, the Appellants appear to argue (i) that certain distortions of competition exist in favour of “*Behind the Meter Generation*”, i.e. generators which operate on a consumer’s premises, and export any surplus to the grid; and (ii) that this somehow vitiates GEMA’s conclusion that there should not be a target of zero. The Appellants’ argument is hard to follow, but, if and insofar as distortions in favour of Behind the Meter Generation exist, that is not a reason why other distortions of competition should be perpetuated or created. See Self, §121.
137. For the reasons above, the Appellants do not demonstrate any error (let alone any material error) in GEMA’s conclusion that not setting a target of (or approaching) €0/MWh would better facilitate achievement of ACO (a).

The other ACOs

138. The Appellants also, albeit more briefly, challenge GEMA’s conclusions in respect of the other ACOs.
139. As to ACO (b), namely cost-reflectivity (NoA, §216):
- 139.1. The Appellants allege that, in the CMP317/327 Decision, GEMA proceeded on the (incorrect) basis that “*TNUoS locational tariffs are cost reflective in absolute terms*” (NoA, §216). As Mr Self explains at §§122-127 of his witness statement, the Appellants misunderstand and/or mischaracterise the reasoning in the CMP317/327 Decision, which does not proceed on the basis that Wider Locational Charges are cost reflective in absolute terms. Rather, Wider Locational Charges are set in such a way as to send relative pricing signals to reflect the costs to the network of generators locating in different regions. Thus, Wider Locational

Charges are highest for those generators who locate furthest from centres of demand.

139.2. The adjustment mechanism by which the Appellants wish average generator charges to be targeted at €0/MWh would (like the TGR) operate as a flat-rate adjustment, i.e. the charges paid by all generators who are liable for TNUoS Charges would be reduced by a fixed £/kW value. As Mr Self explains at §126 of his witness statement, this would tend to distort relative cost reflectivity of charges as between those generators who are liable to TNUoS Charges (i.e. transmission-connected generators and Large DG) and those generators who are not:

139.2.1. In the absence of a flat-rate adjustment, a broadly similar level of £/kW charges would (with certain caveats to which Mr Self refers) apply to a TNUoS-liable or non-TNUoS-liable generator located in a given place. This is consistent with the principles of locational charging and cost reflectivity, since the costs that a generator imposes on the network are driven by its distance from demand, rather than its capacity.

139.2.2. The effect of a flat-rate negative adjustment that only large (i.e. TNUoS-liable) generators receive is that a large generator would have a lower £/kW charge than Small DG located in the same place. The greater the negative adjustment, the greater the disparity between the charges faced by the large generator and Small DG.

139.2.3. This has the effect of undermining locational pricing and the principles of cost reflectivity, since it means that the £/kW charge that a generator faces depends on the generator's size, rather than simply where it has chosen to locate.

139.3. Further, the application of a flat £/kW adjustment also changes the ratios between the charges that different TNUoS-liable generators would face, based on their decisions about where to locate. This is illustrated by the following example:

139.3.1. Suppose that there are two generators connected to the transmission system, one in northern Scotland and the other in north-east England. The generator in northern Scotland faces a locational charge of, say,

£20/kW. The generator in north-east England faces a locational charge of, say, £10/kW. The ratio of the charges is 2:1.

139.3.2. Suppose that a flat-rate credit of £5/kW is applied. The generator in Scotland now faces a charge of £15/kW, and the generator in north-east England faces a charge of £5/kW. The ratio of the charges is now 3:1, and there has thus been a distortion of the relative price signals that the locational charges were intended to send.

139.3.3. Now suppose that a flat-rate credit of £9/kW is applied. The generators thus face charges of, respectively, £11/kW and £1/kW. The ratio is now 11:1, and there has been an even greater distortion of the relative price signals.

139.4. The introduction of a target of €0/MWh would involve (i) a negative adjustment in circumstances where this is not required to ensure compliance with the Permitted Range; or (ii) a greater negative adjustment than required to ensure compliance with the Permitted Range. This would distort locational pricing signals, and thereby undermine the principle that charges should be cost reflective.⁵⁵

140. As to ACO (d), namely compliance with the ITC Regulation and other EU legislation (NoA, §217):

140.1. The Appellants provide no coherent explanation for their assertion that introducing a target of €0/MWh would better facilitate compliance with the ITC Regulation.

140.2. No target is needed to secure compliance with the ITC Regulation. Rather, the effectiveness of the CUSC Calculation at achieving compliance with the ITC Regulation depends on ensuring that the correct inputs are taken into account, e.g. in relation to the correct interpretation of the Connection Exclusion. Setting a target of €0/MWh would not “give leeway” for errors in the interpretation of the

⁵⁵ The Wider Locational element of TNUoS Charges is, on average, positive (Self §124). The Appellants are therefore wrong to suggest that setting a target of zero would “achieve more consistent treatment with Embedded Generators [which is understood to be a reference to Small DG], who as a result of the CMP264/265 Decision paid average Locational Charges of €0.00/MWh” (NoA, §210.3). Setting a target of zero would not mean that Wider Locational Charges would average zero. Rather, Wider Locational Charges would remain positive (on average), and a distortionary negative adjustment would be applied.

ITC Regulation (as suggested at NoA §210.4), since it would mean targeting one limit of the Permitted Range (and it is just as much a breach of the ITC Regulation for charges to fall below the lower limit as to exceed the upper limit).

- 140.3. The Appellants' allegation that GEMA has acted in a way that is not conducive to regulatory certainty is wrong for the reasons at §85 above.
141. The Appellants' arguments on ACOs (c) and (e) are parasitic on their arguments under Ground 4, which are wrong for the reasons at §§112-125 above.
142. For the reasons above, Ground 5 should be dismissed.

L. GROUND 6 (NoA, §§219-232)

Introduction

143. By Ground 6, the Appellants contend that GEMA failed to have "*proper regard or give appropriate weight to the desirability of staggering the introduction of the new measures* [in the CMP317/327 Decision] *through 'phasing'*" over a two or three year period (NoA, §219). The Appellants thereby challenge GEMA's decision to implement the Original Proposal in full from April 2021.
144. Like Ground 5, Ground 6 amounts to a collateral attack on the TCR Decision, and should be dismissed for that reason alone:
- 144.1. GEMA considered the timescale over which the TGR should be set to zero in the TCR Decision, and decided that that change should be implemented in full from April 2021, without phasing. The CUSC Direction likewise required NGENSO to bring forward a proposal to set the TGR to zero, with effect from April 2021. See §§35-36 above.
- 144.2. As explained above, it was open to the Appellants to seek judicial review of the TCR Decision and/or the CUSC Direction, if they considered that GEMA's decision that the TGR should be set to zero from April 2021 (without phasing) was unlawful. The Appellants did not do so, and it is impermissible for them to use this appeal as a vehicle to mount an out-of-time attack on that decision.
145. If, notwithstanding the above, the CMA decides to consider the substance of Ground 6, it should be borne in mind (as with Ground 5) that the challenge is to a multi-factorial

evaluation by a specialist regulator, with which an appellate tribunal should be slow to interfere (see §§48-49 above).

Foreseeability and impact on generators' costs

146. The essence of the Appellants' argument on Ground 6 is an assertion that the CMP317/327 Decision will lead to a large and unforeseeable increase in costs for generators, and that generators should be afforded more time "to adjust their behaviour and investment strategies" (NoA, §225).⁵⁶ This argument is without merit, for similar reasons to those set out in response to Ground 4 above:

146.1. GEMA signalled its intention to set the TGR to zero in its "minded-to" consultation of 28 November 2018 [B4]. The decision to do so was confirmed on 21 November 2019 by the TCR Decision, which also indicated that this change was to be effected, without phasing, in April 2021 (see §35 above).⁵⁷ The setting of the TGR to zero from April 2021 has, therefore, been well signalled to all industry participants. Indeed, the Appellants accept at NoA §222 that the setting of the TGR to zero was foreseeable.⁵⁸

146.2. As explained at §118.1 above, any reasonably prudent generator (i) would since at least 2014 have taken into account the possibility that the CUSC Calculation would at some point be revised to reflect a broader view of the Connection Exclusion; and (ii) would since at least February 2018 have taken into account the likelihood that this would happen in the coming years. Further, generators have known since the date of the TCR Decision that such a change was to be made with effect from April 2021. It is immaterial in this context that the Original Proposal (which GEMA approved) does not perfectly reflect the correct interpretation of the Connection Exclusion, since there would be no material

⁵⁶ See also NoA §222 ("...lack of foreseeability of the nature and extent of the changes..."), §226 ("[g]enerators could not reasonably have predicted..."), §228 ("...no sufficient warning"), §230 ("...unforeseen and significant costs with immediate effect").

⁵⁷ The Appellants refer to the fact that GEMA indicated that the introduction of some elements of the TCR Decision should be phased (NoA, §§219, 223-224). This is irrelevant, given that GEMA's clear decision was the implementation of the element related to removing the TGR should not be phased. See §6.20 of the TCR Decision [A20/p158].

⁵⁸ The Appellants allege at NoA §222 that there was a "lack of foreseeability of the nature and extent of the changes made in the Original Proposal beyond those which reflected the Direction to set the TGR to zero" (underlining added).

financial difference between the Original Proposal and the correct interpretation in 2021/22, i.e. the only charging year when GEMA envisages the Original Proposal being in force (see §§81 and 116.3 above). The suggestion at NoA §226 that GEMA has changed its interpretation of the Connection Exclusion is wrong for the reasons at §85 above.

- 146.3. The other elements of the CMP317/327 (i.e. no change to the CUSC Calculation in respect of BSUoS Charges and/or BSC Charges, and no introduction of any target within the Permitted Range) involve no change to the *status quo*, and GEMA has not at any stage suggested that it was minded to change the *status quo* in any of the relevant respects.⁵⁹ Contrary to what the Appellants say at NoA §226, there was nothing unpredictable about GEMA's conclusion as to the proper interpretation of the Ancillary Services Exclusion; GEMA has never endorsed the Appellants' interpretation.
- 146.4. The alleged "*additional costs*" associated with the CMP317/327 Decision are vastly overstated, for the reasons at §116 above. In short, the Appellants' real complaint is not that the CMP317/327 Decision imposes unforeseeable costs on them, but that it failed to deliver a windfall which they had no good reason to expect.
147. For the reasons above, generators have had ample time to adjust their behaviour and strategies in preparation for the implementation of the changes brought about by the CMP317/327 Decision, and there was no error in GEMA's decision not to phase the introduction of those changes.
148. Further, the Appellants' position on phasing is inconsistent:
- 148.1. Mr Graham voted for WACM72 as the best option in the Workgroup and CUSC Panel votes, and describes it as his "*preferred option*" in his witness statement [A23/pp55, 69; Graham §2.11]. Mr Tindal voted for WACM79 in the Workgroup vote [A23/p55]. WACM72 and WACM79 do not have phasing [B13].
- 148.2. The Appellants' desire for their favoured WACMs to be implemented without phasing presumably reflects that those WACMs would deliver generators a

⁵⁹ Indeed, the Appellants say at NoA §226 that the issues relating to the Ancillary Services Exclusion are "*a wholly new point*". This is inconsistent with the suggestion that generators have for years been organising their business on the footing that the Ancillary Services Exclusion was different from how GEMA has consistently interpreted it.

windfall by (i) taking BSUoS Charges and BSC Charges into account in the CUSC Calculation; and (ii) introducing a target at the bottom of the Permitted Range [B13]. As explained at §§118.2 and 127.5 above, (i) neither the Appellants nor other industry participants had any good reason to anticipate that GEMA would approve such changes; and (ii) the windfall benefit to generators associated with such changes would have had to be paid for by suppliers.

148.3. It is, with respect, quite extraordinary that the Appellants should suggest that there is a need for a phased approach to the well-signalled changes effected by the CMP317/327 Decision, when they would apparently consider it appropriate to introduce, without phasing, immediate and unheralded⁶⁰ changes that would impose significant additional costs on suppliers. Indeed, if the Appellants' proposed changes were to be introduced without phasing, this would be likely to put certain suppliers at serious risk of insolvency: Self §114.

The ACOs

149. GEMA evaluated the proposals in relation to phasing at pages 14-16 of the CMP317/327 Decision, by reference to the ACOs [A27/pp14-16]. The Appellants' criticisms of that evaluation (NoA, §§228-232) are without merit.

150. As to ACO (a), namely facilitating competition (NoA, §228):

150.1. The Appellants accept that phasing would delay the removal of distortions in competition between larger and smaller generators.

150.2. The Appellants' criticism is predicated on the premise that the effect of the CMP317/327 Decision is to impose vast additional costs on transmission-connected generators "*with no sufficient warning*". For the reasons at §§115-118 above, the Appellants greatly overstate the additional costs associated with the CMP317/327 Decision, and the assertion that they had insufficient warning is wrong.

151. As to ACO (b), namely cost-reflectivity (NoA, §229):

⁶⁰ As explained above, GEMA has never suggested that it was minded to change the CUSC Calculation to introduce a target of zero, or to take account of BSUoS Charges and/or BSC Charges.

- 151.1. The Appellants suggest that immediate implementation of the Original Proposal will not send effective locational pricing signals, since it “*could*” be partially offset if a change is made in relation to what is known as the “*reference node*” (cf NoA §227). No decisions have yet been made as to whether any changes should be made in relation to the reference node, but GEMA has publicly indicated that it is not currently convinced of the case for change (see Self §132). It would therefore have been inappropriate to make the CMP317/327 Decision on the footing that changes to the reference node will be made, or are likely to be made. For the same reasons, the Appellants’ contention that immediate implementation will lead to “*tariff volatility*” is unsound (NoA §227).
- 151.2. The Appellants’ general arguments on cost-reflectivity are addressed at §139 above.
- 151.3. The assertion that GEMA was “*motivated to maximise the total annual average transmission charges collected from generation*” (NoA, §229) is entirely without foundation. The fact that, on this occasion, GEMA approved a modification which was disadvantageous to generators (or at least did not deliver the windfall that the Appellants wanted) does not mean that GEMA was motivated by a desire to see generators pay as much as possible. As Mr Self explains at §131 of his witness statement, GEMA had and has no such motivation.
152. As to ACOs (c) and (d), namely taking account of the developments in transmission licensees’ transmission businesses and compliance with the ITC Regulation and other EU legislation (NoA, §§230-231):
- 152.1. The Appellants’ arguments are again predicated on the assertion that the effect of the CMP317/327 Decision is to impose “*unforeseen and significant*” cost burdens on generators. This assertion is wrong for the reasons at §§115-118 above.
- 152.2. The Appellants do not dispute that phased implementation would postpone the taking of steps to bring the CUSC Calculation more closely into line with the calculation envisaged by the ITC Regulation, thus *prima facie* increasing the risk of non-compliance with the ITC Regulation. The Appellants suggest that compliance could alternatively be secured through use of the new adjustment mechanism in CUSC Condition 14.14.5. This is wrong. As explained at §90.4 above, the effect of the adjustment mechanism is to secure “*compliance*” with the

erroneous interpretation of the ITC Regulation contained in the Original Proposal.⁶¹ The adjustment mechanism is not a reliable means of ensuring compliance with the ITC Regulation itself.

152.3. The Appellants also suggest that compliance with the ITC Regulation could be achieved by reducing the value of Wider Locational Charges. This was not an element of any of the proposals submitted to GEMA in the CMP317/327 modification report, and (as explained at §38 above) GEMA has no power to impose a modification that is not set out in the report submitted to it.

153. As to ACO (e), namely promoting efficiency in the implementation and administration of the system charging methodology (NoA, §232):

153.1. The Appellants' argument is again premised on the notion that the CMP317/327 Decision imposes large and unforeseen burdens on generators ("*generator shock*"). This premise is wrong for the reasons at §§115-118 above.

153.2. Even if the premise of the Appellants' argument were correct, it has nothing to do with promoting efficiency in the implementation and administration of the system charging methodology.

154. For the reasons above, Ground 6 should be dismissed.

M. CONCLUSION AND RELIEF

155. For the reasons above, the appeal should be dismissed, and the CMP317/327 Decision and CMP339 Decision confirmed. See s.175(5) EA 2004, which provides: "*Where the CMA does not allow the appeal, it must confirm the decision appealed against*". If the appeal is dismissed, GEMA will also seek an order that the Appellants pay its costs, pursuant to paragraph 13(5) of schedule 22 to EA 2004.

156. If, contrary to the above, the appeal is allowed, the CMA's powers are as set out in ss.175(6)-(7) EA 2004, which provides:

- (6) *Where it allows the appeal, it must do one or more of the following –*
- (a) *quash the decision appealed against;*

⁶¹ The same point would apply had GEMA approved a proposal based on the approach to the Connection Exclusion found in WACM7 or WACM14. In each case, the adjustment mechanism would only secure "*compliance*" with the erroneous interpretation of the ITC Regulation embodied in the relevant proposal.

(b) remit the matter to GEMA for reconsideration and determination in accordance with the directions given by the CMA;

(c) where it quashes the refusal of a consent, give directions to GEMA, and to such other persons as it considers appropriate, for securing that the relevant condition has effect as if the consent had been given.

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

157. In the context of relief, the CMA's powers are strictly limited to the exhaustive list of options set out in s.175(6) EA 2004: see CMA Decision, §9.12.
158. In the event that the appeal is allowed, the appropriate remedy is (i) the quashing of GEMA's decisions to approve the Original Proposal in CMP317/327, to approve the Original Proposal in CMP339, and to refuse consent to all other proposals in CMP317/327 and CMP339; and (ii) for the matter to be remitted to GEMA to reconsider in light of the CMA's conclusions.
159. It is unclear what the Appellants' primary case on relief is. NoA §233 appears to indicate that the primary relief sought is that *"the contested Decision be quashed...until such time as a further and better Proposal is tabled and approved"*, but NoA §236 suggests that *"a more useful form of relief"* would be for the CMA to concoct some new hybrid proposal of its own devising (§236). In the paragraphs which follow, GEMA responds to each of the variant forms of relief proposed.
160. At NoA §233, the Appellants say that the appropriate remedy would be quashing, and that this *"would have the effect of returning matters to the status quo ante until such time as a further and better Proposal is tabled and approved"*. As to this:
- 160.1. GEMA agrees that the quashing (as per §158 above) would be the appropriate remedy if the appeal were allowed.
- 160.2. The Appellants are wrong about the effects of quashing. Quashing would return matters to the *status quo ante* only until such time as GEMA re-takes the quashed decisions (unless, when re-taking the decisions, GEMA decides to reject both the Original Proposal and all of the WACMs).
- 160.3. The fact that the Appellants envisage a *"further and better Proposal"* being brought forward is tantamount to an admission that none of the proposals in CMP317/327 reflect the correct interpretation of the Connection Exclusion.

161. At NoA §234, the Appellants seek (in the alternative) the quashing of “*the contested Decision...in so far as it approves*” various specified “*elements of the Original Proposal*”. Even if the CMA were to agree with the Appellants that it was unlawful for GEMA to approve a proposal containing any or all of the elements specified, the CMA would have no power to grant the relief sought. Such relief would amount to partial quashing of a decision, which the CMA has no power to do. Its only relevant power is to quash “*the decision*” as a whole. See s.175(6)(a) EA 2004.
162. At NoA §235, the Appellants seek (further or in the alternative) a direction that the matter be remitted to GEMA for reconsideration, with GEMA being directed to take various matters into account. GEMA agrees that, if its decisions are quashed, it would be appropriate for the matter to be remitted to it for reconsideration, taking into account such findings as the CMA has made. Those findings may, of course, differ from the matters identified in NoA §§234-235.
163. At NoA §236, the Appellants appear to invite the CMA to direct GEMA to give approval to “*one of the proposed WACMs*”. They do not specify any particular WACM which GEMA should be directed to approve, and in the next sentence indicate that they are in fact inviting the CMA to direct the implementation of some unspecified hybrid of WACMs 14, 72 and 79. This proposal is embarrassing for want of particularity, and the CMA would in any event have no power to grant such relief:
- 163.1. Section 175(7) EA 2004 expressly provides that the CMA must not direct anyone to do anything that they would not otherwise have power to do.
- 163.2. As explained at §38 above, GEMA’s powers when considering a CUSC modification report are (i) to approve a specific modification proposal as set out in the report; (ii) to reject all of the modification proposals; or (iii) to send the report back for revision and resubmission. GEMA has no power to “*pick and mix*” between elements of different WACMs.
- 163.3. It follows that the CMA cannot direct GEMA to approve a modification based on a combination of elements of different WACMs.
- 163.4. Nor should the CMA direct GEMA to approve any particular WACM. In the event that the CMA upholds the appeal, the appropriate course is for the matter to be remitted to GEMA for reconsideration, in its role as a specialist regulator. This would enable GEMA to consider how best to give effect to the CMA’s

findings, taking into account such factors as the serious risk of supplier insolvency that would be associated with immediate implementation of the Appellants' favoured WACMs (see Self §114).

164. At NoA §237, the Appellants suggest that the appropriate relief should be informed by data about whether there has been any historic non-compliance with the ITC Regulation, and purport to reserve a right to make "*further submissions*". As to this:

164.1. The modification proposals at issue in this appeal are concerned with the charging framework for the future. They have nothing to do with rectifying any past breach of the ITC Regulation. If there has been a breach (which will depend, *inter alia*, on the CMA's conclusions regarding the correct interpretation of the Connection Exclusion and the Ancillary Services Exclusion), any steps to rectify it would need to be the subject of a separate CUSC modification proposal.⁶² The question of whether there has been any historic breach of the ITC Regulation is therefore irrelevant to the question of what relief should be granted, should the Appellants succeed on their appeal.

164.2. The Appellants have no right to make further submissions, whether on this or any other topic. It is for the CMA to decide what, if any, further submissions it wishes to receive from the parties.

165. The Appellants' intention to seek a costs order if their appeal succeeds is noted (NoA §238). In the event that the Appellants apply for a costs order, GEMA respectfully requests that it be afforded a reasonable opportunity to make submissions in response to the application.

KASSIE SMITH QC
LIGIA OSEPCIU
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2 February 2021

⁶² GEMA indicated in the CMP317/327 Decision that it would expect NEGSO to bring forward proposals to address any historic breach that may be identified [[A27/p26](#)].