SSE Generation Limited v Gas and Electricity Markets Authority and National Grid Electricity System Operator Limited (Intervener) and Centrica plc/British Gas Trading Limited (Intervener)

Final determination on costs

Notified: 5 December 2023

CMA
Competition & Markets Authority

The Competition and Markets Authority has indicated with [✂] in this version of the final determination on costs information which the appeal group considers confidential and which should be excluded from publication having regard to section 175(10) Energy Act 2004

Contents

Page

Introduction

1. This document sets out the Competition and Markets Authority's (the **CMA**) final determination on costs following the outcome of the decision of the Court of Appeal in *R (on the application of SSE Generation Ltd) v Gas and Electricity Markets Authority*.[1] These costs arise from an appeal to the CMA brought in 2021 (the **CMA Appeal**) by SSE Generation Limited and a number of companies within the SSE corporate group[2] (**the Appellants**) against a decision of the Gas and Electricity Markets Authority (**GEMA**) (together, the **Parties**). The appeal was heard by the CMA and a decision on the substance was delivered in March 2021 (**the CMA 2021 Decision**). In November 2021, the CMA issued its decision as to costs (**the CMA 2021 Costs Decision**).

2. Subsequently, the Appellants challenged the CMA 2021 Decision before the Administrative Court by way of judicial review (the **Judicial Review**). The Administrative Court heard the Judicial Review and allowed it in part by way of an order dated 11 April 2022. Consequently, the CMA issued a further decision dated 20 May 2022 (the **CMA May 2022 Decision**).

3. The Parties each brought appeals against aspects of the Judicial Review decision, and those appeals were heard in the Court of Appeal. The Court of Appeal delivered its decision and made an order on 8 November 2022 by which it allowed both appeals. The CMA issued a further decision on 12 December 2022 (the **CMA December 2022 Decision**) to give effect to the Court of Appeal's order.

4. By the CMA December 2022 Decision, the CMA allowed the Appellants' appeal with respect to a single ground, Ground 3(i) in the CMA Appeal. It noted in the decision that the outcome of all proceedings is that Ground 3(i) is allowed, and all of the Appellants' other CMA Appeal grounds are dismissed. This costs decision (and accompanying order) follows the CMA December 2022 Decision[3] and is made after the issuing of a provisional determination of the matter and a period of consultation with the Parties.

---

[1] [2022] EWCA Civ 1472.
[2] Keadby Generation Limited, Medway Power Limited, Griffin Windfarm Limited, SSE Renewables (UK) Limited, and Keadby Windfarm Limited
[3] Both should be read together and terms used in this costs decision have the same meaning as in the CMA December 2022 Decision unless otherwise stated or the context requires otherwise.

Background

5. On 17 December 2020, GEMA published its decision on the Connection and Use of System Code (**CUSC**) Joint Modification Proposal CMP 317/327[4] (**CMP317/327**) and the 'Consequential changes for CMP317 and CMP327' (**CMP339**).[5] GEMA's decision was to approve the proposal (**the Original Proposal**) made by the National Grid Electricity System Operator Limited (**NGESO**) to amend the CUSC and set new parameters for the calculation of generator Transmission Network Use of System (**TNUoS**) charges (the **GEMA Decision**). The Original Proposal covered a range of elements, including the treatment of connection charges and charges for ancillary services (including those relating to congestion management), all of which formed a part of the calculation of the new average TNUoS charges.

The CMA Appeal and subsequent decisions

6. On 12 January 2021, the Appellants applied to the CMA for permission to appeal against the GEMA Decision, under section 173(4) of the Energy Act 2004 (**EA04**). On 21 January 2021, the CMA granted the Appellants permission to appeal on six grounds (the **Appeal Grounds**) that accordingly comprised the CMA Appeal.[6]

7. On 9 February 2021, National Grid Electricity Systems Operator (**NGESO**) and British Gas Trading Limited (**BGT**) made an application to intervene in the CMA Appeal pursuant to Rule 7 of the Energy Code Modification Rules 2005 (the **Rules**). On 10 February 2021, BGT amended its application to include Centrica plc (**Centrica**) as a joint applicant to intervene. On 10 February 2021, the CMA granted NGESO and Centrica/BGT permission to intervene.

8. The CMA considered the extensive pleadings, submissions and skeleton arguments, and heard from the Parties at clarification hearings on 11 February 2021 and at main, substantive, hearings on 4 and 5 March 2021. The CMA notified its determination of the CMA Appeal to the Parties by way of the CMA 2021 Decision on 30 March 2021, dismissing the appeal in respect of all six grounds and confirming the GEMA Decision in respect of CMP317/327 and CMP339.

---

[4] 'CMP317: 'Identification and exclusion of Assets Required for Connection when setting Generator Transmission Network Use of System (TNUoS) Charges / CMP327: 'Removing the Generator Residual from TNUoS Charges'
[5] 'CMP339: Consequential changes for CMP317 and CMP327'
[6] CMA Decision on permission to appeal, 21 January 2021

9. In November 2021, the CMA made the CMA 2021 Costs Decision following a period of consultation with the Parties that involved them submitting statements of their costs and representations as to liability for them. It also involved the issuing of a provisional costs determination on which the Parties made representations. The CMA 2021 Costs Decision was issued after consideration of those representations and was that:

(a) In relation to the CMA's costs incurred in connection with the appeal, the Appellants should pay £392,600 to the CMA.

(b) In relation to *inter partes* costs, the Appellants should pay £318,333.45 plus VAT to GEMA in respect of its claimed costs of the appeal.

10. As we note above, the Appellants challenged certain parts of the CMA 2021 Decision in the Judicial Review. On 11 April 2022, the Administrative Court handed down its judgment on that challenge, allowing the appeal in part (in relation to Grounds 1 and 2 of the CMA Appeal). On 20 May 2022, the CMA made a new decision (the CMA May 2022 Decision) and order, to give effect to the decision of the Administrative Court.[7]

11. GEMA appealed the Administrative Court's judgment to the Court of Appeal, and the Appellants cross-appealed. On 8 November 2022, the Court of Appeal handed down its judgment, allowing both GEMA's appeal and the Appellants' cross-appeal.

12. In relation to costs, the Court of Appeal ordered that:

> *The decision of the CMA dated 4 November 2021 in relation to the costs of the appeal before it[8] is quashed. The CMA is directed to determine the costs of and occasioned by the appeal before it, both as between the parties to the appeal and in relation to the costs of the CMA itself in entertaining the appeal to the extent permitted by Schedule 22 of the Energy Act 2004, taking into account the outcome of the proceedings before Swift J and this Court.*

13. On 12 December 2022, the CMA made a further decision, the CMA December 2022 Decision, in order to give effect to the Court of Appeal judgment. In effect, this decision allowed the Appellants' appeal to the CMA on Appeal Ground 3(i).

---

[7] The CMA did not take a new costs decision at this time.
[8] Ie the CMA 2021 Costs Decision

14. The CMA subsequently issued a provisional costs determination (the **CMA 2023 Costs PD**) on 27 April 2023. The provisional determination was that:

(a) In relation to the CMA's costs incurred in connection with the appeal, GEMA should pay £437,800 to the CMA.

(b) In relation to *inter partes* costs, the CMA would make no order as to costs.

15. The CMA 2023 Costs PD was issued after the following process:

(a) On 14 December 2022, the CMA sought representations from each of the Parties as to the appropriate orders for costs, taking into account the CMA December 2022 Decision. The Parties provided submissions on the award of CMA costs and *inter partes* costs on 13 January 2023.

(b) Having considered those submissions, the CMA issued the CMA 2023 Costs PD on 27 April 2023 and invited the Parties' written representations on it.

(c) The Parties made representations on 15 May 2023. The Appellants' representations supported the provisionally determined costs outcomes. GEMA's did not and requested additional information and time for making representations.

16. The CMA provided GEMA with additional information, copied to the Appellants, on 4 October 2023. GEMA made further representations, and sought more information as to the CMA's costs, 14 days later. The CMA responded thereto, providing more information to the Parties, on 17 November 2023.

17. The CMA has taken the Parties' representations into account in making this final costs determination.

Legal Framework

18. Costs following an appeal to the CMA are governed by Schedule 22 of EA04.

CMA's costs

19. Under paragraph 13(1) of Schedule 22, a group which determines an appeal brought under section 173 EA04 (the **Group**), '… *must make an order requiring the payment to the CMA of its own costs incurred in connection with the appeal*.'

20. When making an order for the payment of the CMA's own costs, paragraph 13 of Schedule 22 requires that:

> *'(2) Where the appeal is allowed, the order must require those costs to be paid by GEMA;*
>
> *(3) Where the appeal is dismissed, the order must require those costs to be paid by the appellant but, if there is more than one appellant –*
>
> *(a) may provide that only such one or more of the appellants as specified in the order is to be liable for the costs; and*
>
> *(b) may determine the proportions in which the appellants so specified are to be so liable.*
>
> *(4) In sub-paragraph (3) references to an appellant do not include references to an intervener*.'[9]

21. The CMA has adopted rules regarding energy code modification appeals, made in accordance with paragraph 12(1) of Schedule 22. These are the Energy Code Modification Rules (**CC10**) (the **Rules**). They provide at 23.1 that '*When it determines an appeal the [CMA] will make an order for the payment of its own costs'*. The Rules provide no further detail as to how those costs are to be allocated.

Inter partes costs

22. The CMA may also, pursuant to paragraph 13(5) of Schedule 22 of EA04, require a party to the appeal to make payments to another party in respect of costs incurred by that other party in connection with the appeal. These are known as '*inter partes'* costs. Paragraph 13(5) provides as follows:

> *'The group that determines an appeal may also make such order as it thinks fit for requiring a party to the appeal to make payments to another in respect of costs incurred by that other party in connection with the appeal.'*

23. Paragraph 22.1 of the Rules sets out the general rule that, when it determines an appeal, the CMA will normally order an unsuccessful party to pay the costs of the successful party, but it may make a different order.

---

[9] Paragraph 13 of Schedule 22 to EA04.

24. If the CMA decides that it is appropriate to make an *inter partes* order, Rule 22.2 sets out matters to which it will have regard in deciding what order to make. It provides as follows:

> *'22.2 …[the CMA] will have regard to all the circumstances, including the following:*
>
> *22.2.1 The conduct of the parties, including:*
>
> *22.2.1.1 the extent to which each party has assisted the CMA to meet the overriding objective;*
>
> *22.2.1.2 whether it was reasonable for a party to raise, pursue or contest a particular issue;*
>
> *22.2.1.3 the manner in which a party has pursued its case or a particular aspect of its case; and*
>
> *22.2.2 whether a party has succeeded wholly or in part; and*
>
> *22.2.3 the proportionality of the costs claimed having regard to the matters in issue and the resources of all the parties.'*

25. Part 4 of the Guide to Appeals in Energy Code Modification Cases (CC11) (**the Guide**) provides guidance as to which costs incurred by the parties may be recoverable.

26. Paragraph 4.2 of the Guide states that the costs recoverable may include all those fees, charges, disbursements, expenses and remuneration incurred by a party in the preparation and conduct of the appeal. However, the CMA will not normally allow any amount of costs incurred before GEMA first published the decision under appeal.

Payment of the CMA's costs

The Parties' views

27. The following are the Parties' submissions on the meaning and effect of the relevant costs provisions of EA04 with respect to the CMA's costs in connection with the appeal. These were provided both in January 2023 before the issue of the CMA 2023 Costs PD and in May and October 2023 in response to that provisional determination.

GEMA's January 2023 submissions

28. In relation to the CMA's costs, GEMA submitted that an interpretation of paragraph 13 of Schedule 22 to the EA04 resulting in GEMA being required to bear all of the CMA's costs incurred in connection with an appeal, so long as any part of it succeeded, would be unreasonable and absurd.[10] GEMA contended that such an interpretation would be contrary to the general presumption that Parliament intends to act reasonably.

29. In support of that submission, GEMA contended that:

    (a) '*The interpretation of paragraph 13 is an exercise in statutory construction, which requires "an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered*."'[11]

    (b) *'…. "The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty."…..'*[12]

    (c) The presumption that Parliament intends to act reasonably, in line with which the relevant provisions of EA04 should be construed, includes that, ' ….."…. *Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless." …..'* [13]

30. GEMA also submitted that a statute should not be construed in a way that produces anomalous and absurd results unless there is no tenable alternative construction. It contended that there was such a construction in this case.

31. That is, GEMA submitted, the EA04 only dealt with the payment of the CMA's costs in two specific scenarios: where an appeal is allowed or dismissed in full. It is silent as to the appropriate order to be made in respect of the CMA's costs where an appeal is allowed in part and

---

[10] Paragraph 12.2-12.3 of GEMA's submissions on costs dated 13 January 2023 (**GEMA's January 2023 costs submissions**).
[11] R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3, at paragraph 31 (per Lord Hodge)
[12] Lord Bingham in R (Quintavalle) v Secretary of State for Health [2003] UKHL 13, [2003]AC 687 at §8
[13] *R (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209 in which, at paragraph 116, Lord Millet made the statement quoted here.

dismissed in part. The provisions should therefore be construed as giving the CMA freedom to determine by whom and in what proportions its costs must be paid in such cases.[14]

32. In support of its submissions, GEMA referred to the Competition Commission's 2007 energy code modification appeal decision in *E.ON UK Plc, GEMA and British Gas Trading Limited* (***E.ON***).[15] In that appeal, the Commission noted *obiter* that with respect to payment of the CMA's costs '*we think it is right that a split order could, in certain circumstances, be made*'.[16] [17]

33. GEMA further submitted that not adopting a binary approach to the provisions would be coherent with the High Court's judgment on relief in the Judicial Review.[18] In that case, Swift J concluded that section 175 EA04 allowed the CMA to quash a decision in part, and SSE did not, GEMA noted, appeal against that point.

34. Applying the above points, GEMA noted that the great majority of the costs incurred by the CMA related to time spent on the grounds on which SSE was unsuccessful. As such, GEMA submitted, the fair outcome would be for SSE to pay 80% of the CMA's costs and for GEMA to pay the remaining 20%.[19]

The Appellants' January 2023 submissions

35. The Appellants noted that, as a result of the Court of Appeal's order, their appeal had ultimately been allowed. They submitted that, in those circumstances, the provisions of EA04 obliged the CMA to order that GEMA pay all the CMA's costs.[20]

36. In making that submission, the Appellants contrasted the terms of paragraph 13 of Schedule 22 relating to the CMA's costs with those relating to *inter partes* costs, which explicitly afford the CMA a wide-ranging discretion. [21]

37. The Appellants also highlighted the contrast between the provisions in EA04, and comparable provisions in the Electricity Act 1989 (the

---

[14] See paragraph 10 of GEMA's January 2023 costs submissions.
15 E.ON UK plc v GEMA on Energy Code Modification UNC116: Decision (publishing.service.gov.uk)
[16] *E.ON Plc vs GEMA and British Gas Trading Limited*, CC02/07, dated 01 August 2007, paragraph 6.
[17] See paragraphs 10 and 11 of GEMA's January 2023 costs submissions.
[18] *R (SSE and others) v CMA (and others)* [2022] EWHC 987 (Admin).
[19] Paragraphs 15-16 of GEMA's January 2023 costs submissions.
[20] Paragraph 1 of the submissions made by SSE in their letter of 13 January 2023 (**SSE's January 2023 costs submission**).
[21] Paragraph 3 of SSE's January 2023 costs submission

Electricity Act) which deal with other appeals to the CMA. They noted that, if Parliament had intended to confer on the CMA a discretion for the apportionment of its costs in appeals like the present, similar language would have been adopted in EA04.[22]

38. The Appellants, like GEMA, referred to the Competition Commission's 2007 energy code modification appeal decision in *E.ON*.[23] They noted that there was no reasoning given or authority cited for the Commission's proposition that it could make a 'split order' as to its costs and that it was not supported by the wording of EA04.[24]

The Parties' submissions on the CMA 2023 Costs PD

39. In response to the CMA 2023 Costs PD that the EA04 requires that GEMA must pay all of the CMA's costs, the Parties made the following further submissions.

GEMA's May 2023 submissions on the CMA 2023 Costs PD

40. By letter dated 15 May 2023, GEMA maintained its January 2023 costs submissions and contended that the CMA 2023 Costs PD contained errors of law as to the proper construction of paragraph 13 of Schedule 22 EA04. It also added:

(a) '*The absurdity which the CMA's construction produces is underlined by the fact that the CMA rightly recognises (at paragraph 87) that the appeal succeeded only to a "limited extent", that such success as SSE achieved was "pyrrhic", and that "the numerous and important Appeal Grounds on which [SSE] did not succeed…consumed the substantial majority of the time and costs incurred in the appeal."*

(b) '…. *the CMA is wrong to say (at paragraphs 48 and 50 of the PD) that the outcome of the appeal has required the re-calculation of TNUoS Charges, and (at paragraph 49 of the PD) that the decision to adopt the Original Proposal no longer stands.*'

(c) '*The CMA's conclusion that it would be "contrary to the clear wording of the legislation for us to take into account the outcome of our assessment on CMA costs in our assessment on inter partes costs"*

---

[22] Paragraph 10 of SSE's January 2023 costs submission
23 E.ON UK plc v GEMA on Energy Code Modification UNC116: Decision (publishing.service.gov.uk), paragraph 6.
[24] See paragraph 9 of SSE's January 2023 costs submission.

(paragraph 86) is simply wrong. There is no wording, clear or otherwise, to that effect in the EA 2004.'[25]

41. GEMA further submitted that costs in respect of the CMA's overheads are not costs incurred by the CMA in connection with the appeal. Consequently, they are not recoverable under the EA04 and their inclusion in the CMA's provisional determination of its costs is an error of law.

42. GEMA also contended that the CMA had failed to provide sufficient information about its costs to enable GEMA to make informed submissions. It submitted that the information it had been provided with indicated that the CMA had incurred costs unreasonably and unnecessarily. It requested additional information about those costs.

43. Without prejudice to its view that GEMA did not require additional information to respond to the CMA 2023 Costs PD, the CMA provided the Parties with further information on 3 October 2023. That additional information ensured that the Parties had:

    (a) details of the names, grades and cost recovery rate for each of the staff and Group members who worked on the appeal, with the number of hours worked and a brief description of the issues on which each of them worked;

    (b) any travel and subsistence costs incurred in the appeal;

    (c) a breakdown of fees charged by counsel;

    (d) information about the CMA's direct costs; and

    (e) an explanation of how the CMA's overhead rate has been calculated.

GEMA's October 2023 submissions

44. GEMA made further submissions on the CMA's costs on 17 October 2023:

    (a) It restated its position that the CMA 2023 Costs PD is vitiated by errors of law.

    (b) It maintained that the recovery by the CMA of any amount in respect of its overheads was unlawful.

[25] GEMA's May 2023 costs submissions, paragraphs 2(a) and (b).

(c) It made further submissions that the CMA incurred costs unnecessarily, unreasonably and/or disproportionately by specific reference to the duplication of lawyers' time, time spent on administrative tasks, time spent on the appeal by non-legal staff, over representation at meetings and as regards the costs process.

(d) It sought a 50% reduction in the CMA's recoverable direct costs (ie costs prior to the application of any uplift in respect of overheads).

45. In addition, GEMA requested further information about the calculation of the CMA's overhead rate. It also sought confirmation of the job titles and recovery of costs of two of the CMA's employees at the time work was carried out. The CMA responded to GEMA (copied to the Appellants) on 17 November 2023.

The Appellants' May 2023 submissions

46. The Appellants also made submissions on the CMA 2023 Costs PD on 15 May 2023. They said they:

(a) were '*content with the terms of the provisional decision in respect of the CMA's own costs and the basis upon which this has been arrived at, and has no substantive comments on that element*.'

(b) agreed that there should be no orders made as to inter partes costs, though submitted that their success in the appeal had more than limited effect and was not pyrrhic.

The CMA's final assessment on the payment of its costs

47. The CMA has considered all the Parties' submissions. Its determination is that the relevant provisions of the EA04 require it to order GEMA to pay its costs incurred in connection with the appeal. Those costs include sums in respect of the CMA's overheads. They total £428,200. The CMA did not incur those costs unreasonably or unnecessarily.

48. The following paragraphs set out the CMA's reasoning for that conclusion. They first consider matters of statutory interpretation and set out why the CMA considers that paragraph 13 of Schedule 22 EA04 must be construed as requiring it to make an order against GEMA or the Appellants (rather than orders against both parties). They then explain the basis on which the CMA determines that the Appellants' appeal succeeded and, accordingly, that the order must be made against GEMA. Finally, they address matters going to the amount of the CMA's costs.

Statutory interpretation

49. The CMA agrees that the relevant provisions of EA04 must be construed so as to ascertain and give effect to Parliament's legislative intention. The interpretive presumption to which GEMA referred in its submissions is a way of helping to identify that intention. However, so too are the statutory words used and their ordinary meaning, the context in which they appear (including how similar matters are dealt with in other regulatory legislation) and the cogence of the statutory scheme of which they are part.

50. In those latter connections, the CMA notes each of the following:

(a) In *R (Project for the Registration of Children as British Citizens)*, to which GEMA referred in its submissions, Lord Hodge said (emphasis added), that what is required is '*an objective assessment* ***of the meaning*** *which a reasonable legislature as a body would be seeking to convey in using* ***the statutory words*** ….'

(b) Paragraph 13.1(3) of *Bennion on Statutory Interpretation* said of the presumption on which GEMA relies that, '*The presumption may of course be displaced, as the ultimate objective is to ascertain the legislative intention*.' That passage was approved in *Paccar Inc and others v Road Haulage Association Ltd*.[26]

(c) In *R (on the application of Edison First Power Ltd)*, on which GEMA also relied, Lord Millett said at paragraph 117 (again emphasis added), '*I would prefer to go straight to the real question: whether the scheme established by the [Order] is so oppressive, objectionable or unfair that it could only be authorised by Parliament* ***by express words or necessary implication***.'

(d) In *IRC v Hinchy*,[27] and quoted with approval in *Edison*, Lord Reid said, "*One is entitled and indeed bound to assume that Parliament intends to act reasonably, and therefore to prefer a reasonable interpretation of a statutory provision* ***if there is any choice***." (emphasis added)

(e) *Bennion on Statutory Interpretation* at pages 502-503 referred to the relevance of there being a cogent statutory scheme:

(i) *'The presumption against absurdity is simply a guide to legislative intention, and is therefore most likely to be successfully relied on where*

[26] [2021] EWCA Civ 299 at paragraph 68.
[27] [1960] AC 748, at page 768

the alleged absurdity is not a necessary consequence of an otherwise cogent statutory scheme and cannot be justified on other grounds.'

(ii) '*…. a mere assertion that a particular construction would produce an absurd result will not necessarily carry much weight, particularly where the legislation in question creates what appears to be a coherent statutory scheme and there is no obvious way of construing the legislation so as to correct the alleged absurdity*.'

(iii) *Bennion* noted the following passage from *R (on the application of Noone) v Governor of Drake Prison*:[28]

'*31 [Counsel for the Governor] did not seek to challenge the submission that the decision of the Court of Appeal, and the prior policy of the Secretary of State, produced capricious and anomalous results. Nor did he suggest that there was any principle or policy that justified such results. He simply submitted that it was not possible on the wording of the relevant provisions of the 2003 Act and of paragraph 14 to reach the solution for which [the prisoner's Counsel] contended*.'

(iv) Likewise, this passage from *Secretary of State for Culture, Media and Sport v BT Pension Scheme Trustees Ltd*:[29]

'*83 The problem the Secretary of State faces is, therefore, the fruit of shortcomings on the part of the Government in relation to the legislation intended to effect the offered guarantee. The outcome was legislation that, upon its ordinary construction, results in the guarantee taking effect as a guarantee of any outstanding liability of BT that vested in it under section 60. I can identify no proper basis upon which the court can interpret the legislation so as to provide the Crown with an escape from the guarantee to which our legislators voted to subject it. That would not be to interpret section 60, it would be to re-write it.*'

51. With those points in mind the CMA makes the following observations relating to:

(a) the ordinary meaning or construction of the relevant provisions of EA04;

(b) the cogence of the statutory scheme of which they are part;

(c) the provisions relating to costs in other regulatory statutes; and

---

[28] [2015] EWCA Crim 1324.
[29] [2014] EWCA Civ 958.

(d) the alternative interpretation of the relevant provisions advanced by GEMA.

52. As to the ordinary meaning or construction of the relevant provisions, paragraph 13 of Schedule 22 to the EA04 says, in clear, mandatory terms (emphasis added):

'*(1) A group that determines an appeal* ***must make an order*** *requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal.*

(2) ***Where the appeal is allowed, the order must require those costs to be paid by GEMA****.*

(3) Where the appeal is dismissed, the order must require those costs to be paid by the appellant ….'

53. On its face, therefore, paragraph 13 requires the CMA to make an order for the payment of its costs incurred in connection with the appeal. There are two possibilities and the CMA is required to adopt one or the other of them: (i) to require that the costs be paid by GEMA where the appeal is allowed, or (ii) to require that the costs be paid by the Appellant where the appeal is dismissed. There is no discretion afforded to the CMA. Nor is there a third possibility of making an order for the payment of the CMA's costs against parties on both sides of the appeal (where, for example, an appeal is allowed on one ground but not another).

54. The provisions form part of a cogent statutory scheme. That is, the CMA is a creature of statute. It was created by the Enterprise and Regulatory Reform Act 2013 (**ERRA13**). Its powers are those given to it by statute. The powers it has in respect of the costs in appeals under EA04 are those in paragraph 13 of Schedule 22. It has no powers to make costs orders apart from those.

55. Paragraphs 13(1) – (3) require the CMA to make one order or another in respect of its costs incurred in connection with the appeal. Paragraph 13(5), meanwhile, explicitly gives the CMA wide discretion to make order in respect of *inter partes* costs.

56. In other words, the legislation makes different provision for different types of costs. In respect of one type, the CMA is required to make a particular order. In respect of the other, where the CMA has discretion, the legislation says so. There is difference between the provisions, but the scheme they create is coherent and cogent.

57. The statutory scheme in respect of costs also coheres with the provisions of section 175 EA04 relating to the determination of the appeal and with Swift J's judgment on relief, based on section 175, in the Judicial Review.

58. Section 175 provides that:

(a) The CMA may allow the appeal where the decision appealed against was wrong on one or more grounds (section 175(4)).

(b) Where it does not allow the appeal, the CMA must confirm the decision appealed against (section 175(5)).

(c) Where it allows the appeal, the CMA must do one or more of, amongst other things, quash the decision appealed against and remit the matter to GEMA for reconsideration and determination in accordance with the CMA's directions (section 175(6)).

59. In his judgment on relief, Swift J said that section 175 includes the power to quash part of GEMA's decision. He relied, amongst other things, on the following:

> '*I consider it is significant that one of the options available to the CMA when allowing an appeal is to remit the matter to GEMA and give directions to GEMA on what it must do next. If that is right (and it is), I can see no reason why the CMA may not allow an appeal in part and give directions only to the extent to which it has identified some legal or other relevant error in GEMA's conclusion.*'

60. What section 175, and Swift J's judgment, reflect is that GEMA's decision may be wrong because part of it was wrong. In that case, relief may be granted such that the incorrect part of the decision must be reconsidered, but not the other parts, and the decision accordingly re-taken. That is not inconsistent with a requirement in respect of the CMA's costs that, where the appeal is allowed (because it succeeds on one ground but not another), the CMA must order those costs to be paid by GEMA.

61. A comparison between the terms of paragraph 13 EA04 and the costs provisions in other regulatory statutes is also instructive. Different provisions in respect of the CMA's costs are made in each of the following:

(a) Paragraph 12(2) of Schedule 5A of the Electricity Act, which was amended to the following effect in 2011, provides that a group must make an order requiring the payment of CMA costs (emphasis added):

'(a) Where the appeal is allowed in full, by the Authority;

(b) Where the appeal is dismissed in full, by the appellant; or

*(c) **Where the appeal is partially allowed, by one or more parties in such proportions as the CMA considers appropriate in all the circumstances**.'*

(b) Paragraph 32 of Schedule 2 to the Civil Aviation Act 2012 (**CAA12**) provides that (emphasis added):

'*(2) A group that determines an appeal must make an order requiring the payment to the Competition and Markets Authority of the costs incurred by the Competition and Markets Authority in connection with the appeal.*

(3) An order under sub-paragraph (2) must require those costs to be paid—

(a) where the appeal is allowed in full, by the CAA,

(b) where the appeal is dismissed in full, by the appellant, and

*(c) **where the appeal is allowed in part, by the appellant and the CAA in such proportions as the group considers appropriate,** subject to sub-paragraph (4).*'

(c) Section 193A Communications Act 2003 (**CA03**) provides that:

'*(1) Where a determination is made on a price control matter referred by virtue of section 193, the CMA may make an order in respect of the costs incurred by it in connection with the reference (a "costs order").*

(2) A costs order may require the payment to the CMA of some or all of those costs by such parties to the appeal which gave rise to the reference, other than OFCOM, as the CMA considers appropriate.

(3) A costs order must—

(a) set out the total costs incurred by the CMA in connection with the reference, and

(b) specify the proportion of those costs to be paid by each party to the appeal in respect of whom the order is made.

(4) In deciding on the proportion of costs to be paid by a party to the appeal the CMA must, in particular, consider—

(a) the extent to which the determination on the reference upholds OFCOM's decision in relation to the price control matter in question,

(b) the extent to which the costs were attributable to the involvement in the appeal of the party, and

(c) the conduct of the party.'

62. These provisions show that, in one way or another, where Parliament intends that the CMA must or may require the payment of its costs in a regulatory appeal to be by both a regulator and an appellant where an appeal is allowed in part, it specifically provides so. It did not do so in EA04.

63. The CMA also makes two further observations in this connection. First, there are also other relevant differences between the costs provisions of EA04 and the Acts referred to above.

64. For example, Paragraph 32(4) of Schedule 2 to CAA12 provides in respect of the order for the CMA's costs that must be made, '*The order may require an intervener in the appeal to pay such proportion of those costs (if any) as the group considers appropriate*.' Paragraph 13(4) of Schedule 22 EA04, however, provides (emphasis added) that, '*In sub-paragraph (3) references to an appellant [against whom an order for payment of the CMA's costs must in relevant cases be made]* ***do not*** *include references to an intervener.*'

65. In other words, each Act provides differently for the recovery of the CMA's costs from an intervener. Under the CAA12 that may happen. Under EA04, it may not. That further shows a deliberate difference – a different Parliamentary intention – between the different Acts, and that the scheme established under EA04 is a distinct one.

66. Second, the costs provisions of EA04 were amended in 2013 by the ERRA13 when the CMA was brought into being and replaced the Competition Commission as the arbiter of relevant regulatory appeals. That is, shortly after both the Electricity Act 1989 and the Civil Aviation Act 2012 provided as set out above. The provisions requiring the CMA to recover its costs could have been amended then to bring them into line with both those Acts. They were not.

67. The CMA has also considered the alternative interpretation of the relevant provision advanced by GEMA. That is, because it dealt only with the payment of the CMA's costs in two specific scenarios, where an appeal is allowed or dismissed in full, but is silent as to the appropriate order to be

made in respect of those costs where an appeal is allowed in part and dismissed in part, the provision should be construed as giving the CMA freedom to determine by whom and in what proportions its costs must be paid in such cases.

68. GEMA's alternative interpretation is not a tenable one. The CMA only has the powers granted to it by statute. The relevant statute specifies where, as part of a cogent scheme, the CMA has discretion. It contrasts with other statutory schemes which do provide express powers of the kind for which GEMA contends. If that were the position under the EA04 it would have said so, like other regulatory Acts.

69. Accordingly, the CMA determines that paragraph 13 of Schedule 22 EA04 requires it to make an order in respect of the payment of its costs incurred in connection with the appeal against GEMA (where the appeal was allowed) or the Appellants (where the appeal was dismissed). It does not allow, still less require, the CMA to make orders against both GEMA and the Appellants.

70. That determination is based on an objective assessment of the meaning of the statutory words, that authorise that outcome by express words or necessary implication. There is no choice of an alternative tenable interpretation that the CMA is rejecting. The legislation in question creates a cogent statutory scheme and there is no obvious way of construing the legislation so as to correct the absurdity in its meaning or effect as alleged by GEMA. It is not possible on the wording of the relevant provisions to reach the interpretation for which GEMA contended. The CMA can identify no proper basis upon which it can do that: to do so would not be to interpret the provision, it would be to re-write it.

71. That being the position the EA04 requires the CMA to adopt, the question is whether the Appellants' appeal was allowed or dismissed. In the context of a case, such as this one, where only some of the grounds have been allowed, we have also considered whether the present appeal concerned one or multiple appealable decisions, such that the one appeal was allowed and others dismissed.

72. The conclusion the CMA reaches is that GEMA made a single decision that was the subject of the Appellants' appeal. That appeal was allowed, albeit on one ground in relation to one part of the decision (which accordingly did not stand and had to be re-taken).

73. In reaching that conclusion the CMA has taken account of GEMA's submission that it had been wrong to say in paragraphs 48 and 50 of the

2023 CMA Costs PD that the outcome of the appeal required the re-calculation of TNUoS Charges. Likewise, in paragraph 49 of that provisional determination, that the decision to adopt the Original Proposal no longer stands.

74. In the CMA Appeal, the Appellants sought to challenge the GEMA Decision approving the Original Proposal. As noted above, the Original Proposal covered a range of elements, including the treatment of charges for ancillary services (including those related to congestion management), which all formed a part of the calculation of the new average TNUoS charges.

75. The framing of the GEMA Decision shows that GEMA took a single decision, to approve the Original Proposal, rather than a series of decisions to approve the constituent parts of that proposal. See, for example, the section of CMP317/327 entitled 'Summary of our decision' which states:

> *'**We have approved the Original Proposal**, which has the following characteristics:*
>
> - ***All** Local Charges for Local Circuits and Local Substations paid by generators **shall be excluded** for the purposes of assessing compliance with the €0-2.50/MWh range;*
> - *No target within that range shall be set – instead an error margin will be incorporated and where total Wider TNUoS revenues fall outside of the permitted range, an adjustment mechanism will be used solely to bring charges into that range;*
> - ***Neither** BSC Charges **nor** any element of BSUoS Charges **will be taken into account** when assessing compliance with the range;*
> - *These changes will be implemented on 1 April 2021 and will not be subject to any phasing'*
>
> (page 2, emphasis added).[30]

Also the section entitled 'Decision notice' in which GEMA stated:

> *''In accordance with Standard Condition C10 of the Transmission Licence, **the Authority, hereby directs that the Original Proposal** [CMP317 and CMP 327] **be made**'*
>
> (page 27, emphasis added).

[30] The CMA also refers to the section entitled 'our decision', in which GEMA stated: 'Accordingly, **our decision is to approve the Original Proposal** and direct that it be implemented' (page 10, emphasis added).

76. The Appellants challenged CMP317/327 on six grounds. The appeal has been allowed on the basis of one part of Ground 3; the remaining grounds of appeal have been dismissed.

77. Ground 3(i) challenged the inclusion within the Ancillary Services Exclusion[31] of certain BSUoS Charges. This had the consequence that these BSUoS Charges were excluded from the calculation of the TNUoS charges which must fall within the Permitted Range set by that Regulation.[32]

78. In allowing the appeal on the basis of Ground 3(i), the CMA has only quashed the GEMA Decision on that ground. However, the result of the Appellants' success on this ground is that one of the constituent modules of the Original Proposal must be removed and, consequently, the average TNUoS charges had to be recalculated.

79. Put another way, the decision to adopt the Original Proposal and for average TNUoS charges to be calculated in accordance with it no longer stands (even though the Appellants' challenge to it succeeded on only one ground). That was the outcome that the Appellants sought in their appeal.

80. Where, as here, GEMA has explicitly made a single decision to implement the Original Proposal, and the Appellants have succeeded in having an integral element of this proposal removed, such that the decision on the calculation of the relevant TNUoS charges must be re-taken, it cannot be said that the appeal has been dismissed. Rather, in the circumstances of this case, by allowing Ground 3(i), the CMA has allowed the appeal (that the GEMA Decision to adopt the Original Proposal should not stand). As such, we are bound to apply paragraph 13(3)(a) of Schedule 22 of the EA04 such that GEMA is liable for the CMA's costs.

81. The CMA acknowledges that the effect of the re-taken decision by GEMA is the same as the Original Proposal. That, however, is because the applicable law changed after the adoption of the Original Proposal and by the time the decision was re-taken. It does not mean the GEMA Decision stood or that the appeal was not allowed.

82. The CMA notes that there may, in principle, be cases in which GEMA makes more than one appealable decision in a single decision document. In those cases, it may be that an 'appeal' against the decision document could be regarded as 'appeals' against GEMA 'decisions' and so could

---

[31] Regulation 838/2010.
[32] For further detail on this point, see the CMA December 2022 Decision.

allow for a separate costs order for each appealable decision, as envisaged in *E.ON*. However, that is not the case here.

83. It follows that, despite the disparity between the Grounds won and lost and the ultimate outcome of the appeal, the CMA is bound by the relevant provision of the EA04 to order that GEMA pay the entirety of the CMA's costs incurred in connection with the appeal.

Quantum and proportionality of the CMA's costs

GEMA's submissions and the CMA's consideration

84. GEMA's submissions were to the effect that the CMA's costs (as set out in the CMA 2023 Costs PD) are too high because:

(a) the CMA incurred costs unnecessarily, unreasonably and/or disproportionately in respect of the duplication of lawyers' time, the time spent on administrative tasks, the time spent working on the appeal by non-legal staff, over-representation by CMA staff at meetings and as regards the costs process; and

(b) the recovery by the CMA of any amount in respect of its overheads was opaque and, in any event, unlawful.

85. The CMA has considered those submissions and has made an adjustment to its costs, in relation to the overhead rate, in light of them. Subject to that, the CMA determines that the costs it incurred in connection with the CMA Appeal, in the amount of £428,200, were incurred reasonably and necessarily. It is required to recover them from GEMA and accordingly determines that GEMA must pay that sum.

86. The CMA explains its determination as follows. It begins by making some broad observations, followed by an assessment of general points relating to the CMA's costs and then points specific to the costs the CMA incurred at different stages in the CMA Appeal (including in connection with the determination of its costs).

87. The CMA notes firstly that the costs it incurs in regulatory appeals have been the subject of judicial consideration, before the Competition Appeal Tribunal (the **CAT**), in *British Telecommunications plc v CMA (**the BT case**)*.[33] The CAT made these statements about the recovery by the CMA of its costs

[33] *BT v CMA* [2017] CAT 11.

following its determination of a regulatory appeal (in that case, an appeal under section 193A CA03):

(a) ' *….. section 193A requires the CMA to make a broad, soundly based judgment as to its total costs and as to the proportion of those costs for which the paying party is to be made liable but not that it should engage in a process analogous to a detailed assessment of costs under CPR Part 44 or Rule 104 of the Tribunal Rules.*' [34]

(b) '*The purpose of section 193A is to enable the CMA to recover for the public purse costs incurred by it in connection with an unsuccessful appeal. This purpose is therefore significantly different from that of the cost regimes in Part 44 of the CPR and Rule 104 of the Tribunal Rules which make provision for a party to civil litigation to recover its costs from another party.*'[35]

(c) '*There is no requirement in the statute for the CMA to consider proportionality or reasonableness of costs.*'[36]

(d) *'Section 193A does not, in our view, entitle the CMA to make a costs order in relation to costs that were incurred unreasonably or unnecessarily. However, in common with its established approach to appeals on the merits under section 192, the Tribunal will give due weight to the views of the CMA, as a body with considerable experience of managing and staffing telecoms appeals and similar projects, as to its assessment of its total costs, the reasonableness of those costs and as to the proportion for which the paying party should be made liable. The Tribunal will not interfere with the CMA's assessment of these matters merely on the basis that the party can suggest other ways of approaching them…'* [37]

(e) '*Moreover, it would not be appropriate for the Tribunal to seek to direct the CMA as to how it should manage its internal operations with regard to matters such as project planning, staff deployment or record keeping. It is not generally the function of the Tribunal to supervise the operations of regulators; Floe Telecom Ltd v Ofcom and another [2006] EWCA Civ 768, §36.*'[38]

---

[34] *BT v CMA* [2017] CAT 11 at [24].
[35] *BT v CMA* [2017] CAT 11 at [25].
[36] *BT v CMA* [2017] CAT 11 at [27].
[37] *BT v CMA* [2017] CAT 11 at [29].
[38] *BT v CMA* [2017] CAT 11 at [30].

(f) ‘ …. *although section 193A does not require the CMA to provide any more detailed information …., we consider that it would be good practice for the CMA to provide, at the consultation stage, details of how it has calculated its total costs and the proportion of the costs to be paid pursuant to the order, provided that this can be done without imposing a disproportionate burden on the CMA.*’[39]

(g) ‘…. *it would be appropriate for the CMA to disclose, at the consultation stage, the sort of information eventually provided by the CMA in response to BT’s requests after the instigation of this appeal, that is to say:*

(1) Details of the names, grades and cost recovery rate for each of the staff and panel members who worked on the references together with the number of hours worked and a brief description of the issues on which each staff and panel member worked. (2) The travel and subsistence costs incurred in the references. (3) A breakdown of fees charged by contractors, consultants and Counsel. (4) Direct costs. (5) An explanation of how the CMA’s overhead rate has been calculated.’[40]

(h) ‘….. *it was not, in our view, incumbent on the CMA to make available to the CMA Appeal Group at the time it made the Costs Order, or to disclose to the paying party, details of precisely how much time was spent by staff members on particular questions, how many people attended meetings and whether it was reasonable to attend. That level of detail would be appropriate in the context of a detailed costs assessment but not in the context of a section 193A costs order.*’[41]

(i) ‘…. *We are satisfied that the CMA’s calculation of the overhead rate took into account relevant factors and that the decision to apply that rate to members’ costs, on the basis that support functions such as IT, human resources and office accommodation were available to and used by them, was justified as part of the CMA’s broad judgment of its costs ….*’[42]

88. The CMA determines that its costs in this case were incurred reasonably and necessarily, taking into account that:

(a) As the CAT observed in the BT case referred to above, the CMA is a body with considerable experience of managing and staffing regulatory

---

[39] *BT v CMA* [2017] CAT 11 at [31].
[40] In *BT v CMA* [2017] CAT 11 at [32].
[41] In *BT v CMA* [2017] CAT 11 at [33].
[42] In *BT v CMA* [2017] CAT 11 at [34(5)].

appeals and of assessing its total costs and their reasonableness. It is for the CMA to judge how it should manage its internal operations with regard to matters such as project planning and staff deployment.

(b) The Appellants advanced six grounds of appeal. The first of these grounds included five sub-grounds, and the third included two sub-grounds. They raised a number of complex legal and practical questions in extremely detailed pleadings comprising 238 paragraphs across 99 pages, accompanied by two substantial witness statements.

(c) The Appellants set out in their Notice of Appeal (**NoA**) that the issues raised in the CMA Appeal involved important questions of EU and domestic law and its application to the GB energy market that have not previously been definitively determined. According to the Appellants, GEMA's contested decision had the potential to produce very significant consequences for the Appellants, other GB electricity generators and the whole GB energy market, including very considerable extra costs and significant uncertainty for generators. The Appellants contended that those additional costs were £639 million in 2021/22 alone, rising to over £1 billion by 2025/26. They also indicated 27 interested parties in Schedule 2 to their NoA.

(d) GEMA's Reply to the NoA comprised 165 paragraphs across 85 pages. It was accompanied by a substantial witness statement. The Appellants filed a Response to that Reply and the Parties filed detailed skeleton arguments for the main hearings. Additionally, both NGESO and BGT, as Interveners in the appeal, served Notices of Intervention and, in support of its Notice, BGT submitted two witness statements.

(e) The Parties and the Interveners together submitted in excess of 150 supporting documents, including legislation and court authorities. The Appellants, GEMA and NGESO also responded to the CMA's requests for further necessary information. The Parties' Agreed List of Issues in the appeal set out 27 issues, which included 19 sub-issues.

(f) The CMA had statutory obligations (i) to appoint the three panel members (the Group) to determine the appeal (under paragraph 5(2) of Schedule 22 to the EA04); and (ii) to determine the appeal before the end of thirty working days following the last day for GEMA to reply to the NoA (under paragraph 6(1) of Schedule 22). Given the breadth and complexity of the issues under appeal, the CMA extended this deadline by the maximum permitted 10 working days (under paragraph 6(2) of that Schedule).

(g) It was necessary, to meet that deadline, for the CMA to appoint a substantial project team. That team drew on relevant administrative, project management and delivery, technical, economic and legal skills from across the organisation, as well as two external junior counsel. Both the Group and the CMA project team used CMA resources (such as IT systems and support, administrative resources and human resource functions) to support the appeal.

(h) The Group and the CMA project team were required to consider, understand and analyse a very large amount of complex material within the relevant time period. As well as the legal and other issues involved, they were required to understand in a high level of detail the technical, practical and administrative operation of the GB electricity transmission system and its organisation and management. This required intensive teach-in sessions and extensive reading.

(i) Amongst other things, the Group and the CMA project team managed the conduct of the appeal using a series of whole group meetings. Detailed papers relating to the progress and consideration of the appeal were prepared for these. In addition, the Group and project team progressed their work through a substantial number of ad hoc meetings, written communications and advice.

(j) Disposing of the appeal required the holding of clarification hearings with the Parties, and the consideration of 'teach-in' materials prepared by them, in order for the CMA to better understand the issues and facts in the appeal. Main hearings with the Parties and Interveners, requiring extensive preparation by the Group and the CMA project team, were held on 4 and 5 March 2021.

(k) Following the main hearings, the Group and the project team had to consider the large number of documents and submissions, and the substantial oral evidence, from the Parties and Interveners, and draft and publish the Group's decision. Disposing of all six grounds of appeal and considering properly all the relevant documents, submissions and evidence, the decision comprised 13 chapters covering 228 pages.

(l) Determining the appeal was therefore an intensive and substantial exercise. It was necessary for the Group and the CMA project team to devote to it the number of hours of work, and to use the CMA's supporting resources, as set out in Appendix A. Indeed, it was necessary for many of the personnel involved to work significant excess and unpaid hours. These hours are not accounted for in the reported

costs. The CMA has capped the hours reported in this decision at each individual's contracted hours, where excess hours were worked.

89. A comparison between the CMA's costs and the Parties' is instructive. The former were £428,200. The Parties' combined costs up to the point of the CMA 2021 Decision were just over £700,000 excluding VAT. Not only were the CMA's costs generated in response to the collective products of the Parties' work but they were much lower.

90. In its October 2023 submissions GEMA made a number of specific contentions in relation to the CMA's costs, in light of the detailed information as to those costs which the CMA had provided. Notwithstanding the general point that it is for the CMA, as an expert body, to judge how it should manage and staff regulatory appeals, the CMA has considered those contentions and responds as follows:

(a) GEMA questioned the CMA's use of different members of its legal service department, of varying levels of seniority, and the instruction of external counsel in connection with the appeal. This does not represent unnecessary duplication in the carrying out of the CMA's functions. It is entirely reasonable for the CMA to receive advice and input from counsel and for its own lawyers also to be involved in advising on, and assisting in the drafting of, the provisional and final determinations of the appeal. It is similarly reasonable and necessary for senior members of the CMA's legal staff to be involved in peer reviewing those documents as part of quality control. Both GEMA and the Appellants also employed both solicitors and counsel. By way of comparison, GEMA's statement of its own costs in the CMA Appeal reflects that it instructed three external counsel, [✂] and five of its in-house own lawyers (incurring costs of c.£ [✂]).

(b) GEMA also submitted that there was unnecessary duplication of work (and costs) in that five members of CMA's staff performed roles which involved elements of supervision or oversight of others' work. Of them, however:

(i) two were co-Project Directors (ie they shared the role) and whose numerous tasks included '*overseeing administration of the appeal*';[43]

(ii) another was both the Senior Responsible Officer for the appeal and the Senior Director for Regulatory Business and Financial Analysis

[43] This and the other quoted text in this paragraph is part of the descriptions of the work undertaken by CMA staff which the CMA provided to the Parties.

(RBFA), who spent approximately 25 hours across the whole appeal '*overseeing the case and RBFA work*'; and

(iii) the other two were the Legal Director and Senior Legal Director on the appeal, the former of whose numerous roles included '*oversight of drafting of all reports*,' and the latter of whose roles included the provision of '*senior Legal Director oversight and advice to the team throughout the case*.'

None of those roles is surprising or unnecessary across such a large, complex and important appeal necessarily involving a multi-disciplinary team of CMA staff.

(c) GEMA further submitted that there was unnecessary and/or duplicated work in that seven members of CMA staff performed administrative functions in the CMA Appeal. Of them, however, one worked a single hour on the appeal and another 17 hours. Of the others, two were the co-Project Directors. Given their seniority, the nature of their roles and the intensity of the appeal timetable, it is appropriate that their work included a mixture of procedural and administrative functions, as well as substantive ones, working alongside lawyers, economists and RBFA professionals. More broadly, it is also appropriate for CMA staff to have incurred a substantial number of hours on the administrative tasks that an appeal of the type and size described above generated, as well as, where required, assisting in more substantive matters.

(d) GEMA additionally contended that the CMA incurred costs for unnecessary and/or duplicated work in that three non-legally qualified members of its staff contributed to the assessment of Appeal Grounds 1 to 3. GEMA noted that those grounds involved questions of law. The CMA agrees they raised important such questions. They also required an understanding and application of a range of factual and technical matters with which, either because of their industry background or the need for CMA staff to be agile given the tight timeframe for the appeal, the relevant members of staff were able to assist. Those contributions did not produce unnecessary or unreasonable costs.

(e) GEMA also questioned why the CMA had described four members of staff as having attended '*all*' meetings. One of those staff was a co-Project Director and another the Legal Director. Given their roles it is appropriate for them to have attended the meetings that cover the whole span of the appeal. The other two were legal advisers. Given their roles, it is appropriate for them, along with other members of staff, like the co-Project and Legal Directors, to have attended all staff team and Group

meetings which covered the breadth of the appeal and its management and determination. They would also have attended the ad hoc meetings on matters on which they were advising. None of that, in the CMA's judgment, is inappropriate.

(f) GEMA similarly questioned why five different members of CMA staff had worked on the determination of the CMA's costs in the CMA Appeal. They performed different roles (financial – compiling time recording and costs information; administrative – managing the process of producing the costs determinations and obtaining Group approval of them; and legal – advising on the application of the law to this case in light of the Parties' submissions). They did so at different times in the process. Again, that produces neither unnecessary nor unreasonable costs.

91. GEMA also challenged the inclusion of the overhead rate in the CMA's costs. It contended both that (i) the recovery of such costs was unlawful because they were costs the CMA incurred in any event, not costs incurred in connection with the CMA Appeal and (ii) it had not been provided with an explanation of the calculation of the overhead costs that enabled it to understand that calculation.

92. As to the first of those points, the CMA incurs overhead costs in supporting the performance of all its functions. Where they are devoted to the determination of an appeal, those costs are incurred in connection with it (rather than in performance of some alternative function). By virtue of the specific provisions of the EA04, they are recoverable in the context of an appeal.

93. The CAT in the BT case recognised the legitimacy of the recovery of such costs. It noted in paragraph 32(5) of its judgment that an explanation of how the CMA's overhead rate has been calculated is part of the costs information the CMA should disclose to parties to an appeal (rather than a cost that may not be recovered). It also said in paragraph 34(5), as we note above that:

> '*The issues raised by BT are as to whether the overhead rate applied by the CMA was reasonable ….. We are satisfied that the CMA's calculation of the overhead rate took into account relevant factors and that the decision to apply that rate to members' costs, on the basis that support functions such as IT, human resources and office accommodation were available to and used by them, was justified as part of the CMA's broad judgment of its costs….*'

94. As to the second of GEMA's contentions, in the information provided to the Parties on 4 October 2023 the CMA explained the calculation of the overhead rate. That rate is calculated by dividing the CMA's combined back-office budgets[44] by the combined frontline ones.[45]

95. The overhead rate represents the amount that the CMA spends on support services (overheads) for every £1 spent on front-line services (which includes staff and Group member direct costs on appeals. The former is recovered in the overhead rate at that proportion. That does not mean that all the CMA's back-office functions were necessarily used in the CMA Appeal in equal proportions (and some may not have been relevant at all). It is an averaged rate that reflects the relationship between front-line costs and the CMA's support functions required to carry out its duties and which may be recovered as costs incurred in connection with the appeal.

96. The CMA gave the Parties the opportunity to comment on this calculation. GEMA did so. It made submissions that questioned whether an element of the CMA's costs – relating to the Group – were recovered both directly and in the overhead rate in this case. Having considered that submission, the CMA has removed the relevant costs from that rate so that there is no double-counting. It has recalculated that the applicable rate in this case should be 52% (rather than the 56% in the CMA 2023 Costs PD) and has adjusted its costs to be paid by GEMA accordingly.

97. Subject to the adjustment described in the preceding paragraph, therefore, the CMA considers that its costs of £428,200 are those incurred in connection with the appeal which it is required to recover from GEMA. The CMA also makes the following additional observations on particular elements of its costs that were incurred at particular stages connected with the appeal.

The CMA 2021 Decision and the CMA 2021 Costs Decision

98. The total CMA costs of the CMA Appeal up to the point of the CMA 2021 Decision and the CMA 2021 Costs Decision,[46] as set out in the latter, were

[44] Which includes (i) staff costs from the CMA's Property and Facilities Management, Training Academy, Commercial, Finance, HR and Technology Business Services functions and (ii) non-staff costs on matters such as technology, accommodation, recruitment, professional services and training.
[45] Which includes, for example, the costs of staff and Group members working on the appeal.
[46] We note that the Group members' costs in determining the CMA 2021 Costs Decision have been taken into account together with the cost of this CMA 2023 Costs Decision.

£[✂] (now adjusted to £[✂] given the recalculation of the overhead rate that applies in this case).[47] These costs included:

(a) CMA staff and Group members' direct (ie employment) costs;

(b) external advisers' costs (Counsel);

(c) the CMA overhead allowance; and

(d) non-staff costs and disbursements (for example, transcription costs).

99. In 2021, the CMA assessed all its costs incurred in connection with the CMA Appeal against the framework established in the *BT* case. The CMA set out its detailed considerations in the CMA 2021 Costs Decision. For the reasons set out in paragraphs 49 to 83 above, the CMA determines that GEMA should pay those costs (subject to the adjustment of the overhead rate).

The CMA May 2022 Decision and the CMA December 2022 Decision

100. The CMA has also incurred costs in formulating a revised determination subsequent to the Judicial Review, and a further determination subsequent to the appeal to the Court of Appeal. On each occasion, the CMA was required to recall the Group to take a fresh decision, draft the provisional decisions, and hold Group meetings to discuss these and to take the final decisions.

101. In relation to the CMA May 2022 Decision, the CMA sought a stay of the Administrative Court's Order. This application was refused. The CMA then sought the Parties' consent to delay preparation of a further decision until any appeal window had expired. This consent was not forthcoming. Consequently, the CMA prepared the CMA May 2022 Decision reflecting the Administrative Court's judgment.

102. In preparing the CMA May 2022 Decision, the CMA incurred £[✂] in additional costs.[48] These costs included:

(a) CMA staff and Group members' direct costs; and

(b) the CMA overhead allowance.

---

[47] Rounded to the nearest £100. These costs are set out in Appendix A at table 1 (£[✂] for staff costs), table 5 (£[✂] for Appeal Group costs) and in the second column of table 9 (£[✂] for non-staff costs).
[48] These costs are set out in Appendix A at table 2 (£[✂] for staff costs) and table 6 (£[✂] for Appeal Group costs).

103. In relation to the CMA December 2022 Decision, the CMA incurred £[✂] in additional costs, comprising:[49]

(a) CMA staff and Group members' direct costs;

(b) external advisers' costs (Counsel); and

(c) the CMA overhead allowance.

104. The costs the CMA incurred in relation to the CMA May 2022 and the CMA December 2022 Decisions were reasonably and necessarily incurred in connection with the CMA Appeal. The CMA's assessment takes into account the following:

(a) the purpose of a costs order is to enable the CMA to recover for the public purse costs incurred by it in connection with the appeal;

(b) the CMA was required to consider the effect of the High Court's, and subsequently the Court of Appeal's, judgments on the CMA 2021 Decision; and

(c) the CMA was also required to apply that effect and prepare and publish the CMA May 2022 and the CMA December 2022 Decisions as part of the determination of the CMA Appeal.

105. Our determination is therefore that GEMA is required to pay the CMA's costs of £[✂][50] incurred in taking the CMA May 2022 and the CMA December 2022 Decisions. That is the determination paragraph 13 of Schedule 22 to the EA04 says the CMA must make.

CMA costs of making this Costs Decision

106. The costs which the CMA is required to recover include those of making a costs determination and order: those are costs the CMA incurs in connection with an appeal. EA04 provides that the CMA must recover such costs from the unsuccessful party to the appeal. They include those involved in formulating and consulting on a provisional determination of the relevant costs.

---

[49] These costs are set out in Appendix A at table 3 (£[✂] for staff costs), table 7 (£[✂] for Appeal Group costs) and in the third column of table 9 (£[✂] for non-staff costs).
[50] That is to say, the addition of the £[✂]set out at paragraph 102 and the £[✂] set out at paragraph 103.

107. In this connection, the CMA incurred £[✂] in additional costs.[51] These included:

(a) CMA staff and Group members' direct costs;

(b) external advisers' costs (Counsel); and

(c) the CMA overhead allowance.

108. In assessing whether these costs were incurred reasonably and necessarily, the CMA again takes into account the considerations described in paragraph 104. In addition, the CMA also takes into account:

(a) the submissions made by the Parties as to the appropriate costs order to be made following the final determination of the CMA Appeal, including those which raised issues of statutory interpretation requiring further consideration; and

(b) the costs incurred in the preparation of the CMA 2023 Costs PD.

109. The CMA also takes into account that some of the time it spent on matters relating to statutory interpretation concerned the meaning and effect of EA04 in principle. These were matters of general application rather than of specific application to the present case.

110. Accordingly, and while there will be circumstances in which the CMA can recover costs relating to the consideration of points of generally applicable principle, it has made an assessment in the round of the elements of the CMA's work that relate to (i) the meaning in principle of the relevant costs provisions, as they would apply to appeals of the relevant kind generally, and which, in this case, we consider should be for the CMA to bear; and (ii) the application of those provisions, properly construed, which GEMA must pay.

111. Significant proportions of the CMA's work fell within each of categories (i) and (ii) in the preceding paragraph. Our determination is that GEMA must pay £[✂], representing a reasonable proportion of the CMA's overall costs relating to the consideration of the statute and its application to this case.

[51] These costs are set out in Appendix A at table 4 (£[✂] for staff costs), table 7 (£[✂] for Appeal Group costs) and in the fourth column of table 9 (£[✂]for non-staff costs).

Determination of CMA costs

112. The CMA accordingly determines that paragraph 13 of Schedule 22 to the EA04 requires it to order that GEMA pays the CMA's costs incurred in connection with the appeal. Those costs are £428,200.

Inter partes costs

Statements of Costs

113. The statements of costs the Parties submitted to the CMA on 31 March 2021, following the making of the CMA 2021 Decision, set out that GEMA's costs in the CMA Appeal were £[✂] exclusive of VAT and that the Appellants' were £[✂] plus VAT. GEMA also submitted a letter of the same date seeking an order that its costs be paid in full by the Appellants. The Appellants responded in a letter of 8 April 2021 contending that the costs awarded to GEMA should be significantly reduced.

114. After considering the Parties' submissions and the application of the EA04 and the Rules in the context of the CMA 2021 Decision, the CMA made an order on 4 November 2021, pursuant to the CMA 2021 Costs Decision, requiring the Appellants to pay GEMA its total claimed costs of £[✂] plus VAT incurred in connection with the appeal.

115. The CMA has re-considered the position in light of the determination of the CMA Appeal in the CMA December 2022 Decision.

The Parties' views

116. In response to the CMA's invitation to do so, in December 2022, the Parties each made submissions, in January 2023, about what, if any, revised order the CMA should make as to *inter partes* costs to reflect the revised ultimate outcome in the CMA Appeal. Both agreed that Schedule 22 of the EA04 expressly confers on the CMA a discretion as to how it determines an order for such *inter partes* costs.

117. For their part, Appellants said it is not practically possible to undertake a forensic analysis of the total time spent by either party and sensibly identify what proportion of each's time relates to the issue on which the Appellants succeeded, and what proportion relates to other issues. Rather, the CMA must make a determination by reference to its sense of what is a fair and reasonable outcome in all the circumstances.

118. The Appellants acknowledged that they had not been '*wholly successful*' by reference to all the arguments they advanced in the CMA Appeal. They accordingly accepted that, pursuant to paragraph 22.2 of the Rules, there should be a reduction in the level of the costs they recover from GEMA. They nonetheless contended that they should recover at least half of their claimed costs from GEMA.

119. The Appellants also submitted that GEMA should not recover any of its costs from them given that, as a result of the Court of Appeal's judgment, the CMA 2021 Decision has been found to be unlawful and has been quashed in respect of congestion management charges. As such, it contended that GEMA cannot be considered '*a successful party*' (original emphasis), wholly or in part.

120. GEMA noted that the Appellants' appeal was dismissed on 6 of the 7 grounds advanced and that, in *E.ON*[52], the Competition Commission said that consideration should be given to making costs orders on an '*issue-by-issue basis*'. GEMA submitted that an issues-based approach is especially appropriate in this case since the Appellants challenged a series of discrete aspects of the GEMA Decision. It contended that it had been substantially more successful than the Appellants and that this should be reflected in *inter partes* costs.

121. Specifically, GEMA submitted that, on a broad-brush assessment, the issues on which it was successful likely account for around 80% of the costs incurred in the CMA Appeal, and as such it would be appropriate for the Appellants to pay around 80% of GEMA's costs and for GEMA to pay around 20% of the Appellants'. GEMA said that netting off these two notional payments would result in the Appellants paying 60% of GEMA's costs.

122. GEMA further contended that, if the CMA orders GEMA to pay the entirety of the CMA's costs, it should provide as part of its inter partes costs order for the Appellants to reimburse GEMA for 80% of those costs. GEMA submitted in support that paragraph 13(5) of Schedule 22 gives the CMA jurisdiction to require the Appellants to make a payment to GEMA in respect of any amount that GEMA is required to pay under paragraph 13(2).

52 E.ON UK plc v GEMA: energy code modification appeal (CC) - GOV.UK (www.gov.uk)

Assessment of *inter partes* costs

123. The CMA has considered what would be an appropriate *inter partes* costs order in this case, taking into account the views of the Parties and the Rules. In particular, the CMA has taken account of Rule 22.1 which provides that, while the CMA will normally order an unsuccessful party to pay the costs of a successful party, it may make a different order. Likewise, of Rule 22.2.2 which provides that the CMA will have regard to whether a party has succeeded wholly or in part.

124. In reaching its determination on what, if any, *inter partes* costs order to impose, the CMA has also had regard to relevant case law which relates to the operation of Civil Procedure Rule (**CPR**) 44.2. That rule is drafted in terms which mirror Rule 22 and, as such, is relevant here.

125. In *M v London Borough of Croydon*,[53] the Master of the Rolls said at [45]:

> *"…as has long been the case in English civil litigation, and is expressly stated in CPR [44.2.2(a)], the general rule in all civil litigation is that a successful party can look to the unsuccessful party for his costs. Of course, as CPR [44.2(2)(b), (4), (5) and (6)] demonstrate, there may be all sorts of reasons for departing from this principle, but it represents the prima facie position. For instance, the fact that the successful party lost on, or abandoned, an issue, will often involve his being deprived of some, or even all, of his costs (and, in an extreme case, he may even have to pay some of the unsuccessful party's costs) – CPR [44.2(4)(b)]. Further, the parties' conduct is a relevant matter, as CPR [44.2(4)(a)] provides…"*

126. Expanding on this principle, the Master of the Rolls subsequently referred to matters in which a claimant had not succeeded in getting all, or substantively all, the relief which they had claimed. At [50] it was noted that:

> *"…In such cases, the court will often decide to make no order for costs, unless it can, without much effort decide that one of the parties has clearly won, or has won to a sufficient extent to justify some order for costs in its favour".*

127. At [62] in the same judgment, the Court noted also that:

> *"… when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the*

[53] [2012] EWCA Civ 595.

claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim."

128. In *Pigot v Environment Agency*,[54] the principles in relation to issue-based costs orders were summarised as follows at [6]:

'(1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order. In any litigation, there are likely to be issues which involve reviewing the same, or overlapping, sets of facts, and where it is therefore difficult to disentangle the costs of one issue from another. The mere fact that the successful party has lost on one or more issues does not by itself normally make it appropriate to deprive them of their costs.

(2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order may also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.

(3) Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party. An issue may be treated as having been raised unreasonably if it is hopeless and ought never to have been pursued …
...
(6) Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CPR r.44.2, it is in all the circumstances of the case the right result. The aim must always be to make an order that reflects the overall justice of the case.'

129. In light of the Rules and the case law described above, the CMA's starting point, reflecting the general principle, is that GEMA as the ultimately unsuccessful party in the appeal should be required to pay the costs of the Appellants as the ultimately successful party. The CMA has considered

[54] [2020] EWHC 1444 (Cth).

whether and to what extent there are bases on which to depart from that position.

130. The CMA takes into account that GEMA invited it to take an issues-based approach to *inter partes* costs on the basis that the Appellants challenged a series of discrete aspects of the GEMA Decision. Likewise, that the Appellants submitted that a 'mathematical' approach of counting successful and unsuccessful grounds would not reflect the reality of the appeal.

131. The CMA has considered the Parties' submissions in light of *Pigot*. That case reflects the proposition that if an ultimately successful party raises discrete issues which increase the costs incurred and on which it is unsuccessful, where those issues were raised reasonably, it will likely not recover its costs on those issues. However, if those issues were raised *unreasonably*, the ultimately successful party may also be ordered to pay the costs incurred by the unsuccessful one in addressing such issues.

132. In the CMA's assessment, the issues raised in the grounds on which the Appellants were unsuccessful could not be regarded as being unreasonable in the sense described in *Pigot*. They were neither hopeless nor unworthy of (albeit ultimately unsuccessful) pursuit. On that basis, our judgement is that it is not appropriate to order the Appellants to pay GEMA's costs in respect of those grounds (or any of them) on which the Appellants were unsuccessful (or to make a costs order to similar effect).

133. The CMA has also considered whether there are other bases on which to depart from the general principle that the ultimately successful party should be awarded its costs from the ultimately unsuccessful one. Its judgement is that, despite the fact that the appeal has been allowed, the Appellants cannot be considered to have been 'wholly successful' for the purposes of fairly assessing liability for *inter partes* costs.

134. Rather, taking account of the criteria set out in paragraph 62 of *Croydon*, the CMA observes that:

    (a) Although not unreasonably raised, the Appellants' appeal succeeded on only part of one of the six Appeal Grounds.

    (b) The part of the Appeal Ground on which the Appellants succeeded was significantly less important (in the following senses) than the Appeal Grounds on which they lost. The Appellants' victory was a limited one in that, because the law had changed, its effects were confined to short time frame and ultimately resulted in no changes to the calculation of the relevant charges.

(c) The part of the Appeal Ground on which the Appellants succeeded accounted for only a small proportion of the overall time and effort involved in the appeal, and as such the substantial majority of this time, effort and cost related to Appeal Grounds on which the Appellants were unsuccessful.

135. In view of the above, and having particular regard to Rule 22.2, the principles in *Croydon,* and the principle enunciated in paragraph 6(6) of *Pigot* that '*[t]he aim must always be to make an order that reflects the overall justice of the case,'* the CMA's assessment is that it would be fair and reasonable in all the circumstances of this case to depart from the principle that the unsuccessful party should pay the costs of the successful one. That said, the CMA does not consider that this case is an 'extreme' one, as described at paragraph 45 of *Croydon*, which would justify such a departure from the general rule as to require the Appellants to pay any of GEMA's costs.

136. The CMA has also considered GEMA's submission that, in the event it is ordered to pay the entirety of the CMA's costs, the CMA should provide as part of an *inter partes* costs order that the Appellants 'reimburse' GEMA for a proportion of those costs. The CMA does not consider that it may do that.

137. As set out above, the CMA is obliged to make an order for the payment of its costs incurred in connection with the appeal. Liability for those costs is contingent on whether the appeal is 'allowed' or 'dismissed'. As also set out above, that is part of a distinct, deliberate and cogent statutory scheme that requires the unsuccessful party to an appeal to pay the CMA's costs. It would be contrary to Parliament's intention, properly inferred, for the CMA to undo that effect by taking into account the outcome of our assessment on CMA costs in our assessment of *inter partes* costs.

138. Taking all the above into account, and in all the circumstances of this case, including (a) the limited extent on which the Appellants' appeal succeeded, (b) the ultimately very limited effect of that success, and (c) the numerous and important Appeal Grounds on which they did not succeed and which consumed the substantial majority of the time and costs incurred in the appeal, the CMA's conclusion is that the fair and reasonable outcome is to make no order as to *inter partes* costs. This outcome would be consistent, in the circumstances of the case considered in the round, both with the statement of the Master of the Rolls in *Croydon* that, '… *the fact that the successful party lost on … an issue, will often involve his being deprived of*

some, or even all, of his costs …"[55] and with the aim described in paragraph 6(6) of *Pigot* of making an order that reflects the overall justice of the case.

139. In reaching this conclusion, the CMA has also considered its consistency with the determination in respect of the CMA's costs. The short point, in the CMA's judgement, is that the EA04 (intentionally) gives the CMA discretion in respect of *inter partes* costs that is not present in respect of its own costs (and where it is required, as set out above, to order the payment of the latter by GEMA in this case).

Determination of *inter partes* costs

140. In view of the foregoing, and in all the circumstances, the CMA makes no order as to *inter partes* costs.

Interest

141. Paragraph 13(6) of Schedule 22 EA04 provides that a person who is required by an order to pay a sum to another person must comply with the order before the end of the period of twenty-eight days beginning with the day after the making of the order. If sums required to be paid have not been paid within this period, they shall bear interest at such rate as may be determined in the CMA's order.[56]

Overall determination

142. Our overall determination is therefore as follows:

    (a) In relation to the CMA's costs incurred in connection with the appeal, GEMA should pay £428,200 to the CMA.

    (b) In relation to *inter partes* costs, the CMA makes no order as to costs.

143. In addition, our determination is that the interest rate which shall apply in the event of sums set out in paragraph 142 being unpaid within the requisite time period (see paragraph 141) will be one percentage point above the Bank of England's base rate.

---

[55] We also note for completeness the broad equivalence of the costs claimed by the Appellants and by GEMA, at £[✂] plus VAT and £[✂] plus VAT respectively.
[56] Paragraph 13(7) of Schedule 22 to EA04.

Appendix A: Statement of the CMA's costs

Overview

1. This appendix outlines how the CMA's costs were calculated. All costs incurred by the CMA in connection with the appeal have been included in the assessment and, in line with the recommendations of the Tribunal in *BT v CMA* [2017] CAT 11, this appendix provides details of:

(a) the names, grades and cost recovery rate for each of the staff and the Group who worked on the appeal, together with the number of hours worked;[57]

(b) travel and subsistence costs incurred in the appeal;

(c) a breakdown of fees charged by Counsel instructed by the CMA;

(d) direct costs; and

(e) a description of how the CMA's overhead rate has been calculated.

CMA's costs

Overheads

2. The CMA is able to recover all costs incurred, not just its direct costs. It therefore includes an amount for the recovery of overheads in the amounts that it calculates as costs.

3. The CMA overhead rate applied to the recharging of costs is calculated by applying a pre-determined recovery charge percentage to the total direct costs of the rechargeable work. The CMA's pre-determined recovery charge percentage is calculated by dividing the combined back-office annual budgets (Corporate Services and Board) by the combined front line service annual budgets (Enforcement, Legal Services, Markets and Mergers, Office of Chief Economic Advisor, Policy & International and Panel). The rate applied in this case is 52%.

Staff costs

4. Tables 1 to 4 set out the names, job titles, grades and cost recovery rates (£ per hour, based on average salaries for staff of that grade) for each

[57] Capped at salaried hours – see paragraph 5 below.

member of the staff team who worked on the appeal. It also includes the number of hours worked by each member of the staff team on the appeal, and the consequent direct costs and overhead costs incurred by the staff member.

5. A number of staff worked significantly in excess of their conditioned (salaried) hours on the appeal in 2021. In those cases, as reflected in table 1, those individuals' hours were 'capped' at conditioned hours, for the purpose of calculating CMA costs.

Table 1: Staff costs set out within the CMA 2021 Costs Decision

Name	*Job title*	*Grade*	*Recovery rate (£ per hour)*	*Time spent (hours)*	*Direct costs (£000s)*	*Overhead (£000s)**	*Total (£000s)*
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Totals				[✂]	[✂]	[✂]	[✂]

Source: CMA analysis.

Note: costs were extracted on 18 May 2021 and they relate to both the CMA 2021 Decision and the CMA 2021 Costs Decision

* Numbers presented to nearest £100 but underlying calculations are not rounded. Overhead percentage is 52%.
** Promoted to Legal Director during case with effect from 1 April 2021. Assistant Legal Director prior to that date. Costs charged as Assistant Legal Director until 16 May 2021.

Table 2: Staff costs for the CMA May 2022 Decision

Name	*Job title*	*Grade*	*Recovery rate (£ per hour)*	*Time spent (hours)*	*Direct costs (£000s)*	*Overhead (£000s)**	*Total (£000s)*
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Totals				[✂]	[✂]	[✂]	[✂]

Note: Costs relate to those posted after 17 May 2021 up to and including 23 May 2022.

* Numbers presented to nearest £100 but underlying calculations are not rounded. Overhead percentage is 52%.

Table 3: Staff costs for the CMA December 2022 Decision

Name	*Job title*	*Grade*	*Recovery rate (£ per hour)*	*Time spent (hours)*	*Direct costs (£000s)*	*Overhead (£000s)**	*Total (£000s)*
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Totals				[✂]	[✂]	[✂]	[✂]

Note: Costs relate to those posted after 23 May 2022 up to and including 20 March 2023.

* Numbers presented to nearest £100 but underlying calculations are not rounded. Overhead percentage is 52%.

Table 4: Staff costs for this Determination on Costs

Name	*Job title*	*Grade*	*Recovery rate (£ per hour)*	*Time spent (hours)*	*Direct costs (£000s)*	*Overhead (£000s)**	*Total (£000s)*
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]

[✂]* Numbers presented to nearest £100 but underlying calculations are not rounded. Overhead percentage is 52%.

Group costs

6. Tables 5 to 8 set out the names, job titles, grades and cost recovery rates (£ per hour) for the Group Chair and Group members who worked on the appeal. It also includes the number of hours worked by the Group Chair and each of the Group members, and the consequent direct costs and overhead costs incurred by the Group member. Overhead costs should be attributable to all Group members' direct costs, but in the circumstances[58] we have maintained the approach in the CMA 2023 Costs PD to apply the overhead uplift to just the Group chair's direct costs (see paragraph 3 above).

*Table 5: Appeal Group costs for the CMA 2021 Decision as set out in the CMA 2021 Costs Decision**

Name	*Job title*	*Grade*	*Recovery rate (£ per hour)*	*Time spent (hours)*	*Direct costs (£000s)*	*Overhead (£000s)**	*Total (£000s)*
Kirstin Baker	Appeal Panel Chair	Inquiry Chair	[✂]	[✂]	[✂]	[✂]	[✂]
Colleen Keck	Panel member	Panel member	[✂]	[✂]	[✂]	[✂]	[✂]
Frances McLeman	Panel member	Panel member	[✂]	[✂]	[✂]	[✂]	[✂]
Total			[✂]	[✂]	[✂]	[✂]	[✂]

Source: CMA analysis.

Note: costs related to time as per panel member timesheets for the period January to March 2021

* Numbers presented to nearest £100 but underlying calculations not rounded. Overhead percentage is 52%

Table 6: Appeal Group costs for the CMA May 2022 Decision

Name	*Job title*	*Grade*	*Recovery rate (£ per hour)*	*Time spent (hours)*	*Direct costs (£000s)*	*Overhead* (£000s)*	*Total (£000s)*
Kirstin Baker	Appeal Panel Chair	Inquiry Chair	[✂]	[✂]	[✂]	[✂]	[✂]
Colleen Keck	Panel member	Panel member	[✂]	[✂]	[✂]	[✂]	[✂]
Frances McLeman	Panel member	Panel member	[✂]	[✂]	[✂]	[✂]	[✂]
			[✂]	[✂]	[✂]	[✂]	[✂]
Total			[✂]	[✂]	[✂]	[✂]	[✂]

Source: CMA analysis.

Note: costs related to relevant time as per panel member timesheets for the period April 2021 to May 2022

* Numbers presented to nearest £100 but underlying calculations not rounded. Overhead percentage is 52%.

[58] Taking into account, in particular, the basis on which the Parties were consulted in relation to the CMA 2023 Costs PD.

Table 7: Appeal Group costs for the CMA December 2022 Decision

Name	*Job title*	*Grade*	*Recovery rate (£ per hour)*	*Time spent (hours)*	*Direct costs (£000s)*	*Overhead * (£000s)*	*Total (£000s)*
Kirstin Baker	Appeal Panel Chair	Inquiry Chair	[✂]	[✂]	[✂]	[✂]	[✂]
Colleen Keck	Panel member	Panel member	[✂]	[✂]	[✂]	[✂]	[✂]
Frances McLeman	Panel member	Panel member	[✂]	[✂]	[✂]	[✂]	[✂]
Total			[✂]	[✂]	[✂]	[✂]	[✂]

Source: CMA analysis.

Note: costs related to relevant time as per panel member timesheets for the period June 2022 to December 2022

* Numbers presented to nearest £100 but underlying calculations not rounded. Overhead percentage is 52%.

Table 8: Appeal Group costs for making determinations on costs

Name	*Job title*	*Grade*	*Recovery rate (£ per hour)*	*Time spent (hours)*	*Direct costs (£000s)*	*Overhead (£000s)**	*Total (£000s)*
Kirstin Baker	Appeal Panel Chair	Inquiry Chair	[✂]	[✂]	[✂]	[✂]	[✂]
Colleen Keck	Panel member	Panel member	[✂]	[✂]	[✂]	[✂]	[✂]
Frances McLeman	Panel member	Panel member	[✂]	[✂]	[✂]	[✂]	[✂]
Total			[✂]	[✂]	[✂]	[✂]	[✂]

Source: CMA analysis.

[✂]

* Numbers presented to nearest £100 but underlying calculations not rounded. Overhead percentage is 52%.

Non-staff costs

7. Table 9 sets out the non-staff costs incurred on the appeal, including:

   (a) Counsel costs.

   (b) Transcription costs. These include transcription services for hearings.

   Note: there were no ‘Travel and subsistence costs’.

Table 9: Non-staff costs

Non-staff costs	*Amount (£000s)**			
	2021 Decision	*December 2022 Decision*	*Costs Decisions*	*Totals*
Counsel	[✂]	[✂]	[✂]	[✂]
Transcripts	[✂]	[✂]	[✂]	[✂]
Total	[✂]	[✂]	[✂]	[✂]

Source: CMA analysis.

* Numbers presented to nearest £100 but underlying calculations not rounded.

CMA's costs

8. Table 10 summarises the CMA's final costs to be included in the costs order.

Table 10: CMA costs

Costs	*Amount (£000s)**
Staff	[✂]
Appeal Group	[✂]
Non-staff	[✂]
Total	**428.2**

Source: CMA analysis.

* Numbers presented to nearest £100, but underlying calculations not rounded.