

ENERGY CODE MODIFICATION APPEAL 2026

**Gwynt y Môr Offshore Wind Farm Limited,
RWE Renewables UK Limited, and RWE
Renewables UK Swindon Limited**

Determination

19 October 2026

© Crown copyright 2026

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Website: www.gov.uk/cma

**Members of the Competition and Markets Authority
who conducted this inquiry**

Kirstin Baker (*Chair of the Group*)

Roland Green

Frances McLeman

Chief Executive of the Competition and Markets Authority

Sarah Cardell

Table of Contents

1. Introduction	6
Conduct of the appeal	7
Structure of our determination	8
2. Industry background	9
Electricity generation and transmission	9
Offshore generation and offshore transmission owners	9
Contracts for Difference.....	10
How transmission is operated and regulated.....	11
The Appellants	13
3. Legal framework	14
The legislative framework.....	14
The principal objective and general duties of GEMA.....	14
The appeal	17
The Connection and Use of System Code	25
GEMA's decision on a modification	27
4. Background to CMP344 and the appeal	29
Existing treatment of IAE costs.....	29
The Proposal	31
5. Ground 1: Appearance of bias on the basis of predetermination and relationship with one of the stakeholders	36
Introduction.....	36
The law on apparent bias/predetermination	36
The Appellants' submissions	42
GEMA's submissions	44
CMA assessment on Ground 1	46
Other submissions.....	55
Our decision on Ground 1	55
6. Ground 2: GEMA was wrong in fact and/or law in deciding that the modification would not facilitate competition and cost reflectivity and thus better serve Use of System Charging Objectives (d) and (e)	56
Introduction to Ground 2A	57
Ground 2A(4): GEMA wrongly considered that imposing costs on generators would be consistent with the principle of cost reflectivity and/or represent efficient economic signalling	58
Ground 2A(1): GEMA adopted an unduly narrow view of an IAE	69
Ground 2A(2): GEMA failed to consider or give appropriate weight to the lack of feasibility and costs of generators mitigating IAEs.	73
Ground 2A(3) GEMA failed to consider or give due weight to the existing incentives on generators	81

Ground 2A(5) GEMA erred in rejecting the comparison with the SHETL subsea cable reopener	85
Ground 2A(6) GEMA wrongly focused on the generator qua developer rather than qua generator	89
CMA assessment on Ground 2A overall.....	91
Grounds 2B, 2C and 2D: GEMA was wrong in fact and/or law in deciding that the modification would not facilitate competition and thus better serve Use of System Charging Objectives (d).....	92
Ground 2B: GEMA was wrong to dismiss the existence of discrimination against offshore generators by comparison with entities with which they compete	93
Ground 2C: GEMA was wrong to conclude that the impact on competition was nil or immaterial.....	98
Ground 2D: GEMA was wrong to suggest that CMP344 could introduce an anti-competitive distortion on the Contracts for Difference market	111
CMA assessment on Grounds 2B to 2D.....	114
Our decision on Ground 2	115
7. Ground 3: GEMA was wrong to find that the Proposal would not advance Use of System Charging Objective (h) by promoting efficiency in the implementation and administration of the charging methodology	116
The Decision	116
The Appellants' submissions	118
GEMA's submissions	119
CMA assessment on Ground 3	121
Our decision on Ground 3	122
8. Ground 4: GEMA was wrong to hold that the Baseline is advantageous for consumers and therefore consistent with its objectives and duties	123
The Decision	123
The role of the principal objective.....	124
GEMA's approach to and assessment of the evidence on consumer effects	126
CMA assessment on Ground 4	129
Our decision on Ground 4	130
9. Order	131

1. Introduction

- 1.1 This is an appeal brought by Gwynt y Môr Offshore Wind Farm Limited (GYMOWFL), RWE Renewables UK Limited (RWE Renewables) and RWE Renewables UK Swindon Limited (RWE Swindon) (together, the Appellants), against a decision of the Gas and Electricity Markets Authority (GEMA)¹ dated 1 May 2026 (the Decision).²
- 1.2 The Decision is the rejection of Code Modification Proposal 344 (CMP344, or the Proposal), entitled ‘Clarification of Transmission Licensee revenue recovery and the treatment of revenue adjustments in the Charging Methodology’, a proposal to amend the Connection and Use of System Code (CUSC).³
- 1.3 CMP344 sought to amend the charging methodology governing the recovery of the costs of the Great Britain electricity transmission network, specifically how those costs are recovered between offshore generators and consumers. The modification was assessed by GEMA against the Applicable CUSC Objectives (ACOs) contained within the regulatory framework governing transmission charging.
- 1.4 The appeal is brought pursuant to section 173 of the Energy Act 2004 (EA04).⁴ On 26 May 2026 the Appellants filed a Notice of Appeal (NoA) seeking permission to appeal the Decision.⁵
- 1.5 The Appellants raise four grounds. In summary:
 - (a) Ground 1 concerns whether the Decision gave rise to an appearance of bias, arising from pre-determination and/or the connection between the decision-maker and one of the relevant parties, National Energy System Operator (NESO);
 - (b) Ground 2 concerns whether GEMA was wrong in fact and/or law by concluding that CMP344 would not facilitate competition and cost reflectivity and therefore would not better facilitate achievement of Use of System Charging Objectives (d) and (e);
 - (c) Ground 3 concerns whether GEMA was wrong to conclude that CMP344 would not better facilitate achievement of ACO (h) relating to efficiency in the implementation and administration of the charging methodology; and

¹ GEMA is the body established by section 1 of the Utilities Act 2000 to regulate the gas and electricity markets in Great Britain. Ofgem (The Office of the Gas and Electricity Markets Authority) supports GEMA’s operational activities.

² [The Decision](#).

³ A description of the CUSC modification process and GEMA’s role in considering modification proposals is set out in paragraphs 3.43–3.53 of this determination.

⁴ [EA04 section 173](#).

⁵ [NoA](#).

- (d) Ground 4 concerns whether GEMA was wrong to conclude that the existing arrangements are advantageous for consumers and therefore consistent with its statutory objectives and duties.

1.6 We set out the legal framework for determining the appeal in Section 3 and consider each of the grounds in Sections 5 to 8.

Conduct of the appeal

- 1.7 By NoA served on 26 May 2026, the Appellants sought permission to appeal against the Decision. The Appellants' NoA was published on a case page⁶ for this appeal on the Competition and Markets Authority's (CMA) website on 28 May 2026.
- 1.8 On 9 June 2026, the CMA granted the Appellants permission to appeal⁷ and appointed an Appeal Group⁸ to determine the appeal.
- 1.9 The CMA subsequently published an administrative timetable⁹ for the conduct of the appeal. The Appeal Group also issued directions during the course of the proceedings to assist in the efficient conduct of the appeal. On 12 June 2026, the CMA granted GEMA an extension of time¹⁰ in which to submit its response to the NoA.
- 1.10 On 19 June 2026, GEMA submitted its response (GEMA Response¹¹) to the NoA. The GEMA Response was published on the CMA's case page on 22 June 2026.
- 1.11 We held an administrative meeting with the Appellants and GEMA (collectively, 'the Parties') on 30 June 2026 to discuss arrangements for the conduct of the appeal.
- 1.12 A technical teach-in session was held on 7 July 2026, at which the Parties provided information regarding the technical and regulatory background relevant to the issues raised by the appeal.
- 1.13 On 21 July 2026, the Appellants submitted their Reply (Appellants' Reply) to the GEMA Response.
- 1.14 A hearing was held with the parties on 9 September 2026 (the Hearing). Ahead of the Hearing, the Parties submitted Skeleton Arguments. At the Hearing, the

⁶ Case Page, NoA.

⁷ Decision on permission to appeal.

⁸ Case page - appeal group.

⁹ Case page - administrative timetable.

¹⁰ Case page – extension.

¹¹ GEMA Response.

Parties developed the arguments advanced in their written submissions and responded to questions from the Appeal Group.

- 1.15 The Parties filed witness evidence from employees and representatives of both the Appellants and GEMA. They also submitted in excess of 230 supporting documents, including legislation, court authorities and industry materials.
- 1.16 In determining this appeal, we have considered the NoA, the GEMA Response, the Appellants' Reply, the Parties' written and oral submissions, and the documentary and witness evidence.
- 1.17 Throughout the appeal, the CMA published relevant materials on its case page in accordance with the requirements of the EA04 and the Energy Code Modification Rules.¹²

Structure of our determination

- 1.18 Our determination is structured as follows:
 - (a) Industry background
 - (b) Legal framework
 - (c) Background to CMP344 and the appeal
 - (d) The grounds of appeal
 - (e) Order
- 1.19 We have carefully considered all the Parties' arguments and submissions. We do not address every argument individually in this determination but focus on those matters necessary to explain our conclusions.

¹² [CMA196: Energy Code Modification Appeals Rules](#).

2. Industry background

- 2.1 In this section, we describe the aspects of the electricity industry and regulatory framework that are relevant to the issues arising in this appeal. We begin by outlining the operation of offshore transmission arrangements before describing the role of Offshore Transmission Owners (OFTOs), the transmission charging framework and the regime governing adjustments to offshore transmission revenues. We also briefly describe the Appellants and their role within the sector.

Electricity generation and transmission

- 2.2 Electricity can be generated using a range of technologies, including fossil fuel, nuclear and renewable generation technologies, such as onshore and offshore wind. Generators sell electricity in wholesale electricity markets and require access to transmission infrastructure to transport electricity from the point of generation to where it is consumed.¹³
- 2.3 The infrastructure used to transport electricity across Great Britain comprises the National Electricity Transmission System (NETS) and the distribution system. The NETS includes both onshore transmission infrastructure and offshore transmission infrastructure connecting offshore generation to the onshore network. The NETS is operated by NESO, a publicly owned but operationally independent organisation established on 1 October 2024.¹⁴
- 2.4 While offshore transmission infrastructure forms part of the NETS, it is structured differently from the onshore transmission network. Offshore transmission infrastructure generally takes the form of radial, point-to-point links connecting an offshore generator to the onshore transmission system. By contrast, the onshore transmission network is more extensively meshed and shared by a wider range of users.¹⁵

Offshore generation and offshore transmission owners

- 2.5 Electricity generated offshore must be transmitted to shore before it can be used by consumers. In a typical offshore wind farm, electricity generated by turbines is conveyed through inter-array cables to offshore substations, exported to shore through subsea export cables and connected to the onshore transmission network at an onshore substation.¹⁶

¹³ GEMA Response, paragraph 13.

¹⁴ GEMA Response, paragraph 13.

¹⁵ GEMA Response, paragraph 13.

¹⁶ NoA, paragraph 12.

- 2.6 Offshore wind generation in Great Britain has to date been developed under a generator-build model.¹⁷ Under that model, the generator designs and constructs both the generation assets and the transmission assets required to connect the offshore generation to the onshore network. Regulatory unbundling requirements¹⁸ prevent a generator from continuing to own and operate both the generating asset and the offshore transmission assets beyond an initial 27-month period. In practice, the generator retains the generation assets, while the transmission assets are transferred to an OFTO selected through a competitive tender process run by Ofgem. The OFTO acquires the transmission assets from the generator and pays a transfer value reflecting the economic and efficient costs of developing and constructing those assets.¹⁹
- 2.7 The successful bidder is granted an OFTO licence and assumes responsibility for owning, operating and maintaining the transmission assets. An OFTO licence fixes the OFTO's allowed revenue for a period of up to 25 years. This revenue, known as the Tender Revenue Stream (TRS), is paid by NESO²⁰ and reflects the OFTO's required return on investment, financing costs and ongoing costs of operating and maintaining the assets.²¹

Contracts for Difference

- 2.8 Contracts for Difference (CfDs) are the government's principal mechanism for supporting investment in low-carbon electricity generation. The Department for Energy Security and Net Zero (DESNZ) sets the parameters and budgets for competitive allocation rounds (Allocation Rounds or ARs), through which eligible generators seek long-term contracts that provide a degree of revenue certainty through a contractually agreed strike price. Where the market reference price (a measure of the average wholesale market price for electricity in Great Britain) falls below the strike price, the generator receives a top-up payment; where it exceeds the strike price, the generator pays back the difference.²²
- 2.9 Recent offshore wind projects have generally participated in competitive CfD allocation rounds. Generators submit bids reflecting their expected costs, revenues and risks. Allocation rounds are organised into separate technology 'pots', enabling different generation technologies to compete for support within

¹⁷ The model under which an offshore generator designs, procures, finances and constructs the offshore transmission assets connecting its generation assets to the onshore transmission network with the offshore transmission assets subsequently transferred to an appointed OFTO following a competitive tender exercise.

¹⁸ [Electricity Act 1989 section 10F](#).

¹⁹ [NoA](#), paragraph 16.

²⁰ Funded by charges as described in paragraph 4.2 of this determination.

²¹ [Ofgem IAE Policy](#), paragraphs 1.1 and 3.8; [NoA](#), paragraphs 15–16.

²² [GEMA Response](#), paragraph 13(1).

their respective categories. The outcome of the auction determines the strike price applicable to successful projects.²³

How transmission is operated and regulated

- 2.10 Each year, NESO sets Transmission Network Use of System charges (TNUoS charges). TNUoS charges are intended to recover transmission costs and are levied on onshore and offshore generators by reference to a number of factors, including the maximum amount of power a generator has a contractual right to put into the transmission system at any one time. TNUoS charges comprise three components: Local Charges, Wider Locational Charges²⁴ and a generator TNUoS adjustment tariff.²⁵
- 2.11 Generator charges alone are insufficient to cover the revenues which NESO pays to OFTOs and to onshore Transmission Owners (TOs). Accordingly, the remainder is recovered through a residual charge known as the Transmission Demand Residual (TDR), the costs of which are ultimately borne by customers.²⁶
- 2.12 Consumers currently bear the majority of TNUoS charges through the TDR. In 2026/27, generators are expected to pay 16.2% of total TNUoS charges.²⁷

Income Adjusting Events

- 2.13 As explained in paragraph 2.7, an OFTO's allowed revenue is generally fixed at the point at which it acquires the offshore transmission assets. However, the OFTO licence contains a mechanism that permits adjustments to that revenue where specified events arise after the TRS has been set. These adjustments are known as Income Adjusting Events (IAEs). The purpose of the IAE regime is to provide protection against certain unexpected costs arising from low-probability but high-impact events.²⁸
- 2.14 Not all exceptional cost events qualify as IAEs. The OFTO's allowed revenue is intended to fund its ordinary operating activities. An adjustment may be made only where the requirements of the licence are satisfied and, where relevant, Ofgem approves the event as an IAE. For an event or circumstance to be treated as an IAE, it must fall within one of the categories provided for in the OFTO licence and,

²³ NoA paragraphs 156–160; [GEMA Response](#), paragraph 13(1).

²⁴ Wider Locational Charges are the component of generator TNUoS charges intended to reflect the costs associated with a generator's use of the wider transmission network, including costs that vary according to the generator's location.

²⁵ NoA, paragraph 16; [Ofgem IAE Policy](#), paragraph 3.66.

²⁶ NoA, paragraphs 55–57.

²⁷ [GEMA Response](#), paragraph 13(8).

²⁸ [GEMA Response](#), paragraph 13(5).

where relevant, be approved by Ofgem. An IAE may arise from an event or circumstance under any of the following three limbs:²⁹

- (a) An event or circumstance constituting force majeure, namely certain events beyond the reasonable control of the OFTO (Limb A);³⁰
- (b) An event or circumstance resulting from certain unexpected amendments to the System Operator Transmission Owner Code (STC) that were not taken into account when the relevant Allowed Transmission Owner Revenue was determined (Limb B);³¹ or
- (c) Another event or circumstance which, in Ofgem's opinion, constitutes an IAE and is approved by Ofgem as such, provided the relevant threshold is met (Limb C).

2.15 On 28 November 2018, Ofgem published its policy 'Income Adjusting Events in Offshore Transmission Owner Licences' (Ofgem IAE Policy).³² The policy explains that Limbs A and B are expressly defined and do not involve the exercise of discretion by Ofgem. In determining whether an event falls within Limb C, Ofgem applies a policy framework informed by its statutory duties and considers four factors:³³

- (a) whether the OFTO knew of the event or circumstance before it arose or ought to have known of it;
- (b) whether the risk of damage of that type was reasonably foreseeable (even if the particular way in which the damage has occurred may not have been);
- (c) whether there are nevertheless exceptional factors in the relevant case that mean that the event or circumstance, or its consequences, could not have been reasonably foreseeable; and
- (d) the ability of the OFTO to manage the risk or impact by putting in place and pursuing risk management arrangements such as insurance, commercial recourse against third parties and/or operating practices.³⁴

2.16 Where Ofgem approves a claim for the costs of an event treated as an IAE, the OFTO may request payment of the allowed sum from NESO in the charging year following Ofgem's decision. NESO initially funds that payment through an adjustment to the TRS and recovers the amount through the TDR. When the

²⁹ [Ofgem IAE Policy](#), paragraphs 1.3–1.4; [NoA](#), paragraph 21.

³⁰ Limb A (force majeure) covers certain events beyond the reasonable control of the OFTO, including events such as war, terrorism, sabotage, vandalism, fire, flooding and certain legislative changes.

³¹ Limb B applies where costs arise from amendments to the STC that were not taken into account when the OFTO's allowed revenue was determined.

³² [Ofgem IAE Policy](#).

³³ [Ofgem IAE Policy](#), paragraphs 1.4–1.6; [NoA](#), paragraph 24.

³⁴ [NoA](#), paragraph 24.

relevant offshore generator's TNUoS charges are subsequently reset, NESO increases the relevant offshore Local Charges paid by the generator and reduces the TDR paid by consumers. This means that consumers initially fund approved IAE costs, but consumers are subsequently reimbursed through charges recovered from the relevant offshore generator through the charging framework.³⁵

- 2.17 The Ofgem IAE Policy states that OFTOs should acquire offshore transmission assets on the basis that they assume risks arising from damage or defects that could not be identified through due diligence. The policy further states that the offshore transmission regime was not designed to insulate OFTOs from all such risks and that latent defects are a type of risk that is reasonably foreseeable.³⁶ The policy also states that, in certain circumstances, the IAE regime will continue to provide protection where an OFTO is unable effectively to mitigate the effects of latent defect risk, including where that risk has become uninsurable through no fault of the OFTO. The policy therefore recognises both that asset owners are generally expected to bear latent defect risks and that there may be limited circumstances in which those risks cannot reasonably be mitigated and may warrant protection under the Ofgem IAE policy.³⁷

The Appellants

- 2.18 RWE Renewables and RWE Swindon are members of the RWE Group. GYMOWFL is the project company that owns the Gwynt y Môr Offshore Wind Farm, in which the RWE Group holds an ownership interest.³⁸ The Gwynt y Môr Offshore Wind Farm is a 576 Megawatt (MW) wind farm located off the north Wales coast. The wind farm became operational in 2015, prior to the introduction of the CfD support regime for offshore wind generation.³⁹

³⁵ [GEMA Response](#), paragraph 13(9).

³⁶ [Ofgem IAE Policy](#), paragraph 1.7; [NoA](#), paragraph 24.

³⁷ [Ofgem IAE Policy](#), paragraphs 1.8, 2.1 and 3.5. [NoA](#), paragraph 24–25.

³⁸ [NoA](#), paragraphs 9–10.

³⁹ [NoA](#), paragraph 9.

3. Legal framework

- 3.1 In this section, we set out the legislative framework relevant to the electricity industry and this appeal. We then set out the framework for appeals brought under section 173 of EA04.⁴⁰

The legislative framework

- 3.2 The Electricity Act 1989 (EA89) privatised the wholesale electricity industry. It replaced the supply of electricity to consumers in Great Britain by state-controlled monopolies with a regulated market divided into four components: generation, transmission, distribution and supply, offering services under licence from the Secretary of State. These arrangements allow for competition between generators and also between suppliers.
- 3.3 Section 89 of EA04 amended section 4 of EA89 to extend the requirement for a licence for certain offshore activities including electricity generation.⁴¹
- 3.4 Section 1 of the Utilities Act 2000⁴² established GEMA as the regulatory authority for Great Britain, in place of the former offices of the Director General of Gas Supply and the Director General of Electricity Supply. GEMA operates through Ofgem.

The principal objective and general duties of GEMA

- 3.5 In carrying out its functions under Part I of EA89 and Part 6 of the Energy Act 2023 (EA23),⁴³ GEMA is subject to a statutory ‘principal objective’, which is to protect the interests of existing and future consumers in relation to electricity conveyed by distribution systems or transmission systems.⁴⁴
- 3.6 Section 3A of EA89 explains that the ‘interests of existing and future consumers are their interests taken as a whole’, including:⁴⁵
- (a) their interests in the reduction of electricity supply emissions of targeted greenhouse gases;
 - (b) their interests in the security of the supply of electricity; and

⁴⁰ EA04 section 173.

⁴¹ EA89 section 6(1)(a).

⁴² Utilities Act 2000 section 1.

⁴³ Energy Act 2023 Part 6 provides for modifications of designated documents (including industry codes) by GEMA.

⁴⁴ EA89 section 3A(1). The principal objective includes protecting the interests of existing and future consumers in relation to gas conveyed through pipes. As this appeal is in relation to electricity, no further reference to gas is made.

⁴⁵ EA89 section 3A(1)(a).

- (c) their interests in the fulfilment by GEMA, when carrying out its designated regulatory functions, of the ‘designated regulatory objectives’.⁴⁶

3.7 Section 3A of EA89 sets out a series of specific duties that GEMA must discharge in relation to its principal objective, as well as a series of considerations to which it must (or, in some cases, may) have regard in performing those duties:

- (a) First, GEMA is required to carry out its functions under EA89 in a manner which it considers is best calculated to further the principal objective, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the generation, transmission, distribution or supply of electricity.⁴⁷
- (b) Second, before deciding to carry out its functions in a particular manner with a view to promoting competition, GEMA must consider:
 - (i) to what extent the interest of consumers would be protected by that manner of carrying out those functions; and
 - (ii) whether there is any other manner (whether or not it would promote competition) in which GEMA could carry out those functions which would better protect those interests.⁴⁸
- (c) Third, when performing the duties described in paragraphs 3.6 and 3.7, GEMA must have regard to:
 - (i) the need to secure that all reasonable demands for electricity are met;
 - (ii) the need to secure that licence holders are able to finance the activities which are the subject of obligations; and
 - (iii) the need to contribute to the achievement of sustainable development.⁴⁹
- (d) Fourth, in performing its duties set out above, GEMA shall have regard to the interests of a number of specified categories of individuals (such as those

⁴⁶ EA89 section 3A(5)(b) provides that ‘designated regulatory objectives’ mean the objectives set out in Article 36(c) to (h) of the [Electricity Directive 2009/72/EC](#) but read with modifications as stated in the [Electricity and Gas etc. \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) and these include: (c) eliminating restrictions on trade in natural gas and electricity including enabling the development of appropriate cross-border transmission capacities to meet demand (d) helping to achieve, in the most cost-effective way, the development of secure, reliable and efficient non-discriminatory systems [...] (e) facilitating access to the network for new generation capacity, in particular removing barriers that could prevent access for new market entrants and electricity from renewable energy sources (f) ensuring that system operators and system users are granted appropriate incentives, in both the short and the long term, to increase efficiencies in system performance (g) ensuring that customers benefit through the efficient functioning of the energy market in Great Britain, promoting effective competition and helping to ensure consumer protection; and (h) helping to achieve high standards of universal and public service in electricity supply, contributing to the protection of vulnerable customers and contributing to the compatibility of necessary data exchange processes for customer switching.

⁴⁷ EA89 section 3A(1)(b).

⁴⁸ EA89 section 3A(1)(c).

⁴⁹ EA89 section 3A(2).

who are disabled and those with low incomes) but that does not imply that regard may not be had to the interests of other descriptions of consumer.⁵⁰

- (e) Fifth, and subject to the requirements set out in paragraphs 3.6 and 3.7, GEMA must carry out its functions in relation to the supply of electricity in the manner which it considers is best calculated:
 - (i) to promote efficiency and economy on the part of persons authorised by licences or exemptions under EA89, to distribute, supply or participate in the transmission of electricity, to participate in the operation of electricity interconnectors, to provide a smart meter communication service and the efficient use of electricity conveyed by distribution systems or transmission systems;
 - (ii) to protect the public from dangers arising from the generation, transmission, distribution or supply of electricity or the provision of a smart meter communication service; and
 - (iii) to secure a diverse and viable long-term energy supply;⁵¹ and
 - (iv) in carrying out those functions, GEMA must have regard to the effect on the environment of activities connected with, under EA89, the generation, transmission, distribution or supply of electricity or the provision of a smart meter communication service.⁵²
- (f) Sixth, in carrying out its functions, GEMA must have regard to:
 - (i) the principles under which regulatory activities should be transparent, accountable, proportionate and targeted only at cases in which action is needed;⁵³
 - (ii) any other principles appearing to it to represent the best regulatory practice;⁵⁴
 - (iii) any guidance issued by the Secretary of State about the making by GEMA of a contribution towards the attainment of any social or environmental policies;⁵⁵ and
 - (iv) must take into account any advice given by the Health and Safety Executive or the Office for Nuclear Regulation about any electricity safety issue.⁵⁶

⁵⁰ EA89 section 3A(3).

⁵¹ EA89 section 3A(5).

⁵² EA89 section 3A(5).

⁵³ EA89 section 3A(5)(a)(a).

⁵⁴ EA89 section 3A(5)(a)(b).

⁵⁵ EA89 section 3B(2).

⁵⁶ EA89 section 3C(3).

The appeal

- 3.8 Certain GEMA decisions are subject to a specific appellate regime. The present appeal has been brought pursuant to section 173 of EA04 which provides that an appeal lies to the CMA against a decision by GEMA if:
- (a) it is a decision relating to a document by reference to which provision is made by a condition of a gas or electricity licence;
 - (b) that document is designated for the purposes of this section by an order made by the Secretary of State;
 - (c) the decision consists in the giving or refusal of a consent by virtue of which the document has effect, or would have had effect, for the purposes of the licence with modifications or as reissued; and
 - (d) the decision is not of a description of decisions for the time being excluded from the right of appeal under this section by an order made by the Secretary of State.⁵⁷
- 3.9 An appeal against a decision may only be brought by a person whose interests are materially affected by it or a body representing those persons.⁵⁸ Permission of the CMA is required to bring an appeal.⁵⁹ On 26 May 2026 the Appellants applied for permission to appeal GEMA's Decision on the CMP344 code modification proposal. The Parties agreed that the relevant conditions were satisfied in this appeal. The CMA granted permission to appeal on all grounds on 9 June 2026.

The legal test on appeal

- 3.10 The relevant procedures for the appeal are set out in Schedule 22 to EA04, and CMA196 Energy Code Modification Appeal Rules.⁶⁰
- 3.11 In determining appeals (following the grant of permission), the CMA must have regard, to the same extent as is required of GEMA, to the matters to which GEMA must have regard:
- (a) in the carrying out of its principal objective under section 3A of EA89;
 - (b) in the performance of its duties under section 3A of EA89; and,
 - (c) in the performance of its duties under sections 3B and 3C of EA89.⁶¹

⁵⁷ EA04 section 173(2).

⁵⁸ EA04 section 173(3).

⁵⁹ EA04 section 173(4).

⁶⁰ CMA196: Energy Code Modification Appeal Rules.

⁶¹ EA04 section 175(2).

- 3.12 Section 175(3) of EA04 provides that in determining an appeal, the CMA may have regard to matters which GEMA was not able to have regard to in relation to the case of the decision appealed against; but must not in the exercise of that power, have regard to any matter to which GEMA would not have been entitled to have regard in that case had it had the opportunity of doing so.
- 3.13 Section 175(5) of EA04 provides that '[t]o the extent that the CMA does not allow the appeal, it must confirm the decision appealed against'. Where the CMA allows the appeal, it must do one or more of the following:
- (a) quash the decision appealed against;
 - (b) remit the matter to GEMA for reconsideration and determination in accordance with the directions given by the CMA;
 - (c) where it has quashed the refusal of a consent, give directions to GEMA, and to such other persons as it considers appropriate, for securing that the relevant condition has effect as if the consent had been given.
- 3.14 The decision of the CMA on the appeal must be contained in an order which must set out the reasons for its decision and must be published by the CMA.

Standard of review

- 3.15 Having granted permission, the CMA may allow an appeal only where it is satisfied that GEMA's decision was wrong on one or more of the statutory grounds, and not whether it was merely 'wrong'.⁶² The statutory grounds are that:
- (a) GEMA failed properly to have regard to the matters to which it must have regard in carrying out its principal objective under EA89 section 3A, and its duties under EA89 sections 3A, 3B and 3C;
 - (b) GEMA failed properly to have regard to the purposes for which the relevant condition has effect;
 - (c) GEMA failed to give the appropriate weight to one or more of those matters or purposes;
 - (d) the decision was based, wholly or partly, on an error of fact;
 - (e) the decision was wrong in law.⁶³

⁶² *R (Wales and West Utilities Limited) v Competition and Markets Authority* [2026] EWHC 99 (Admin), ('R (Wales and West Utilities Ltd')') paragraph 140.

⁶³ EA04 section 175(4).

- 3.16 We have adopted the following general principles about the standard of review for the purpose of making this determination:
- (a) An appeal does not give rise to a re-run of the original investigation or to a *de novo* hearing of all the matters that were before GEMA.⁶⁴
 - (b) The CMA's role goes further than the traditional judicial review grounds in that the CMA is required to consider the merits of GEMA's decision only by reference to the specific errors alleged by the appellant and within the confines of the prescribed statutory appeal grounds as pleaded, that is 'through the prism of the specific errors alleged by the appellants'.⁶⁵
 - (c) The different grounds on which the CMA may find that GEMA's decision was 'wrong' necessarily require consideration of the way in which the appeal is put, based on the conclusion reached by GEMA and the findings of fact and analysis that led to that conclusion.⁶⁶
 - (d) It is not the CMA's role to substitute its judgement for that of GEMA simply on the basis that it would have taken a different view of the matter, were it the primary energy regulator.⁶⁷

The meaning of 'wrong'

- 3.17 As explained above, the CMA must decide whether the appealed decision was wrong on one or more of the statutory grounds, and not whether that decision was merely 'wrong'.⁶⁸
- 3.18 In *R (Wales and West Utilities Ltd)*, the High Court stated that the different grounds on which the CMA may find that GEMA's decision was 'wrong' 'necessarily require consideration of the way in which the appeal is put, based on the conclusion reached by GEMA and the findings of fact and analysis that led to that conclusion'.⁶⁹ The High Court confirmed that the CMA should regard themselves as being in the position that 'there is no blank canvas upon which the parties can paint a new picture which fails to heed the reasoning in the decision under challenge'.⁷⁰
- 3.19 We set out below the review to be applied when considering grounds that fall under each subsection of section 175(4).

⁶⁴ *R (Wales and West Utilities Ltd)*, paragraph 138.

⁶⁵ *R (Wales and West Utilities Ltd)*, paragraph 139.

⁶⁶ *R (Wales and West Utilities Ltd)*, paragraph 141.

⁶⁷ *SSE Generation Limited code modification appeal (2021)*, paragraph 5.16.

⁶⁸ *R (Wales and West Utilities Ltd)*, paragraphs 139-140.

⁶⁹ *R (Wales and West Utilities Ltd)*, paragraph 141.

⁷⁰ *Hutchison 3G UK Ltd and British Telecommunications PLC and others v Ofcom* [2017] EWHC 3376 (Admin), paragraph 40.

Wrong on matters of judgement

- 3.20 This concerns failure by GEMA properly to have regard to or failure to give the appropriate weight to the carrying out of its principal objective in 3A of EA89 and its duties under sections 3A, 3B and 3C of EA89.⁷¹
- 3.21 The High Court in *R (Wales and West Utilities Ltd)*, set out the approach when considering whether GEMA was ‘wrong’ on matters of evaluation or judgement:⁷²
- (a) The CMA will make its own assessment of what is proper regard and appropriate weight.
 - (b) The CMA will show some deference to GEMA’s evaluation or judgement as the primary decision-maker and does not merely compare the merits of its own approach with that of GEMA.
 - (c) The CMA will consider the adequacy of GEMA’s chosen approach by comparing its merits with those of any reasonable alternatives put forward by the appellant.
 - (d) Any alternative approach is required to be ‘materially’ better than GEMA’s approach: ‘that is, the alternative approach is one which, weighing up the pros and cons of the different approaches, offers *something more* than GEMA’s approach. That is all that is required for the CMA to adjudge that GEMA got it “wrong”. If, however, GEMA’s approach is equally good to the other approaches then it should be upheld by the CMA, even if the CMA would have preferred one of the other approaches’.⁷³

Wrong due to error of fact

- 3.22 This concerns whether GEMA’s decision was based, wholly or partly, on an error of fact.⁷⁴
- 3.23 Where an appellant alleges that GEMA’s decision is wrong on the grounds of an error of fact, the CMA will apply the test in *E v Secretary of State for the Home Department*, endorsed in the *R (Wales and West Utilities Ltd)* judgment.⁷⁵
- (a) First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter.

⁷¹ EA04 section 175(4)(a), (b) and (c).

⁷² *R (Wales and West Utilities Ltd)*, paragraphs 151–159.

⁷³ *R (Wales and West Utilities Ltd)*, paragraphs 158–159.

⁷⁴ EA04 section 175(4)(d).

⁷⁵ *E v Secretary of State for the Home Department* [2004] EWCA 49, (*E v Secretary of State for the Home Department*) paragraph 66 and *R (Wales and West Utilities Ltd)*, paragraph 142.

- (b) Second, the fact or evidence must have been ‘established’, in the sense that it was uncontentious and objectively verifiable.
- (c) Third, the appellant (or its advisers) must not have been responsible for the mistake.
- (d) Fourth, the mistake must have played a material (not necessarily decisive) part in GEMA's reasoning.

Wrong in law

- 3.24 The concept of ‘wrong in law’ is not defined in EA04. In other statutory contexts, however, appeals on a ‘point of law’ or a ‘question of law’ have been held to include matters of statutory construction and the full range of issues which would otherwise be subject of an application to the High Court for judicial review.⁷⁶ These include challenges on grounds of procedural error, irrationality, inadequacy of reasons, having regard to irrelevant matters, and failing to have regard to relevant matters.⁷⁷
- 3.25 In *R (Wales and West Utilities Ltd)*, the High Court stated that determining whether GEMA’s decision was wrong in law will involve assessing ‘whether there has been an error in construction, or whether GEMA has reached a conclusion that was irrational: including whether GEMA reached a conclusion that was not open to it on the evidence’.⁷⁸
- 3.26 GEMA’s decisions will therefore be wrong in law where, among other things, GEMA has: (i) acted ultra vires, that is outside its powers and obligations, properly interpreted; (ii) made an unreasonable decision; (iii) failed to take into account relevant matters (or taken into account irrelevant ones); (iv) failed to carry out a reasonable investigation; (v) has failed to act in a proportionate manner; or (vi) acted with procedural unfairness.

Process and outcome irrationality

- 3.27 In the recent *Spreadex* case⁷⁹ the Competition Appeals Tribunal (CAT) summarised the concept of irrationality, noting that within judicial review case law

⁷⁶ [Energy Licence Modification Appeals \(Northern Powergrid\) \(2023\)](#), paragraph 3.66; [H7 Heathrow Licence Modification Appeals \(2023\)](#), paragraph 3.39 and [Financial resilience appeal \(2024\)](#), paragraph 3.54, citing *E v Secretary of State for the Home Department*, paragraph 42 and *Mohamoud v Birmingham City Council* [2014] EWCA 227, paragraph 23. See also *R (Wales and West Utilities Ltd)*, paragraph 144 (which provides the specific examples of irrationality and conclusions not otherwise open on the evidence).

⁷⁷ *RB (Algeria) v Secretary of State for the Home Department* [2008] EWCA 290, paragraphs 62 and 73; [James v Hertsmere Borough Council](#) [2020] EWCA 489, paragraph 31.

⁷⁸ *R (Wales and West Utilities Ltd)*, paragraph 144.

⁷⁹ [Spreadex Ltd v Competition and Markets Authority](#) [2026] CAT 24 (*Spreadex*).

two heads of irrationality have developed: process irrationality and outcome irrationality.⁸⁰

- 3.28 Process irrationality includes the requirement that the decision-maker must have regard to all mandatory relevant considerations and no irrelevant ones. The CAT in *Spreadex* added:

The public body's process of reasoning should contain no logical error or critical gap. As sometimes said in the cases, a decision that 'does not add up' is one where there is an error of reasoning which robs the decision of logic. Another more practical way of putting this is to ask whether the body's conclusions follow from the evidence or whether there is an unexplained evidential gap or leap in reasoning which fails to justify the conclusion. It is important, however, to always bear in mind that more than one conclusion can in public law terms follow from the evidence. That is particularly the case where a public body is required to make a decision based on inferences from incomplete evidence.⁸¹

- 3.29 Outcome irrationality is concerned with situations where the process of reasoning is not materially flawed, but the outcome is outside the range of reasonable decisions open to the decision-maker.⁸²
- 3.30 As regards the adequacy of GEMA's reasoning, the appeal is against the decision, not the reasons for the decision. Therefore, it is not enough for the appellant to identify some error of reasoning; the appeal can only succeed if the decision cannot stand in the light of that error. If the decision can be supported on a basis other than that on which the regulator relied, then the appellant will not have shown that the decision was wrong and will fail.⁸³

Errors as to the interpretation of evidence amounting to errors of law

- 3.31 An error on the part of a decision-maker in interpreting a piece of evidence may amount to an error of law. The Court of Appeal noted in the recent *Pfizer* case:

Challenges to findings of primary fact or findings based upon an evaluation of evidence can in principle amount to a point of law, but the threshold for success in such a challenge is high. It must be established that the decision-maker's conclusions were outside the

⁸⁰ *Spreadex*, paragraph 49.

⁸¹ *Spreadex*, paragraph 50.

⁸² *Spreadex*, paragraph 51.

⁸³ *Energy Licence Modification appeal – Firmus Energy (2017)* (Firmus), paragraphs 3.20(b) and (h).

margin of appreciation that a specialist body, such as the CMA or CAT, has over the facts.⁸⁴

- 3.32 We may, therefore, find an error of law if the Decision is based on unreliable data or fails to take account of the relevant evidence.

Procedural deficiencies

- 3.33 In the Firmus licence modification appeal, the CMA found that:

If the CMA is satisfied that the regulator's decision was correct, then the fact that the regulator's consultation process was deficient ought not to matter, unless that process was so deficient that the CMA cannot be assured that the regulator did indeed get it right.⁸⁵

- 3.34 GEMA's decision may also be 'wrong in law' on the basis of a procedural deficiency. Consistent with the statement of principle summarised in Firmus, the decision will be 'wrong in law' only where the procedural deficiency (including a flawed consultation process) was so serious that the CMA cannot be assured that the decision was not 'wrong'.⁸⁶

Decision is wrong under more than one subsection of section 175(4)

- 3.35 Where an appellant has argued that a particular alleged error by GEMA renders the decision wrong on an error of fact, made an error of law or failed properly to have regard to or failed to give appropriate weight to the matters and obligations in section 175(4)(a) or (b), the CMA takes the following approach:

- (a) It considers whether GEMA has, in the way alleged, made an error of law or an error of fact.
- (b) It considers whether GEMA has in the way alleged failed to have proper regard to or failed to give appropriate weight to the matters to which GEMA must have regard under the relevant statutory duties raised by the appellants. In this context the CMA considers whether there was a materially better approach available to GEMA.⁸⁷

⁸⁴ [Pfizer Incorporated & Anor v The Competition and Markets Authority \[2026\] EWCA 765](#), paragraph 42.

⁸⁵ [Firmus](#), paragraph 3.20.

⁸⁶ [Firmus](#), paragraph 3.20(e).

⁸⁷ [R \(Wales and West Utilities Ltd\)](#), paragraphs 141–145, 158.

GEMA's margin of appreciation

- 3.36 The margin of appreciation afforded to GEMA in matters of regulatory judgement is an important consideration in reaching a finding as to whether a decision is 'wrong'.
- 3.37 In *R (Wales and West Utilities)* the High Court recognised in considering whether a decision was 'wrong', that some deference to GEMA's evaluation or judgement was needed. As an expert regulator GEMA is expected to have great familiarity with the sector for which it is the regulator and decisions such as licence or code modifications take time to determine and will involve a great degree of analysis.⁸⁸ However, the Court also noted that '... the CMA contains members with relevant expertise and has powers to call for evidence'.⁸⁹
- 3.38 In *E.ON* (a code modification appeal), the CMA's predecessor, the Competition Commission, took the view that the statutory test under section 175 of EA04:
- ... clearly admits of circumstances in which we might reach a different view from GEMA but in which it cannot be said that GEMA's decision is wrong on one of the statutory grounds. For example, GEMA may have taken a view as to the weight to be attributed to a factor which differs from the view we take, but which we do not consider to be inappropriate in the circumstances.⁹⁰
- 3.39 Accordingly, the CMA should apply appropriate restraint and should not interfere with the regulator's exercise of judgement unless satisfied that it was wrong.⁹¹ Where GEMA has exercised regulatory judgment in selecting amongst various alternative solutions to a regulatory problem, we will not substitute GEMA's assessment or weighting of the evidence or reasoning with our own. Instead, we will assess whether GEMA's approach was wrong.⁹²
- 3.40 The extent of and therefore our approach to GEMA's margin of appreciation will vary depending on the nature of the error alleged and the relevant statutory ground of appeal that is engaged.
- 3.41 Where GEMA has made findings of fact, the CMA should be slow to impugn those findings as GEMA has an advantage of experience and will often have the benefit of having conducted a consultation with the industry. However, the CMA has a clear jurisdiction in respect of factual errors and will exercise that jurisdiction where the conclusion is that GEMA has made a plain error of fact. However, it is not enough for an appellant to demonstrate that some error of fact, whether

⁸⁸ *R (Wales and West Utilities Ltd)*, paragraph 153.

⁸⁹ *R (Wales and West Utilities Ltd)*, paragraph 152.

⁹⁰ *E.ON code modification appeal (2007)*, (E.ON), paragraph 5.12.

⁹¹ *British Telecommunications plc v Ofcom and others [2014] EWCA 133*, paragraphs 87-88.

⁹² *Energy licence modification appeals 2021*, paragraph 3.77.

consequential or inconsequential, has been made by GEMA in its decision. Rather, an appellant will need to demonstrate that the error was material to the outcome of the decision.⁹³

- 3.42 Where an error of law is alleged, ‘there is no role for regulatory judgement’ or discretion on the question of what is the correct construction of legislation and also that ‘... on that question, the concept of reasonable judgement as embodied in the Wednesbury test, has no part to play’.⁹⁴

The Connection and Use of System Code

- 3.43 The CUSC is set in accordance with license conditions contained in NESO’s Electricity System Operator Licence issued under EA89. EA89 confers on GEMA powers to grant licenses to generate electricity and also determines the circumstances in which an electricity system operator license is issued. Section 6 provides that GEMA can grant licences, including generation and transmission licences. Section 7 allows GEMA to set general conditions, and section 8A allows GEMA to set standard conditions, for those licences. Section 11A gives GEMA power to modify standard conditions.⁹⁵
- 3.44 The CUSC is the contractual framework for connecting to and using the NETS.⁹⁶ Section 14 of the CUSC sets out charging methodologies for use of the electricity transmission system and contains the Use of System Charging Methodology.⁹⁷ Part A of Condition E2 of NESO’s licence requires NESO to establish CUSC arrangements for use of system which are calculated to facilitate the achievement of the ACOs.

ACOs in relation to modification of the Use of System Charging Methodology

- 3.45 Where a proposed modification affects the Use of System Charging Methodology, as proposed by CMP344, the relevant ACOs are the Use of System Charging Objectives set out in the NESO licence.⁹⁸ The ACOs provide the framework against which charging modification proposals are assessed. In determining whether to approve a charging modification proposal, GEMA must consider

⁹³ E.ON, paragraphs 5.16-5.17.

⁹⁴ SSE Generation Limited code modification appeal (2021), paragraph 5.17.

⁹⁵ EA89 section 11A.

⁹⁶ NESO.

⁹⁷ CUSC section 14.

⁹⁸ The Use of System Charging Objectives are set out in Part A of Special Condition E2 of the NESO Electricity System Operator Licence. They comprise objectives relating to: (a) efficient discharge by the licensee of its obligations; (b) efficient use and development of the transmission system; (c) efficient operation of the transmission system; (d) effective competition; (e) cost reflectivity; (f) transparency; (g) compliance with applicable legislation and licence obligations; and (h) efficiency in the implementation and administration of the Use of System Charging Methodology. Only objectives (d), (e) and (h) are material to this appeal.

whether the proposal would better facilitate achievement of those objectives than the existing arrangements.

3.46 The ACOs⁹⁹ relevant to this appeal are:

- (a) ACO (d), as to 'effective competition': compliance with the Use of System Charging Methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity.
- (b) ACO (e), as to 'cost reflectivity': compliance with the Use of System Charging Methodology results in charges that reflect, as far as is reasonably practicable, the costs (excluding any payments between the licensee and Transmission Licensees that are made under and in accordance with the STC) incurred by Transmission Licensees in their Transmission Businesses, and that are compatible with condition C11 (Requirements of a Connect and Manage Connection).
- (c) ACO (h), as to efficiency in administration: promoting efficiency in the implementation and administration of the Use of System Charging Methodology.

CUSC modification procedure

3.47 The CUSC modification process is set out in section 8 of the CUSC.¹⁰⁰ The procedures under the CUSC envisage a largely stakeholder and industry led, open governance process.

3.48 Paragraph 8.16.1 (a) of the CUSC provides that a modification to the CUSC may be proposed by:

- (a) a CUSC Party, Citizens Advice, Citizens Advice Scotland, or by a Balancing and Settlement Code Party;
- (b) under paragraph 8.28.5, by the CUSC Modifications Panel;
- (c) a Relevant Transmission Licensee, in specified circumstances;
- (d) GEMA; or
- (e) NESO.

⁹⁹ The ACO objectives at the time of the 2020 Workgroup consideration were labelled (a) to (e), but these correspond with ACO (d) to (h) as set out within the Decision, and we use these (d) to (h) descriptors in this determination.

¹⁰⁰ [CUSC section 8](#).

- 3.49 A standard CUSC modification will typically follow the following stages as set out in the CUSC. References are to paragraphs in the CUSC:
- (a) Modification proposal (8.16.1).
 - (b) Modification proposal initial evaluation by the CUSC Panel. If the Panel considers it is required, it sets out the terms of reference, forms a workgroup (Workgroup¹⁰¹) and sets out a timetable (8.18 and 8.19).
 - (c) Workgroup stage to consider whether the proposal better meets the ACOs and consider alternatives (8.20). This includes a workgroup consultation. This stage can result in Workgroup Alternative CUSC Modification(s) (WACM) being considered alongside the original proposal(s).
 - (d) Code Administrator (NESO) consultation (8.22).
 - (e) Code Administrator presents draft modification report to CUSC Panel – Draft Modification Report (8.23.4).
 - (f) CUSC Panel Recommendation Vote (8.24.4.iii).
 - (g) CUSC Panel report to GEMA – Final Modification Report (FMR) (8.23.6).
 - (h) GEMA decision (8.23.7 and 8.23.10).
- 3.50 It is also possible for the CUSC Panel to request that GEMA grant ‘urgent’ status for a modification. If a modification has ‘urgent’ status, paragraph 8.24 of the CUSC allows for adjustments to the process to take account of the shorter timetable set by GEMA. These adjustments include not appointing a Workgroup, if the time does not allow for this, and different requirements for reaching a recommendation.

GEMA’s decision on a modification

- 3.51 Paragraph 8.23.7 of the CUSC sets out GEMA's power to approve a CUSC modification proposal or a WACM contained in a Final Modification Report. CUSC paragraph 8.23.7:

Subject to Paragraphs 8.23.9 to 8.23.13, in accordance with the ESO [¹⁰²] Licence, the Authority **may** approve the CUSC Modification Proposal or a Workgroup Alternative CUSC Modification(s) contained in the CUSC Modification Report (which shall then be an ‘Approved CUSC Modification’ until implemented).

¹⁰¹ As defined in the [CUSC section 8](#) it consists of at least 5 persons selected by the CUSC panel (paragraphs 8.20.3 to 8.20.5)

¹⁰² The Electricity System Operator (ESO).

If the Authority believes that neither the CUSC Modification Proposal (nor any Workgroup Alternative CUSC Modification(s)) would better facilitate achievement of the Applicable CUSC Objectives, then there **will be** no approval. In such a case, the Code Administrator will notify CUSC Parties and will raise the issue at the next CUSC Modifications Panel meeting. If the Authority believes that neither the CUSC Modification Proposal (nor any WACMs [¹⁰³] would better facilitate achievement of the ACOs, then there will be no approval. (emphasis added)

- 3.52 If GEMA determines that the CUSC FMR is such that it cannot properly form an opinion on the CUSC modification proposal and any WACM(s), it may issue a direction to the CUSC Panel:
- (a) specifying the additional steps that it requires in order to form such an opinion (these can include: drafting or amending existing drafting associated with the Proposal and/or any WACMs; revision, including revision to the timetable; analysis; or information);¹⁰⁴ and
 - (b) requiring the FMR to be revised and to be re-submitted (the option of requiring revision and re-submission is known as the 'send-back' option).¹⁰⁵
- 3.53 GEMA's options on receipt of a FMR are therefore:
- (a) to approve the proposal or one of the Workgroup alternatives;
 - (b) not to approve the proposal or any of the Workgroup alternatives; or
 - (c) to 'send-back' the FMR, for revision and re-submission.

¹⁰³ Workgroup Alternative CUSC Modification (WACM).

¹⁰⁴ CUSC section 8 paragraph 8.23.12 (a).

¹⁰⁵ CUSC section 8 paragraph 8.23.12 (b).

4. Background to CMP344 and the appeal

- 4.1 This section brings together the background to CMP344 (the Proposal) and the events leading to this appeal. It explains the existing treatment of approved IAE costs, the concerns that led to the Proposal, how the Proposal developed through the CUSC modification process and the Decision.

Existing treatment of IAE costs

Recovery of OFTO revenues through transmission charges

- 4.2 Under the offshore transmission regime, OFTOs are required to provide transmission services to NESO and are entitled to charge NESO for those services in accordance with the conditions of their OFTO licences. In particular, OFTOs receive revenue equivalent to their allowed revenue under their licences, including any approved adjustments to that revenue. The costs incurred by NESO in paying for those transmission services are recovered through TNUoS charges levied under the CUSC.¹⁰⁶
- 4.3 TNUoS charges are paid by both generators and consumers. Generator charges comprise a number of components, including Local Charges associated with particular transmission assets and Wider Locational Charges designed to reflect the costs that a generator imposes on the network including those that are driven by its choice of location. Generator charges alone are insufficient to recover the revenues paid to OFTOs and other transmission owners. The remaining revenue requirement is therefore recovered from consumers through the TDR.¹⁰⁷
- 4.4 For offshore generators, part of the TNUoS charge comprises offshore Local Charges associated with the transmission assets serving that generator. These charges are linked to the revenue recovered by the relevant OFTO and typically account for the majority of that OFTO's allowed revenue, with the remainder recovered from consumers through the TDR. As a result, changes to an OFTO's allowed revenue may affect the transmission charges payable by the offshore generator connected to those assets.¹⁰⁸
- 4.5 As explained in paragraphs 2.7 and 2.13, OFTO revenues are generally fixed for the duration of the licence term once an OFTO acquires offshore transmission assets. However, the OFTO licence permits adjustments to the TRS where specified events arise after the licence has been granted and those events result

¹⁰⁶ NoA, paragraphs 26–28.

¹⁰⁷ GEMA Response, paragraph 13(7); Teach-in slides 19–20.

¹⁰⁸ NoA, paragraphs 38–56; Teach-in slide 21.

in material increases or decreases in the OFTO's costs or revenues. These adjustments are known as IAEs.¹⁰⁹

- 4.6 The OFTO licence provides for three categories of IAE: (a) force majeure events or circumstances beyond the reasonable control of the OFTO (Limb A); (b) certain unexpected amendments to the STC that were not allowed for when the relevant revenue was determined (Limb B); and (c) other events or circumstances which GEMA determines should be treated as an IAE (Limb C). As explained in paragraphs 2.13 to 2.17, the Ofgem IAE Policy describes the purpose of the regime as providing protection against certain unexpected costs arising from low-probability but high-impact events.¹¹⁰
- 4.7 Unlike the first two categories, which are expressly defined in the licence, the third category requires GEMA to exercise its discretion. For Limb C Ofgem applies a policy framework informed by its statutory duties. In particular, it considers whether the relevant risk was foreseeable, whether there are exceptional circumstances affecting foreseeability and the extent to which the OFTO was able to manage or mitigate the relevant risk through measures such as insurance, contractual protections or operating practices.¹¹¹
- 4.8 The approach to IAEs is not intended to compensate OFTOs for ordinary operational risks, which are expected to be managed through the OFTO's normal revenues and commercial arrangements. The Ofgem IAE Policy recognises that OFTOs acquire transmission assets on the basis that they assume risks arising from damage or defects that could not be identified through due diligence, subject to the protections provided by the IAE regime.
- 4.9 The Ofgem IAE Policy states that the offshore transmission regime was not designed to insulate OFTOs from all such risks. One example of a category of risk considered in the policy is latent defects, which the policy describes as generally foreseeable.¹¹²
- 4.10 The Ofgem IAE Policy nevertheless recognises that certain latent defect risks may become effectively or practically uninsurable. In those circumstances, Ofgem has maintained a mechanism through which certain costs associated with uninsurable latent defects may be recovered through the IAE regime, subject to specified conditions and deductibles.¹¹³
- 4.11 Where Ofgem approves a claim for the costs of an event to be treated as an IAE, the resulting adjustment to the OFTO's revenue is recovered through the same charging framework. NESO initially funds the adjustment through the TDR. When

¹⁰⁹ NoA, paragraph 14; [GEMA Response](#), paragraph 13(5).

¹¹⁰ NoA, paragraph 14, paragraph 24 ([Ofgem IAE Policy](#) paragraph 1.4); [GEMA Response](#), paragraph 13(5).

¹¹¹ NoA, paragraph 24 ([Ofgem IAE Policy](#) paragraph 1.6); [GEMA Response](#), paragraph 13(6).

¹¹² NoA, paragraph 24 ([Ofgem IAE Policy](#) paragraph 1.7).

¹¹³ NoA, paragraph 24 ([Ofgem IAE Policy](#) paragraph 1.8); NoA, paragraph 25(a)-(c).

the relevant offshore generator's TNUoS charges are subsequently reset, NESO increases the relevant offshore Local Charges paid by that generator and reduces the TDR paid by consumers. Under the existing arrangements, approved IAE costs are initially funded through the TDR but are subsequently recovered, in whole or in part, from the relevant offshore generator through offshore Local Charges.¹¹⁴

The Proposal

Origins of CMP344

- 4.12 As described above, where Ofgem approves a claim for the costs of an IAE, those costs are ultimately recovered through transmission charging arrangements. Under the existing arrangements, offshore generators connected to the relevant offshore transmission assets may bear a substantial proportion of approved IAE costs through offshore Local Charges, with the remaining costs recovered from consumers through the TDR.¹¹⁵
- 4.13 Some offshore generators raised concerns regarding the recovery of approved IAE related costs within the charging framework. In particular, they expressed concerns that offshore generators could be required to bear a substantial proportion of approved IAE costs through offshore Local Charges, including where those costs arose from events that the generator considered to be outside its control, rather than being recovered from demand users through the TDR. These concerns led to the development of CMP344. Proponents of the Proposal argued that approved IAE costs should be recovered through the TDR rather than through offshore Local Charges and that offshore generators were treated differently from certain onshore generators in relation to comparable transmission costs.¹¹⁶

The Proposal

- 4.14 CMP344 was proposed by the RWE Group¹¹⁷ on 21 May 2020. The Proposal was entitled 'Clarification of Transmission Licensee revenue recovery and the treatment of revenue adjustments in the Charging Methodology'. At the time the Proposal was raised, the text of the proposed modification was undeveloped, but its purpose was to change the recovery of certain revenue adjustments associated with unforeseen and unforeseeable events, including IAEs.¹¹⁸

¹¹⁴ [GEMA Response](#), paragraph 13(9).

¹¹⁵ [GEMA Response](#), paragraph 13(9).

¹¹⁶ [NoA](#), paragraph 58; James Stone, first witness statement, paragraphs 67–68.

¹¹⁷ RWE Renewables is, in effect, the Proposer of CMP344. The Proposal was originally raised by an employee of RWE Supply & Trading GmbH (another member of the RWE Group), but the conduct of the Proposal was taken over by RWE Renewables, from around May 2021 ([NoA](#), paragraph 10).

¹¹⁸ [NoA](#), paragraph 58; James Stone, first witness statement, paragraph 66.

- 4.15 In its original form, CMP344 sought to: (i) clarify that the allowed revenue of onshore transmission owners is fixed for the duration of each price control period; (ii) clarify that the TRS of OFTOs is fixed at the point of asset transfer; and (iii) amend the CUSC so that revenue adjustments arising from unforeseen or unforeseeable events, including IAEs, would be recovered from demand users rather than from the offshore generator connected to the relevant transmission assets.¹¹⁹
- 4.16 The CMP344 third FMR submitted to GEMA on 9 July 2025 was limited to the treatment of IAE-related costs and no longer applied to other categories of OFTO pass-through items.¹²⁰ The Proposal nevertheless retained the proposed clarifications regarding the point at which TO allowed revenues and OFTO TRS revenues are fixed.¹²¹ Under the Proposal, approved IAE costs would no longer be recovered from the relevant offshore generator through offshore Local Charges and would instead, be recovered through the TDR. The Proposal would apply to approved IAEs affecting both existing and future OFTOs, including approved IAEs that had not yet been recovered from the relevant offshore generator.¹²²
- 4.17 The CUSC modification process is described in paragraphs 3.49 to 3.53. In summary, following submission of a modification proposal, the CUSC Panel may establish a Workgroup to evaluate the proposal and any alternatives against the ACOs and to consult on them. The Panel then considers the Workgroup's conclusions and makes a recommendation to GEMA in an FMR. GEMA may approve the proposal or a Workgroup alternative, decline to approve it, or send the FMR back for further work.¹²³

The CMP344 modification process

- 4.18 Following the initial submission of CMP344 in May 2020, a Workgroup was established to assist the CUSC Panel in evaluating the Proposal against the ACOs. The CMP344 Workgroup met during 2020, consulted on the Proposal and assessed it against the ACOs.¹²⁴ A majority of CMP344 Workgroup members concluded that the Proposal better facilitated the ACOs than the pre-existing arrangements against which the Proposal was assessed (the Baseline) arrangements.¹²⁵
- 4.19 On 8 January 2021, the CUSC Panel considered CMP344 and voted on whether the Proposal better facilitated the ACOs. By a majority of 7:2, the Panel

¹¹⁹ James Stone, first witness statement, paragraph 67; [First FMR](#), pp 6–7.

¹²⁰ [NoA](#), paragraph 67; James Stone, first witness statement, paragraph 74.

¹²¹ James Stone, first witness statement, paragraph 68.

¹²² James Stone, first witness statement, paragraphs 68 and 86(a).

¹²³ [CUSC section 8](#).

¹²⁴ [NoA](#), paragraphs 58–60; James Stone, first witness statement, paragraph 69.

¹²⁵ [NoA](#), paragraph 61.

recommended that the Proposal should be implemented and submitted the first FMR to GEMA on 12 January 2021.¹²⁶

- 4.20 On 5 May 2021, GEMA exercised its power to send the Proposal back to the CUSC Panel for further consideration. GEMA concluded that it was unable to form a view on the Proposal on the basis of the information before it, including because it was unclear which OFTO costs the Proposal was intended to cover and because insufficient quantitative evidence had been provided regarding the impacts on network users.¹²⁷
- 4.21 In progressing the Proposal, RWE commissioned external economic analysis from Cornwall Insight in order to assess the potential impacts of CMP344 on system users, including consumers.¹²⁸ The analysis examined how IAE-related risks might affect future CfD bids and consumer outcomes.¹²⁹ The analysis sought to demonstrate long run benefits to consumers from CMP344 through a reduction in strike prices.
- 4.22 Following further Workgroup consideration, including the Cornwall Insight analysis, and consideration by the CUSC Panel, the Proposal was revised and a second FMR was submitted to GEMA on 8 February 2023. The revised Proposal was limited to IAE-related costs and was accompanied by further analysis of potential impacts on consumers and generators.¹³⁰
- 4.23 On 12 February 2024, GEMA sent the Proposal back for a second time. While GEMA considered that some of the issues identified in the first send-back had been addressed, it concluded that further clarification and evidence were required, including in relation to the treatment of IAEs under the existing charging arrangements and the assessment of impacts on generators with existing CfDs.¹³¹
- 4.24 Following a further Workgroup phase and additional analysis from Cornwall Insight, and consideration by the CUSC Panel, a third FMR was submitted to GEMA on 9 July 2025. The third FMR provided further clarification regarding the treatment of IAEs, including comparisons between offshore and onshore charging arrangements and the potential implications of IAE-related risks for future CfD bids.¹³²

¹²⁶ NoA, paragraph 64; James Stone, first witness statement, paragraphs 70–71.

¹²⁷ NoA, paragraph 65; James Stone, first witness statement, paragraph 72.

¹²⁸ The Cornwall Insight report is available as Annex 11 by downloading the [third FMR and Annexes package](#) from the NESO website.

¹²⁹ Thomas Steward, first witness statement, paragraphs 46–47. The analysis modelled how rational generators would reflect expected future costs from IAEs in their CfD bids and explored the extent to which different assumptions about the cost and incidence of future IAE events will impact on strike prices. It also noted that generators would be likely to also include a premium for bearing such risks but did not model this. Further updates were later commissioned after the second send-back, including analysis of the extent to which windfall effects might arise and their relationship to consumer outcomes.

¹³⁰ NoA, paragraphs 67–69; James Stone, first witness statement, paragraphs 73–78.

¹³¹ NoA, paragraph 70; James Stone, first witness statement, paragraphs 80–81.

¹³² NoA, paragraphs 72–75; James Stone, first witness statement, paragraphs 82–84.

- 4.25 The third FMR also developed the comparison between the treatment of unexpected costs under the offshore IAE arrangements and under onshore transmission arrangements, including the subsea cable reopener applicable to the Shetland High-Voltage Direct Current Link. That reopener permits Scottish Hydro Electric Transmission plc (SHETL) to seek an adjustment to its allowed revenue for efficient costs associated with unexpected subsea cable faults or mitigating the risk of such faults.¹³³

The Decision

- 4.26 On 1 May 2026, GEMA published its Decision to reject CMP344.¹³⁴ GEMA concluded that implementation of the Proposal would not better facilitate achievement of the relevant ACOs and that approval of the Proposal would not be consistent with its principal objective and statutory duties.¹³⁵
- 4.27 GEMA concluded that CMP344 would have a negative impact on ACO (d) (facilitating effective competition), ACO (e) (reflecting costs incurred) and ACO (h) (promoting efficiency in the implementation and administration of the charging methodology). GEMA considered that the Proposal would have a neutral impact on the remaining ACOs.¹³⁶
- 4.28 According to the Decision, GEMA considered the FMRs, including the conclusions and votes of the CMP344 Workgroups and the recommendations and votes of the CUSC Panel, together with industry consultation responses, analysis prepared by Cornwall Insight, the relevant licence conditions, the Ofgem IAE Policy, and the relevant provisions of the CUSC.¹³⁷
- 4.29 The Decision assessed CMP344 against the relevant ACOs before considering whether approval would be consistent with GEMA's principal objective and statutory duties. GEMA considered offshore generators are the sole users and beneficiaries of the relevant offshore transmission assets and that the existing arrangements better targeted recovery of IAE-related costs on the party most likely to drive those costs and respond to the relevant cost signals. GEMA considered that offshore generators were better placed than consumers to influence, manage or mitigate at least some IAE-related risks through decisions relating to the design, construction and procurement of offshore transmission assets. GEMA therefore

¹³³ [Third FMR](#), pp 18-19.

¹³⁴ We refer to GEMA, although the Decision was issued by Ofgem. As explained in footnote 1 of [The Decision](#), the decision was made by or on behalf of GEMA, and references to GEMA and Ofgem were used interchangeably in the document.

¹³⁵ [The Decision](#), pp 12–13 and 28–29; James Stone, first witness statement, paragraphs 87 and 105–108.

¹³⁶ [The Decision](#), p 13; James Stone, first witness statement, paragraph 87.

¹³⁷ [The Decision](#), p 12; [GEMA Response](#), paragraph 23; James Stone, first witness statement, paragraph 85.

concluded that the existing arrangements were more reflective of costs incurred and better facilitated effective competition.¹³⁸

- 4.30 GEMA did not accept that offshore and onshore generators were in an equivalent position for the purposes of the charging methodology. In particular, GEMA considered that offshore transmission assets are constructed for the sole use of a particular offshore generator, whereas the comparators relied upon by the Proposer related to assets or projects with a broader system function. GEMA therefore concluded that the different treatment of offshore and onshore arrangements was justified.¹³⁹
- 4.31 GEMA also considered the potential effects of CMP344 on competition in future CfD allocation rounds. It was not persuaded that removal of IAE-related costs would materially improve competition or significantly reduce strike prices. GEMA further considered that the Proposal could create a distortion between existing and future generators because existing CfD-supported projects may already have incorporated IAE-related risks into their strike prices.¹⁴⁰
- 4.32 GEMA also concluded that CMP344 would not better facilitate efficiency in the implementation and administration of the charging methodology. While it recognised that a single-stage recovery mechanism could be simpler in some respects, it considered that the Proposal would introduce a fundamentally different cost recovery framework rather than merely clarify the existing arrangements.¹⁴¹
- 4.33 Finally, GEMA concluded that approval of CMP344 would not be consistent with its principal objective and statutory duties. In particular, GEMA expressed concerns regarding the assumptions underpinning the Cornwall Insight analysis and was not persuaded that the analysis demonstrated the consumer benefits claimed by the Proposer. GEMA also considered that consumers could potentially bear both IAE-related costs and risk premia already reflected in existing CfD strike prices.¹⁴²

¹³⁸ [The Decision](#), pp 15–18 and 22–25; James Stone, first witness statement, paragraphs 88–96.

¹³⁹ [The Decision](#), pp 17–18 and 20–21; James Stone, first witness statement, paragraphs 97–98.

¹⁴⁰ [The Decision](#), pp 18–21 and 28–29; James Stone, first witness statement, paragraphs 99–103 and 108.

¹⁴¹ [The Decision](#), pp 26–27; James Stone, first witness statement, paragraph 104.

¹⁴² [The Decision](#), pp 28–29; James Stone, first witness statement, paragraphs 107–108.

5. Ground 1: Appearance of bias on the basis of predetermination and relationship with one of the stakeholders

Introduction

- 5.1 This section addresses the Appellants' submissions and GEMA's response in respect of Ground 1 of the NoA, by which the Appellants argue that the Decision was vitiated by an appearance of bias, arising from predetermination and/or the connection between the decision-maker, Mr James Stone, and one of the relevant parties, NESO.
- 5.2 This section is structured as follows:
- (a) the relevant legal framework;
 - (b) a summary of the key submissions made by the Parties in the NoA, the GEMA Response, the Appellants' Reply and at the Hearing; and
 - (c) our assessment and determination of this ground.

The law on apparent bias/predetermination

- 5.3 The Appellants' allegations are that the Decision is vitiated by apparent bias and therefore wrong in law. The questions to be determined are therefore: (i) whether a finding of apparent bias or apparent predetermination constitutes an error of law capable of rendering the decision wrong; and (ii) whether on examining the full circumstances, a fair minded and informed observer would conclude that there is a real possibility that Mr Stone was biased, predetermined the issue, or approached the issue with a closed mind.

Wrong in law

- 5.4 The concept of 'wrong in law' includes the full range of issues which would otherwise be the subject of an application to the High Court for judicial review.¹⁴³ The question of whether a decision is vitiated by apparent bias or pre-determination is a question of law, requiring application of the relevant legal test to the facts.¹⁴⁴ It follows that a finding of apparent bias or predetermination is an error of law for which the CMA Group may find GEMA's decision to be wrong.

¹⁴³ This is set out in paragraphs 3.24 to 3.34 of this determination.

¹⁴⁴ *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781 (*Gillies v Secretary of State*), paragraph 6.

Apparent bias/pre-determination

- 5.5 The court in *Porter v Magill*¹⁴⁵ established the two-stage legal test for apparent bias: first identify the circumstances which suggest that the decision-maker was biased or predetermined the issue and second, apply the fair minded and informed observer test, namely whether those circumstances would lead a fair minded and informed observer to conclude that there is a real possibility that the decision-maker was biased.¹⁴⁶ The same objective approach applies to apparent predetermination, where the question is whether the circumstances would lead the fair minded and informed observer to conclude there was a real possibility that the decision-maker approached the issue with a closed mind.¹⁴⁷
- 5.6 The first stage of the test requires us to have an intense focus on the facts, identifying the facts with precision.¹⁴⁸ This requires us to consider all the circumstances as they appear from the material before us – we are therefore not restricted to the circumstances known by the hypothetical observer at the time of the original decision.¹⁴⁹
- 5.7 The second stage of the test is objective and is not concerned with whether the decision-maker was in fact biased. The ‘fair minded and informed observer’ test has been elaborated on in *Gillies v Secretary of State*:

The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed... that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant.¹⁵⁰

- 5.8 The Court in *Helow v SSHD*,¹⁵¹ explained the ‘informed’ observer:

before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that

¹⁴⁵ [Porter v Magill \[2001\] UKHL 67](#) (*Porter v Magill*), recently confirmed in [Pfizer](#), paragraph 174.

¹⁴⁶ [Porter v Magill](#), paragraph 103.

¹⁴⁷ [Miller v Health Service Commission for England \[2018\] EWCA 144](#) (*Miller v Health Service Commission*), paragraph 62; [Pfizer](#), paragraph 174.

¹⁴⁸ [R \(on the application of Condon\) v National Assembly for Wales \[2006\] EWCA 1573](#) (*Condon v National Assembly*), paragraph 26; [R \(Nobel Oil E&P North Sea Ltd\) v Oil and Gas Authority \[2025\] EWHC 2139 \(Admin\)](#), (*Nobel Oil*), paragraph 68.

¹⁴⁹ [Condon, v National Assembly](#), paragraph 50.

¹⁵⁰ [Gillies v Secretary of State](#), paragraph 17.

¹⁵¹ [Helow v Secretary of State for the Home Department \[2008\] UKHL 62](#), (*Helow v SSHD*).

are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.¹⁵²

- 5.9 Therefore, the wider factual context is critical – it is necessary to identify the facts on which the suggestion of bias/predetermination is based and thereafter consider the wider factual context.¹⁵³ Apparent bias or predetermination therefore cannot be inferred from isolated features of the process and all the relevant facts must be considered before deciding whether there is a real possibility of apparent bias or predetermination.¹⁵⁴

Pecuniary and non-pecuniary interests

- 5.10 It is useful to distinguish between cases where a decision-maker is effectively judging their own cause and cases which are assessed under the ordinary apparent bias test. In *Pinochet (No 2)*,¹⁵⁵ the House of Lords reaffirmed the rule that no person should be a ‘judge in their own cause’. In a judicial context, automatic disqualification from hearing a case applies where a judge has a direct pecuniary and proprietary interests, and may be extended to a limited category of non-pecuniary interests: the latter category of automatic disqualification applies where the decision-maker has a direct personal interest in the outcome, is effectively a party to the cause, or has an equivalent non-pecuniary interest or connection such that they are, in substance, judging their own cause (for instance such closeness or connection with the particular cause/interest that is the subject matter of the case). However, this is classically applied to judicial and quasi-judicial contexts so, outside that category, the question is generally assessed through the ordinary two stage apparent bias test set out above.
- 5.11 In applying the test, we set out a number of factors which may inform the objective test in *Porter v Magill*.

Predisposition

- 5.12 In applying the fair-minded and informed observer test, the distinction between legitimate predisposition, which is consistent with a preparedness to consider and weigh relevant factors in reaching a final conclusion, and unlawful

¹⁵² *Helow v SSHD*, paragraph 3.

¹⁵³ *Condron v National Assembly*, paragraph 57.

¹⁵⁴ *Helow v SSHD*, paragraph 2; *R (on the Application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin), (*British Songwriters*), paragraph 280.

¹⁵⁵ *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 (*Pinochet No 2*).

predetermination, which involves a mind closed to that exercise is considered.¹⁵⁶ Unlawful predetermination is objectionable because it results in a decision-maker not being open to new arguments or having already made up their mind.¹⁵⁷

- 5.13 The nature and strength of any view previously expressed by the decision-maker is relevant in making that determination. A prior view does not itself demonstrate that the decision-maker has ceased to be open-minded. In *Nobel Oil*, the High Court emphasised that an open mind does not require an empty mind. A regulator may properly bring existing expertise, regulatory strategy and preliminary views to a decision. The essential question is whether the decision-maker remained willing to consider conscientiously the material before them.¹⁵⁸
- 5.14 By contrast, an appearance of predetermination may arise where the decision-maker has previously expressed an unqualified or settled view on a central issue that remains live for determination. The case law indicates that there will be concerns where earlier views of a decision-maker: show a decision-maker was not genuinely open to the possibility that contrary views might have value;¹⁵⁹ are expressed in simple terms without any qualification;¹⁶⁰ or could be described as being unusually trenchant, extreme or in partisan terms such that there is a real danger the views might unconsciously influence the decision-maker's assessment of the disputes in the case.¹⁶¹ The language used where a prior view has been expressed on a matter and the circumstances in which the view was expressed are therefore all potentially relevant factors.
- 5.15 The observer also considers the decision-maker's precise role within the relevant process and the case law indicates there is a spectrum of involvement. In *Compton*,¹⁶² although relating to a report prepared by an adviser married to the decision-maker, the High Court treated the report which summarised consultation responses as the neutral provision of information, because it made no strong recommendation on the decision to be taken.¹⁶³ This was more recently revisited in *Office for Students*,¹⁶⁴ where the High Court revisited the principles for apparent bias and emphasised the need to examine the precise-decision making process and the various roles and responsibilities within that process.¹⁶⁵

¹⁵⁶ [Condron v National Assembly](#), paragraph 43.

¹⁵⁷ *R (Lewis) v Redcar and Cleveland BC* [2008] EWCA Civ 746, (*Lewis v Redcar*), paragraphs 106–107.

¹⁵⁸ *Nobel Oil*, paragraphs 70–71.

¹⁵⁹ *Downey v Court of Appeal* [2022] NICA 67 (Downey), paragraph 69.

¹⁶⁰ *Georgiou v London Borough of Enfield* [2004] EWHC 779 (*Georgiou*), paragraph 32.

¹⁶¹ *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (*Locabail*), paragraphs 25, 85–89.

¹⁶² *R (Compton) v Wiltshire Primary Care Trust* [2009] EWHC 1824 (Admin) (*Compton*).

¹⁶³ *Compton*, paragraphs 90–96, though the Court noted that in case law there is no distinction between the application of the test because it was an adviser as opposed to the decision-maker; bias of advisers is capable of vitiating decisions when there is a real possibility that it has adversely infected the views of the decision-maker.

¹⁶⁴ *R (on the application of the University of Sussex) v The Office for Students v The Free Speech Union Ltd* [2026] EWHC 984 (Admin) (*Office for Students*).

¹⁶⁵ *Office for Students*, paragraph 362.

Prior involvement

- 5.16 The nature of any interest or association of the decision-maker is material to the objective appearance of impartiality. In *BAA v Competition Commission*,¹⁶⁶ the Court of Appeal considered that a Competition Commission inquiry group member's former advisory relationship became material when the former client bid for an airport whose divestment the inquiry group was supervising, notifying the inquiry group member of the same. In *Kelton v Wiltshire*,¹⁶⁷ the High Court found an apparent conflict where a councillor had a paid role with an organisation that had committed resources and expertise to supporting the planning development under consideration.¹⁶⁸
- 5.17 Prior involvement by the decision-maker in the matter under consideration is more likely to be material where the decision-maker previously performed a direct and substantive role in relation to the policy, issue or proceedings later placed before them. In *Ortona*,¹⁶⁹ the decision-maker had previously been responsible for formulating and implementing policies central to the appeal he was later appointed to determine.¹⁷⁰ In *De Cubber*,¹⁷¹ the European Court of Human Rights considered prior investigative functions undertaken in the same criminal proceedings gave rise to legitimate doubts in relation to impartiality, though we note this relates to a judicial context.¹⁷²
- 5.18 In *Locabail*, the Court of Appeal explained that previous employment, professional associations and earlier statements will not ordinarily establish apparent bias. It noted each case is dependent on the particular facts, stating:
- Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history [...] or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers. [...]) By contrast, a real danger of bias might well be thought to arise [...] if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind [...] or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere

¹⁶⁶ *BAA Limited v Competition Commission* [2010] EWCA 1097 (*BAA v Competition Commission*)

¹⁶⁷ *Kelton v Wiltshire Council* [2015] EWHC 2853 (Admin) (*Kelton v Wiltshire*)

¹⁶⁸ *Kelton v Wiltshire*, paragraph 50.

¹⁶⁹ *R (Ortona Ltd) v Secretary of State for Communities and Local Government* [2009] EWCA 863 (*Ortona*)

¹⁷⁰ *Ortona*, paragraph 34.

¹⁷¹ *De Cubber v Belgium* (1985) 7 EHRR 236 (*De Cubber*)

¹⁷² *De Cubber*, paragraph 29.

fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. [...] The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.¹⁷³

- 5.19 We take from this that the significance of earlier involvement may be diminished where there has been a material passage of time. Similarly, it may also be diminished where the proposal or issue has subsequently developed, further consultation or investigation has taken place, additional evidence has been obtained, or the later decision has been reached through a broader and more objective process. In *Nobel Oil*, the High Court also treated the intervening decision-making process as material. The lengthy consideration of information and submissions, together with extensive internal scrutiny and the decision-maker's continuing review of the material, weighed against an inference that the outcome had been predetermined.¹⁷⁴
- 5.20 The considerations set out above are not an exhaustive checklist. They are factors that may inform the application of the objective test in *Porter v Magill*. Their weight will depend on the particular circumstances, and they must be considered in the context of the decision-making process as a whole.

Waiver

- 5.21 In certain circumstances where apparent bias or predetermination is alleged a further issue may arise, namely, whether or not the party alleging the bias or predetermination waived their right to object. The expression 'waiver' describes, a 'voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise'.¹⁷⁵ In order for a party to have waived the right to object on the ground of apparent bias, it should therefore be: (i) aware of all the material facts; (ii) aware of the consequences of the choice open to them; and (iii) given a fair opportunity to reach an unpressured decision.¹⁷⁶ All the material facts means all the essential facts (rather than a more expansive approach of every possible detail), but will include those facts which give rise to the possible conflict of interest.¹⁷⁷ Objections are expected to be made with reasonable promptness and fair opportunity to object does not mean waiting

¹⁷³ *Locabail*, paragraph 25.

¹⁷⁴ *Nobel Oil*, paragraph 74.

¹⁷⁵ *Millar v Dickson* [2002] 1 WLR 1615 (PC), (*Millar v Dickson*), paragraph 31.

¹⁷⁶ *Smith v Kvaerner Cementation Foundations Ltd (Bar Council intervening)* [2006] EWCA 242 (*Smith v Kvaerner*), paragraph 29.

¹⁷⁷ *Jones v DAS Legal Expenses Insurance Limited* [2003] EWCA Civ 1071 (*Jones v DAS*), paragraph 36. See also *BAA v Competition Commission*, where the Court concluded that BAA was entitled to know the essential facts, relating to a panel member's involvement and chronology, before deciding whether to waive.

for the outcome of the proceedings.¹⁷⁸ Finally, waiver must be clear and unequivocal.¹⁷⁹ If we conclude there is apparent bias or predetermination, we will consider whether the Appellants have waived their right to object to the Decision on that basis.

Article 6 of the European Convention of Human Rights

5.22 Finally, the Appellants also alleged that the Decision was in breach of Article 6 of the European Convention of Human Rights (ECHR) because of apparent bias, assessed under the test set out above. A breach of Article 6 ECHR, assessed under the test set out above, would commonly be fixed by a remittal to an impartial decision-maker;¹⁸⁰ it follows that, if the CMA concluded there was apparent bias or predetermination, remittal to GEMA on the basis that the decision is taken by an impartial person would fix the breach. Alternatively, the Appellants argued that to remedy this a full reconsideration of the merits of the Decision should be conducted, which could be most efficiently achieved by the CMA adopting an expanded jurisdiction beyond that set out above to a full merits jurisdiction, instead of the CMA remitting the matter to the original decision-maker to reconsider.¹⁸¹

The Appellants' submissions

5.23 In their NoA, the Appellants submitted that the Decision was wrong in law because it was vitiated (that is, the decision could not stand) by apparent bias and/or apparent predetermination on the part of the decision-maker. They submitted that the Decision was taken by Mr Stone, who had represented National Grid Electricity System Operator Limited (NGESO, the predecessor of NESO, but for simplicity, we follow the NoA and refer to NESO throughout), at earlier stages of the CMP344 process and had consistently expressed the view that the Baseline position should be maintained.¹⁸²

5.24 Mr Stone was a member of the CMP344 Workgroup representing NESO during 2020 and 2021 as part of his employment by NESO.¹⁸³ Mr Stone, at a later stage of the process became the ultimate decision-maker for GEMA in relation to CMP344 and went on to take the Decision in 2026.¹⁸⁴

5.25 In support, the Appellants relied in particular on the following:

¹⁷⁸ *Smith v Kvaerner*, paragraph 29; *BAA v Competition Commission*, paragraph 39.

¹⁷⁹ *Locabail*, paragraph 15.

¹⁸⁰ *Kingsley v United Kingdom* [2001] 33 EHRR 13 (*Kingsley*), paragraph 58.

¹⁸¹ *NoA*, paragraph 98.

¹⁸² *NoA*, paragraph 63 and 94.

¹⁸³ Following initial submission of a code modification proposal, a Workgroup is established to assess the proposal against the ACOs, prior to the CUSC Panel's consideration (as set out in *CUSC section 8*). Further detail is set out in paragraphs 3.47 to 3.53 of this determination.

¹⁸⁴ *NoA*, paragraphs 94 and 97.

- (a) in November 2020, the only negative response to CMP344 by a Workgroup member was from Mr Stone on behalf of NESO;
- (b) on 24 November 2020, he was the only member of the Workgroup that voted against CMP344; and
- (c) the only negative response to the Code Administrator Consultation in December 2020 was the response submitted by him on behalf of NESO.¹⁸⁵

5.26 The Appellants submitted that these matters showed that Mr Stone had previously formed a position which he maintained notwithstanding the supporting views expressed by others.¹⁸⁶ The Appellants characterised his contributions at the Workgroup stage as three consistent and considered positions, and submitted that he later determined the same question that he had previously answered.¹⁸⁷ In their submission, his earlier reasoning was directly transferable to the Decision.¹⁸⁸ The Appellants submitted that, although Mr Stone was acting as NESO's representative while working for NESO, it could be inferred that the views and opinions were ones that he had reached on NESO's behalf and, in any event, that he agreed with them, before later determining CMP344 as GEMA's decision-maker.¹⁸⁹ They also relied on the fact that GEMA does not express a view during the code modification process and submitted that it was therefore inappropriate for Mr Stone subsequently to take the Decision.¹⁹⁰

5.27 The Appellants also relied on what they characterised as the tension between Mr Stone's approach in CMP344 and the reasoning adopted in CMP463.¹⁹¹ They submitted that, in CMP463, Mr Stone accepted that significant and unforeseen changes in TNUoS charges could be detrimental to competition and that this reasoning is inconsistent with his approach to unforeseeable costs in CMP344.¹⁹²

5.28 The Appellants further submitted that Mr Stone's prior role was relevant because he had previously advanced NESO's position on the precise policy issue that later fell to be determined by him as GEMA decision-maker. They relied on case law, including *Ortona*, concerning prior involvement in the same policy area and contended that NESO's position formed part of the material that later fell to be evaluated in the decision-making process.¹⁹³ The Appellants submitted that the

¹⁸⁵ NoA, paragraph 97.

¹⁸⁶ NoA, paragraph 97.

¹⁸⁷ Transcript of the Hearing on 9 September 2026, pp 14-15.

¹⁸⁸ Appellants' Reply, paragraph 2.

¹⁸⁹ Appellants' Reply, paragraph 2.

¹⁹⁰ Transcript of the Hearing on 9 September 2026, p 15.

¹⁹¹ CMP463, GEMA's decision approving a proposal to freeze specific onshore expansion factors. Further discussion in relation to CMP463 is set out in Section 6 of this determination.

¹⁹² NoA, paragraph 97(e).

¹⁹³ NoA, paragraph 97(f).

prior involvement and view create a perception of risk of unconscious bias, or not approaching the matter with an open mind.¹⁹⁴

- 5.29 The Appellants made additional submissions in relation to their alternative argument on Article 6 ECHR and in response to the GEMA's alternative argument on waiver. For the reasons set out at paragraphs 5.78 to 5.79, this determination does not need to go into those aspects in detail.

GEMA's submissions

- 5.30 GEMA submitted that Ground 1 should be dismissed. It submitted that the Appellants had not identified circumstances capable of leading the fair-minded and informed observer to conclude that there was a real possibility of bias or predetermination. In GEMA's submission, the Appellants' complaint rested on the fact that, five years before the Decision, Mr Stone had expressed scepticism about an earlier version of CMP344 while employed by NESO and acting as its representative in the Workgroup process. GEMA submitted that those circumstances fell far short of establishing apparent bias or predetermination.¹⁹⁵
- 5.31 In relation to the applicable test, GEMA submitted that the observer is neither complacent nor unduly sensitive, nor suspicious so would understand the decision-making process, including its safeguards and internal input and review.¹⁹⁶
- 5.32 GEMA further submitted that the courts recognise the context in which administrative decision-makers operate, including that they may legitimately hold and express views on matters that later fall for decision.¹⁹⁷ It relied on *Nobel Oil* as an example in a regulatory context, including the Court's consideration of the passage of time and the further work undertaken between an earlier expression of support and the Oil and Gas Authority's final decision.¹⁹⁸ GEMA submitted that an open mind does not require an empty mind.¹⁹⁹ The relevant question, according to GEMA, was therefore whether there was a possibility Mr Stone approached CMP344 with a closed mind, not whether he had previously expressed a view or ultimately reached a consistent conclusion.²⁰⁰
- 5.33 In relation to the application of the fair-minded and informed observer test, GEMA submitted that the observer would have in mind the following factors:

¹⁹⁴ Transcript of the Hearing on 9 September 2026, p 40 and p 43.

¹⁹⁵ [GEMA Response](#), paragraphs 10(1) and 41.

¹⁹⁶ Transcript of the Hearing on 9 September 2026, p 31.

¹⁹⁷ [GEMA Response](#), paragraph 43.

¹⁹⁸ GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 15.

¹⁹⁹ Transcript of the Hearing on 9 September 2026, p 24.

²⁰⁰ Transcript of the Hearing on 9 September 2026, p 31.

- (a) the passage of time between Mr Stone's CMP344 workgroup involvement and the Decision, which GEMA submitted totalled five years;²⁰¹
- (b) the involvement was the Workgroup stage which was the earliest stages in evolution of the proposed modification and Mr Stone was not on the CUSC Panel;²⁰²
- (c) Mr Stone's involvement was on behalf of NESO and to convey NESO's position, with NESO holding no commercial interest;²⁰³
- (d) the views expressed by Mr Stone were based on the evidence received at the time, with those views being kept under review and the views expressed were balanced and provisional;²⁰⁴
- (e) Mr Stone was required to act in accordance with the Civil Service Code; GEMA decision-makers do not act in a vacuum and receive input from internal experts and oversight from senior management;²⁰⁵
- (f) Mr Stone actively reviewed evidence, including seeking clarification from Cornwall Insight;²⁰⁶ and
- (g) no one for the Appellants actively objected to Mr Stone's role.²⁰⁷

5.34 GEMA submitted that the Decision also considered evidence in detail and did not simply adopt the position previously put forward by NESO.²⁰⁸

5.35 In relation to the Appellants' reliance on the *Ortona* judgment, GEMA submitted that the circumstances were distinguishable from *Ortona*. Mr Stone was not determining a statutory appeal and had not been responsible for formulating or applying the policy that later fell for determination.²⁰⁹ GEMA further submitted that, notwithstanding the Appellants' arguments concerning *Lewis v Redcar*, the relevant principles were capable of applying in a regulatory context, as recognised in *Office for Students*.²¹⁰ In their reply, the Appellants had submitted that GEMA's reliance on *Lewis v Redcar* was misplaced because that case concerned elected councillors.²¹¹

5.36 In response to the Appellants' reliance on CMP463, GEMA submitted that code modification decisions are fact-specific and may involve materially different

²⁰¹ [GEMA Response](#), paragraph 52.

²⁰² [GEMA Response](#), paragraph 53.

²⁰³ [GEMA Response](#), paragraph 54.

²⁰⁴ [GEMA Response](#), paragraph 55; GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 15.

²⁰⁵ [GEMA Response](#), paragraphs 56–57; Transcript of the Hearing on 9 September 2026, p 31.

²⁰⁶ [GEMA Response](#), paragraph 58.

²⁰⁷ [GEMA Response](#), paragraph 59.

²⁰⁸ GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 15.

²⁰⁹ [GEMA Response](#), paragraph 61.

²¹⁰ GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 19(1).

²¹¹ Appellants' Reply, paragraph 7.

regulatory and evidential circumstances. It submitted that Mr Stone's engagement with those particular circumstances was evidence of proper decision-making and that his conclusion in CMP463 did not demonstrate that he had approached CMP344 with a closed mind.²¹²

- 5.37 GEMA submitted that CMP344 was a route to avoid liability for future IAEs, describing its Decision as 'unexceptionable'.²¹³ In their Reply, the Appellants submitted that this language suggested that GEMA was motivated by a desire to preserve GYMOWFL's liability and had approached the Proposal as an open-and-shut case, rather than with an open mind.²¹⁴ In its Skeleton Argument, GEMA rejected this submission, submitting that there was no evidence that the Decision had been taken for that or any other improper purpose.²¹⁵ GEMA further submitted that the Appellants had provided additional evidence during the process and that Mr Stone had properly considered it.²¹⁶
- 5.38 GEMA made additional submissions in relation to its alternative argument on waiver and in response to the Appellants' alternative argument on Article 6 ECHR. For the reasons set out at paragraphs 5.78 and 5.79, this decision does not need to go into those aspects in detail.

CMA assessment on Ground 1

- 5.39 We have considered Ground 1 by reference to the principles set out at paragraphs 5.5 to 5.20, the Appellants' and GEMA's submissions and the factual evidence provided. We first identify the circumstances bearing on that question and then assess their significance as set out in the *Porter v Magill* test. We consider the features together, rather than treating any one feature as determinative.

Stage 1: The factual circumstances

(i) The Workgroup process and Mr Stone's involvement in CMP344 at NESO

- 5.40 The Appellants emphasised that Mr Stone represented NESO through the Workgroup stage of CMP344, voted against the Proposal in the Workgroup vote and responded to the November 2020 and December 2020 consultations.²¹⁷ GEMA accepted that involvement but submitted that its nature and context are important.²¹⁸

²¹² Transcript of the Hearing on 9 September 2026, p 34.

²¹³ [GEMA Response](#), paragraphs 6 and 9.

²¹⁴ Appellants' Reply, paragraphs 3–6.

²¹⁵ GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 19(3).

²¹⁶ GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 19(4).

²¹⁷ [NoA](#), paragraph 97

²¹⁸ [GEMA Response](#), paragraphs 50–59.

- 5.41 Generally, we understand from the evidence before us that the Workgroup is established to assist the CUSC Panel in evaluating whether code modification proposals better achieve the ACOs.²¹⁹ A Workgroup usually consists of at least 5 persons (who may also be CUSC Panel members) selected by the CUSC Panel, in addition to the Code Administrator (which is a role filled by NESO).²²⁰ Attendees on the Workgroup can include generators, suppliers and representatives from NESO and are part of a consultative process.²²¹ The Workgroup chairperson prepares a report to the CUSC Panel, which, if the Workgroup is unable to reach agreement, will reflect the views of the members of the Workgroup.²²² The chairperson then attends the next CUSC meeting (other Workgroup members may attend) where the CUSC Panel considers the Workgroup's report and determines whether, amongst other things, to proceed to wider Code Administrator Consultation.²²³ The CUSC Panel then considers the proposal in depth, votes and makes a recommendation to GEMA as part of the FMR.²²⁴ The FMR includes an analysis of the proposal, including the CUSC Panel's recommendation and reasons for its assessment. The FMR will also include, amongst other things, a summary of the conclusions of the Workgroup.²²⁵
- 5.42 During the Workgroup phase, the NESO representative on the Workgroup would decide, in consultation with NESO officials, whether to respond to the Workgroup Consultation or Code Administrator consultation.²²⁶ The NESO representative would consult with colleagues in the specific area to which the proposal relates, as well as consulting with their manager and a collective view would be formed.²²⁷
- 5.43 The evidence also indicated that NESO had distinct functions within the code modification process, including as Code Administrator as a participant on Workgroups, and that it does not have a commercial interest in the outcome of code modifications.²²⁸ As part of the Workgroup, NESO would provide expertise on charging methodologies during discussions to assist members in understanding the charging methodology.²²⁹
- 5.44 The evidence indicates that Mr Stone worked for NESO between 2020 and 2023 and during his role as Senior Commercial Code Change Lead, he was participating as NESO's representative on code modifications during the Workgroup phase.²³⁰

²¹⁹ CUSC section 8 –CUSC Modification 1.40, paragraph 8.20.1.

²²⁰ CUSC section 8 –CUSC Modification 1.40, paragraphs 8.20.3–8.20.5.

²²¹ James Stone, first witness statement, paragraph 61.

²²² CUSC section 8 –CUSC Modification 1.40, paragraph 8.20.22.

²²³ CUSC section 8 –CUSC Modification 1.40, paragraph 8.20.24.

²²⁴ James Stone, first witness statement, paragraph 62.

²²⁵ CUSC section 8 –CUSC Modification 1.40, paragraph 8.23.2.

²²⁶ Transcript of the Hearing on 9 September 2026, p 26.

²²⁷ Transcript of the Hearing on 9 September 2026, p 26.

²²⁸ James Stone, first witness statement, paragraph 128.

²²⁹ Transcript of the Hearing on 9 September 2026, p 26.

²³⁰ James Stone, first witness statement, paragraph 9.

- 5.45 In relation to Mr Stone's involvement in CMP344 in particular, Mr Stone told us that he was new in his role and supported by internal colleagues and a manager. Mr Stone fed into NESO's views at the Workgroup stage, but the overall position from NESO was collective.²³¹ Mr Stone took part in the Workgroup vote on 24 November 2020, responded to the Workgroup consultation in November 2020 and the Code Administrator consultation in December 2020.²³²
- 5.46 We understand from the evidence that Mr Stone was not a member of the CUSC Panel on CMP344 and did not participate in the Panel's recommendation to GEMA – his involvement was through the Workgroup and consultation process rather than through the CUSC Panel recommendation stage.²³³

(ii) Mr Stone's views expressed in 2020

- 5.47 The Appellants submitted that the consultation responses submitted by Mr Stone on behalf of NESO demonstrated that Mr Stone had formed a view that CMP344 should be rejected and subsequently maintained that view after receiving views from those supporting the amendment.²³⁴ However, GEMA submitted that the responses were balanced and objective and do not demonstrate a real possibility of a closed mind.²³⁵
- 5.48 In the November 2020 Workgroup consultation response, Mr Stone, on behalf of NESO, stated that CMP344 'may have some merit,' because it would ensure consistency between the onshore and offshore frameworks, whilst also expressing concerns regarding costs recovery and the impact on consumers.²³⁶
- 5.49 At the Workgroup vote on 24 November 2020, Mr Stone was the only participant who did not support the Proposal overall. He considered that CMP344 better facilitated ACO (a) and (e) (current ACO (d) and (h)), did not better facilitate ACO (b) (current ACO (e)), and was neutral in relation to ACO (c) and (d) (current ACO (f) and (g)).²³⁷ Mr Stone stated the Proposal would ensure consistency between onshore and offshore frameworks, but suggested that items, for example circuits, could be treated in a specific manner rather than aligning generator costs. Mr Stone also expressed concern in relation to end consumers and cost reflectivity.²³⁸
- 5.50 In the December 2020 Code Administrator Consultation response, Mr Stone, stated that 'on balance', he considered that CMP344 did not better facilitate the

²³¹ Transcript of the Hearing on 9 September 2026, p 27.

²³² Thomas Steward, first witness statement, paragraph 61; James Stone, first witness statement, paragraph 132.

²³³ James Stone, first witness statement, paragraph 70.

²³⁴ [NoA](#), paragraph 97.

²³⁵ GEMA's Skeleton Argument filed in advance of the Hearing, paragraphs 15–16.

²³⁶ [Third FMR](#), Annex 4–Workgroup Consultation Response (ESO).

²³⁷ [Third FMR](#), Annex 6–Workgroup vote. We note the ACO objectives at the time of the 2020 Workgroup consideration. were labelled (a) to (e), but these correspond with ACO (d) to (h) as set out within the Decision and this determination.

²³⁸ [Third FMR](#), Annex 6–Workgroup vote.

ACOs and set out reasons for that view. Those reasons included the potential impact of the costs on end consumers and cost reflectivity.²³⁹

- 5.51 Therefore, the evidence indicates that the views expressed by Mr Stone were balanced and qualified and do not demonstrate predetermination or approaching the Proposal with a closed mind.

(iii) Development of CMP344 after Mr Stone's involvement

- 5.52 The Appellants submitted that the Proposal ultimately determined by Mr Stone was materially the same Proposal that Mr Stone considered while at NESO and that his earlier reasoning was therefore transferable to the Decision.²⁴⁰ Conversely, GEMA submitted that the Proposal underwent two send-backs seeking further development, including evidence from Cornwall Insight after Mr Stones's earlier involvement.²⁴¹ The development of the Proposal is summarised in paragraphs 4.18 to 4.24.
- 5.53 As described in paragraphs 4.18 to 4.24, following Mr Stone's earlier involvement the Proposal was sent back twice, underwent further consultation, and was narrowed to focus on IAEs. Further evidence was also obtained from Cornwall Insight.²⁴² Mr Stone participated in a further Workgroup meeting on 9 September 2021. By 2022, however, he had moved to a different role and did not participate in the Workgroup meeting on 31 October 2022.²⁴³ The second Code Administrator Consultation ran from 16 December 2022 to 17 January 2023 and received six responses, none of which was from NESO.²⁴⁴ The Workgroup narrowed the Proposal to IAEs, and Cornwall Insight undertook quantitative analysis commissioned by the RWE Group.²⁴⁵ The CUSC Panel subsequently recommended the Proposal by a majority and the second FMR was submitted to GEMA on 8 February 2023.²⁴⁶
- 5.54 Following the second send-back, a third Code Administrator Consultation ran from 9 May to 2 June 2025 and received two responses, neither of which were from NESO. Further analysis was obtained from Cornwall Insight.²⁴⁷ The CUSC Panel recommended the Proposal by a majority on 27 June 2025 and the third FMR was submitted to GEMA on 9 July 2025.²⁴⁸

²³⁹ [Third FMR](#), Annex 7–CMP344 CAC Response (ESO).

²⁴⁰ Appellants' Reply, paragraph 2.

²⁴¹ GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 15.

²⁴² [First Send-back Decision](#); [Second Send-back Decision](#); Thomas Steward, first witness statement, paragraphs 43–47; Cornwall Insight, CMP344 Additional Workgroup Analysis, 1 November 2024

²⁴³ James Stone, first witness statement, paragraph 73; Transcript of the Hearing on 9 September 2026, p 27.

²⁴⁴ GEMA response to RFI, dated 14 September 2026.

²⁴⁵ Cornwall Insight, CMP344 Workgroup Analysis, 1 October 2022; Thomas Steward, first witness statement, paragraphs 44 to 46.

²⁴⁶ [Second FMR](#).

²⁴⁷ Cornwall Insight, CMP344 Additional Workgroup Analysis, 1 November 2024; [Third FMR](#) – Annex 20.

²⁴⁸ [Third FMR](#).

5.55 The evidence indicates that the Proposal was therefore narrowed after Mr Stone's earlier involvement and was considered on a materially developed evidential basis, including further consultation responses and the Cornwall Insight analysis. We do not consider the Proposal ultimately determined by Mr Stone to have been materially the same as the iteration he had considered while at NESO.

(iv) Mr Stone's role at GEMA

5.56 The Appellants' case focusses on Mr Stone being the sole decision-maker.²⁴⁹ GEMA accepted that Mr Stone took the Decision,²⁵⁰ but submitted that the observer would take into account the wider decision-making framework and materials considered by Mr Stone.²⁵¹

5.57 The evidence indicates that Mr Stone joined GEMA in October 2023, initially as Electricity Network Charging Expert. In that role, Mr Stone was involved in the second send-back decision by GEMA.²⁵² The evidence indicates that Mr Stone supported the decision-maker as a policy expert, in drafting the send-back decision. Mr Stone did not make a recommendation, which was the responsibility of another GEMA official.²⁵³

5.58 In March 2025, Mr Stone became Head of Electricity Network Charging at GEMA. In this role Mr Stone became the decision-maker on code modifications²⁵⁴ and at the point of this appeal, had taken four other code modification decisions in that role.²⁵⁵ The third FMR went to Mr Stone as Head of Electricity Network Charging. Before taking the Decision, Mr Stone considered the third FMR, previous FMRs, Workgroup evidence, CUSC Panel recommendations and votes, the Cornwall Insight analysis, relevant policy material and recommendations from GEMA officials.²⁵⁶ GEMA also contacted Cornwall Insight in order to understand its modelling, including the absence of an 'insurance premium' in its modelling.²⁵⁷ The evidence indicates the Proposal had developed since Mr Stone's earlier involvement, gaining clarity on the comparison with onshore unforeseen events and how they were recovered, and with the Shetland reopener.²⁵⁸

5.59 The evidence also indicates that the decision-making process involved engagement with GEMA officials, including a briefing recommendation and analysis prepared by the Senior Policy Manager, and he sought input from the OFTO licencing team, senior economists, the price control team and legal

²⁴⁹ Appellants' Reply, paragraph 2.

²⁵⁰ James Stone, first witness statement, paragraph 85.

²⁵¹ [GEMA Response](#), paragraphs 57–58.

²⁵² James Stone, first witness statement, paragraph 112.

²⁵³ Transcript of the Hearing on 9 September 2026, p 28.

²⁵⁴ Thomas Steward, first witness statement, paragraph 63; James Stone, first witness statement, paragraph 113.

²⁵⁵ James Stone, first witness statement, paragraph 117.

²⁵⁶ James Stone, first witness statement, paragraph 85.

²⁵⁷ Thomas Steward, first witness statement, paragraph 55.

²⁵⁸ Transcript of the Hearing on 9 September 2026, p 29.

colleagues. There was also a peer review process, using the ‘four-eyes principle’, to scrutinise the evidence and identify the areas for further analysis.²⁵⁹ The process also included line-management oversight by a Deputy Director,²⁶⁰ engagement with Cornwall Insight,²⁶¹ and Mr Stone was subject to the Civil Service Code and conflicts of interest internal policy.²⁶² Mr Stone stated that his Deputy Director was appropriately sighted on his thinking at various stages and had the opportunity to scrutinise this, and the Deputy Director understood Mr Stone’s intended decision and agreed with it prior to publication.²⁶³ The Deputy Director also confirmed that decision-makers have input, assistance and approval at multiple levels and, in CMP344, he considered the evidence and discussed the intended approach with Mr Stone, also confirming he agreed with the conclusion.²⁶⁴

Stage 2: Application of the fair-minded and informed observer test

- 5.60 Having identified the factual circumstances, we consider the second stage of the *Porter v Magill* test. The question is whether the fair-minded and informed observer, having considered all of those circumstances together, would conclude that there was a real possibility that Mr Stone was biased or had pre-determined the issue.
- 5.61 As noted above, the observer is neither unduly suspicious or sensitive, nor complacent. They would take seriously that Mr Stone had previously participated in the CMP344 process as NESO’s representative, had expressed views opposing an earlier iteration of the Proposal, and later became GEMA’s ultimate decision-maker. They would also recognise that Mr Stone was the only participant who did not support the overall earlier iteration of the Proposal at the November 2020 Workgroup vote and that NESO’s consultation responses were the only negative consultation responses at the relevant stages. We consider the observer would attach limited weight to the fact that Mr Stone was the sole dissenting participant – the number of participants holding a particular view does not itself indicate whether there is a risk that Mr Stone as the decision-maker approached the matter with an open or closed mind.
- 5.62 We also do not consider that the fact that, for GEMA, Mr Stone ultimately reached a conclusion broadly consistent with the position expressed in 2020 is determinative. As set out in the legal framework above, apparent predetermination concerns whether there is a risk the decision-maker considered the evidence, arguments and competing considerations with a closed mind, rather than whether

²⁵⁹ James Stone, first witness statement, paragraphs 120–121; Transcript of the Hearing on 9 September 2026, p 25.

²⁶⁰ Shai Hassid, first witness statement, paragraph 11.

²⁶¹ Thomas Steward, first witness statement, paragraph 55.

²⁶² Shai Hassid, first witness statement, paragraph 8; James Stone, first witness statement, paragraph 118; [Civil Service Code](#).

²⁶³ Shai Hassid, first witness statement, paragraph 13.

²⁶⁴ Shai Hassid, first witness statement, paragraphs 11–15.

the decision-maker ultimately reached the same conclusion as before. We consider that the observer would recognise that regulators routinely consider and revisit questions on a more developed evidential basis.

- 5.63 Similarly, the Appellants submitted that Mr Stone's earlier reasoning was directly transferable and that he later determined the same question. There was continuity in the broad subject matter and in concerns including consumer impact and cost reflectivity. However, after Mr Stone's earlier involvement, the Proposal was narrowed to IAEs, underwent further consultations and two further FMRs, and was sent back twice by GEMA for further work. Further analysis was provided by Cornwall Insight. The Decision was therefore taken on a materially more developed proposal and evidential basis, which required further evaluation by Mr Stone, such that the observer would not regard Mr Stone as having simply re-affirmed the view expressed in 2020.
- 5.64 The observer would first consider the capacity in which Mr Stone had previously acted. He participated as NESO's representative in a consultative Workgroup process. He did not exercise a judicial or adjudicative function, was not a member of the CUSC Panel and did not participate in the CUSC Panel recommendation subsequently placed before GEMA. We also consider that the observer would consider that neither Mr Stone nor NESO had a personal, proprietary or commercial interest in the outcome. This is therefore not a case in which the decision-maker could be regarded as judging their own cause.
- 5.65 Mr Stone participated in formulating and communicating the Workgroup views. However, the evidence was that NESO's position was developed collectively, following consultation with relevant colleagues. We consider that the collective character of the responses would reduce the weight that the observer would attach to them as evidence that there was a risk Mr Stone approached CMP344 with a closed mind or pre-determined the outcome.
- 5.66 The observer would next consider the content and language of the earlier views. The November 2020 response stated that CMP344 'may have some merit', including because it would ensure consistency between the onshore and offshore frameworks, while identifying concerns about cost recovery and the impact on consumers. The December 2020 response concluded 'on balance' that CMP344 did not better facilitate the ACOs and gave reasons for that conclusion. Those responses show that Mr Stone, on behalf of NESO, had reached and expressed a reasoned view at that stage. Neither the language nor the reasoning was unqualified, unusually trenchant, extreme or partisan. The qualified language is inconsistent with circumstances where a decision-maker is approaching the matter with a closed mind or not open to consider contrary views.
- 5.67 We have also considered the Appellants' submission that GEMA ordinarily remains separate from the stakeholder process and that Mr Stone's earlier

participation made it inappropriate for him to take the Decision. We consider that institutional separation does not itself disqualify a person who previously participated in the process in a different capacity. We distinguish this from the circumstances in *Ortona*: Mr Stone had not formulated or implemented a policy that he was later required to adjudicate upon, nor had he previously exercised an adjudicative or investigative function in relation to CMP344. His earlier role was as one stakeholder representative participating at the Workgroup and consultation stages.

- 5.68 The observer would also consider what occurred when the developed Proposal came before GEMA. Mr Stone was subject to management oversight and considered the third FMR, the previous FMRs, the Workgroup evidence, the CUSC Panel's recommendations and votes, and engaged with the Cornwall Insight analysis, relevant policy material and recommendations from GEMA officials. In our view, the observer would consider that internal engagement and management oversight do not fully answer the allegation, because Mr Stone remained the ultimate decision-maker. However, they are nevertheless part of the overall context and we consider that the observer would not be concerned that he had simply adopted the position advanced in 2020 without considering the intervening material.
- 5.69 The Appellants also relied on an asserted inconsistency between Mr Stone's treatment of unforeseen charging impacts in CMP344 and his approach in CMP463. We do not consider that a fair-minded and informed observer would consider his acceptance in CMP463 that significant and unforeseen changes in TNUoS charges could harm competition indicates that he approached CMP344 with a closed mind. Each proposal fell to be assessed on its merits in its own factual and evidential context based on the issues presented, and different conclusions do not demonstrate predetermination.
- 5.70 As set out at paragraph 5.37, the GEMA Response characterised CMP344 as a means for the Appellants to avoid liability and described the Decision as 'unexceptionable' with no basis to impugn GEMA judgment. The Appellants relied on this submission in their Reply to support their case that Mr Stone approached CMP344 with a closed mind and was motivated by a desire to preserve GYMOWFL's liability. We do not accept the Appellants' submission. We do not consider the arguments as presented show that Mr Stone took the Decision for an improper purpose or approached CMP344 with a closed mind. Nor is there evidence that preserving GYMOWFL's liability was treated as a relevant consideration by Mr Stone or as an objective for GEMA during the CMP344 decision process in itself.
- 5.71 As set out in our legal framework, we consider that public decision-makers are not required to approach matters with an empty mind and may bring prior knowledge, experience and views to their role, provided that they remain willing to consider the

material before them.²⁶⁵ As set out in the legal framework, the question is whether, in all the circumstances, a fair-minded and informed observer would consider there was a real possibility that Mr Stone's earlier involvement and views meant that he was no longer willing conscientiously to consider the Proposal and material ultimately before him, or that his earlier involvement might unconsciously influence his assessment.

- 5.72 We recognise the importance of the decisions of public bodies being taken and seen to be taken impartially and objectively, particularly in a case such as this, where the decision maker had expressed views against an earlier iteration of the Proposal some years before.
- 5.73 However, we also consider it important to carefully consider the context and have regard to the reasoned manner in which he expressed those views, and the capacity in which he expressed them. His earlier views were expressed in balanced and qualified terms, on behalf of NESO, and without any personal or commercial interest in the outcome.
- 5.74 We also take into account that the Proposal was subsequently narrowed and materially developed, further consultation took place, new analysis was obtained, and the Decision was taken on a substantially more developed evidential basis. This meant that Mr Stone had to engage diligently with a materially developed proposal and evidential basis requiring further evaluation, a factor which weighs strongly against a conclusion that he approached the Decision with a closed mind.
- 5.75 We also attach some, though lesser, significance on the passage of time between Mr Stone's earlier involvement and the Decision. Similarly, we only attach limited significance to GEMA's internal oversight and safeguards because Mr Stone remained the ultimate decision-maker, although those arrangements form part of the wider context.
- 5.76 We attach limited weight to the fact the views he expressed differed from that of other participants on the Workgroup and respondents to the consultations.
- 5.77 Considering the relevant circumstances together, including the fact that Mr Stone's earlier views were expressed in a consultative capacity, in balanced and qualified terms, without any personal or commercial interest, and that the materially developed Proposal and evidential basis required further evaluation before the Decision was taken, we do not consider that the fair-minded and informed observer would conclude that there was a real possibility that Mr Stone was biased, had pre-determined the issue or approached the Decision with a closed mind.

²⁶⁵ Which was consistent with the principles in [Nobel Oil](#).

Other submissions

- 5.78 GEMA submitted in the alternative that the Appellants had waived any objection to Mr Stone acting as decision-maker, submitting that no objection was raised before the Decision was taken.²⁶⁶ The Appellants rejected this submission, stating there had been no clear and unequivocal waiver.²⁶⁷ As we have concluded that there was no apparent bias or apparent predetermination, it is unnecessary to determine that alternative case.
- 5.79 On remedy, the Appellants submitted there had been a breach of Article 6 ECHR and the CMA should conduct a full rehearing to cure that alleged breach, submitting that the CMA's appeal jurisdiction allows this approach, or, in the alternative, the legislation could be read so as to permit that approach under section 3 of the Human Rights Act 1998.²⁶⁸ GEMA rejected this submission, stating the administrative decision-making process and the available statutory appeal must be considered together.²⁶⁹ That remedial argument depends on establishing apparent bias or predetermination. In the light of our conclusion that apparent bias/predetermination has not been established, it is unnecessary to determine this issue.

Our decision on Ground 1

- 5.80 For the reasons set out above, we have concluded that the fair minded and informed observer, having considered all the relevant circumstances, would not consider there was a real possibility that Mr Stone was biased, pre-determined the issue or approached the Decision with a closed mind. The Appellants have therefore not established that the Decision was wrong in law by reason of apparent bias or apparent pre-determination. Accordingly, Ground 1 is dismissed.

²⁶⁶ [GEMA Response](#), paragraphs 44 and 46–49.

²⁶⁷ Appellants' Reply, paragraphs 8–10.

²⁶⁸ [NoA](#), paragraph 98.

²⁶⁹ [GEMA Response](#), paragraph 45.

6. Ground 2: GEMA was wrong in fact and/or law in deciding that the modification would not facilitate competition and cost reflectivity and thus better serve Use of System Charging Objectives (d) and (e)

- 6.1 In this section we address Ground 2 of the NoA that GEMA erred in failing to approve CMP344, since it both better facilitated competition than the Baseline and is more consistent with the principle of cost reflectivity.²⁷⁰ In their pleadings, both the Appellants and GEMA refer to ACO (d) and (e) respectively as the ‘competition’ and ‘cost reflectivity’ ACOs. In our determination we adopt that terminology.
- 6.2 In the Decision, GEMA considered that for a number of reasons CMP344 would not improve competition as compared to the Baseline and, accordingly, assessed that the proposal was negative against ACO (d).²⁷¹ GEMA also considered that the proposal to remove an offshore generator’s liability in relation to IAE costs would be less cost reflective than the Baseline and, accordingly, assessed that CMP344 was negative against ACO (e).²⁷²
- 6.3 In the NoA the Appellants split Ground 2 into four parts:
- (a) Ground 2A: GEMA erroneously relied upon generators being the party best placed to mitigate the risk of an IAE occurring and its consequences;
 - (b) Ground 2B: GEMA was wrong to dismiss the existence of discrimination against offshore generators by comparison with entities with which they compete;
 - (c) Ground 2C: GEMA was wrong to conclude impact on competition was nil or immaterial; and
 - (d) Ground 2D: GEMA was wrong to suggest that CMP344 could introduce an anti-competitive distortion on the CfD market.
- 6.4 Ground 2A was in turn split into six parts and Ground 2B into two parts.
- 6.5 Ground 2A relates to GEMA’s assessment of CMP344 in relation to ACO (e), the ‘cost reflectivity’ ACO. Grounds 2B to 2D all relate to GEMA’s assessment of CMP344 in relation to ACO (d), the ‘competition’ ACO.

²⁷⁰ NoA, paragraph 99.

²⁷¹ The Decision, p 21.

²⁷² The Decision, p 25.

- 6.6 We deal with the parts of Ground 2, namely Grounds 2A to 2D, in the order they are pleaded in the NoA, meaning ‘cost reflectivity’ first (Ground 2A) and then ‘competition’ (Grounds 2B to 2D).
- 6.7 We then conclude on whether the Decision that CMP344 would not better facilitate ACOs (d) and (e) than the Baseline was wrong.

Introduction to Ground 2A

- 6.8 The Appellants summarised Ground 2A as being that GEMA erroneously relied upon generators being the party best placed to mitigate the risk [of an IAE occurring] and its consequences and submitted this line of GEMA’s reasoning was flawed for the reasons as pleaded in each of the six subsidiary grounds:
- (a) Ground 2A(1): GEMA adopted an unduly narrow a view of an IAE, treating it as essentially concerned with uninsurable latent defects in sub-sea transmission cables;
 - (b) Ground 2A(2): GEMA failed to consider or give appropriate weight to the lack of feasibility and costs of generators mitigating IAEs;
 - (c) Ground 2A(3): GEMA failed to consider or give appropriate weight to the existing incentives on generators, given that transmission assets represent their route to market;
 - (d) Ground 2A(4): GEMA wrongly considered that imposing costs on generators would be consistent with the principle of cost reflectivity and/or represent efficient economic signalling;
 - (e) Ground 2A(5): GEMA erred in rejecting the comparison with the Scottish Hydro Electric Transmission plc (SHETL) subsea cable reopener; and
 - (f) Ground 2A(6): GEMA wrongly focused on the generator qua developer rather than qua generator.
- 6.9 For each subsidiary ground we summarise the parties’ submissions before assessing the sub-ground. We then consider whether GEMA was wrong to conclude that CMP344 would not better facilitate ACO (e) than the Baseline.
- 6.10 We commence with subsidiary ground 2A(4), which addresses some broad points of principle, before following on with the other more specific sub-grounds.

Ground 2A(4): GEMA wrongly considered that imposing costs on generators would be consistent with the principle of cost reflectivity and/or represent efficient economic signalling

The Parties' views on 'cost reflectivity' and its rationale

- 6.11 Before addressing the specific pleadings on Ground 2A(4) we consider it to be helpful to first set out how GEMA and the Appellants respectively articulated cost reflectivity, and the rationale for it, in their pleadings and in the Hearing.

GEMA's views

- 6.12 In response to the appeal, GEMA told us:

Offshore generators are sole users and beneficiaries of the offshore cables they are connected to and which they constructed. Offshore transmission assets are point to point radial links and as such built solely for the purpose of the generator ie to export to the mainland. These transmission cables are not wider assets (ie assets that serve wider system benefit such as security of supply). As a matter of cost reflectivity, cost reflective arrangements should expose the users of offshore transmission assets to the cost of constructing and utilising those offshore cables. Put another way, the cost of those assets and any additional associated costs, arise as a direct consequence of offshore generators requiring and utilising such infrastructure. Given that these generators confer costs on that part of the network, it is appropriate that recovery be targeted to those generators rather than socialised.²⁷³

- 6.13 At the Hearing, GEMA was more explicit:

The essential principle was that if a user drives or confers a particular cost on a network, it should pay charges which reflect that cost.²⁷⁴

- 6.14 GEMA illustrated this principle as follows:

If I set up a wind farm, onshore, offshore, in a particular place and if I connect my facility radially to the network, I drive or I confer the costs of that radial connection. I might not cause the individual cost. I might not be able to control any of them. There might be a problem with that cable that has nothing whatever to do with me or a tax or a charge that is associated with it, which is completely

²⁷³ James Stone, first witness statement, paragraph 93.

²⁷⁴ Transcript of the Hearing on 9 September 2026, p 18.

outside my control. It does not matter. I have driven the need for the radial link and cost reflective charging would mean that I pay charges which reflect, at least to some degree, the associated costs. That is essentially the core cost reflectivity principle.²⁷⁵

6.15 GEMA added four points to explain its view of 'the very essence of cost reflectivity':²⁷⁶

- (a) The costs associated with the asset are driven or conferred by the user when it is that user which drives the use for the infrastructure to exist and operate.²⁷⁷
- (b) GEMA's concern in imposing cost reflective charging was to implement a methodology that meant that generators had to properly weigh up and assess the cost consequences of their choices and that they were incentivised, so far as possible, to make efficient decisions.²⁷⁸
- (c) The situation was more nuanced regarding connections which were not radial point-to-point links. For example, where two or more generators used a particular link, they should share the associated costs. There might be other scenarios where either costs would be shared or passed onto demand. But none of that affected the core case of a sole use point-to-point link where cost reflectivity meant that the user would pay.²⁷⁹
- (d) There was an array of costs associated with the choice of the generator in the first place to operate a wind farm in a particular location, that were currently being recovered through local charges. These included all manner of costs over which generators had no control such as seabed leasing costs, community taxes, council tax and business rates. IAE costs were being recovered in exactly the same way as all other costs that fed into the total to be recovered.²⁸⁰

6.16 GEMA also explained that there were cases where cost reflectivity worked at a second, narrower level where the user might be able to control particular costs, at least in part, where there might be things the user could do or not do that would stop those costs arising or control their size. It explained that cost reflective charging 'may incentivise generators to think hard about the commercial choices that they make: whether to choose location one or location two; whether to diversify their assets; whether to spend money on the most robust materials or

²⁷⁵ Transcript of the Hearing on 9 September 2026, p 18.

²⁷⁶ Transcript of the Hearing on 9 September 2026, p 20.

²⁷⁷ Transcript of the Hearing on 9 September 2026, p 20.

²⁷⁸ Transcript of the Hearing on 9 September 2026, p 21.

²⁷⁹ Transcript of the Hearing on 9 September 2026, p 21.

²⁸⁰ Transcript of the Hearing on 9 September 2026, pp 21-22.

structures or processes’.²⁸¹ In that scenario, according to GEMA, the cost reflectivity arguments were even stronger.²⁸²

- 6.17 At this second level, GEMA clarified that, it was not suggesting that offshore generators could avoid or mitigate every potential IAE. Generators could nevertheless take steps to avoid or control the costs of at least some IAEs. GEMA’s position was that exposure to IAE costs encouraged generators to take the steps available to them.

The Appellants’ views

- 6.18 The Appellants quoted the following statement by GEMA from a previous code modification proposal as being a useful statement of the rationale behind cost reflective charging:²⁸³

Cost reflective charging targets the cost of establishing and operating transmission infrastructure on users of the system who impose those costs. This provides a signal to enable them to make informed decisions where to situate new generation and when to adjust or close existing generation. This supports the development of an economically efficient system at lowest cost to the consumer.²⁸⁴

- 6.19 This logic, the Appellants argued, was reflected in paragraph 14.14.6 of the CUSC, which stated that the underlying rationale behind TNUoS charges ‘is that efficient economic signals are provided to Users’ to reflect the differing local costs of using transmission services’.²⁸⁵
- 6.20 The Appellants’ position was that these incentives had to be communicated in a manner that could be responded to by rational economic operators in a manner which enhanced competition.²⁸⁶
- 6.21 At the Hearing, the Appellants argued that under GEMA’s interpretation of cost reflectivity, it would be appropriate to impose unavoidable costs outside the control of a party and which had not been created as a result of its decisions on that party because it had driven or conferred those costs. The Appellants argued that it would be inefficient as parties would take expensive mitigation measures the cost of which would be ultimately passed on to consumers.²⁸⁷ They argued such an approach to cost reflectivity also had the potential to affect competition as costs

²⁸¹ Transcript of the Hearing on 9 September 2026, p20.

²⁸² Transcript of the Hearing on 9 September 2026.

²⁸³ NoA, paragraph 127.

²⁸⁴ GEMA Decision on CMP213, 25 July 2014, section 1.4.

²⁸⁵ NoA, paragraph 128.

²⁸⁶ NoA, paragraph 129.

²⁸⁷ Transcript of the Hearing on 9 September 2026, p47.

were not being allocated in a manner that reflected the decisions of rational economic operators.²⁸⁸

- 6.22 The Appellants noted that, according to GEMA's reasoning, there were two senses in which a generator would be imposing a cost on the system where a cable had been laid between two points to serve a particular generator. In the first sense, if something happened to the cable (for example as a result of an act of sabotage), then the generator would be imposing a cost only in the sense that a cable to serve that generator had been laid. In the second sense, where a cable was known to have a fault, then the generator would be imposing a cost in a much clearer sense. The Appellants did not agree with GEMA's logic that, even if a party did not know about those faults, there were efficient things it could have done to avoid the fault.²⁸⁹

CMA observations on the parties' views on cost reflectivity and its rationale

- 6.23 In summary, the key point of difference between GEMA and the Appellants is whether it is appropriate to treat all costs which arise as a result of the existence of the transmission link, as costs which have been conferred on the system by the user of that link.

Parties' submissions on Ground 2A(4)

- 6.24 We now deal with the specific matters pleaded by the Appellants under Ground 2A(4) which was that GEMA wrongly considered imposing costs on generators would be consistent with the principle of cost reflectivity and/or represent efficient economic signalling.

The Appellants' submissions

- 6.25 The Appellants submitted that:
- (a) in line with the underlying rationale behind TNUoS charges, the charges levied needed to provide efficient economic signals to reflect the different local costs to generators of using transmission services;²⁹⁰
 - (b) furthermore, the incentives arising from such charges levied on generators needed to be communicated to them in a way that they could respond to in a way that enhanced competition;²⁹¹

²⁸⁸ Transcript of the Hearing on 9 September 2026, p48.

²⁸⁹ Transcript of the Hearing on 9 September 2026, p49.

²⁹⁰ NoA, paragraph 128.

²⁹¹ NoA, paragraph 129.

- (c) GEMA was wrong to assume that the Baseline arrangements did either of these;²⁹²
- (d) GEMA's reasoning was wrong in law and/or fact and failed properly to interpret or apply ACO (e);²⁹³
- (e) it was inefficient and distorted competition for IAE costs to be imposed on generators because it created a form of 'punitive lottery' without any proper basis for considering that establishing such a lottery would reduce the risk of IAEs occurring or their extent; and
- (f) IAEs represented 'unforeseeable and uncontrollable risks' which did not 'systematically arise for less efficient market participants;' nor were they locationally specific. IAEs were costs of the system, which should be socialised,²⁹⁴ rather than being allocated to generators as insurers of the last resort.²⁹⁵

6.26 The Appellants also submitted that GEMA had incorrectly assumed that the Baseline sent efficient economic signals to mitigate locationally varying costs, because:

- (a) if a generator could not take any efficient steps to avoid or mitigate the cost of an event, then reallocation of that cost to the generator did not send any meaningful locational signal to the generation development market; and
- (b) the costs of IAEs were not in their general nature locationally specific in the sense of being risks that foreseeably arose because of the specific location of the transmission assets. Cable failures caused, for instance, by Acts of God, latent defects in cables, or substation failures, could occur in any location and were not specific to the location of any particular generating station or transmission assets.²⁹⁶

6.27 In the context of refuting GEMA's position on the incentivising effect of IAE liability, the Appellants submitted imposing IAE liability upon offshore generators in respect of a sub-set of faults (such as those caused by latent defects that are both out-of-warranty and uninsurable) did not send any meaningful 'charging signal'. Testing could not detect every defect and would be done irrespective of IAE liability given the need to avoid transmission interruptions.²⁹⁷

²⁹² NoA, paragraph 131.

²⁹³ NoA, paragraph 130. In its pleadings here the Appellants also referred to ACO (d). We deal with ACO (d) in Grounds 2B to 2D.

²⁹⁴ NoA, paragraph 130.

²⁹⁵ Appellants' Skeleton Argument filed in advance of the Hearing, paragraph 4.

²⁹⁶ NoA, paragraphs 131.

²⁹⁷ Appellants' Skeleton Argument filed in advance of the Hearing, paragraph 23(c).

6.28 The Appellants also submitted that, in other contexts, GEMA had recognised the need to shield market participants from unpredictable risks to preserve and promote competition. The Appellants referred to four of GEMA's previous decisions:

- (a) In CMP463 it had frozen specific expansion factors (SEFs)²⁹⁸ for onshore generators in order to stabilise charging as unexpected changes in charges with little advanced notice were detrimental to competition.
- (b) In CMP308 it had reallocated to consumers an element of Balancing Services Use of System (BSUoS) charges from generators those costs that generators could not reduce.²⁹⁹ The second BSUoS task force had noted that recovering balancing system costs on generation created unnecessary risk premia and transaction costs for generators.³⁰⁰
- (c) In the Ofgem IAE policy decision it had reallocated IAE risk from OFTOs to generators because it would not be value for money for OFTOs to price the full risk of uninsurable latent defects into their bids for OFTO assets.³⁰¹
- (d) In its RIIO Final Determination³⁰² for SHETL it had not imposed IAE risk on the Viking Wind Farm.³⁰³

GEMA's submissions

6.29 In its Response, GEMA submitted:

- (a) that the Appellants had alleged errors of fact but had failed to explain why there were alleged errors of fact as to existing, uncontentious and objectively verifiable facts that were material;
- (b) that ACO (e) did not limit cost reflectivity to locational signals; but in any event, IAE costs were recouped by way of Local Charges, which were locational by their nature;
- (c) the contention that the Baseline constituted a distortion of competition and/or punitive lottery was incorrect; and

²⁹⁸ See paragraph 6.152(b) for an explanation of SEFs.

²⁹⁹ NoA, paragraphs 133.

³⁰⁰ George Anstey, first expert report, paragraph 116.

³⁰¹ NoA, paragraphs 134.

³⁰² See Ofgem's '[RIIO-2 Final Determinations – SHET Annex \(REVISED\)](#)' dated 3 February 2021, pp 59-60. See Ofgem's '[RIIO-3 Final Determinations – Scottish Hydro Electric Transmission \(SHET\)](#)', dated 4 December 2025, p 27-28.

³⁰³ NoA, paragraphs 132–135.

- (d) its alleged inconsistent decisional practice could be distinguished by explaining they were either temporary measures or were cost recovery charges rather than cost reflective charges.³⁰⁴

6.30 GEMA further submitted that:

- (a) it considered it appropriate for the costs associated with particular infrastructure to be borne by the system users which ‘drive’ those costs;³⁰⁵
- (b) cost reflectivity meant that the charges payable by a user reflect the system costs driven by that user;³⁰⁶
- (c) it was properly open to it as a matter of regulatory judgement to conclude that CMP344 did not better facilitate cost reflectivity;³⁰⁷ and
- (d) the Baseline charging arrangements were cost reflective:³⁰⁸
 - (i) First, they were cost reflective in the core sense that a generator who constructed and had sole use of an offshore transmission asset should ordinarily bear most of the costs associated with that asset, including IAE costs, just as all other costs in the OFTO’s allowed revenue stream.³⁰⁹
 - (ii) Second, the Baseline arrangements sent a relevant cost signal – they encouraged generators to make commercial choices when procuring the design, build and testing of offshore transmission assets which might help mitigate the risk and costs of IAEs.³¹⁰

6.31 GEMA submitted that Ground 2A(4) raised a relatively simple point about signals and incentives. Sending a relevant cost signal did not mean that generators would always be able to avoid IAEs, nor that generators were at ‘fault’ in the event an IAE materialised. GEMA submitted that it had been fully entitled to conclude, as a matter of regulatory judgement that even with these complexities, the Baseline sent a valuable cost signal.³¹¹

6.32 GEMA submitted that the Appellants were simply wrong to contend that IAE charges were not locationally specific, and accordingly not a relevant signal as regards cost reflectivity and competition.³¹² ACO (e) did not limit cost reflectivity to

³⁰⁴ [GEMA Response](#), paragraphs 85-86.

³⁰⁵ GEMA’s Skeleton Argument filed in advance of the Hearing, paragraph 6.

³⁰⁶ GEMA’s Skeleton Argument filed in advance of the Hearing, paragraph 22.

³⁰⁷ GEMA’s Skeleton Argument filed in advance of the Hearing, paragraph 21.

³⁰⁸ GEMA’s Skeleton Argument filed in advance of the Hearing, paragraph 22.

³⁰⁹ GEMA’s Skeleton Argument filed in advance of the Hearing, paragraph 23.

³¹⁰ GEMA’s Skeleton Argument filed in advance of the Hearing, paragraph 25.

³¹¹ GEMA’s Skeleton Argument filed in advance of the Hearing, paragraph 26.

³¹² [GEMA Response](#), paragraph 86 (1).

locational signals.³¹³ In any event, GEMA noted, IAE costs were recouped by way of Local Charges, which were locational by their nature³¹⁴ in the sense that a generator located further offshore, in deeper water, or at seabed with a challenging topography would be expected to have higher costs for the relevant offshore transmission assets and in turn Offshore Local Charges.³¹⁵

- 6.33 GEMA told us that in relation to the Appellants' 'punitive lottery' point,³¹⁶ there was none as alleged in that the costs of IAEs were at least partly controllable by generators.³¹⁷
- 6.34 GEMA told us in relation to CMP308, that BSUoS charges recovered a range of costs which included NESO's costs of taking actions to balance the transmission system (such as ensuring generation output equals demand). GEMA explained to us that it had decided to approve CMP308 as it would remove a charge on generators that they could not influence by changing their behaviour. GEMA noted that the costs that were recovered through BSUoS charges did not relate to the actions of a single generator but were influenced by the actions of both generators and consumers across Great Britain.³¹⁸

CMA assessment on Ground 2A(4)

- 6.35 In the Decision, as set out within its consideration of whether the Proposal furthered ACO (e), GEMA stated the following:

We consider that it is important that generators benefitting from the network infrastructure are contributing fairly towards its operation and maintenance, and should receive charging signals that appropriately reflect the costs they confer on that network. As such we believe that targeting the recovery of costs on the party most likely to drive those costs or best placed to respond to a cost signal (for example the party that can to a degree mitigate the occurrence, and cost, of IAEs) is appropriate.³¹⁹

- 6.36 GEMA expanded on this reasoning during the course of the appeal. Specifically, in its Skeleton Argument ahead of the Hearing, GEMA stated the following:

The Baseline arrangements are cost reflective in two respects.
First, they are cost reflective in the core sense that a generator

³¹³ GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 44.

³¹⁴ GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 44.

³¹⁵ James Stone, first witness statement, paragraph 173(a).

³¹⁶ Set out in paragraph 6.25(e) of this determination.

³¹⁷ GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 44.

³¹⁸ James Stone, witness statement, paragraph 173(c).

³¹⁹ [The Decision](#), p. 23.

who constructs³²⁰ and has sole use of an offshore transmission asset should ordinarily bear most of the costs associated with that asset, including IAE costs, just as all other costs in the OFTO's allowed revenue stream.³²¹

[...] Second, the Baseline arrangements send a relevant cost signal – they encourage generators to make commercial choices when procuring the design, build and testing of offshore transmission assets which may help mitigate the risk and costs of IAEs.³²²

- 6.37 In our view, the reasoning GEMA has provided during the course of the appeal, expands on, but is consistent with, that set out in the Decision.
- 6.38 The essence of the Appellants' case is that the cost reflectivity objective requires that the charges levied on generators provide them with efficient economic signals, including in respect of their location, such as to affect the choices made by those users, and that imposing IAE costs on generators does not send a meaningful signal to generators.³²³ GEMA's position is that charges on generators which include the recovery of IAE costs are cost reflective³²⁴ even if there might be some circumstances where generators are unable to respond to the signal sent by those charges.³²⁵
- 6.39 In our view, GEMA was not wrong to conclude that, as a result of the need for the transmission link to be built, all costs relating to that transmission link which subsequently arise are costs which have been conferred on the system by the user of that link. We agree with GEMA that is because, as GEMA explains,³²⁶ it is the decision of the individual generator to enter, and remain in, the generation market that has caused a particular transmission link to be built and to be built in a particular location, and the need for that link to be subsequently operated and maintained. Those decisions of the individual generator are therefore the cause for the resulting costs to have been incurred.
- 6.40 We note the Appellants' arguments regarding the inability of generators to respond to cost signals in all circumstances.³²⁷ GEMA was, in our view, not wrong to consider that charges based on the costs conferred by the user nevertheless gave

³²⁰ We note that GEMA has formulated this in terms of a generator who is also a developer. We note that limitation to generators who are also developers is not necessary as it is the generator which is driving the need for the link regardless of whether they also develop the link.

³²¹ GEMA's Skeleton Argument filed in advance of the Hearing, paragraphs 22 and 23.

³²² GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 25.

³²³ Set out in paragraphs 6.18—6.20 of this determination.

³²⁴ As described in paragraph 6.30(d) of this determination.

³²⁵ Set out in paragraph 6.31 of this determination.

³²⁶ Set out in, for example, paragraphs 6.14, 6.15(a), 6.15(b) and 6.15(d) of this determination.

³²⁷ Set out in paragraph 6.21 of this determination.

a meaningful signal to influence the long-term decisions of potential investors regarding whether to invest (or divest) and, if so, where.³²⁸

- 6.41 We also note that GEMA's interpretation of cost reflectivity is consistent with the definition of ACO (e), namely 'compliance with the Use of System Charging Methodology **results in charges that reflect**, as far as is reasonably practicable, **the costs incurred** by Transmission Licensees in their Transmission Businesses' (emphasis added). 'Costs incurred' is, in our view, another way of expressing the costs which have been conferred on the system by the user of that link.
- 6.42 We therefore consider GEMA's interpretation of the concept of cost reflectivity in the context of ACO (e) was not wrong, and that its application of ACO (e) in the Decision was reasonably open to it as a matter of regulatory judgement.
- 6.43 As GEMA explains,³²⁹ what is important in this context is that charges reflect the costs incurred so that they send a signal to a particular generator regarding the level of the costs that that generator is conferring on the system. Its view is that it is important that this message is sent so that both existing generators as well as potential investors in generation are given an opportunity to respond or adjust their behaviour if they are in a position to do so. In GEMA's view that provides a useful incentive in many circumstances, and even if individual existing generators will not always be able to respond to charges that recover IAE costs, future potential investors will be able to evaluate these and consider how they affect their decisions. We are not persuaded that GEMA was wrong to adopt this reasoning.
- 6.44 Accordingly, we do not consider that GEMA was wrong in its view regarding cost reflectivity and the rationale for it in relation to the recovery of IAE costs, or therefore in its application of ACO (e) to the Decision.
- 6.45 Regarding the point made by the Appellants that the signals being sent to generators by the charges are intended to be locationally specific³³⁰ (in other words, that the charges are intended to influence generators' choice of location), it is evident that the charges send signals to their recipients in respect of the location as well as the type of generation (here offshore). Therefore, GEMA was not wrong to conclude that ACO (e) did not limit cost reflectivity to locational signals. As it is, in this case GEMA was also entitled to consider that the charges levied were locational by their nature.³³¹

³²⁸ We also note the Appellants' argument that IAE risks are unforeseeable and uncontrollable and therefore it would be more efficient to allocate IAE costs to consumers in order to avoid the risk premia that generators would be expected to apply to their CfD bids to compensate for being exposed to IAE risks. We consider the Appellants' submissions on this matter to relate to the potential overall impact of the IAE arrangements on consumers rather than to better achieving the cost reflectively objective. These submissions are summarised at paragraphs 8.14 to 8.17.

³²⁹ Set out in particular in the quote at paragraph 6.14 and paragraph 6.16.

³³⁰ Set out in paragraph 6.26(b) of this determination.

³³¹ Set out in paragraph 6.29(b) of this determination.

- 6.46 The Appellants submitted that charges that recoup the costs of successful IAE claims from generators send signals which result in parties doing things that were very expensive for the system to the ultimate cost of consumers.³³² We are not persuaded that GEMA was wrong to consider that the possibility of these charges is intended to incentivise the consideration of mitigation measures but it is ultimately up to each individual generator to decide what actual measures to take.³³³ We agree that the generator is best positioned to evaluate whether a particular mitigation measure is cost effective, particularly given its role in designing and developing the relevant assets. Because the generator bears both the costs and the benefits of that decision, GEMA was entitled to consider that exposure to IAE costs may encourage efficient mitigation measures.
- 6.47 We also consider below the Appellants arguments relating to a ‘punitive lottery’, incentives and previous GEMA decisions.³³⁴
- 6.48 We are not persuaded by the Appellants’ point that the current regime creates a ‘punitive lottery’ which distorts competition through the economic signals sent.³³⁵ While different IAE costs may arise in different locations and for different reasons, we consider that GEMA was not wrong to conclude that exposing generators to these costs was consistent with sending them a useful long-term cost signal.
- 6.49 We note the four instances where the Appellants point to an apparent inconsistency between GEMA’s approach to the assessment of cost reflectivity in CMP344 and certain of its previous regulatory decisions.³³⁶ In our view, each of those instances can be distinguished from the Decision.
- (a) We address CMP463 at paragraph 6.163.
- (b) Regarding CMP308 (which dealt with the issue of whether generators should contribute to the recovery of balancing system costs) GEMA explained that the costs that were being recovered through BSUoS charges did not relate to the actions of a single generator but were also influenced by actions of other generators and consumers.³³⁷ Therefore, the costs that were at issue in CMP308 were either joint or common between both generators and consumers. We agree with GEMA that this provides a clear point of difference to CMP344 and does not suggest any obvious inconsistency between decisions.

³³² Set out in paragraph 6.21 of this determination.

³³³ Set out in paragraph 6.30(d)(ii) of this determination.

³³⁴ Set out in paragraphs 6.25 to 6.28 of this determination.

³³⁵ The question of whether the ‘punitive lottery’ distorts competition in CfD auctions for offshore wind by means of raising barriers to entry into offshore wind is addressed in paragraphs 6.193 to 6.195 within Ground 2C.

³³⁶ Set out in paragraph 6.28 of this determination.

³³⁷ See paragraph 6.34 of this determination.

- (c) Regarding the Ofgem IAE Policy decision that it would not be 'value for money' for OFTOs to 'price the full risk of uninsurable latent defects into their bids for transmission assets during the OFTO tender process', we note that GEMA's policy does not remove the risk of exposure to costs that may be related to IAEs from OFTOs, rather it limits that risk. Limiting that risk takes into account the role that OFTOs have played (or should be treated as having played)³³⁸ with respect to offshore transmission assets, in a context where offshore generators have developed those assets.
- (d) Regarding not imposing IAE risk on the Viking Wind Farm, and as referred to within paragraphs 6.126 and 6.134, there were a number of distinctions on which GEMA relied which, in our view, provide a reasonable basis for treating the arrangements differently.

6.50 For the reasons set out above, we find GEMA was not wrong to consider that imposing costs on generators would be consistent with the principle of cost reflectivity and/or represent efficient economic signalling and sub ground 2A(4) fails.

Ground 2A(1): GEMA adopted an unduly narrow view of an IAE

The Appellants' submissions

6.51 The Appellants submitted that GEMA erred in law by adopting a myopic focus on cable failures arising from latent defects and used them as the exclusive perspective from which to analyse CMP344.³³⁹ Further, they submitted that GEMA was wrong in fact to conclude that generators were 'best placed' to mitigate the risk and consequence of IAEs because the costs of fixing and remediating damage to transmission assets as a result of an IAE are within the control of the OFTOs that own those assets.³⁴⁰

6.52 In support, the Appellants submitted that:

- (a) the Decision did not attempt to analyse the scope of the concept of an IAE which was a broad concept which included events constituting force majeure, circumstances resulting from an amendment to the STC and events which in the opinion of GEMA amounted to an IAE;³⁴¹
- (b) GEMA had misconstrued the concept of an IAE as circumstances that can be avoided or mitigated during development by the offshore generator procuring

³³⁸ Set out in paragraph 6.107 of this determination.

³³⁹ NoA, paragraph 108.

³⁴⁰ NoA, paragraph 109.

³⁴¹ NoA, paragraph 103.

quality assets and supplier warranties and indemnities (such as latent defects);³⁴²

- (c) GEMA was wrong to rely on historic IAE approvals and did not give consideration to other possible IAEs;³⁴³ and
- (d) GEMA made no attempt to explain or consider how a generator could be 'best placed' to deal with other IAEs, such as sabotage or vandalism of transmission assets, or those arising from terrorism, warlike activities of enemy states, or changes in the law.³⁴⁴

GEMA's submissions

- 6.53 In its Response, GEMA submitted that this ground was misconceived and there was no error in law or fact as both the 'relevant IAE condition and Ofgem's IAE policy' were considered in the Decision.³⁴⁵
- 6.54 GEMA said that the Decision treated latent cable defects only as an example of potential IAEs. GEMA added that given all IAEs approved to date involved uninsurable latent cable defects, its consideration of this type of IAE was reflective of the reality. It also noted that the Workgroup and FMR had focused on IAEs arising from uninsurable latent cable defects.³⁴⁶
- 6.55 GEMA said that it did not proceed on the basis that it would be possible for a generator to mitigate the occurrence and costs of all IAEs. Instead, GEMA stated that its position is that a generator is relatively better placed to mitigate the occurrence and cost of at least some IAEs than consumers, given generators design the offshore transmission asset, procure the components, construct and operate the asset for more than two years until asset transfer.³⁴⁷
- 6.56 GEMA submitted that:
- (a) references to latent failures in the Decision reflected 'the reality that all IAEs approved by Ofgem to date have related to such failures' and the Workgroup and the final FMR focused on latent cable failures';³⁴⁸

³⁴² We note that the Appellants' argument relating to supplier warranties and indemnities overlaps with their pleadings under sub-ground Ground 2A(2). We address these arguments in our assessment under 2A(2).

³⁴³ Appellants' Skeleton Argument filed in advance of the Hearing, paragraph 8(b).

³⁴⁴ [NoA](#), paragraph 108.

³⁴⁵ James Stone, first witness statement, paragraph 137.

³⁴⁶ [GEMA Response](#), paragraph 63.

³⁴⁷ [GEMA Response](#), paragraph 65.

³⁴⁸ [GEMA Response](#), paragraph 64.

- (b) 'it was appropriate to consider the Decision in the context of past events, recognising the difficulty that might arise in attempting to assess impacts against hypothetical scenarios',³⁴⁹
- (c) the third FMR did not treat the IAE limbs separately, and that it was clear that CMP344, if approved, would change the treatment of all costs arising from IAEs irrespective of which 'limb' of the licence condition the claim fell under;³⁵⁰ and
- (d) it would have been open to the Appellants to put forward an alternative modification proposal that the costs of different types of IAEs be addressed differently, with the costs of, for instance, sabotage, terrorism, war or other force majeure events to be borne by consumers, not generators.³⁵¹

6.57 The Decision stated that the code modification proposal was 'all or nothing':³⁵²

the only proposal before Ofgem for decision was a modification to all IAEs. Neither the Proposer nor any other Workgroup members chose to put forward a more targeted modification for Ofgem to consider from that related eg only to changes in the law, or to force majeure, or to some other subset of overall IAEs.³⁵³

CMA assessment on Ground 2A(1)

6.58 IAEs are defined in the OFTO's offshore transmission licence in paragraph 15 of the Amended Standard Condition E12-J3:

An income adjusting event in relevant year t may arise from any of the following:

- a. an event or circumstance constituting force majeure under the STC;
- b. an event or circumstance resulting from an amendment to the STC not allowed for when allowed transmission owner revenues of the Licensee were determined for the relevant year t; and
- c. an event or circumstance other than listed above which, in the opinion of the Authority, is an income adjusting event and is approved by it as such in accordance with paragraph 21 of this licence condition,

³⁴⁹ James Stone, first witness statement, paragraph 139.

³⁵⁰ James Stone, first witness statement, paragraph 137.

³⁵¹ [GEMA Response](#), paragraph 66.

³⁵² James Stone, first witness statement, paragraph 139.

³⁵³ James Stone, first witness statement, paragraph 143.

where the event or circumstance has, for relevant year t, increased or decreased costs and/or expenses by more than [£500,000]/[£1,000,000] (the ‘threshold amount’).

- 6.59 The Proposal was that ‘the additional revenue allowances for OFTOs in relation to IAEs should be recovered from all demand Users, rather than the Generator directly affected’.³⁵⁴ In the third FMR, the Proposer stated that IAEs were not a signal that developers were able to respond to and there was no evidence to show that offshore generators are able to take any action to avoid the occurrence of IAEs.³⁵⁵
- 6.60 During the Hearing, the Appellants conceded that CMP344 itself ‘suffered from focusing on just the IAEs that kind of have occurred to date’ and that ‘it is fair to say that maybe the discussion [of IAEs] was overly dominated by that [cable failures]’.³⁵⁶ Consistent with this, we note that the only type of IAE that was expressly discussed in the third FMR was cable failures.³⁵⁷ In this context we consider it to be unsurprising that the Decision focuses on IAEs caused by latent defects.
- 6.61 Although there are three explicit references in the Decision to cable failures caused by latent defects, and no explicit references to other possible types of IAEs, in each case we are satisfied by GEMA’s explanation that it was given as an example of an IAE.³⁵⁸
- 6.62 In our view, it was not wrong for GEMA to take the approach it did based on its interpretation of cost reflectivity.³⁵⁹ Equally it was reasonable to illustrate that approach by reference to the costs associated with IAEs such as cable failures caused by latent defects as matters that were potentially within the generators’ ability to mitigate.
- 6.63 We are not persuaded by the Appellants’ submissions that GEMA misdirected itself or made an error of law by adopting a myopic focus on cable failures as a result of latent defects as the perspective to analyse CMP344. In our view the Decision considered the Proposal as presented which was to remove the costs associated with all IAEs from offshore generator users to consumers.
- 6.64 We also note that GEMA could only decide on an FMR as proposed. It was not open to GEMA to modify the third FMR as submitted. In that connection, we note GEMA’s submission that ‘[i]t would have been open to RWE or any other Workgroup member to put forward an alternative modification proposal that the

³⁵⁴ [Third FMR](#) p 5.

³⁵⁵ [Third FMR](#) p 6

³⁵⁶ Transcript of the Hearing on 9 September 2026, p63.

³⁵⁷ [Third FMR](#), pp 6 and 16.

³⁵⁸ [The Decision](#), pp 6, 15 and 22.

³⁵⁹ As discussed in paragraphs 6.12 to 6.17 of this determination.

costs of different types of IAEs be addressed differently [...] But absent any such proposal, [GEMA's] only choice was to accept or reject CMP344 in its entirety'.³⁶⁰

- 6.65 In any event, in our view, absent persuasive evidence about the likely nature of future IAEs, and in particular absent evidence that historical IAEs were unlikely to be indicative of future IAEs, GEMA was not wrong in its assessment to have particular regard to the types of IAEs that had occurred in practice to date, such as cable failures.
- 6.66 We note that our broader finding under Ground 2A(4) (that GEMA was not wrong to conclude that cost reflectivity does not depend on a generator's ability to control or mitigate a cost) is relevant. Whether or not GEMA had focussed on cable failures or the full scope of IAEs as defined in the transmission licence, GEMA would not have been wrong in its Decision regarding ACO (e). This is because, regardless of the focus, the generators are the drivers of those costs for the reasons set out at paragraphs 6.35 to 6.44.
- 6.67 For the reasons set out above, we are not persuaded that GEMA took an unduly narrow view of an IAE such that the Decision is wrong. Ground 2A(1) is accordingly dismissed.

Ground 2A(2): GEMA failed to consider or give appropriate weight to the lack of feasibility and costs of generators mitigating IAEs.

The Appellants' submissions

- 6.68 The Appellants submitted that GEMA failed to consider or give appropriate weight to the lack of feasibility and costs of generators seeking to mitigate IAEs.
- 6.69 The Appellants submitted that:
- (a) generators lacked the ability to further mitigate IAEs;³⁶¹
 - (b) GEMA failed to consider the cost effectiveness of mitigation measures from a total systems point of view;³⁶² and
 - (c) generators as developers could not be expected to incur mitigation costs which GEMA might preclude them recovering on the sale of the asset to the OFTO.³⁶³

³⁶⁰ [GEMA Response](#), paragraph 66.

³⁶¹ [NoA](#), paragraphs 113-115.

³⁶² [NoA](#) paragraphs 120-123.

³⁶³ Set out in paragraphs 6.73 to 6.75 of this determination.

Generators lacked the ability to further mitigate IAEs

- 6.70 The Appellants submitted that generators could not do more to mitigate the risk of IAEs beyond that which they were already doing:
- (a) Robust processes were followed in relation to design, procurement, contractor selection, quality assurance, and oversight of installation works as any reduction in the ability to export electricity had an immediate financial impact but despite those measures, defects might still arise, including latent defects.³⁶⁴
 - (b) There was no evidence that warranties beyond those already procured from suppliers responsible for constructing transmission links could be obtained.³⁶⁵ The typically maximum five-year warranty period ran from developer takeover of the cable, not from transfer of the asset to the OFTO, which occurred later following an initial period of ownership and operation by the developer. Warranties extending for at least five years from OFTO transfer were not consistent with prevailing market practice and one would not expect to see, warranties structured on that basis.³⁶⁶
 - (c) Regarding the variation in warranty practice that GEMA had found,³⁶⁷ the Appellants could not comment on the arrangements secured by other developers. Warranty terms might vary for a range of reasons, including the nature of the project, the contractors involved, the parties' relative bargaining positions, and the developer's commercial priorities.³⁶⁸
 - (d) The measures that RWE took as a developer reflected all those that could reasonably have been taken and reflected the then prevailing good industry practice.³⁶⁹ Furthermore, in order to be able to pursue a claim against a supplier in the case of asset failure, it needed to be able to evidence that it as a developer had done all that it should have.³⁷⁰ As a result, decision-making at the development or construction stage would unlikely to be affected by the possibility of having to pay IAE claim costs at a later stage.³⁷¹
 - (e) Generators had limited ability to mitigate IAEs risks arising from its use of the transmission assets following their transfer to the OFTO as a generator had

³⁶⁴ Kerry McCole, first witness statement, paragraph 61.

³⁶⁵ NoA paragraph 114.

³⁶⁶ Michael Case, second witness statement, paragraph 8.

³⁶⁷ Set out in paragraph 6.79 of this determination.

³⁶⁸ Michael Case, second witness statement, paragraph 6.

³⁶⁹ This is set out in Tyler Walter, first witness statement. Mr Walter is the lead expert for power transmission systems within RWE.

³⁷⁰ Kerry McCole, first witness statement, paragraph 62.

³⁷¹ Kerry McCole, first witness statement, paragraph 63.

no rights to direct or control how those assets were operated, maintained or repaired.³⁷²

- (f) GEMA's reasoning, based on its narrow view of IAEs as cable failures, was flawed as there was no evidence that generators could do anything to mitigate the risks of IAEs caused by force majeure events.³⁷³

GEMA failed to consider the cost effectiveness of mitigation measures from a total systems point of view

6.71 The Appellants submitted that GEMA:

- (a) wrongly assumed that imposing liability for IAE costs provides meaningful and efficient economic signals to generators;
- (b) had failed to consider the costs to the system of allocating uncontrollable risks which would be inefficient to mitigate;³⁷⁴ and
- (c) took the wrong approach assuming the costs of mitigation activities would be economically efficient and reduce costs in the system as a whole.³⁷⁵

6.72 The Appellants gave examples of mitigation measures such as reinforced cables or warranties which would reduce or eliminate the risk of IAEs. However, according to the Appellants, the cost of these measures would be disproportionate when the probability of an IAE occurring in these assets was low. These measures would only serve to increase transmission costs.^{376, 377}

Generators as developers could not be expected to incur mitigation measures / costs which GEMA might preclude them recovering on the sale of the asset

6.73 The Appellants submitted that when assessing CMP344, GEMA failed to consider that costs expended by generators in building transmission assets were subject to review and costs that were in GEMA's view not 'economic and efficient' were disallowed when the assets are transferred to the OFTO. It was a specific

³⁷² Kerry McCole, first witness statement, paragraph 63.

³⁷³ NoA, paragraph 115.

³⁷⁴ NoA, paragraph 120.

³⁷⁵ NoA, paragraph 116.

³⁷⁶ NoA, paragraphs 117-119.

³⁷⁷ The Appellants noted that GEMA had no framework for assessing the costs of allocating risks to generators. First, it was the incremental costs to consumers of allocating risks to generators that was relevant. Part of that (the expected cost of a successful IAE claim) would be reflected in the price of CfDs, a point which GEMA, the Appellants submitted, had conceded, but another was compensation in the form of a margin over and above that expected cost for generators taking on that asymmetric risk exposure.

requirement under existing guidance that developments had to provide evidence of ‘sufficient pre installation risk assessment and mitigation practices’.³⁷⁸

- 6.74 The Appellants gave examples where GEMA had refused to allow developers to recover the costs of assets such as seabed surveys, spare transformers, cable or equipment despite those assets building resilience into the system. The Appellants submitted that this was compelling evidence that GEMA did not itself consider the costs of such measures, when taken at the point of development, to be efficiently incurred.³⁷⁹
- 6.75 The Appellants also told us that with offshore transmission links developer generators consistently had a significant portion (typically in the order of 10%) of their spend deemed ‘inefficient’ and therefore disallowed by GEMA for inclusion in the transfer price.³⁸⁰

GEMA’s submissions

- 6.76 GEMA submitted that the Appellants’ arguments did not relate to the assessment of whether CMP344 would better facilitate cost reflectivity, and accordingly effective competition. GEMA submitted it had expressly considered feasibility and cost of mitigations and there was no proper basis for any challenge to its evaluative judgement.³⁸¹
- 6.77 We set out below GEMA’s responses to the three key issues the Appellants raised under this sub-ground.

Generators lacked the ability to further mitigate IAEs

- 6.78 Addressing the argument that generators as developers could take no more steps to prevent occurrence of an IAE in the first place, GEMA submitted that:
- (a) following good industry practice at the design and construction phase reduced the risk of the occurrence of IAEs, and therefore the risk of assets becoming uninsurable by the OFTO;³⁸²
 - (b) offshore generator developers’ decisions on the design, procurement and build stages, in particular, influenced the quality and resilience of the assets transferred to an OFTO;³⁸³

³⁷⁸ NoA, paragraph 121.

³⁷⁹ NoA, paragraph 122.

³⁸⁰ Thomas Steward, second witness statement, paragraph 8.1.

³⁸¹ GEMA Response, paragraphs 67, 69-70.

³⁸² GEMA Response, paragraph 73.

³⁸³ James Stone, first witness statement, paragraph 150.

- (c) the Appellants' submissions on feasibility and costs of mitigations showed it was 'both feasible and efficient for generators to take at least **some** steps to mitigate **some** IAEs';³⁸⁴
- (d) it accepted that there were certain risks that offshore generators could not mitigate but its view was a relative one that 'the developer is better placed to mitigate the occurrence and cost of IAEs than consumers are, given that they design the asset, procure the components, construct the offshore asset, and operate the asset for an initial period of up to 27 months until asset transfer as part of the commissioning and testing phase';³⁸⁵ and,
- (e) longer, comprehensive warranties that included vessel costs would minimise the number of IAE claims, as the OFTOs would then rely on the warranty for protection for costs as a result of a latent defect. That in turn would enhance the longer-term viability of the OFTOs and hence the continuous operation of the offshore transmission system.³⁸⁶

6.79 Addressing the point that generators as developers could take no more steps to procure the best warranties available, GEMA told us that when Ofgem had consulted on its IAE policy in February 2018, responses from industry indicated that some generators had obtained comprehensive cable warranties which they transferred to the OFTO on transfer of the transmission asset,³⁸⁷ and that had prevented the need for IAE claims.³⁸⁸ Ofgem had found a large variation at that time in the duration and scope of warranties procured by developers and novated to OFTOs at asset transfer. Ofgem had concluded that longer, comprehensive warranties that included vessel costs would minimise the number of IAE claims, as the OFTOs would then rely on the warranty for protection for costs as a result of a latent defect. That in turn would enhance the longer-term viability of the OFTOs and hence the continuous operation of the offshore transmission system.³⁸⁹

6.80 GEMA submitted that it had accepted that there were certain risks that offshore generators could not mitigate. GEMA stated that, '[w]e did not conclude (and do not consider) that it is possible for a generator-developer to mitigate the occurrence and cost of all IAEs...'.³⁹⁰ GEMA told us that its view was a relative one that 'the developer is better placed to mitigate the occurrence and cost of IAEs than consumers are, given that they design the asset, procure the components, construct the offshore asset, and operate the asset for an initial period of up to 27 months until asset transfer as part of the commissioning and testing phase'.³⁹¹

³⁸⁴ [GEMA Response](#), paragraph 71.

³⁸⁵ [GEMA Response](#), paragraph 72.

³⁸⁶ James Stone, first witness statement, paragraph 156, quoting [Ofgem IAE Policy](#), paragraph 3.70.

³⁸⁷ [GEMA Response](#), paragraph 73.

³⁸⁸ James Stone, first witness statement, paragraph 156.

³⁸⁹ James Stone, first witness statement, paragraph 156, quoting [Ofgem IAE Policy](#), paragraph 3.70.

³⁹⁰ James Stone, first witness statement, paragraph 143.

³⁹¹ [GEMA Response](#), paragraph 72.

GEMA failed to consider the cost effectiveness of mitigation measures from a total systems point of view

- 6.81 GEMA told us that it was not for it to determine what would be cost efficient for a particular generator to take particular steps in respect of every possible potential IAE. Whether to take particular steps at the build stage, or to buy particular insurance or negotiate particular warranties, or instead to price in risk to a CfD bid, was, GEMA explained, a commercial decision for the generator, balancing cost, risk and reward. When generators were considering how to act, and whether to mitigate particular risks, the Baseline, GEMA further explained, provided a desirable charging signal, incentivising mitigations. GEMA also noted that the cost efficiency or otherwise of mitigations had not been raised as an issue in the third FMR and was, therefore, a new point.³⁹²
- 6.82 GEMA also told us a balanced assessment needed to look beyond the specific and incremental costs to generators associated with such mitigations. It would also need to take account of the impact on the likely costs of the IAEs themselves if the existing incentive from the regulatory charging structure were to be removed. Put another way, the costs to date of those events that have been approved as IAEs were the costs with the benefit of the existing charging incentive on generators. It could not simply be assumed that the costs to date of those events that have been approved as IAEs would have been at the same level without that charging incentive. It was, GEMA added, not realistically possible to quantify these relative cost burdens given the uncertainty entailed.³⁹³
- 6.83 GEMA elaborated on its criticism of the Appellants' implicit assumption that shifting IAE costs from generators to consumers would not affect the future occurrence or costs of IAEs. GEMA explained that transferring liability from generators to consumers would create a moral hazard. In its view, generators would not face the consequences of failing to take appropriate mitigating measures, resulting in higher network charges for consumers.³⁹⁴

Generators as developers could not be expected to incur mitigation measures / costs which GEMA might preclude them recovering on the sale of the asset

- 6.84 GEMA told us that the Appellants' analogy with the transfer value set by itself in respect of the Beatrice Offshore Windfarm, the wind farm that the Appellants had referred to,³⁹⁵ was a bad one. When it came to the transfer value, it had disallowed the £3.9 million cost of spare transformer because the probability of an event necessitating the use of a spare transformer was between 1 in 189 to 1 in 500

³⁹² [GEMA Response](#), paragraph 74.

³⁹³ Gavin Knott, first witness statement, paragraph 10.

³⁹⁴ Gavin Knott, first witness statement, paragraph 62(b).

³⁹⁵ This is set out in paragraph 6.74 of this determination.

years – significantly lower than the 25-year OFTO licence period. In contrast, there were other examples in which it had allowed spare parts to enhance offshore reliance, including as to the transmission link for the Gwynt y Môr Offshore Wind Farm itself.³⁹⁶

CMA assessment on Ground 2A(2)

6.85 We set out below our assessment of the Appellants' arguments under Ground 2A(2).

6.86 We do not agree with the Appellants that GEMA did not consider that generators lack the ability to further mitigate IAEs. In the Decision, GEMA stated that:³⁹⁷

We do not agree with the views presented that offshore generators cannot mitigate the risk of IAEs and their associated costs and therefore can't act upon any potential signal. We consider offshore generators to be best placed to ensure appropriate arrangements are in place to reduce the risk of such events occurring by ensuring the quality of the assets and the installation, together with appropriate commercial recourse to mitigate the subsequent cost impacts of any such occurrence (through asset warranties, indemnities, and relevant contractual protections to be agreed as part of the transaction phase, ie insurance).

6.87 It is clear from this paragraph that GEMA did consider whether generators could mitigate the risks of at least some IAEs through good industry practice, design and procurement of quality materials. We are not persuaded by the Appellants' submissions that the limitations on generators' ability to mitigate the costs of IAEs over the shorter and medium time frame would justify IAE costs being borne by demand users rather than generators.

6.88 The Appellants also made two arguments related to the cost of mitigation. The Appellants stated that GEMA failed to consider (i) the cost effectiveness of mitigation measures from a total systems point of view; and (ii) that generators as developers could not be expected to incur mitigation measures / costs which GEMA might preclude them recovering on the sale of the asset.

6.89 We note that in its Response, GEMA stated that the third FMR asserted that offshore generators cannot mitigate the risk of IAEs and that the cost of mitigation was a new point raised by the Appellants in the NoA.³⁹⁸ Consequently, GEMA did

³⁹⁶ [GEMA Response](#), paragraph 75(2).

³⁹⁷ [The Decision](#), pp 23-24.

³⁹⁸ [GEMA Response](#), paragraph 74.

not consider the cost of mitigation in the Decision. The question is therefore whether the Decision was wrong for not considering the cost of mitigation.

- 6.90 GEMA responded to the Appellants' submissions on the cost of mitigation during the course of the appeal.³⁹⁹ We do not consider that this subsequent evidence amounted to a new justification for the Decision.
- 6.91 We consider it would be within GEMA's judgement as the expert regulator to conclude that the costs of mitigation measures were matters for the generators' commercial judgement. We therefore find that GEMA was not wrong to take the view that it was for the generators to determine whether certain mitigation measures might be cost-ineffective or run the risk of not being recovered on sale.
- 6.92 We agree with GEMA's submissions⁴⁰⁰ that the assessment of the total system cost would need to be broader than the specific and incremental costs to generators associated with such mitigations. We also agree that in practice, given the uncertainty and assumptions required, it was not possible to quantify the impact robustly.
- 6.93 We also note that GEMA's process for reviewing developers' expenditure at the point of sale to an OFTO would not change regardless of whether or not CMP344 was approved. We therefore find that the Appellants' arguments that developers could not be expected to incur mitigation costs which GEMA might preclude them recovering on the sale of the asset were not relevant to GEMA's assessment of the Proposal.
- 6.94 For the reasons set out above, we find that GEMA did not fail to consider or give appropriate weight to the lack of feasibility and costs of generators mitigating IAEs.
- 6.95 We note that our broader finding under Ground 2A(4) (that GEMA was not wrong to conclude that cost reflectivity does not depend on an individual generator's ability to control or mitigate a cost) is relevant. Even if GEMA failed to consider, or give appropriate weight to, the feasibility and costs of generators mitigating IAEs, its Decision would still be not wrong. This is because, regardless of whether a generator can control or mitigate IAE costs, the generators are the drivers of those costs for the reasons set out at paragraphs 6.35 to 6.44.
- 6.96 For the reasons set out above, we conclude that GEMA's Decision was not wrong on the basis alleged in sub-ground 2A(2), namely that it failed to consider, or give appropriate weight to, the feasibility and cost of generators mitigating IAEs. Ground 2A(2) is, therefore, dismissed.

³⁹⁹ Set out in paragraphs 6.81 to 6.84 of this determination.

⁴⁰⁰ Set out in paragraph 6.82 of this determination.

Ground 2A(3) GEMA failed to consider or give due weight to the existing incentives on generators

6.97 In the Decision, GEMA noted comments from the Proposer and the Panel Members relating to incentives.⁴⁰¹

- (a) The Proposer states that offshore generators already have a very strong incentive to ensure a cable is constructed to an exceptionally high standard to avoid potential cable failures which could affect their ability to export power, thus leading to significant revenue losses.
- (b) Four out of nine Panel members considered the Proposal to better facilitate this objective. Where reasoning was provided it was considered that the current treatment for IAEs does not provide a useful signal to offshore generators, who would still be incentivised to build reliable offshore networks to avoid outages.
- (c) Three Panel members considered the Proposal to be negative against this objective. One Panel member highlighted the Proposal places the impact of IAEs fully onto consumers rather than an individual generator, therefore, reducing the cost reflectiveness of charges and removes any incentive on generators to manage the risk.

6.98 GEMA also recognised in its Decision that offshore generators have commercial incentives, independently of the IAE regime, to put arrangements in place to mitigate the financial consequences of IAEs. These include warranties, indemnities, insurance and other contractual protections agreed during the transaction phase. GEMA stated that it had taken these existing incentives into account in reaching its conclusion that CMP344 would negatively affect cost reflectivity.⁴⁰²

The Appellants' submissions

6.99 We note that this sub-ground was minimally pleaded in the NoA in three short paragraphs. The Appellants pleaded that GEMA failed to consider or give due weight to the existing incentives on generators relating to cable and network integrity that result from disruption to transmission having a direct impact on their revenue.⁴⁰³

⁴⁰¹ [The Decision](#), p 22.

⁴⁰² [The Decision](#), p24.

⁴⁰³ [NoA](#), paragraph 124.

- 6.100 The Appellants compared this to OFTOs, who they submitted were not incentivised by economic incentives to minimise transmission disruption as their revenue was not dependent on transmission.⁴⁰⁴
- 6.101 The Appellants added that the commercial incentives on generators (for example, to take effective steps to minimise the risks to cable and network integrity) rendered any additional incentive effect caused by the risk of an IAE insignificant (given the unlikelihood, unpredictability and level of such liability).⁴⁰⁵
- 6.102 The Appellants told us that the availability of insurance did not diminish the incentives to take effective steps to minimise the risks to cable and network integrity because, in the occurrence of a significant transmission outage, obtaining such insurance (operating all risks),⁴⁰⁶ business interruption and contingent business interruption (CBI)⁴⁰⁷ did not place a generator in the same financial position it would be in had that outage not occurred. The Appellants stated that those products were subject to material limitations, including policy limits, exclusions, deductibles and waiting periods. The Appellants viewed insurance as a means of mitigating exposure to catastrophic losses, rather than as a mechanism that eliminated the commercial consequences of asset failure or a substitute for robust design, construction and asset management.⁴⁰⁸
- 6.103 The Appellants told us that OFTOs were not incentivised to the same extent as generators by economic incentives to minimise transmission disruption, for example, to repair damaged assets owned by the OFTO as quickly as possible, as the revenue they received was not dependent upon being able to transmit electricity. GEMA, the Appellants continued, considered that the licence conditions requiring OFTOs to maintain and repair transmission assets were adequate.⁴⁰⁹

GEMA's submissions

- 6.104 In response, GEMA submitted that:
- (a) nothing in this sub-ground touches GEMA's assessment that it would better facilitate cost reflectivity, and accordingly competition, for the party which constructed and uses an offshore transmission asset – for example here, the generators, for whose sole use and benefit these subsea cables and associated infrastructure transmit electricity to the mainland – to pay a portion of any associated costs;⁴¹⁰

⁴⁰⁴ NoA, paragraph 125.

⁴⁰⁵ NoA, paragraph 126.

⁴⁰⁶ 'All risks' basis means that physical loss or damage is covered unless it is expressly excluded by the policy.

⁴⁰⁷ Following transfer, generators may be able to obtain CBI in respect of losses arising from damage to OFTO-owned assets ie contingent on the failure of assets owned by another.

⁴⁰⁸ Laura Schneider, first witness statement, paragraph 2.

⁴⁰⁹ NoA, paragraph 125.

⁴¹⁰ GEMA Response, paragraph 80.

- (b) it had identified and considered that there were existing incentives⁴¹¹ on generators other than being subject to IAE risk to design and build transmission assets in a manner that mitigated the risk of asset failure;⁴¹²
- (c) the commercial risk of lost revenue operated alongside, and in combination with, the concurrent cost signal sent by the existing charging policy, including exposure to the risk of costs of IAEs;⁴¹³
- (d) the risk of financial exposure provided a valuable incentive, whether that exposure came from commercial consequences such as revenue loss from not being able to export electricity from the windfarm concerned, or from IAE costs, or a combination of the two;⁴¹⁴ and
- (e) if generators were not exposed at all to the costs of IAEs, insurers might, over time, become more reluctant to provide insurance coverage to OFTOs in respect of latent defects.⁴¹⁵

6.105 GEMA further submitted that if generators' own financial exposure to IAEs (such as through loss of revenue from generation) is considered to be a strong incentive (as the Appellants contended) so too must the parallel exposure to IAE costs given their comparable size.^{416, 417}

6.106 GEMA submitted that, in at least some cases, generators might be able to secure business interruption insurance providing cover for at least a material part of those costs, with the consequence that, according to GEMA, it is doubtful that the cost signal associated with the commercial risk of lost revenue in the event of an IAE is as strong as the Appellants contended.⁴¹⁸

6.107 GEMA told us in response to the above contention of the Appellants that at present OFTOs were expected to seek insurance cover in the worldwide markets, as set out in the Ofgem IAE Policy. If an OFTO obtained such cover, the insurer would bear the costs of a cable failure or similar event. If an OFTO failed to obtain such cover when it had been realistically available, the OFTO would likely have to bear those costs, as GEMA would reject any IAE claim.

6.108 GEMA told us that if generators were not exposed at all to the costs of IAEs, insurers might, over time, become more reluctant to provide insurance coverage to

⁴¹¹ GEMA referenced the Decision where it stated that 'We recognise that there will still be a strong commercial incentive for an offshore generator to ensure a quality build whatever the ultimate treatment of IAEs, and to that extent this is a marginal consideration.' [The Decision](#), p 18.

⁴¹² [GEMA Response](#), paragraph 78.

⁴¹³ [GEMA Response](#), paragraph 81.

⁴¹⁴ [GEMA Response](#), paragraph 81.

⁴¹⁵ [GEMA Response](#), paragraph 84.

⁴¹⁶ [GEMA Response](#), paragraph 82.

⁴¹⁷ GEMA contended that the loss of revenue from generation that a generator would incur should an IAE type incident occur was on a par with cost that the generator bore from a successful IAE claim by the OFTO.

⁴¹⁸ [GEMA Response](#), paragraph 83.

OFTOs in respect of latent defects. That was important cover, reducing costs overall. GEMA told us that it was therefore seeking to avoid the risk that removing generators' exposure to the costs of IAEs might reduce insurers' appetite to provide cover for OFTOs in the first place.⁴¹⁹

CMA assessment on Ground 2A(3)

- 6.109 Under Ground 2A(3), the Appellants contend that GEMA failed to consider or give due weight to the incentives generators are already under to take steps to ensure cable and network integrity as a result of disruption to transmission having a direct impact on their revenue.
- 6.110 In its Decision, GEMA expressly stated that it had considered generators' incentives to mitigate the occurrence of IAEs and existing commercial incentives to minimise the risk to revenue of transmission outages.⁴²⁰ GEMA expanded on this reasoning in its submissions during the course of the appeal.⁴²¹
- 6.111 We are therefore satisfied that GEMA did have regard to generators' existing incentives in reaching its Decision.
- 6.112 We next consider whether GEMA erred in the weight it gave to these incentives when assessing whether CMP344 against ACO (e).
- 6.113 It is clear that generators have existing commercial incentives to take effective steps to minimise the risks to cable and network integrity which could result in transmission outage. This was acknowledged by GEMA in its Decision.⁴²² However, that does not mean that exposure to costs related to IAEs provides no additional incentive. We note that GEMA in the Decision considered this point.⁴²³ We also note that there is not reliable data on the relative size of the different incentives (ie incentives due to the costs related to IAEs compared with broader commercial incentives).
- 6.114 We therefore find that it was reasonable for GEMA to conclude that exposure to IAE costs provides an additional, and not insignificant incentive, notwithstanding the existing commercial incentives.
- 6.115 The Appellants also argued that OFTOs are not incentivised to minimise transmission disruption.⁴²⁴ We note that this particular aspect of the current regime would not change even if CMP344 was accepted compared to the Baseline (as the IAE costs would be borne by demand customers, not the OFTOs) and there would

⁴¹⁹ [GEMA Response](#), paragraph 84.

⁴²⁰ [The Decision](#), p 18 and p 24.

⁴²¹ GEMA's submissions are set out in paragraphs 6.104 to 6.108.

⁴²² [The Decision](#), p 18.

⁴²³ [The Decision](#), pp 18-19.

⁴²⁴ Set out in paragraph 6.103 of this determination.

therefore be no impact on OFTOs incentives. In our view, therefore, this is a point which does not advance the Appellants' case.

- 6.116 We therefore find, for the reasons set out above, that GEMA did not fail to consider or give appropriate weight to the existing incentives of generators.
- 6.117 We note that our broader finding under Ground 2A(4) (that GEMA was not wrong to conclude that cost reflectivity does not depend on a generator's ability to control or mitigate a cost) is relevant. Even if GEMA had failed to consider, or give appropriate weight to, the existing incentives of generators, GEMA would not have been wrong in its Decision regarding ACO (e). This is because, regardless of whether the imposition of IAE costs changes the incentives on generators, the generators are the drivers of those costs for the reasons set out at paragraphs 6.35 to 6.44.

Ground 2A(5) GEMA erred in rejecting the comparison with the SHETL subsea cable reopener

- 6.118 Ground 2A(5) concerns the Appellants' reliance on the subsea cable reopener contained in Special Condition 3.28 of the transmission licence held by SHETL. The reopener applies to the Shetland High-Voltage Direct Current Link (SHVL), a subsea link connecting Shetland to mainland Scotland. It permits SHETL to apply to GEMA for an adjustment to its allowed revenue for efficient costs associated with resolving unexpected subsea cable faults or mitigating the risk of such faults occurring. Any additional revenue allowed under the reopener is recovered from consumers through the TDR.⁴²⁵
- 6.119 The Appellants relied on the SHETL reopener as an example of what they considered to be an inconsistent approach by GEMA to the allocation of unexpected transmission asset costs. They submitted that the reopener demonstrated GEMA's acceptance that efficient costs associated with unexpected subsea cable faults could appropriately be recovered from consumers. This contrasts with the Decision in which GEMA rejected a proposal (CMP344) to remove the relevant offshore generator's liability for approved IAE costs. They argued that, in rejecting the relevance of that comparison, GEMA erred in fact and/or law and/or failed properly to have regard, or give appropriate weight, to ACOs (d) and (e).⁴²⁶
- 6.120 GEMA rejected the comparison on the basis that the characteristics and regulatory context of SHVL differed materially from those of the offshore transmission assets affected by CMP344.

⁴²⁵ NoA, paragraphs 136–138. James Stone, first witness statement, paragraphs 175–177.

⁴²⁶ NoA, paragraphs 136–143.

The Appellants' submissions

- 6.121 The Appellants submitted that the significance of the SHETL comparison lay in the principle reflected by the reopener rather than in the detailed design of the respective regulatory arrangements. In their view, both the SHETL reopener and CMP344 concerned the allocation of efficient costs arising from unexpected faults affecting subsea transmission assets. They argued that the SHETL reopener therefore demonstrated GEMA's acceptance that such costs may, in appropriate circumstances, be recovered from consumers.⁴²⁷
- 6.122 The Appellants challenged the distinctions relied upon by GEMA. In particular, they submitted that an offshore generator should not be regarded as the sole beneficiary of the transmission assets serving it because suppliers and consumers also benefit from the electricity transported through those assets. They also submitted that SHVL was developed to facilitate the connection of Viking Wind Farm and could not therefore be characterised simply as general network infrastructure unrelated to a particular generation project. In their view, the fact that SHVL also serves demand did not provide a sufficient reason for allocating the costs of unexpected cable faults differently.⁴²⁸
- 6.123 The Appellants also challenged GEMA's statement in the Decision that SHETL had not submitted a claim under the reopener. They submitted that whether the reopener had been used in practice was irrelevant to the comparison, which concerned the regulatory allocation of costs if an unexpected subsea cable fault occurred. They argued that GEMA had therefore taken account of an irrelevant consideration and erred in law.⁴²⁹

GEMA's submissions

- 6.124 GEMA submitted that SHVL differed materially from the offshore transmission assets affected by CMP344. In particular, it relied on the following distinctions:
- (a) SHVL was constructed and is owned by SHETL, an onshore transmission owner. Viking Wind Farm did not construct the link. By contrast, the offshore transmission assets affected by CMP344 were constructed under the generator-build model and subsequently transferred to an OFTO;
 - (b) SHVL is bi-directional and serves both transmission-connected generation and demand on Shetland. Its costs are shared between generators, consumers and, unusually, the distribution network operator serving Shetland. By contrast, the offshore transmission assets affected by CMP344

⁴²⁷ NoA, paragraphs 136-138 and 142(d).

⁴²⁸ NoA, paragraphs 142(a)-(d).

⁴²⁹ NoA, paragraph 141.

are generally radial, point-to-point links used to export electricity from a particular offshore generator to the onshore transmission system;

- (c) the construction of SHVL was approved by GEMA following consideration of its wider system role. The needs case included the connection of Viking Wind Farm but also placed weight on the link's contribution to security of supply on Shetland, which had previously been isolated from the GB electricity network; and
- (d) the SHVL reopener forms part of the onshore price-control arrangements applicable to SHETL. There is no directly equivalent IAE mechanism in the onshore transmission licence. The offshore IAE arrangements operate within a different regulatory framework governing assets owned by OFTOs and used by offshore generators.⁴³⁰

6.125 GEMA submitted that these differences in construction, ownership, use, wider system function and regulatory context provided a proper basis for distinguishing SHVL from the offshore transmission assets affected by CMP344. It further submitted that its statement that SHETL had not made a claim under the reopener was no more than a statement of fact and was not material to its reasoning.⁴³¹

CMA assessment on Ground 2A(5)

6.126 The SHETL reopener and CMP344 share a relevant feature; each concern how costs associated with unexpected faults affecting subsea transmission assets would ultimately be recovered. The existence of that similarity did not, however, require GEMA to treat the two arrangements in the same way. The issue is whether the distinctions relied upon by GEMA provided a rational basis for its assessment.

6.127 We first consider GEMA's reliance on the fact that SHETL had not submitted a claim under the reopener. We agree with the Appellants' submission that the practical use of the reopener is not determinative of the relevance of SHETL as a comparison to CMP344. It is the allocation of any qualifying costs that may arise under the respective regulatory arrangements that was relevant, rather than whether SHETL had already incurred and claimed any such costs. We therefore place no weight on whether the SHETL reopener had been used in practice.

6.128 That does not, though, establish that GEMA's rejection of the comparison was wrong. GEMA's reasons for distinguishing SHVL were not confined to the absence of a claim under the reopener. GEMA also relied on differences relating to who constructed and owns the assets, how the link is used, the parties benefiting

⁴³⁰ [GEMA Response](#), paragraphs 87-89; James Stone, first witness statement, paragraphs 175-182.

⁴³¹ [GEMA Response](#), paragraph 89; James Stone, first witness statement, paragraph 183(a).

directly from it, its wider network function and the regulatory arrangements under which its costs are recovered.⁴³²

- 6.129 We accept the Appellants' submission that the connection of Viking Wind Farm formed part of the case for constructing SHVL. SHVL cannot therefore be characterised as infrastructure entirely unrelated to a particular generation project.
- 6.130 However, the distinguishing characteristics relied upon by GEMA indicate that it was not constructed solely to provide a radial export connection for Viking Wind Farm. It is a bi-directional link serving both generation and demand. Its approval reflected wider system considerations, including the connection of Shetland to the GB electricity network and the contribution of the link to security of supply on Shetland. Those characteristics are relevant to the allocation of costs associated with the link and distinguish it from the radial offshore transmission assets to which CMP344 principally applied.⁴³³
- 6.131 There was also a relevant difference in the development and regulatory treatment of the assets. SHVL was constructed and is owned by an onshore transmission owner, and its construction was approved through the onshore regulatory framework having regard to its broader system purposes. The offshore transmission assets affected by CMP344 were generally constructed by the relevant generator under the generator-build model and subsequently transferred to an OFTO. As explained in our assessment of the other parts of Ground 2A, GEMA considered that this feature was relevant because the existing charging arrangements could influence decisions taken during the development, construction and early operation of those assets.
- 6.132 We therefore consider that it was rational for GEMA to distinguish the SHETL reopener from the transmission assets affected by CMP344. Although there were similarities between the arrangements, GEMA did not treat the fact that both concerned subsea cables and unexpected fault costs as determinative. It took account of the wider network and security-of-supply functions of SHVL, its use by both generation and demand, the identity of the party that constructed it and the different regulatory framework governing its costs.
- 6.133 GEMA's reasoning on this issue was expressed briefly in the Decision and was explained in greater detail in its Response and the witness evidence of James Stone. We do not consider that the subsequent evidence amounted to a new justification for the Decision. It elaborated on the distinctions identified in the Decision and explained why GEMA considered those distinctions relevant.⁴³⁴

⁴³² [The Decision](#), p 17; [GEMA Response](#), paragraphs 87 - 89; James Stone, first witness statement, paragraph 179 - 182.

⁴³³ James Stone, first witness statement, paragraphs 179 - 181.

⁴³⁴ [The Decision](#), p 17; [GEMA Response](#), paragraph 88; James Stone, first witness statement, paragraphs 179 to 183.

6.134 For those reasons, we find that GEMA did not err in distinguishing the SHETL subsea cable reopener from the offshore transmission assets covered by CMP344. GEMA's reliance on the absence of a claim under the reopener was, in our view, erroneous, but we do not consider it was material to GEMA's conclusion. The other distinctions on which GEMA relied provided a proper basis for treating the arrangements differently.

Ground 2A(6) GEMA wrongly focused on the generator qua developer rather than qua generator

6.135 Ground 2A(6) concerns the Appellants' contention that GEMA's reasoning focused on generators in their capacity as developers rather than generators. The Appellants submitted that many of the matters relied upon by GEMA including decisions relating to the design, procurement, construction and testing of transmission assets, together with warranties and other contractual protections, concerned activities undertaken before the assets were transferred to the OFTO. They argued that GEMA therefore justified the allocation of IAE-related costs to generators by reference to their activities as developers rather than their activities as generators. We therefore consider whether GEMA wrongly drew false equivalence between the roles of generators and developers when assessing CMP344.⁴³⁵

The Appellants' submissions

6.136 The Appellants submitted that GEMA's reasoning in the Decision was based on the capacity of developers to mitigate the risk and consequences of IAEs rather than the capacity of generators to do so. They submitted that GEMA's conclusion that generators were 'best placed' to bear IAE risk depended on the capacity of developers to influence matters such as asset quality, construction and contractual protections. The Appellants argued that this approach imposed costs on generators by reference to their activities as developers and thereby confused the separate stages of development and generation.⁴³⁶ They argued there was no necessary reason in either fact or law for the equivalence to be drawn by GEMA, and that generators may not always be the developers of transmission assets in the future.⁴³⁷

6.137 The Appellants further submitted that the considerations relied upon by GEMA related to the development and construction of the transmission assets rather than the activities of generation. They argued that GEMA therefore failed properly to

⁴³⁵ NoA, paragraphs 144 and 145(a).

⁴³⁶ NoA, paragraphs 144 and 145(a).

⁴³⁷ NoA, paragraph 144

distinguish between the position of a generator as developer and the position of a generator after transfer of the assets to the OFTO.⁴³⁸

GEMA's submissions

6.138 GEMA submitted that it was appropriate to consider the role of the developer when assessing CMP344.⁴³⁹ GEMA submitted that developers design, procure, construct and test the transmission assets before transfer to the OFTO and may influence matters such as asset specification, contractor selection, warranties and contractual protections. GEMA submitted that those decisions may affect the quality and resilience of the assets and therefore the likelihood and consequences of future IAEs. GEMA therefore considered it appropriate to assess the incentives created by the charging arrangements by reference to the generator in its capacity as developer.⁴⁴⁰

CMA assessment on Ground 2A(6)

- 6.139 We accept the Appellants' submission that, once the transmission assets have been transferred to the OFTO, the generator has limited ability to influence how those assets are operated, maintained or repaired. The evidence before us indicates that responsibility for those activities rests with the OFTO rather than the generator.⁴⁴¹
- 6.140 However, the reasoning relied upon by GEMA was directed principally towards decisions taken before the transfer of the assets to the OFTO. We do not consider that GEMA failed to appreciate the distinction between the generator acting as developer and the generator acting as generator. Rather, its assessment reflected the fact that to date, all offshore wind generation in Great Britain has been constructed under a 'generator-build' model.
- 6.141 The factors on which GEMA relied, including asset specification, procurement, testing, contractor oversight, warranties and contractual protections, relate principally to the development, construction and early operational stages of a project, rather than to actions taken by a generator after the assets have been transferred to the OFTO. That does not establish that GEMA erred. In assessing CMP344, it was open to GEMA to conclude that any incentives relevant to the occurrence and consequences of IAEs would operate primarily through decisions taken during those earlier stages of the project lifecycle.

⁴³⁸ [NoA](#), paragraphs 144 and 145(a) – (c).

⁴³⁹ GEMA also noted that to date, all offshore wind generation in Great Britain has been constructed under a 'generator-build' model whereby an offshore generator designs and installs both: (i) the relevant generation assets as well as (ii) the transmission assets required to link the offshore generation to the onshore network ([GEMA Response](#), paragraph 13).

⁴⁴⁰ [GEMA Response](#), paragraph 72; James Stone, first witness statement, paragraph 150.

⁴⁴¹ Kerry McCole, first witness statement, paragraph 63.

6.142 For the reasons set out above, we find that GEMA did not err by taking account of the generator's role as developer when assessing CMP344. While generators have limited ability to influence the assets after their transfer to the OFTO, it was open to GEMA to consider incentives relevant to the occurrence and consequences of IAEs arising during the development, construction and early operational stages of the assets prior to transfer. We note the Appellants' submission that future arrangements may not involve generators undertaking those activities. However, CMP344 fell to be assessed against the existing offshore transmission regime and we do not consider that GEMA was required to determine the implications of hypothetical future models when reaching its decision. We therefore find that GEMA was not wrong to consider the role of the generator as developer.

CMA assessment on Ground 2A overall

6.143 We have assessed the submissions made in relation to the various sub-grounds of Ground 2A:

- (a) Ground 2A(1): GEMA adopted an unduly narrow a view of an IAE, treating it as essentially concerned with uninsurable latent defects in sub-sea transmission cables;
- (b) Ground 2A(2): GEMA failed to consider or give appropriate weight to the lack of feasibility and costs of generators mitigating IAEs;
- (c) Ground 2A(3): GEMA failed to consider or give appropriate weight to the existing incentives on generators, given that transmission assets represent their route to market;
- (d) Ground 2A(4): GEMA wrongly considered that imposing costs on generators would be consistent with the principle of cost reflectivity and/or represent efficient economic signalling;
- (e) Ground 2A(5): GEMA erred in rejecting the comparison with the Scottish Hydro Electric Transmission plc (SHETL) subsea cable reopener; and
- (f) Ground 2A(6): GEMA wrongly focused on the generator qua developer rather than qua generator.

6.144 Overall, our view is that GEMA was not wrong to have concluded that CMP344 would not better achieve ACO (e) relative to the Baseline:

- (a) We consider that GEMA was not wrong to conclude that cost reflectivity does not depend on a generator's ability to control or mitigate a cost, nor whether it was responsible for, or caused, the events giving rise to a cost. All costs associated with the construction, operation and maintenance of a

transmission link for a sole user are costs which have been conferred on the system by that user, who should accordingly pay charges which reflect those costs (Ground 2A(4)).

- (b) Even if GEMA had erred in one or more of the respects alleged by the Appellants under Grounds 2A(2), 2A(3), 2A(5) or 2A(6) – which in each case we are not persuaded it did – we do not consider that any such error would change the conclusion that CMP344 would be negative against ACO (e). This is because none of the issues raised by those subsidiary grounds, for example whether or not generators can feasibly mitigate the occurrence or costs of IAEs, are relevant to an assessment of cost reflectivity in circumstances where that concept requires that the entity which drives or confers the costs associated with the transmission assets, including IAE costs – namely the generator as the sole user of those assets – should be responsible for paying charges which reflect those costs. For the reasons set out above, we have not found that approach to the meaning of cost reflectivity to be mistaken.
- (c) Similarly, for the reasons set out above, we are not persuaded that GEMA adopted an unduly narrow view of IAEs when assessing the proposal against ACO (e) (Ground 2A(1)), but even if it had done so, we do not consider that any such error would have meant that GEMA's conclusion regarding ACO (e) was wrong. This is because, where cost reflectivity requires that the generator, as the entity which drives or confers the costs associated with the transmission assets, including IAE costs, should be responsible for paying charges which reflect those costs – which is an approach we have found not to be mistaken – that would apply to all possible types of IAEs.

6.145 Accordingly, we are not persuaded that any of the alleged errors identified by the Appellants in their submissions on Ground 2A mean that GEMA's conclusion that CMP344 would not better achieve ACO (e) relative to the Baseline was wrong within the meaning of section 175(4) of EA04.

Grounds 2B, 2C and 2D: GEMA was wrong in fact and/or law in deciding that the modification would not facilitate competition and thus better serve Use of System Charging Objectives (d)

6.146 Under Grounds 2B, 2C and 2D, the Appellants submitted that GEMA was wrong in fact and/or law in deciding the CMP344 would not better facilitate ACO (d) relative to the Baseline (absent the modification). As was set out in paragraph 3.46(a), ACO (d) is:

...that compliance with the Use of System Charging Methodology facilitates effective competition in the generation and supply of

electricity and (so far as is consistent therewith) facilitates competition in the sale distribution and purchase of electricity.

- 6.147 Grounds 2B, 2C and 2D – which are considered in turn below – are directed at different aspects of the assessments GEMA presented in its Decision in support of its conclusion that CMP344 would not better achieve ACO (d):
- (a) Under Ground 2B, the Appellants submitted that GEMA was wrong to have dismissed the existence of discrimination against offshore generators by comparison with the entities with which they compete.⁴⁴²
 - (b) Under Ground 2C, the Appellants submitted that GEMA was wrong to have concluded that the impact of CMP344 on competition was nil or immaterial.⁴⁴³
 - (c) Under Ground 2D, the Appellants submitted that GEMA was wrong to have suggested that CMP344 could introduce an anticompetitive distortion on the CfD market.⁴⁴⁴

Ground 2B: GEMA was wrong to dismiss the existence of discrimination against offshore generators by comparison with entities with which they compete

- 6.148 Under Ground 2B, the Appellants submitted that GEMA was wrong to dismiss the existence of discrimination against offshore generators by comparison with entities with which they compete.⁴⁴⁵ Ground 2B has two parts:
- (a) Under Ground 2B(1), the Appellants submitted that GEMA was wrong in stating that the treatment of onshore local circuit charges ‘was in fact comparable to existing baseline arrangements for offshore local circuit charges’.⁴⁴⁶
 - (b) Under Ground 2B(2), the Appellants submitted that GEMA was wrong to state that offshore and onshore generators are not in a materially equivalent position.⁴⁴⁷
- 6.149 We begin below by summarising those parts of the Decision that relate directly to this Ground 2B. We then consider Grounds 2B(1) and 2B(2) in turn. In each case we summarise the submissions we received before setting out our assessment. We then provide our overall assessment in relation to Ground 2B.

⁴⁴² NoA, paragraph 6(b).

⁴⁴³ NoA, paragraph 6(c).

⁴⁴⁴ NoA, paragraph 6(d).

⁴⁴⁵ NoA, paragraph 6(b).

⁴⁴⁶ NoA, paragraphs 146-152.

⁴⁴⁷ NoA, paragraphs 153-155.

The Decision

6.150 In the Decision, as part of its assessment of ACO (d), GEMA said that it disagreed (with the majority of CUSC Panel members) that onshore and offshore generators are in an equivalent position such that additional costs incurred by a TO and an OFTO should be recovered in an aligned and consistent manner, such as from demand.⁴⁴⁸ GEMA said that there are differences between onshore and offshore generators in terms of their ability to mitigate both the risks of IAE-related events occurring and the costs arising from such events, and that it considered these sufficient to warrant a different cost recovery mechanism applying as between OFTOs and TOs should these assets fail and, in the case of OFTOs, an IAE is submitted and approved.⁴⁴⁹

6.151 GEMA also said:⁴⁵⁰

We would add that to the extent that there is a perceived onshore equivalent for an IAE, we observe that for onshore local circuit failures, the cost of the TO fixing or replacing the local circuit asset itself is recovered through onshore local circuit charges via an update to the SEF at the start of the following price control period. Onshore local charges are payable by generators and not demand consumers. This is in fact comparable to existing baseline arrangements for offshore local circuit charges (for example, if an IAE is awarded due to an offshore circuit failure the cost is recovered via an update to the generator offshore local circuit tariff and charges at the start of the next price control).

Ground 2B(1): GEMA was wrong in stating that the treatment of onshore local circuit charges ‘was in fact comparable to existing baseline arrangements for offshore local circuit charges’

The Appellants’ submissions

6.152 The Appellants submitted that the comparison made in the Decision – in the excerpt shown in paragraph 6.151 – between onshore local circuit charges and the offshore IAE arrangements was limited in a number of important respects that were not addressed in the Decision,⁴⁵¹ including that:

- (a) an onshore generator may not need to pay a local circuit charge at all as it may be directly connected to a main interconnected transmission system node and therefore not use a local circuit. That is not an option available to

⁴⁴⁸ [The Decision](#), p 15.

⁴⁴⁹ [The Decision](#), pp 15-16.

⁴⁵⁰ [The Decision](#), p 16.

⁴⁵¹ [NoA](#), paragraph 147.

an offshore generator because of the practical requirement for a circuit to carry electricity to shore for onward transmission;⁴⁵²

- (b) even when an onshore generator is connected to the transmission network via a local circuit, the local circuit tariff is generally calculated by reference to a non-specific circuit expansion factor. The only circuits to which SEFs apply are AC sub-sea cables and HVDC (High Voltage Direct Current) links, and that – according to the Final Modification Report for CMP463 – there are only six of these in the UK;⁴⁵³
- (c) GEMA was wrong in stating that the cost of the TO fixing or replacing the local circuit is recovered via an update to the SEF at the start of the following price control period,⁴⁵⁴ there has never been any scope for the costs of repairing a local circuit to be included in the calculation of a SEF;⁴⁵⁵ and
- (d) SEFs in the upcoming price control will be frozen at 2025/26 values such that the current position under the CUSC is that a SEF cannot be updated at the start of the next price control.⁴⁵⁶

6.153 The Appellants submitted that, given the above, GEMA had misdirected itself as to the meaning and effect of the CUSC and consequently failed to appreciate the discriminatory effect of imposing the cost of IAEs on offshore generators when onshore generators are not subject to such costs.⁴⁵⁷ The Appellant submitted that onshore circuit charges are not in fact comparable to offshore circuit charges, as currently administered by NESO, whether in fact or in law, and that GEMA's conclusion to the contrary was based wholly or partly on an error of fact, and/or was wrong in law.⁴⁵⁸

6.154 At the Hearing, the Appellants' conceded that this error alone would not be enough to allow the appeal, but said that it demonstrated a dismissive approach on the part of GEMA to comparisons that were drawn between onshore and offshore, and a lack of care in really analysing the different treatment of onshore and offshore generation.⁴⁵⁹

GEMA's submissions

6.155 In its Response, GEMA conceded that in its Decision it had incorrectly described SEFs and that this amounted to an error. GEMA stated that it accepted the factual

⁴⁵² NoA, paragraph 148.

⁴⁵³ NoA, paragraph 149.

⁴⁵⁴ NoA, paragraph 150.

⁴⁵⁵ NoA, paragraph 150(e).

⁴⁵⁶ NoA, paragraph 151.

⁴⁵⁷ NoA, paragraph 152.

⁴⁵⁸ NoA, paragraph 152.

⁴⁵⁹ Transcript of the Hearing on 9 September 2026, p 108.

description set out in the NoA,⁴⁶⁰ as summarised in paragraph 6.152.⁴⁶¹ GEMA further submitted that this point of detail was merely illustrative set against its overarching position that onshore and offshore generators are not in an equivalent position,⁴⁶² and that the admitted error had no impact on its conclusion in respect of ACO (d) and is immaterial.⁴⁶³

CMA assessment on Ground 2B(1)

- 6.156 As GEMA accepted that it had made an error in describing the onshore SEF charging arrangements,⁴⁶⁴ we focused on the question of how material that error was to GEMA's conclusion that CMP344 would not better facilitate ACO (d).
- 6.157 GEMA's error was to describe an aspect of the onshore SEF arrangements as comparable to the offshore IAE arrangements. However, we consider it to be clear from the Decision that GEMA's approach to assessing IAEs was underpinned by the view that onshore and offshore generators are not in an equivalent position, and that it intended there to be a difference in the charging arrangements that were to be applied.⁴⁶⁵ Indeed, we note that the Appellants' contention under Ground 2B(2) is that GEMA was wrong to state that offshore and onshore generators are not in a materially equivalent position.⁴⁶⁶ Given this, while we consider it unhelpful that the Decision included this error, our view is that it did not have a material impact on GEMA's conclusion with respect to ACO (d).
- 6.158 We therefore do not consider that the error GEMA made in describing the onshore SEF charging arrangements means that its conclusion that CMP344 would not better facilitate ACO (d) was wrong.

Ground 2B(2): GEMA was wrong to state that offshore and onshore generators are not in a materially equivalent position

The Appellants' submissions

- 6.159 The Appellants submitted that CMP344 would have better facilitated competition by putting offshore generators on a level playing field with onshore generators.⁴⁶⁷ The Appellant submitted that in approving the proposal to freeze SEFs (in CMP463), GEMA had agreed that significant and unexpected changes to charges undermine competition where material effects between generators are witnessed

⁴⁶⁰ NoA, paragraphs 149-150.

⁴⁶¹ GEMA Response, paragraph 94; James Stone, first witness statement, paragraph 194.

⁴⁶² James Stone, first witness statement, paragraph 194.

⁴⁶³ GEMA Response, paragraph 94.

⁴⁶⁴ Set out in paragraph 6.155 of this determination.

⁴⁶⁵ Set out in paragraph 6.150 of this determination.

⁴⁶⁶ NoA, paragraphs 153-155.

⁴⁶⁷ NoA, paragraph 153.

at short notice and without reasonable justification.⁴⁶⁸ The Appellants submitted that, in seeking to justify the retention of a regulatory rule conferring a selective advantage on one set of market participants, GEMA adopted the position that onshore and offshore generation are not in an equivalent position but that this was based on an incorrect assessment that offshore generators are best placed to avoid or mitigate IAE risks.⁴⁶⁹ The Appellants submitted that, for the reasons it had set out in the foregoing grounds, had GEMA properly considered the inability of an offshore generator to avoid or mitigate IAE risks, or to do so efficiently, it would have recognised that there was no material distinction between onshore and offshore generators, and concluded that the current arrangements are discriminatory and anticompetitive.⁴⁷⁰

GEMA's submissions

- 6.160 GEMA submitted that onshore and offshore generators are not in a materially equivalent position, noting that the offshore transmission network has used a generator-build model to date whereas that is not the position onshore.⁴⁷¹ GEMA submitted that even if there was prima facie discrimination, the consequent impact on competition would be negligible;⁴⁷² there is different treatment of onshore and offshore generators both through GEMA's regulation of onshore and offshore transmission, and through DESNZ's approach to CfDs.⁴⁷³
- 6.161 GEMA submitted that there was no inconsistency arising from its decision to freeze SEFs (in CMP463) as that was a temporary measure to mitigate potentially harmful step changes in charges levels – which, in that instance, it had identified as significant, occurring at short notice and without reasonable justification – prior to further review as part of wider reforms.⁴⁷⁴ GEMA submitted that, by contrast, CMP344 would have been an enduring change to the methodology, and that the cause and drivers of IAE costs are known and subject to robust scrutiny ahead of any decision, with generators typically receiving advanced notice of changes to charges.⁴⁷⁵

CMA assessment on Ground 2B(2)

- 6.162 The Appellants' submissions under this ground raised the question of whether applying different charging arrangements to offshore, as compared to onshore, generators, through the current IAE charging arrangements, is justified. These

⁴⁶⁸ NoA, paragraph 154.

⁴⁶⁹ NoA, paragraph 155.

⁴⁷⁰ NoA, paragraph 155.

⁴⁷¹ GEMA Response, paragraph 93(1). Paragraphs 6.124 and 6.125 of this determination summarise GEMA's submissions on differences between the offshore and onshore transmission arrangements in relation to Ground 2A(5).

⁴⁷² GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 43.

⁴⁷³ Gavin Knott, first witness statement, paragraph 27.

⁴⁷⁴ James Stone, first witness statement, paragraphs 197-199.

⁴⁷⁵ James Stone, first witness statement, paragraph 198-199.

submissions were largely presented by reference to,⁴⁷⁶ and/or repeated,⁴⁷⁷ submissions that were made, and that we address⁴⁷⁸ in relation to Ground 2A concerning cost reflectivity.

- 6.163 With respect to CMP463 (a proposal to freeze onshore SEFs), we consider GEMA's submissions on the circumstances it was addressing in that decision to have identified a range of material differences from those that are relevant to the assessment of IAEs.⁴⁷⁹ Given that, in our view, GEMA's reasoning in CMP463 (where it had referred to the potential for significant and unexpected changes to charges to undermine competition) does not imply that the approach it took when assessing CMP344 was unjustified or otherwise inappropriate.
- 6.164 While the current IAE arrangements mean that the charging arrangements for offshore generators differ from those that apply to onshore generators, in our view that does not imply that a selective advantage is conferred on one set of market participants over another. The use of separate technology pots in CfD auctions – such that the CfD price for offshore wind generators will be set through a separate auction process, and (in all likelihood) at a different level, to that for other, including onshore, supported forms of generation – allows for underlying cost pressures that affect offshore wind generators to be taken into account in auction bids. In our view, this provides a means through which the expected cost implications of the treatment of IAE costs for offshore generators can be compensated for (such as by raising the strike price).
- 6.165 Given the above, in our view GEMA's assessment of ACO (d) was not wrong for any of the reasons submitted by the Appellants under this ground. We assess the Appellants' other submissions related to impacts of competition under Grounds 2C and 2D below.

Ground 2C: GEMA was wrong to conclude that the impact on competition was nil or immaterial

- 6.166 The Appellants submitted that in concluding that CMP344 would not better facilitate competition, GEMA failed to have regard to a relevant consideration, based its view wholly or partly on an error of fact and/or acted irrationally and reached a conclusion that involved a failure to have proper regard or give appropriate weight to ACO (d).
- 6.167 In addition, relying on Cornwall Insight's first report, the Appellants submitted that there was 'uncontradicted economic evidence' that CMP344 would in the long run

⁴⁷⁶ NoA, paragraph 155.

⁴⁷⁷ NoA, paragraph 155; Appellants' Skeleton Argument filed in advance of the Hearing, paragraphs 27-28.

⁴⁷⁸ Including paragraphs 6.85 to 6.96, 6.109 to 6.117, and 6.149 to 6.152 of this determination.

⁴⁷⁹ Set out in paragraph 6.161 of this determination.

avoid detrimental impacts on consumers that the current arrangements were likely to cause.⁴⁸⁰

6.168 The Appellants submitted that CMP344 would better facilitate ACO (d) in a number of ways by lessening distortions that it said arise under the current IAE arrangements.

6.169 We evaluate Ground 2C by considering the following matters in turn:

- (a) competition for overall CfD budgets;
- (b) competition and the disinvestment horizon;
- (c) the Appellants' submissions on a 'punitive lottery';
- (d) the potential for CMP344 to reduce CfD strike prices; and
- (e) competition over the dispatch horizon.⁴⁸¹

6.170 We begin below by summarising those parts of the Decision that relate directly to this Ground 2C. For each of (a) to (e), we then summarise the submissions we received in relation to the matter before setting out our assessment of each one. We then provide our overall assessment in relation to Ground 2C. We note that submissions related to (e) above (competition over the dispatch horizon) were not included, or explicitly referred to, in the NoA. We have nonetheless assessed the evidence submitted in relation to (e) as included in the report from Mr Anstey that supported the NoA⁴⁸² and in subsequent documents.⁴⁸³

The Decision

6.171 In the Decision, as part of its assessment of ACO (d), GEMA said – with respect to CfDs and the sale of electricity – that its understanding and expectation remained that removing the costs of IAEs from offshore generators would not necessarily result in greater volumes of offshore generation entering the market and potentially better facilitating competition through improved liquidity in the CfD auctions.⁴⁸⁴ GEMA also said that it was unclear that the level of risk premia assumed to be

⁴⁸⁰ We consider the relevance of the Cornwall Insight analysis to Ground 2C in our assessment of submissions on the potential for CMP344 to reduce CfD strike prices in paragraphs 6.198 to 6.199. The Cornwall Insight analysis is described further in paragraph 4.21, and the submissions we received on it in relation to Ground 4 are summarised in paragraphs 8.14 to 8.23.

⁴⁸¹ As set out in paragraph 6.201, the Appellants' evidence described the dispatch horizon as including the wholesale electricity markets over the short-term in which participants buy and sell electricity (George Anstey, first expert report, paragraph 55).

⁴⁸² George Anstey, first expert report, Section 3.2.

⁴⁸³ Including: Appellants' Skeleton Argument filed in advance of the Hearing, paragraph 30.

⁴⁸⁴ [The Decision](#), p 19.

applied to CfD bids and alleged to be removed via CMP344 would be material enough to reduce CfD strike prices or meaningfully improve competitiveness.⁴⁸⁵

- 6.172 GEMA said that it considered that CMP344 would not improve an offshore generator's ability to compete with other forms of generation.⁴⁸⁶ GEMA said that the current CfD regime recognises the material differences in cost structures for onshore and offshore wind, allocating separate 'pot' structures which group the separate technologies and use different cost parameters.⁴⁸⁷ GEMA said that the different levels of CfD support are to address any underlying cost differentials between regimes and forms of generation, and that, to the extent that offshore generators consider it prudent to factor in an appropriate level of risk premium for IAEs, this will have been included within their bids and ultimately strike prices following any successful bids.⁴⁸⁸ GEMA said that, in relation to the resulting competition in the sale of electricity, the effect of securing the different levels of subsidy (for onshore and offshore generators) for their respective CfD contracts is essentially to put them on a level playing field (by providing the 'missing money' to make their respective investments viable).⁴⁸⁹

Competition for overall Contracts for Difference budgets

The Appellants' submissions

- 6.173 The Appellants submitted that there had been no basis for GEMA's 'understanding and expectation' that removing the costs of IAEs from offshore generators would 'not necessarily' result in greater volumes of offshore generation entering the market, nor for its assumption that the way in which the CfD regime had been administered to date meant that onshore and offshore wind do not meaningfully compete for subsidies.
- 6.174 The Appellants submitted evidence that while the use of separate allocation pots in historical CfD auctions means that there is no direct competition between offshore and onshore generators, there is (and has been) competition between these technologies for the overall CfD budget⁴⁹⁰ and this can arise in two ways:⁴⁹¹
- (a) ex post adjustments to CfD budgets: DESNZ's approach for the seventh Allocation Round (AR7),⁴⁹² which may apply in future auction rounds, allows

⁴⁸⁵ [The Decision](#), pp 19-20.

⁴⁸⁶ [The Decision](#), p 20.

⁴⁸⁷ [The Decision](#), p 20.

⁴⁸⁸ [The Decision](#), p 20.

⁴⁸⁹ [The Decision](#), p 20.

⁴⁹⁰ George Anstey, first expert report, paragraphs 64-65.

⁴⁹¹ George Anstey, first expert report, paragraph 65.

⁴⁹² The CfD arrangements are described in paragraphs 2.8 to 2.9. AR7 commenced in July 2025, with results published in January 2026: [Contracts for Difference \(CfD\): Allocation Round 7 - GOV.UK](#).

it to adjust the budgets within each technology pot once auctions have cleared; and

- (b) dependence of auction budgets on results in previous rounds: DESNZ would be expected to rely on information provided by strike prices from previous allocation rounds when allocating budget between technology pots.

6.175 The Appellants' evidence was that offshore generators would have an incentive to include expected IAE costs (plus a premium) in their CfD bids, whereas onshore generators – because they do not face the same risks – would not.⁴⁹³ This difference could distort competition for the allocation of CfD budget in both of the ways set out in (a) and (b) above.⁴⁹⁴

GEMA's submissions

6.176 GEMA submitted that onshore and offshore generators do not compete directly against one another in the CfD allocation process as there is no 'market' for DESNZ funding in an economic sense.⁴⁹⁵

6.177 GEMA's evidence was that:

- (a) DESNZ sets the size of auction pots;⁴⁹⁶
- (b) the difference in cost between offshore and onshore wind in recent auctions was in the order of 300 times higher than the size of the IAE premium suggested by the Appellants' own submissions, such that the IAE effect was immaterial by comparison;⁴⁹⁷
- (c) DESNZ's decisions on the size of CfD pots already differ across technologies due to wider strategic planning and policy considerations in addition to generation costs; and that the size of onshore and offshore pots in future allocation rounds is also likely to be influenced by system planning (including the Strategic Spatial Energy Plan under design by NESO);⁴⁹⁸ and
- (d) it was fanciful to believe that the size of the difference in costs associated with IAEs would impact on CfD pot size decisions in that context.⁴⁹⁹

⁴⁹³ George Anstey, first expert report, paragraph 66.

⁴⁹⁴ George Anstey, first expert report, paragraph 67.

⁴⁹⁵ [GEMA Response](#), paragraph 98.

⁴⁹⁶ Gavin Knott, first witness statement, paragraph 44.

⁴⁹⁷ Gavin Knott, first witness statement, paragraph 46.

⁴⁹⁸ Gavin Knott, first witness statement, paragraph 47.

⁴⁹⁹ Gavin Knott, first witness statement, paragraph 47.

CMA assessment on Ground 2C: overall Contracts for Difference budgets

- 6.178 The Appellants and GEMA both recognised that separate auction pots for offshore wind and other supported technologies are set by DESNZ such that there is no direct competition between different technologies for the CfD budget.⁵⁰⁰ Given this, any impact on the allocation of the overall CfD budget between offshore and onshore generators resulting from CMP344 would have to arise indirectly from the decisions that DESNZ makes when it determines the size of auction pots for different technologies, rather than through the competitive process. While those DESNZ decisions will be informed by CfD auction price information, we note that both the Appellants and GEMA highlighted that DESNZ sets CfD budgets based on a wide range of factors.⁵⁰¹
- 6.179 Given this context, we do not consider that the Appellants have shown why offshore generators bearing IAE costs would be expected to have any material bearing on DESNZ's assessments as a result of the impact it might have on strike prices. In forming this view, we have taken account of GEMA's evidence⁵⁰² (which the Appellants did not challenge in their Reply) on the likely limited scale of the impact of IAE costs on CfD strike prices for offshore wind relative to the difference between onshore and offshore wind strike prices that has been observed recently. Moreover, even if the impact of the treatment of IAE costs on offshore wind strike prices was viewed as being of a sufficient scale to potentially materially influence DESNZ budget allocation decisions, it would be open to DESNZ to take that into account in its assessment process.
- 6.180 Given the above, in our view GEMA was not wrong to have treated CMP344 as having a nil or immaterial impact on competition for overall CfD budgets.

Competition and disinvestment horizon

The Appellants' submissions

- 6.181 The Appellants submitted that GEMA:⁵⁰³
- (a) had failed to consider whether CMP344 would better facilitate competition to invest in existing offshore generation, that is to continue operating or repower an ageing asset (which the Appellant referred to as the 'disinvestment horizon'); or alternatively

⁵⁰⁰ George Anstey, first witness statement, paragraph 64; Gavin Knott, first witness statement, paragraph 44.

⁵⁰¹ George Anstey, first expert report, paragraph 65(B); Gavin Knott, first witness statement, paragraph 47.

⁵⁰² Referred to in paragraph 6.177(b) of this determination.

⁵⁰³ [NoA](#), paragraph 158(b).

- (b) had wrongly assumed that CMP344 would have no impact on the disinvestment horizon.

6.182 The Appellants' evidence in support was that:

- (a) onshore and offshore generators compete over the disinvestment horizon because, all else equal, generators which face higher forward costs will retire their assets sooner than those that face lower forward costs;⁵⁰⁴
- (b) the IAE arrangements create an uncertain liability for offshore generators and increase their expected forward-looking costs, whereas onshore generators do not face equivalent provisions;⁵⁰⁵ and
- (c) unequal treatment between onshore and offshore generators may distort competition because offshore generators may retire their assets earlier than they would have done absent the allocation of IAE costs.⁵⁰⁶

6.183 At the Hearing, the Appellants further submitted that if an IAE had already occurred but had not yet been recovered, or fully recovered, there would be a clear incentive to retire generating assets before becoming liable for such costs.⁵⁰⁷

GEMA's submissions

6.184 GEMA submitted that:

- (a) the Appellants' submissions on competition and the disinvestment horizon were new points that had not been made in the third FMR;⁵⁰⁸
- (b) at the point of a retirement decision, there are a wide range of considerations, including the operating and capital cost implications of extending the life of an asset, and the availability of support schemes and/or contractual arrangements for post-CfD generation;⁵⁰⁹
- (c) these factors differ across different asset types, and also individual assets, and that it is already unclear what the investment case would be for post-CfD offshore wind generators if they face marginal pricing in the wholesale market;⁵¹⁰

⁵⁰⁴ George Anstey, first expert report, paragraph 70.

⁵⁰⁵ George Anstey, first expert report, paragraphs 71 and 72.

⁵⁰⁶ George Anstey, first expert report, paragraph 73.

⁵⁰⁷ Transcript of the Hearing on 9 September 2026, p 13.

⁵⁰⁸ [GEMA Response](#), paragraph 99(2).

⁵⁰⁹ Gavin Knott, first witness statement, paragraph 50.

⁵¹⁰ Gavin Knott, first witness statement, paragraph 50.

- (d) it was inconceivable that the size of risk that has been attributed to IAEs (0.07% of costs) would be material to this decision;⁵¹¹ and
- (e) in the theoretical case where a specific developer faced significant exposure to IAE costs, such that extending the life of an asset would result in higher costs for that developer relative to other offshore wind generators, then it was not obvious that transferring those higher costs to consumers would better facilitate competition.⁵¹²

CMA assessment on Ground 2C: the disinvestment horizon

- 6.185 The Appellants submitted that GEMA failed to have regard to a relevant consideration, for instance whether CMP344 would better facilitate competition between existing offshore generators when they decide whether to continue operating or repower an ageing asset. In our view, through the limited submissions it made on this matter, the Appellants have not shown that the current IAE arrangements would be likely to have an adverse effect on competition through their impact on that decision (of whether to continue operating/repower an ageing asset), which CMP344 would be expected to remedy.
- 6.186 First, given the wide range of considerations and uncertainties that may affect decisions over the continued operation of wind generation assets,⁵¹³ the Appellants have not demonstrated that the current IAE arrangements would be expected to have a material effect on such decisions. Second, even if it did turn out to be the case that IAE costs could result in significantly higher costs for a particular developer, the Appellants have not shown that under those circumstances it would be appropriate to treat such an effect as likely to give rise to a distortion of competition.
- 6.187 As noted in paragraph 6.183, at the Hearing, the Appellants submitted that a distortion of competition could arise under such circumstances if an IAE had already occurred but had not yet been recovered or fully recovered. In our view, the Appellants' brief comments on this scenario at the Hearing fall short of demonstrating that CMP344 should be treated as better achieving ACO (d). For example, they do not address the question of whether such a scenario is likely to arise, or whether the potential for avoiding IAE costs would be sufficient to outweigh the other incentives that the generator might have for remaining in the market.
- 6.188 We also note that – as set out in paragraph 6.184(a) – the potential for CMP344 to affect competition over the disinvestment horizon was not raised in the third FMR.

⁵¹¹ Gavin Knott, first witness statement, paragraph 50.

⁵¹² Gavin Knott, first witness statement, paragraph 51.

⁵¹³ Set out in paragraph 6.184(b) of this determination.

This suggests that, at that time, it had not been viewed as likely to be a material factor by the Appellants or by any other party to that process.

- 6.189 Given the above, we therefore do not consider that the Appellants have shown that GEMA failed to take into account a relevant consideration in reaching a view on whether CMP344 had a material impact on competition. Our view is therefore that GEMA was not wrong on the basis argued by the Appellants; namely that it either (i) did not consider whether CMP344 would better facilitate competition to invest in existing offshore generation; or (ii) assumed that CMP344 would have no impact on the disinvestment horizon.

The Appellants' submissions on a 'punitive lottery'

The Appellants' submissions

- 6.190 The Appellants submitted that GEMA had failed to consider the distortive effect of allocating unforeseeable and uncontrollable risks to certain agents, rather than socialising them, which it described as a 'punitive lottery' that obscures the impact of competition as a method for identifying and rewarding successful plant ownership and operation.⁵¹⁴ The Appellants submitted that, alternatively, GEMA had wrongly assumed that there would be no such distortive effect.⁵¹⁵ The Appellants submitted that the risks from IAEs are asymmetric (because they can only result in additional costs for generators) and increase the cost of capital.⁵¹⁶ The Appellants said that this may be managed most effectively by large market participants with diversified portfolios, so allocating IAE costs to generators could act as a barrier to entry for smaller, less diversified parties.⁵¹⁷ The Appellants submitted that, given the above, GEMA had failed to have regard to a relevant consideration, based its decision wholly or partly on an error of fact, and/or acted irrationally (and reached a conclusion that involved a failure to have proper regard or give appropriate weight to ACO (d)).⁵¹⁸

GEMA's submissions

- 6.191 GEMA submitted that the Appellants' submissions on the allocation of unforeseeable and uncontrollable risks were a repeat of Grounds 2A(2) and 2A(3).⁵¹⁹
- 6.192 In relation to barriers to entry, GEMA submitted that the capital costs associated with developing offshore generation assets are likely to be far more material than

⁵¹⁴ NoA, paragraph 158(c).

⁵¹⁵ NoA, paragraph 158(c).

⁵¹⁶ George Anstey, first expert report, paragraph 80.

⁵¹⁷ George Anstey, first expert report, paragraph 80.

⁵¹⁸ NoA, paragraph 158(c).

⁵¹⁹ GEMA Response, paragraph 99(3).

any costs related to IAEs, which represent only a small fraction of total costs.⁵²⁰ GEMA submitted that access to significant capital to cover the risks associated with the other 99% of costs of offshore wind development is already a prerequisite for entry, and that it seems very unlikely that the marginal additional risks associated with IAE costs would materially alter this dynamic.⁵²¹

CMA assessment on Ground 2C: ‘punitive lottery’

- 6.193 The focus here is on the potential for the current IAE arrangements to distort competition in CfD auctions for offshore wind (with the Appellants having pointed to the potential for barriers to entry to arise: see paragraph 6.190),⁵²² and therefore for CMP344 to have a beneficial impact by removing that distortion.⁵²³
- 6.194 While the Appellants raised the possibility that the current IAE arrangements could act as a barrier to entry into offshore wind generation for smaller, less diversified parties, our view is that the evidence does not show that this would be likely to impact on the effectiveness of competition in CfD auctions for offshore wind:
- (a) first, we note that GEMA said that there is strong competition in CfD auctions, as evidenced by the results of the most recent auctions AR7,⁵²⁴ and that the Appellants did not challenge this evidence; and
 - (b) second, the need for access to significant capital is already a feature of entry into offshore wind generation,⁵²⁵ and we do not consider the Appellants to have shown that IAEs would be expected to have a material bearing on potential entry decisions.
- 6.195 Given the above, we are not persuaded that GEMA was wrong to have treated CMP344 as having a nil or immaterial impact on competition. In our view the Appellants have not shown that the current arrangements raise a material barrier to entry that would be removed through CMP344.

⁵²⁰ Gavin Knott, first witness statement, paragraph 55.

⁵²¹ Gavin Knott, first witness statement, paragraph 55.

⁵²² We considered the implications of the Appellants’ submissions on a ‘punitive lottery’ for cost reflectivity considerations in our assessment of Ground 2A (see paragraph 6.48). Also, we addressed the Appellants’ submissions on competition for overall CfD budgets in paragraphs 6.178 to 6.180.

⁵²³ The Appellants’ submissions on competition in wholesale markets are considered in paragraphs 6.206 to 6.212.

⁵²⁴ [GEMA Response](#), paragraph 99(1).

⁵²⁵ Set out in paragraph 6.192 of this determination.

The potential for CMP344 to reduce Contracts for Difference strike prices

The Appellants' submissions

- 6.196 The Appellants criticised GEMA's statement in the Decision that it was unclear whether the level of risk premia that Cornwall Insight assumed⁵²⁶ would be removed by CMP344 would be material enough to reduce CfD strike prices or meaningfully improve competitiveness. The Appellants argued that GEMA's reasoning was unsupported by analysis and contrary to the evidence in Cornwall Insight's first report.⁵²⁷ The Appellants submitted that GEMA had taken a strikingly different approach when assessing the significance of the windfall gain that might be obtained by existing CfD-backed generation were CMP344 to be implemented, where the Appellants argued that, GEMA had regarded the mere risk of such an impact as being sufficient to justify its conclusion that CMP344 would not facilitate effective competition better.⁵²⁸ The Appellants submitted that GEMA's approach was contradictory, irrational and wrong.⁵²⁹

GEMA's submissions

- 6.197 GEMA presented its submissions in relation to the level of risk premia assumed in the Cornwall Insight analysis and the resulting potential for CMP344 to reduce CfD strike prices as part of its response to Ground 4, where it submitted that, at best, the benefits identified by that analysis were highly uncertain, and that there may be no benefits at all.⁵³⁰

CMA assessment on Ground 2C: Contracts for Difference strike prices

- 6.198 The Cornwall Insight analysis sought to estimate the uplift to CfD strike prices that would result from generators being exposed to the risk of IAEs. However, we do not consider that the Appellants have shown why this should be viewed as implying that CMP344 would be expected to have a positive impact on ACO (d). We consider that under the current IAE arrangements generators would be expected (implicitly or explicitly) to include a provision to reflect expected IAE costs in their CfD bids. In future auctions, CMP344 would, in our view, be expected to result in CfD prices for offshore wind that were, at least to some extent, lower than those that would arise under the current arrangements (other

⁵²⁶ The Cornwall Insight analysis sought to give a reasonable order of magnitude for the likely uplift to CfD strike prices that resulted from generators being exposed to the risk of IAEs (Cornwall Insight, CMP344 Additional Workgroup Analysis, November 2024 p 5). This analysis is introduced in paragraph 4.21, and the submissions we received on it in relation to Ground 4 are summarised in paragraphs 8.14 to 8.23 of this determination.

⁵²⁷ NoA, paragraph 158(d).

⁵²⁸ NoA, paragraph 158(e).

⁵²⁹ NoA, paragraph 158(e).

⁵³⁰ This is set out at paragraphs 8.18 to 8.20 of this determination.

things being equal).⁵³¹ However, our view is that this likely difference in CfD prices does not imply that the current IAE arrangements give rise to a distortion of competition that CMP344 would alleviate. Rather, it reflects that different pricing outcomes can be expected to arise in competitive processes when the allocation of risks within those processes is altered. In line with this, our view is that the impact CMP344 might have on future CfD prices (relative to the current arrangements) does not imply that CMP344 would better facilitate ACO (d). Whether or not there was any inconsistency in GEMA's approach to assessing the significance of any uplift to CfD strike prices is not relevant to that assessment.

- 6.199 Accordingly, we do not consider that GEMA's approach to taking account of the potential for CMP344 to reduce CfD strike prices was irrational, or that GEMA was wrong to treat any competitive impact of CMP344 on competition arising through lower CfD prices as insufficiently material to affect its overall assessment.

Competition over the dispatch horizon

The Appellants' submissions

- 6.200 Mr Anstey, in his first report submitted on behalf of the Appellants, stated that the current IAE arrangements resulted in distortions over the dispatch horizon: that is, the wholesale electricity markets over the short-term in which participants buy and sell electricity, which in the case of CfD-supported plant – are typically the Day Ahead Market (DAM), Intra-day markets and the Balancing Market (BM).⁵³² Mr Anstey said that IAE costs do not directly increase the marginal costs of generation in any half hour, but submitted that the costs and risks of IAEs may nevertheless have distortive effects indirectly through their impact on the prices of CfD contracts.⁵³³
- 6.201 Mr Anstey stated that a wholesale market distortion may occur in the BM whenever NESO accepts negative-priced bids.⁵³⁴ Generators can only earn CfD revenues on the amounts they generate.⁵³⁵ In the BM, CfD holders have incentives to offer to reduce their generation in response to system constraints at prices that are sufficiently negative to compensate for their foregone top-up payment under the CfD.⁵³⁶ If the current approach to IAEs results in higher CfD

⁵³¹ Both the Appellants and GEMA recognised that the scale of this impact on CfD prices was uncertain (paragraph 6.171 and Transcript of the Hearing on 9 September 2026, p 81).

⁵³² George Anstey, first expert report, Section 3.2 and paragraph 55. The DAM refers to the electricity market segment where participants buy and sell power for delivery on the next day. It operates on an auction basis, with separate prices set for each hour of the day. The BM is NESO's primary tool to balance supply and demand on GB's electricity network, with market participants submitting bids (to consume more or generate less electricity) and offers (to generate more or consume less).

⁵³³ George Anstey, first expert report, paragraph 56.

⁵³⁴ George Anstey, second expert report, paragraph 28. Under a negative-priced bid, the relevant generator would be paid to reduce its output.

⁵³⁵ RWE response to RFI dated 3 September 2026, Question 1.

⁵³⁶ George Anstey first expert report, paragraph 58. The Appellant also submitted that in the DAM, depending on the dates of their contracts, some CfD-supported wind plants receive the CfD strike price less the market reference price for

strike prices for offshore generators than would be the case under CMP344, those generators would have an incentive to bid lower (ie bid prices where they are paid more to reduce their output) in short-term wholesale markets, which would result in NESO constraining them down less frequently and increase constraint costs.⁵³⁷

- 6.202 Mr Anstey stated that the relevant distortions to competition were likely not to be large in absolute terms or on a per unit basis,⁵³⁸ but that the fact that a distortion is small is not a good reason for refusing to address it.⁵³⁹

GEMA's submissions

- 6.203 In its Response, GEMA submitted that any conceivable impact on competition in wholesale electricity markets would be de minimis.⁵⁴⁰ GEMA said that the costs associated with IAEs were an example of a fixed cost component associated with the construction and operation of an offshore wind generator, in the sense that they are incurred regardless of the volumes of wind produced by that generator.⁵⁴¹ GEMA submitted that the design of the wholesale market, together with the form of CfDs, meant that such fixed costs are recovered via CfD pricing, not through the wholesale market.⁵⁴²
- 6.204 GEMA submitted that the feature of the BM referred to by the Appellants – with CfD holders requiring compensation for their lost support payment when bidding how much they would need to be paid not to generate – appeared to be a consequence of the way in which the current balancing BM rules and CfD rules interact.⁵⁴³ GEMA said that there is a Balancing and Settlement Code modification proposal (CMP462) which is currently at the workgroup stage that considers solutions that could remedy distortions created by CfD contracted assets bidding into the BM.⁵⁴⁴
- 6.205 GEMA submitted that, even if it was the case that exposing offshore generators to IAE costs amplified existing distortions within the CfD design, the impact would be immaterial.⁵⁴⁵ GEMA submitted that negative days were rare, and that the impact on the overall value of a CfD contract would be trivial (less than 0.07% based on the Appellant's estimate that exposing offshore generators to IAE costs would

their generation even when the DAM price is negative, and can have an incentive to offer their generation for as low as the negative of the CfD strike price (George Anstey, first expert report, paragraph 57).

⁵³⁷ George Anstey, first expert report, paragraph 59.

⁵³⁸ George Anstey, second expert report, paragraph 29.

⁵³⁹ Appellants' Skeleton Argument filed in advance of the Hearing, paragraph 30.

⁵⁴⁰ [GEMA Response](#), paragraph 97.

⁵⁴¹ Gavin Knott, first witness statement, paragraph 34.

⁵⁴² Gavin Knott, first witness statement, paragraph 35.

⁵⁴³ Gavin Knott, first witness statement, paragraph 37.

⁵⁴⁴ Gavin Knott, first witness statement, paragraph 37.

⁵⁴⁵ Gavin Knott, first witness statement, paragraph 38.

increase CfD prices by £0.06/MW hours and a strike price of £91/MW hours in the AR7 CfD auctions).⁵⁴⁶

CMA assessment on Ground 2C: the dispatch horizon

- 6.206 In our view, the Appellants' submissions in relation to competition over the dispatch horizon lacked clarity and failed to articulate why this should have been treated as a material factor within GEMA's assessment of the impact of CMP344 on ACO (d). We note that submissions on this matter were not included, or explicitly referred to, in the NoA. While the first report of Mr Anstey provided some brief commentary on how the current IAE arrangements might potentially have had distortive effects on the DAM and BM, in our view it did not articulate why CMP344 should be treated as likely to have a material beneficial effect with respect to ACO (d).
- 6.207 Given the above, to assist with our assessment of this matter, we sought clarification from the Appellants regarding the impact they considered CMP344 would have on the potential sources of distortion to competition that had been referred to in the first Anstey report. The Appellants' response included that:
- (a) CMP344 would have no effect on the bids of offshore wind generators that already have CfD strike prices agreed;⁵⁴⁷
 - (b) CMP344 would have no effect on the DAM, assuming the same negative pricing rule was applied in future CfD rounds as have been since AR4.⁵⁴⁸ Under contracts since AR4 (2022), a top-up payment is made to the relevant generator if and only if the DAM price is not negative in respect of the hour in question; and
 - (c) CfD holders from AR4 (2022) and subsequent auctions will bid down in the BM to the negative of their top-up payment if the DAM did not clear at a negative price in the relevant hour.⁵⁴⁹
- 6.208 We note that the above implies that the potential for a distortion to competition to arise of the kind referred to by the Appellants would be limited to the BM, and to the impact that bidding incentives of CfD-holders from future auction rounds could have in circumstances where the DAM price was zero or positive, but the BM price was negative.
- 6.209 We do not consider that the Appellants have shown that CMP344 would be likely to have a significant impact on competition in the circumstances referred to above.

⁵⁴⁶ Gavin Knott, first witness statement, paragraph 38.

⁵⁴⁷ RWE response to RFI dated 3 September 2026, Question 2.

⁵⁴⁸ RWE response to RFI dated 3 September 2026, Question 2.

⁵⁴⁹ RWE response to RFI dated 3 September 2026, Question 1.

- 6.210 The Appellants provided what they presented as indicative estimates of the potential efficiency gain that CMP344 could provide for by lessening this potential competitive distortion over the next 20 years. These were estimates of the expected impact of CMP344 on the overall level of NESO constraint payments to wind farms. In our view, the calculations underpinning these estimates exhibit a range of limitations such that they do not provide a reasonable means of estimating the likely impact of CMP344 on NESO constraint payments. Notably, the calculations are scaled by reference to evidence on the overall extent to which offshore wind capacity was constrained in 2025 but take no account of the extent to which those constraining actions arose in periods when the DAM price was zero or positive. This suggests that the measure for constrained capacity used in the Appellants' calculations, which includes constraints related to all existing offshore wind plants, including those not subject to a negative pricing rule (referred to in paragraph 6.207(b)) may provide an unreliable and potentially overstated basis for estimating likely future levels of constraint associated with future CfD contracts in a context where those contracts would be expected to include a negative pricing rule.⁵⁵⁰
- 6.211 More importantly, we did not consider that the Appellants' calculations provide a reliable basis for seeking to estimate the extent of any distortion of competition that might arise. That would depend on the extent to which different bidding levels (as a result of IAEs) would be expected to affect NESO balancing decisions. In principle, such a distortion could occur if the bidding behaviour of future offshore wind CfD holders materially affected NESO contracting decisions in the BM. In our view, the scale of the potential CfD price impact⁵⁵¹ does not suggest that GEMA would have been wrong to treat the scope for IAE-driven BM distortions of the kind raised by the Appellants (not during this appeal process) as likely to be immaterial.
- 6.212 For the reasons set out above, we do not consider that GEMA was wrong to conclude that CMP344 would not facilitate effective competition better over the dispatch horizon.

Ground 2D: GEMA was wrong to suggest that CMP344 could introduce an anti-competitive distortion on the Contracts for Difference market

- 6.213 Under Ground 2D, the Appellants submitted that GEMA was wrong to suggest that CMP344 could introduce an anticompetitive distortion on the CfD market. We begin below by summarising the part of the Decision that relates directly to this ground. We then summarise the submissions we received before setting out our assessment.

⁵⁵⁰ Also – as the Appellants noted in their response – a discount rate is not used when estimating overall costs.

⁵⁵¹ Set out in paragraph 6.205 of this determination.

The Decision

6.214 In the Decision, GEMA said that:⁵⁵²

Importantly, we agree with the CAC [Code Administrator Consultation] respondent who highlighted the risk that the Proposal could introduce a distortion, as the Proposal would apply to both existing and future CfD backed generation. If it is correct that generators will factor in a risk premia in respect of IAEs (under the current arrangements), it is expected to be the case that existing CfD holders will have benefited from a strike price that includes such risk premia. If the proposal was implemented, existing CfD generators would therefore obtain the benefit of a strike price inflated to cover the costs of potential IAEs in respect of which (if they were to materialise) they would not face the costs. This would not be the case for future CfD backed generators (or indeed any other generators) and as such, would negatively impact competition (even if only to a marginal extent given the estimated value of the risk premia). In practice, this distortion would result in consumers continuing to fund risk premia for some existing projects, while also bearing IAE costs directly should one be awarded.

6.215 GEMA said that this was one of the reasons for its conclusion that CMP344 would result in a negative outcome for ACO (d).⁵⁵³

The Appellants' submissions

6.216 The Appellants submitted that, in reasoning as it did in the excerpt from the Decision shown in paragraph 6.214, GEMA had had regard to an irrelevant consideration, acted irrationally, based its decision wholly or partly on an error of fact and reached a conclusion that involved a failure to have proper regard or give appropriate weight to ACO (d). Specifically:⁵⁵⁴

- (a) GEMA made no finding that it was correct that generators had in the past factored risk premia in respect of IAEs into their CfD bids, and instead described CMP344 as giving rise to no more than a risk of generators obtaining the benefit of a strike price inflated to cover the costs of potential IAEs;

⁵⁵² [The Decision](#), p 21.

⁵⁵³ [The Decision](#), p 21.

⁵⁵⁴ [NoA](#), paragraph 160.

- (b) instead of disregarding this risk, GEMA moved from speculating about its existence to concluding that CMP344 would negatively impact competition;
- (c) in any event, it was wrong in principle, and contrary to its statutory objective and duties, for GEMA to make a decision that entrenched an anticompetitive rule merely because, in the short-term, there was a risk (no matter how slight) of an advantage being conferred on some incumbent market participants; and
- (d) as GEMA considered that any negative impact on competition, should this risk materialise, would be marginal, its approach in this part of its decision was inconsistent with the approach it took to assessing materiality when considering whether CMP344 would have a positive impact on competition. That inconsistent approach was irrational.

GEMA's submissions

6.217 GEMA submitted that the essential point in relation to this ground is that CMP344 would prompt distortive windfall gains, in that it would alter charging arrangements for IAEs even for generators who had already priced in the risk of IAE costs at CfD auctions.⁵⁵⁵

CMA assessment on Ground 2D

6.218 In our view, GEMA was not wrong to treat CMP344 as likely to result in some scope for windfall gains for existing CfD-backed offshore wind generators.⁵⁵⁶ The Appellants' view that a rational generator would include a contingency for IAE risks in CfD bids is consistent with that.⁵⁵⁷ However, our view is that GEMA was wrong to treat the potential for such windfall gains as meaning that CMP344 would be expected to have an adverse effect on ACO (d). Our primary reason for this view is that such windfall gains would not impact on forward-looking costs.

6.219 At the Hearing, GEMA presented its assessment of the potential for windfall gains as concerned more with a matter of regulatory principle and said that it was bad precedent to retrospectively change the rules of engagement within allocation rounds.⁵⁵⁸ Dr Knott confirmed that, because they are fixed costs, GEMA were not saying that they have forward-looking, competitive effects, but rather the impact is on market outcomes – it is bad to make these kinds of interventions if they have retrospective effects and therefore distort the outcomes from the competitive process.⁵⁵⁹ We note that, in principle, regulatory changes that have retrospective

⁵⁵⁵ [GEMA Response](#), paragraph 100.

⁵⁵⁶ We also note that this would be relevant to assessing the impact of CMP344 on consumers, and submissions related to that are considered under Ground 4.

⁵⁵⁷ Transcript of the Hearing on 9 September 2026, p 7.

⁵⁵⁸ Transcript of the Hearing on 9 September 2026, pp 83-84.

⁵⁵⁹ Transcript of the Hearing on 9 September 2026, p 84.

effects can have adverse forward-looking impacts on the effectiveness of competition, because they can affect expectations with respect to future regulatory decisions that may affect market participants. However, in our view, the conclusions that GEMA set out on this matter in the Decision⁵⁶⁰ did not suggest that considerations of that kind had been viewed as a significant factor (its assessment focused more directly on the potential for windfall gains).

6.220 In addition, we do not consider the submissions that we received provided a sufficient basis upon which to draw a conclusion on whether the scope for retrospective effects as a result of CMP344 would be expected to have a material adverse impact on competition. We note that such an assessment would depend, to some extent, on consideration of what existing holders of CfDs (and earlier rights) would reasonably have expected with respect to IAE policy when bidding.⁵⁶¹

6.221 For the reasons set out above, our view is that GEMA was wrong to have concluded that CMP344 would result in a negative outcome for ACO (d) because of the potential for it to result in windfall gains for existing CfD holders. We note, however, that removing this negative conclusion does not alter our view – given our assessments of Ground 2B and 2C – that GEMA was not wrong overall to have concluded that CMP344 would not better facilitate ACO (d), as set out at paragraph 6.222.

CMA assessment on Grounds 2B to 2D

6.222 Having assessed the submissions made in relation to Grounds 2B, 2C and 2D, overall our view is that GEMA was not wrong to have concluded that CMP344 would not better achieve ACO (d) relative to the Baseline:

- (a) In relation to Grounds 2B (other than the error identified under Ground 2B(1)) and 2C, we consider that – in forming its conclusion that CMP344 would not better achieve ACO (d) – GEMA did not err in its assessment of the impact of CMP344 on the potential for discrimination between offshore and onshore generators,⁵⁶² or in its assessment of the potential for beneficial impacts on competition to result.⁵⁶³

⁵⁶⁰ Set out in paragraph 6.214 of this determination.

⁵⁶¹ The Appellants submitted their views on this matter at the Hearing (Transcript of the Hearing on 9 September 2026, pp 85-87). In particular they said that generators would not have factored in these costs before November 2018, which is when Ofgem took the decision to extend IAE costs to uninsured cable failures, and that prior to this date OFTOs would have factored these costs into their bids for the OFTO assets.

⁵⁶² Set out in paragraphs 6.158 and 6.165 of this determination.

⁵⁶³ Set out in paragraphs 6.180, 6.189, 6.195, 6.199 and 6.212 of this determination.

- (b) In relation to Ground 2D, we consider that GEMA erred in concluding that CMP344 would result in a negative outcome for ACO (d) because of the potential for it to result in windfall gains for existing CfD holders.⁵⁶⁴
- (c) Neither of the errors we have found under Grounds 2B(1) (see paragraphs 6.156 to 6.158) and 2D (see paragraphs 6.218 to 6.221) individually or taken together establish that GEMA was wrong overall to conclude that CMP344 would not better facilitate ACO (d), having regard to our conclusions under Grounds 2B and 2C. In particular, we remain of the view that the Appellants have not established either a material discriminatory effect on offshore generators or a material positive effect on competition sufficient to show that CMP344 would better facilitate ACO(d).

Our decision on Ground 2

6.223 For the reasons given above, we conclude that Ground 2 did not establish that the Decision was wrong within the meaning of section 175(4) of the EA04. Accordingly, Ground 2 is dismissed.

⁵⁶⁴ Set out in paragraph 6.221 of this determination.

7. Ground 3: GEMA was wrong to find that the Proposal would not advance Use of System Charging Objective (h) by promoting efficiency in the implementation and administration of the charging methodology

- 7.1 Ground 3 concerns GEMA's assessment of CMP344 against ACO (h), which is directed to 'promoting efficiency in the implementation and administration of the Use of System Charging Methodology'.⁵⁶⁵ In its Decision, GEMA concluded that CMP344 would have a negative impact on that objective.⁵⁶⁶
- 7.2 The Appellants contended that CMP344 would better facilitate ACO (h) by simplifying the treatment of approved IAE costs, increasing clarity and replacing the existing two-stage recovery mechanism with a single-stage process.⁵⁶⁷ They argued that GEMA failed properly to assess ACO (h) as a separate consideration and by reference to those administrative efficiencies, instead relying on the reasoning it had adopted in connection with its assessment of ACOs (d) and (e).⁵⁶⁸
- 7.3 At the Hearing, the Appellants clarified their case that Ground 3 engaged (i) the failure to properly have regard to the purposes of the relevant licence condition,⁵⁶⁹ on the basis that the relevant condition encompasses the charging objectives; and (ii) the 'wrong in law' statutory ground,⁵⁷⁰ on the basis that misinterpreting the licence condition would constitute an error of law.⁵⁷¹
- 7.4 We therefore consider Ground 3 by reference to those two bases: whether GEMA properly had regard to ACO (h), and whether it adopted an incorrect interpretation of ACO (h) such that the Decision was wrong in law. We begin below by summarising the part of the Decision that relates directly to this ground. We then summarise the submissions we received before setting out our assessment.

The Decision

- 7.5 In the Decision, GEMA's assessment of ACO (h) began by setting out the Proposer's case and the CUSC Panel's view as follows:

The Proposer considers that the Proposal would be positive in regard to ACO (h) as it would bring clarity to something which is

⁵⁶⁵ NoA, paragraph 7.

⁵⁶⁶ The Decision, p.27.

⁵⁶⁷ NoA, paragraphs 161–162.

⁵⁶⁸ NoA, paragraphs 161–163.

⁵⁶⁹ EA04 section 175(4)(b)(i). The relevant licence condition is Standard Condition E2 of NESO's [Electricity System Operator Licence](#). Its purpose, as far as material to this appeal, is to provide the framework governing the CUSC and its modification, including by requiring proposed modifications to be assessed by reference to the ACOs. In the case of a modification affecting the Use of System Charging Methodology, those objectives include ACO (h).

⁵⁷⁰ EA04 section 175(4)(e).

⁵⁷¹ NoA, paragraph 82; Transcript of the Hearing on 9 September 2026, p 90.

not currently addressed in the CUSC. They also state that the Proposal will reduce the complexity of the administration of TNUoS charges as it creates a single stage recovery mechanism from demand users, rather than the current two-stage recovery.

The majority of [CUSC] Panel members considered the Proposal better facilitated ACO (h), highlighting that it clarifies the approach with respect to IAEs which in turn is judged to improve efficiency. It was considered that the Proposal introduces an efficient mechanism for reflecting changes in revenue associated with IAEs and removes any potential ambiguity in the CUSC.⁵⁷²

- 7.6 GEMA recognised in the Decision that the current IAE approach is not currently codified (meaning included within the terms of the CUSC itself), but that it had been confirmed through guidance⁵⁷³ issued by the NGESO in July 2017.⁵⁷⁴
- 7.7 In the Decision, GEMA distinguished between two aspects of CMP344: (i) clarification of existing arrangements in relation to the point at which OFTO TRS and TO allowed revenues are set;⁵⁷⁵ and (ii) the introduction of new wording to the CUSC to transfer full liability for offshore IAE costs from offshore generators to consumers.
- 7.8 In the Decision, GEMA acknowledged that, if the Proposal had been confined to enshrining an established process expressly into the CUSC, it would likely have been positive against ACO (h).⁵⁷⁶
- 7.9 GEMA acknowledged in the Decision that removing demonstrably unnecessary steps would ordinarily simplify the charging methodology and could therefore improve efficiency. However, GEMA stated that it considered that the current process should be maintained and therefore that ‘updating the methodology to explicitly provide for a different process would be inefficient and as such detrimental to the effectiveness of the charging methodology overall.’⁵⁷⁷
- 7.10 It therefore concluded CMP344 would have a negative impact on ACO (h).⁵⁷⁸

⁵⁷² [The Decision](#), p 26.

⁵⁷³ [NESO: Reflecting variations in Offshore Transmission Owner \(OFTO\) revenue in Offshore Local TNUoS Tariffs](#)

⁵⁷⁴ [The Decision](#), p 7. NGESO became NESO on 1 October 2024.

⁵⁷⁵ Set out in paragraphs 4.15 and 4.16 of this determination.

⁵⁷⁶ [The Decision](#), p 27.

⁵⁷⁷ [The Decision](#), p 27.

⁵⁷⁸ [The Decision](#), p 27.

The Appellants' submissions

7.11 In the NoA, the Appellants contended that GEMA was wrong to find that CMP344 would not advance ACO (h) by promoting efficiency in the implementation and administration of the charging methodology.⁵⁷⁹

7.12 According to the Appellants, CMP344 would advance ACO (h) in several ways. In particular, they submitted that:

- (a) it would clarify existing practice in relation to the point in time at which onshore TO allowed revenues and OFTO Tender Revenue Streams are set, which is currently not clear from the CUSC. In that respect, the Appellants relied on CMP344 as codifying in the CUSC arrangements already followed in practice;⁵⁸⁰
- (b) it would enhance certainty and predictability for generators as to the charges to which they might be subject by removing what they described as the 'lottery' of being allocated IAE costs; and
- (c) it would also remove the uncertainty caused by the prolonged and uncertain process of determining IAE and their costs, which extend over many years, and in respect of which generators have no control, including the uncertainty as to when such costs would ultimately be imposed and their eventual level.⁵⁸¹

7.13 In addition, the Appellants argued that by relying on its reasoning in respect of ACOs (d) and (e) to conclude that ACO (h) was not advanced, GEMA had 'misunderstood and misapplied' ACO (h) because it is 'an independent objective ... which requires separate consideration and assessment.'⁵⁸²

7.14 As set out in the Decision, the Proposer argued that CMP344 would provide a single route for recovery under which consumers would bear the relevant IAE costs (rather than a two-stage recovery process under the Baseline, see paragraph 4.11). The Appellants said that this would remove the need for subsequent adjustments to generator charges and reconciliation of the initial consumer funding, clarify expressly how approved IAEs are to be treated under the CUSC, and reduce administrative complexity.⁵⁸³

⁵⁷⁹ NoA, paragraph 7.

⁵⁸⁰ The Decision, p 9, recording that the existing CUSC text does not recognise the differing TO and OFTO revenue arrangements and that the proposed change would codify existing arrangements for the purpose of clarification.

⁵⁸¹ NoA, paragraph 161.

⁵⁸² NoA, paragraphs 162 and 163.

⁵⁸³ The Decision, pp 26–27, recording the Proposer's case that CMP344 would bring clarity to matters not currently addressed in the CUSC and reduce complexity by replacing the existing two-stage recovery process with a single-stage mechanism; The Decision, pp 9–10, describing the effect of CMP344 on the subsequent adjustment to generator charges and TDR reconciliation.

- 7.15 At the Hearing the Appellants conceded that, although Ground 3 was a freestanding ground of appeal, the consequences of any error by GEMA in connection with its assessment against ACO (h) would depend on whether any of the other grounds of appeal were made out; success on Ground 3 would not necessarily entail approval of CMP344.⁵⁸⁴

GEMA's submissions

- 7.16 In its Response, GEMA submitted that CMP344 'was not limited to clarification'; rather, it 'provided for substantive change to existing charging methodology', which GEMA considered 'inefficient and undesirable'.⁵⁸⁵ GEMA further said that 'the draft text [of CMP344] is far from a model of clarity, even on its own terms. (It does not even identify how (if at all) CMP344 affects the costs of IAEs already approved by GEMA.)'⁵⁸⁶
- 7.17 The GEMA Response summarised evidence from Mr Stone's witness statement:⁵⁸⁷
- [I]f CMP344 had proposed updating the CUSC merely to clarify the status quo, this would have been positive against ACO (h).⁵⁸⁸ However, it provided for a substantive change to the existing charging methodology which we considered inefficient for all the reasons already addressed, and, as such, detrimental to the effectiveness of the charging methodology overall.
- 7.18 Mr Stone gave an example⁵⁸⁹ of another modification decision where GEMA acknowledged the Proposal would simplify calculation methodology but found that the simplification would be detrimental to the effectiveness of the charging methodology and therefore concluded the Proposal would have a negative impact on ACO (h). Mr Stone stated that this approach is consistent with GEMA's approach to ACO (h) in other modification decisions.⁵⁹⁰
- 7.19 At the Hearing, GEMA submitted that ACO (h) is concerned with efficiency rather than simplicity. It submitted that 'simplicity is about how easy a methodology is to

⁵⁸⁴ Transcript of the Hearing on 9 September 2026, pp 90-91.

⁵⁸⁵ [GEMA Response](#), paragraphs 10(4) and 101.

⁵⁸⁶ [GEMA Response](#), paragraph 101.

⁵⁸⁷ James Stone, first witness statement, paragraphs 217-218.

⁵⁸⁸ [GEMA Response](#), paragraph 101.

⁵⁸⁹ James Stone, first witness statement, paragraph 218, where Mr Stone stated that this approach was consistent with Ofgem's approach to ACO (h) in other modification decisions. He cited as an example CMP432 [SB/18] where Ofgem stated: 'We recognise that removing demonstrably unnecessary steps in the charging methodology would ordinarily simplify the calculation process and in that respect may be considered to improve efficiency. However, as we believe that network redundancy to provide security is an inherent part of network design and build, the removal of the LSF [locational security factor] from the charging methodology would be inefficient such simplification would be detrimental to the effectiveness of the charging methodology. We therefore conclude the Proposal would have a negative impact on ACO (h).'

⁵⁹⁰ James Stone, first witness statement, paragraph 218.

understand, communicate, follow'⁵⁹¹ whereas ACO (h) asks whether a proposal would 'promote efficiency' in the administration and operation of the charging methodology.⁵⁹²

- 7.20 GEMA accepted that reducing steps, adding definitions or codifying existing arrangements may simplify the administration of the CUSC, but submitted that 'ACO (h) does not sit in isolation'⁵⁹³ and that GEMA was entitled to consider whether a proposed simplification changed the charging regime in a way that was negative overall against the other ACOs.⁵⁹⁴ It was therefore entitled to consider 'the nature of the change that is proposed' and ask whether it in fact promoted efficiency,⁵⁹⁵ rather than treating any simplification or codification as necessarily positive under ACO (h).
- 7.21 At the Hearing GEMA also accepted that there were different possible ways of analysing a modification which simplified the charging methodology but was considered to produce an undesirable substantive outcome.⁵⁹⁶ GEMA submitted that such a modification could be treated as 'neutral for [ACO (h)] and negative against the other ACOs', or even as 'positive under [ACO (h)]', with that positive assessment subsequently outweighed by the other ACOs'.⁵⁹⁷ It explained that the approach adopted in the Decision was instead that, 'once you factor it all in the round, it is negative under [ACO (h)]'.⁵⁹⁸
- 7.22 GEMA further characterised the Decision as recognising, first, that clarification of existing arrangements would be positive under ACO (h); second, that removing demonstrably unnecessary steps would ordinarily simplify the methodology and be positive in that respect; but, third, that introducing 'a different undesirable new process would be inefficient overall'.⁵⁹⁹
- 7.23 On materiality, GEMA submitted that any error in the assessment of ACO (h) could not affect the overall decision if GEMA's conclusions under the other relevant ACOs remained intact. At the Hearing, GEMA described this as the 'core point', namely that ACO (h) was not a factor that ever tips the balance',⁶⁰⁰ and submitted that even if there were an error in GEMA's analysis under ACO (h), 'it could not possibly affect the decision overall'.⁶⁰¹

⁵⁹¹ Transcript of the Hearing on 9 September 2026, p 92.

⁵⁹² Transcript of the Hearing on 9 September 2026, p 92.

⁵⁹³ Transcript of the Hearing on 9 September 2026, p 92.

⁵⁹⁴ Transcript of the Hearing on 9 September 2026, p 92.

⁵⁹⁵ Transcript of the Hearing on 9 September 2026, p 93.

⁵⁹⁶ Transcript of the Hearing on 9 September 2026, pp 92-93.

⁵⁹⁷ Transcript of the Hearing on 9 September 2026, p 93.

⁵⁹⁸ Transcript of the Hearing on 9 September 2026, p 93.

⁵⁹⁹ Transcript of the Hearing on 9 September 2026, pp 94.

⁶⁰⁰ Transcript of the Hearing on 9 September 2026, p 93.

⁶⁰¹ Transcript of the Hearing on 9 September 2026, p 94.

CMA assessment on Ground 3

- 7.24 The Appellants' pleadings on Ground 3 were minimal. They dedicated three short paragraphs of the NoA to this Ground, without identifying which of the statutory grounds in section 175(4) of the EA04 were engaged. The Appellants subsequently clarified that their case on Ground 3 was that the Decision was wrong on the basis that GEMA had failed properly to have regard to ACO (h) and/or because it was wrong in law (as a result of having misinterpreted or misapplied the charging objective).⁶⁰² We have therefore assessed Ground 3 on that basis.
- 7.25 In doing so, we have first considered the meaning of ACO (h). ACO (h) is concerned with 'promoting efficiency in the implementation and administration of the Use of System Charging Methodology'. Its focus is therefore specifically on the efficiency with which the charging methodology is implemented and administered.
- 7.26 In our view, that does not, though, mean that ACO (h) must be considered through a narrow lens in isolation from the substance of a proposed modification. Whether or not a change promotes efficiency in the implementation and administration of the charging methodology is, in our view, intrinsically linked to the nature of the process which the modification would introduce. In that regard, we see force in GEMA's submission that a proposal that involves at least some element of simplification cannot be said necessarily to equate to one that promotes efficiency. Accordingly, we consider that GEMA was entitled to look beyond the mere fact that CMP344 would simplify some aspects of the existing arrangements and to consider whether the proposed arrangements taken as a whole would promote efficiency.
- 7.27 There is, however, a distinction between taking account of the nature of the process being implemented when assessing ACO (h) and treating a conclusion that the substantive outcome of the proposal is undesirable (or desirable) under other ACOs as necessarily determinative of ACO (h). If the latter approach were adopted, there would be a risk that ACO (h) would cease to perform a distinct function within the overall assessment.
- 7.28 It could nonetheless be the case that GEMA, having decided ACOs (d) and (e) are not met and having turned its mind to ACO (h), could decide that ACO (h) is also not met on the basis that implementing a flawed proposal would not be the most efficient way to implement the charging methodology. Taking that approach to the meaning of ACO (h), and reaching that conclusion, would not deprive ACO (h) of meaning. Other possibilities would still exist in other cases, including finding that a proposed modification that results in simplification of the existing charging methodology is positive against ACO (h), or that a proposed modification that is

⁶⁰² Transcript of the Hearing on 9 September 2026, p 09.

positive against other ACOs nonetheless introduces material complexity such that it is negative against ACO (h).

- 7.29 In the Decision, GEMA expressly recognised that clarification of existing arrangements and removal of unnecessary steps, would ordinarily simplify the relevant process and as a result could be said to improve efficiency. It considered the extent to which CMP344 would do that, before going on to consider whether the proposed arrangements taken as a whole, including those aspects that would make substantive changes to the charging methodology, would improve efficiency of the charging methodology. Having considered all of this in the round, it then concluded that, overall, updating the methodology to provide for a different process would be inefficient.
- 7.30 Given the above, we are not persuaded that GEMA misinterpreted or misapplied ACO (h). Nor are we persuaded that GEMA failed properly to have regard to ACO (h).
- 7.31 In any event, even if we had concluded that GEMA had erred in its assessment of ACO (h), we consider that any error in connection with its assessment of ACO (h) would not have been sufficient to render the Decision wrong. As explained in our assessment of Ground 2, we have concluded that GEMA was not wrong to find that CMP344 would have a negative impact on ACOs (d) and (e). The potential benefit under ACO(h) identified by the Appellants concerned greater clarity, certainty and administrative simplicity. In our view, even if GEMA had assessed CMP344 as having a positive impact under ACO (h), that would not have displaced its adverse conclusions under ACOs (d) and (e) or altered its overall conclusion that CMP344 did not better facilitate achievement of the ACOs.

Our decision on Ground 3

- 7.32 Based on the evidence we have seen, we consider that GEMA's conclusion that CMP344 would not better achieve ACO (h) relative to the Baseline was not wrong within the meaning of section 175(4) of the EA04. Accordingly, Ground 3 is dismissed.

8. Ground 4: GEMA was wrong to hold that the Baseline is advantageous for consumers and therefore consistent with its objectives and duties

- 8.1 Ground 4 is summarised by the Appellants as GEMA was wrong to hold that the Baseline is advantageous for consumers and therefore consistent with GEMA's principal objective and its other statutory duties as set out in section 3A of EA89.⁶⁰³ As noted there, Section 3A of the EA89 provides that GEMA's principal objective is to protect the 'interests of existing and future consumers'.
- 8.2 In this section we first set out the relevant aspects of the Decision. We then set out the Parties' submissions, first in respect of the role of the principal objective in the Decision, and second in respect of the Appellants' criticisms of GEMA's approach to and assessment of the evidence about the impact of the proposed modifications on consumers. We then present our analysis and conclusions.

The Decision

- 8.3 In the Decision, GEMA considered whether CMP344 would better facilitate the achievement of the ACOs than the Baseline.⁶⁰⁴ In relation to its principal objective and other statutory duties, GEMA introduced its assessment in the Decision with:

Having concluded that the assessment against the objectives is overall negative, section 8.23.7 of the CUSC provides that there shall be no approval. For completeness, however, we note that we consider that rejecting the Proposal is also consistent with our statutory duties, including our principal objective to protect the interests of existing and future consumers.⁶⁰⁵

It concluded with:

As stated above, we conclude the assessment against the ACO's is overall negative, but in any event, we do not consider the Proposal would be consistent with our principal objective and wider statutory duties.⁶⁰⁶

- 8.4 GEMA set out the following reasons in the Decision for its conclusion that approving CMP344 would not have been consistent with the principal objective:⁶⁰⁷

⁶⁰³ Set out in paragraphs 3.5 to 3.7 of this determination.

⁶⁰⁴ [The Decision](#), pp 12–13 and 21.

⁶⁰⁵ [The Decision](#), p 28.

⁶⁰⁶ [The Decision](#), p 29.

⁶⁰⁷ [The Decision](#), pp 28–29.

- (a) It rejected the conclusion set out in the evidence submitted in support of the Proposal that CMP344 would lead to consumer benefits through the removal of risk premia in CfD bids. It considered that that analysis, conducted by Cornwall Insight, was premised on the Proposal being implemented prior to CfD rounds AR5, AR6 and AR7 commencing, whereas these had already taken place and so no consumer benefit from lower CfD bids would arise. It also considered that implementing CMP344 would risk consumers facing a double burden – in effect paying twice – in relation to the costs of an approved IAE in respect of existing generators receiving CfD support: once as a result of the risk premium already included in CfD bids and the subsequent strike price, and a second time following recovery via the TDR.
- (b) It considered there were limitations in the Cornwall Insight analysis, including that the analysis makes a number of simplifying assumptions of how an IAE is funded in practice, which GEMA considered to be ‘not fully correct’. In particular, GEMA stated that the analysis does not reflect certain aspects of the existing IAE cost recovery mechanism, including the treatment of OFTO insurance deductibles or the potential for the sharing of the awarded IAE cost between parties.

8.5 The Decision concluded that GEMA considered it unlikely, or at least uncertain, that the overall net consumer savings identified by Cornwall Insight will materialise in practice.⁶⁰⁸ GEMA also stated that it had already addressed several factors earlier in its Decision which indicate that the Proposal does not protect the interests of existing and future consumers, albeit it did not specify which earlier parts of its Decision it was referring to.

The role of the principal objective

8.6 We first consider the Parties’ submissions on the role of the principal objective in the context of code modification decisions such as CMP344.

The Appellants’ submissions

8.7 In the NoA, the Appellants contended that GEMA was wrong in principle to give consideration to the principal objective because it was required to approve or reject CMP344 by reference to whether it facilitated the ACOs, particularly ACOs (d) and (e).⁶⁰⁹ The Appellants argued GEMA’s principal objective would have been relevant only if there were more than one course equally conducive to competition, with one clearly more beneficial to consumers. They submitted that the economic

⁶⁰⁸ [The Decision](#), p 29.

⁶⁰⁹ [NoA](#), paragraph 165(a)(iii).

evidence demonstrated the Baseline to be detrimental to competition in the long term whereas CMP344 would 'be facilitative of competition'.⁶¹⁰

- 8.8 At the Hearing, the Appellants indicated that they held a similar view of the role of the principal objective as that explained by GEMA.⁶¹¹ The Appellants explained that they had challenged GEMA's view that CMP344 would not benefit consumers, because they considered consumers would benefit as it would lower the strike prices in the CfD market. The Appellants explained that insofar as they are right on the other grounds of their Appeal, there is nothing in the section of the Decision dealing with GEMA's assessment of the principal objective and consumer interest which should result in the appeal not being upheld.⁶¹²
- 8.9 The Appellants also pointed to examples of previous GEMA decisions, in other contexts, where it was held consumers would benefit from shielding market participants from unpredictable risks (these are described at paragraph 6.28).⁶¹³

GEMA's submissions

- 8.10 In its Response, GEMA submitted that once it concluded that CMP344 did not better facilitate the ACOs than the Baseline, CUSC 8.23.7 required it to reject the Proposal. GEMA added that it had 'no discretion to do otherwise'.⁶¹⁴ In support of this it referred to the Court of Appeal's judgment in *SSE Generation*,⁶¹⁵ which stated that GEMA cannot approve a proposal unless it considers that the proposal would better facilitate achievement of the ACOs.⁶¹⁶
- 8.11 At the Hearing, GEMA reiterated its position:

Ofgem approaches this in two stages. It does that because of the way it is directed to approach these decisions under the CUSC.

Step one is to ask, looking at the identified ACOs, does a proposal better facilitate those ACOs [than] the Baseline. The effect of, I think it is 8.23.7 of the CUSC, is if a proposal does not get past that threshold condition, Ofgem cannot approve it. We just cannot, we are not permitted to do so under the CUSC, that is there expressly.

If a particular proposal or, in some cases, a number of potential proposals with modifications and so forth, get through that threshold condition, one or more of them is better facilitative of the

⁶¹⁰ NoA, paragraph 165(b)(iii).

⁶¹¹ Transcript of the Hearing on 9 September 2026, p 96. Set out in paragraphs 8.10 and 8.11 of this determination.

⁶¹² Transcript of the Hearing on 9 September 2026, p 96.

⁶¹³ Transcript of the Hearing on 9 September 2026, p 97; NoA, paragraphs 132–135; George Anstey, first expert report, paragraph 79.

⁶¹⁴ GEMA Response, paragraphs 102–103.

⁶¹⁵ *R (SSE Generation Ltd and others) v GEMA* [2022] 4 WLR 115, paragraph 22.

⁶¹⁶ GEMA Response, paragraph 8.

ACOs [than] the Baseline. Then Ofgem has an overarching decision as to whether to approve just the one, if there is just one or which to approve of the choice, if there are more than one.

At that stage it approaches its decision making with its principal objectives and its wider statutory duties very much in mind. In one sense, just cutting to the chase on this, you may be about to say to me, ‘What is the point of all of that analysis at the Ofgem decision’. The strict answer to that is having decided that this was negative, as against the ACOs, we could not approve of it..... Out of deference to the arguments that were put in the FMR, we did engage with it, and we expressed the views we did. In one sense it is by the by. The decision on the ACOs was determinative, consumer interest does not enter the balance.⁶¹⁷

- 8.12 GEMA further explained at the Hearing that the principal objective nevertheless operated as a ‘sense check’ on the outcome.⁶¹⁸ In his witness statement, Mr Stone similarly stated that, although GEMA was not required to go beyond an assessment of the ACOs where it concludes that a proposed code modification would not better facilitate the ACOs, it remained ‘cognisant’ of the principal objective and statutory duties. He explained that the Decision to reject the Proposal was consistent with GEMA’s statutory duties, having taken account of the impact on cost reflectivity and competition generally and the financial impact of the Proposal on consumers.⁶¹⁹

GEMA’s approach to and assessment of the evidence on consumer effects

- 8.13 We now set out the Parties’ submissions on GEMA’s approach to and assessment of the evidence on consumer effects.

The Appellants’ submissions

- 8.14 In addition to submitting that GEMA was wrong in principle to give consideration to the principal objective, in the NoA the Appellants also submitted that GEMA was incorrect to conclude that rejecting the proposed modification was consistent with the principal objective. In particular, they submitted that GEMA’s criticism of evidence provided in the Proposal on consumer impacts – the Cornwall Insight analysis⁶²⁰ – was unfair, irrational and based wholly or partly on an error of fact:

⁶¹⁷ Transcript of the Hearing on 9 September 2026, pp 94-95.

⁶¹⁸ Transcript of the Hearing on 9 September 2026, p 95.

⁶¹⁹ James Stone, first witness statement, paragraph 220.

⁶²⁰ Set out in paragraph 4.21 of this determination.

- (a) First, they criticised GEMA's assessment that Cornwall Insight's conclusions as to the consumer costs and benefits of CMP344 have become out-of-date.⁶²¹ They argued Cornwall Insight's analysis was current when it was prepared, that it only ceases to be due to the unreasonably long time GEMA took to make its decision, and that in any event the basic principle that CMP344 represented a long-term benefit to competition still applied.⁶²²
- (b) Second, in relation to the criticisms set out in the Decision that Cornwall Insight did not take into account (i) that GEMA's current practice is to apply an insurance deductible to an IAE claim in respect of an uninsurable latent defect; and (ii) that a proportion of the cost of an IAE may be borne by the consumer where a generator's local charge is fixed by reference to a TEC⁶²³ that is lower than the actual capacity of the transmission infrastructure,⁶²⁴ the Appellants argued this was unfair because the criticisms were never drawn to the Proposer's (ie RWE's) attention and no opportunity to address them was afforded to it.^{625, 626}
- (c) Third, the Appellants stated in relation to GEMA's criticism of the Cornwall Insight analysis: 'It was irrational and/or based on an error of fact because a degree of uncertainty over the magnitude of the consumer savings meant only that the savings might be smaller than they otherwise would be. It did not justify the conclusion that CMP344 was not in the interests of existing and future consumers taken as a whole'.⁶²⁷

8.15 The Appellants submitted that the Cornwall Insight analysis (which was updated in a witness statement)⁶²⁸ attempted to isolate the likely risk premia a prudent generator may have included in its CfD bid in each allocation round. It said that its approach would give a reasonable order of magnitude for the likely uplift to CfD strike prices that resulted from generators being exposed to the risk of IAEs.⁶²⁹ The Cornwall Insight analysis also explored the extent to which different assumptions about the cost and incidence of future IAE events will impact on strike prices, noting CfD bidders may have poor information and may be risk averse.

⁶²¹ NoA, paragraph 165(a).

⁶²² NoA, paragraph 165(a)(1).

⁶²³ Transmission Entry Capacity, this is a measure of the amount of power that a generator has a contractual right to export onto the transmission system at a given time.

⁶²⁴ NoA, paragraph 165(b).

⁶²⁵ NoA, paragraph 165(b)(i).

⁶²⁶ Dr Steward's witness statement said that shortly before the Decision was issued, Cornwall Insight informed him they had been contacted directly by GEMA in relation to their modelling concerning aspects of the modelling methodology. He stated that during GEMA's final consideration of the proposal, he was not aware of any request from GEMA for the analysis to be updated or supplemented, nor was any such request communicated to Cornwall Insight, or to RWE (Thomas Steward, first witness statement, paragraphs 55 and 70).

⁶²⁷ NoA, paragraph 165(b)(ii).

⁶²⁸ George Anstey, first expert report, paragraph 108.

⁶²⁹ Cornwall Insight, CMP344 Additional Workgroup Analysis, November 2024 p 5.

- 8.16 The Appellants argued that operators would demand a premium for handling the risk arising from IAE liability in strike prices and so consumers would be paying more under the Baseline than they would under CMP344.⁶³⁰ Mr Anstey, in his expert report, explained:

Allocating IAE costs to offshore generators will increase the costs of future investments to consumers. It will raise the risk borne by the generators and therefore increase the cost of capital for offshore wind projects.⁶³¹

In his second report he said:

There are good reasons to think that generators may be risk averse in the context of large, project specific and asymmetric downside risk... when commercial arrangements force them to bear a risk, they will charge a margin and that margin is not in consumers' interest.⁶³²

- 8.17 The Appellants stated: 'Whilst it may be difficult to quantify the extent to which offshore generators increase their CfD bids to include (a) expected IAE costs; and (b) risk premia for carrying IAE risk, it appears to be common ground that a rational actor would include them'.⁶³³

GEMA's submissions

- 8.18 GEMA disputed the Appellants' criticism that its treatment of the Cornwall Insight analysis was irrational or based on errors of fact. Its case was that the analysis has been considered carefully, including through direct engagement with Cornwall Insight, but that the Cornwall Insight analysis contained significant limitations and did not establish a reliable net consumer benefit from CMP344.⁶³⁴
- 8.19 GEMA identified a number of concerns with the Cornwall Insight analysis. These included that some of the data had become outdated by the time of the Decision;⁶³⁵ that the analysis did not fully account for the costs which consumers would now bear if CMP344 were implemented; that it assumed shifting IAE costs to consumers would not affect the frequency or cost of future IAEs; and that it did not reflect the existing sharing of IAE costs, including OFTO deductibles and the

⁶³⁰ Transcript of the Hearing on 9 September 2026, p 12.

⁶³¹ George Anstey, first expert report, paragraph 112.

⁶³² George Anstey, second expert report, paragraphs 22–23.

⁶³³ Appellants' Skeleton Argument filed in advance of the Hearing, paragraph 36.

⁶³⁴ James Stone, first witness statement, paragraphs 212–214; [GEMA Response](#), paragraphs 105-106.

⁶³⁵ [GEMA Response](#), paragraph 105.

proportion already borne by consumers.⁶³⁶ GEMA therefore considered that the estimated benefits to consumers were uncertain and potentially overstated.⁶³⁷

- 8.20 GEMA also relied on the possibility of windfall gains to existing CfD generators. Its position was that generators with existing CfDs may already have priced IAE risk into their strike prices. If CMP344 removed those generators' liability for future IAEs, consumers could continue to pay an enhanced price for those CfD contracts reflecting the incorporation of risk premia for IAEs, while also bearing IAE costs directly through the TDR. As indicated in the Decision, GEMA considered that this potential 'double burden' was not in consumers interests.⁶³⁸
- 8.21 In his witness statement, Dr Knott similarly identified the omission of consumer IAE costs, the assumption that the transfer of risk would not alter the behaviour of future IAE costs and the potential windfall to existing generators as weaknesses in the Appellants' analysis.⁶³⁹
- 8.22 GEMA rejected the Appellants' procedural criticism that concerns about the Cornwall Insight analysis should have been put back to RWE for further work. It submitted that the CUSC process provides for evidence to be submitted through the FMR and permits a send-back where GEMA cannot reach a decision. Where GEMA is able to form a view on the material before it, however, it is not required to invite a proposer to provide further or corrected evidence. Mr Stone, in his witness statement, stated this was particularly so here because, in GEMA's view, CMP344 was negative against the ACOs and in any event fails on that basis.⁶⁴⁰
- 8.23 GEMA acknowledged that it met with Cornwall Insight before the Decision but said that the purpose was to understand and test the assumptions underlying the analysis rather than to provide feedback or commission revised modelling. Mr Stone stated that he also sought input from Ofgem economists and, having done so, was not satisfied that the Cornwall Insight analysis was fully reliable, accurately reflected the existing recovery of IAE costs, or demonstrated that CMP344 would produce a net consumer benefit.

CMA assessment on Ground 4

- 8.24 The question we have to determine in connection with Ground 4 as pleaded by the Appellants is whether the Decision was wrong as a result of GEMA erring in its assessment that rejecting CMP344 was consistent with its principal objective.

⁶³⁶ GEMA's Skeleton Argument filed in advance of the Hearing, paragraph 46.

⁶³⁷ [GEMA Response](#), paragraph 105.

⁶³⁸ [The Decision](#) p 29

⁶³⁹ Gavin Knott, first witness statement, paragraph 62.

⁶⁴⁰ James Stone, first witness statement, paragraph 225.

- 8.25 At the Hearing, it became clear that there is not a dispute between the Parties about the relevance of GEMA's principal objective and wider statutory duties to a code modification decision in circumstances where that proposal does not better facilitate the relevant ACOs compared with the Baseline. In short, both Parties told us, in terms, that in such circumstances GEMA is bound to reject the modification proposal because the CUSC⁶⁴¹ prevents approval:
- (a) As noted at paragraph 8.10, GEMA told us that it is required to consider whether a proposal better facilitates the ACOs than the Baseline and that if a proposal does not get past that threshold, then, in accordance with the express provision of the CUSC, GEMA cannot approve it.
 - (b) Similarly, the Appellants told us that they accepted that it was necessary for a proposal to further the ACOs in order for it to be accepted.⁶⁴²
- 8.26 In addition, in response to a question at the Hearing about whether the Decision could be held to be wrong within the meaning of section 175 of EA04 on the basis of Ground 4 alone, the Appellants conceded 'We have to be positive on at least one of the CUSC objectives to get a CUSC modification, yes. You could not just win on this Ground [Ground 4] alone.'⁶⁴³
- 8.27 In light of this and given our findings in respect of Grounds 2 and 3, we consider that the Decision cannot be wrong on the basis of Ground 4. Further, given that the conclusion on the ACOs was sufficient to require GEMA to reject CMP344, we consider that any error in GEMA's additional assessment of the principal objective, wider statutory duties or consumer interests would not have affected the outcome of its Decision. We therefore have not addressed the further points raised by the Appellants covered in paragraph 8.14.

Our decision on Ground 4

- 8.28 For the reasons given above, we conclude that Ground 4 did not establish that the Decision was wrong within the meaning of section 175(4) of the EA04. Accordingly, Ground 4 is dismissed.

⁶⁴¹ Paragraph 8.23.7.

⁶⁴² Set out in paragraph 8.8 of this determination.

⁶⁴³ Transcript of the Hearing on 9 September 2026, p 102.

9. Order

- 9.1 By way of an Order dated 19 October 2026, and published on the CMA's website, it is ordered that the appeal against the Decision dated 1 May 2026 not be allowed and that the Decision be confirmed.
- 9.2 Costs are reserved.

Glossary

Allocation Round / AR	The auctions held for the award of CfD contracts. There have been seven Allocations Rounds to date, referred to as AR1 (2014/2015) through to AR7 (2025/26).
Applicable CUSC Objectives / ACOs	Objectives against which modification of the charging methodology as set out in the CUSC are to be assessed.
Appellants	All parties making the appeal (Gwynt y Môr Offshore Wind Farm Limited, RWE Renewables UK Limited and RWE Renewables UK Swindon Limited)
Balancing Market / BM	The market through which NESO procures increases or decreases in electricity generation or consumption to balance electricity supply and demand in real terms.
Baseline	The pre-existing arrangements (or status quo) under the CUSC against which a code modification proposal is assessed.
BSUoS	Balancing Services Use of System.
Competition Appeal Tribunal / CAT	The UK Competition Appeal Tribunal (CAT) is a specialist judicial body with a cross-disciplinary expertise in law, economics, business and accountancy, whose function is to hear and decide cases involving competition or economic regulatory issues.
CBI	Contingent Business Interruption insurance.
Contract for Difference / CfD	A private law contract between a low carbon electricity generator and the Low Carbon Contracts Company under which a generator is paid the difference between the 'strike price' (a fixed price for electricity) and the 'reference price' (a measure of the average market price for electricity in the GB market). These contracts are typically awarded through government auctions, known as Allocation Rounds.
CMA	Competition and Markets Authority.
CMP	CUSC Modification Proposal.
CMP344	CUSC Modification Proposal to modify Section 14 of the Connection and Use of System Code, raised by RWE on 21 May 2020, entitled <i>Clarification of Transmission Licensee revenue recovery and the treatment of revenue adjustments in the Charging Methodology</i> .
CUSC	Connection and Use of System Code, an industry code which is the contractual framework for connection to, and use of, the NETS in GB. NESO is required to prepare, maintain and implement the CUSC under the conditions of its ESO Licence.
CUSC Objectives	The objectives set out in Standard Condition E2 of NESO's Electricity System Operator Licence against which proposed modifications to the CUSC are assessed.
CUSC Panel	The panel established and constituted from time to time pursuant to and in accordance with section 8 of the CUSC.

DAM	Day Ahead Market.
Decision	Decision by GEMA dated 1 May 2026 to reject CMP344.
DESNZ	Department for Energy Security and Net Zero, the government department responsible for energy policy since 7 February 2023.
EA89	Electricity Act 1989.
EA04	Energy Act 2004.
EA23	Energy Act 2023.
ECHR	European Convention on Human Rights.
ESO	The Electricity System Operator, currently NESO (the National Grid Electricity System Operator Limited before 1 October 2024).
ESO Licence	NESO's electricity system operator licence.
FMR	Final Modification Report (also referred to as the CUSC Modification Report in the CUSC), being the report submitted to GEMA for decision in respect of a CUSC Modification Proposal.
GEMA	Gas and Electricity Markets Authority (GEMA), is the board that oversees the Office of Gas and Electricity Markets (Ofgem), the organisation through which GEMA's functions are exercised, and sets Ofgem's policy priorities. In this determination, references to Ofgem and GEMA may be used interchangeably unless the context requires otherwise.
Generator-build model	The model under which an offshore generator designs, procures, finances and constructs the offshore transmission assets connecting its generation assets to the onshore transmission network with the offshore transmission assets subsequently transferred to an appointed OFTO following a competitive tender exercise.
Gwynt y Môr Offshore Wind Farm	Offshore wind farm off the coast of north of Wales.
Gwynt y Môr Offshore Wind Farm Limited / GYMOWFL	The first appellant, the owner and operator of Gwynt y Môr Offshore Wind Farm, in which RWE Swindon holds a 50% interest.
Hearing	The hearing held with the parties on 9 September 2026.
HVDC	High Voltage Direct Current.
Income Adjusting Event / IAE	As set out in paragraphs 14 to 24 of Amended Standard Condition E12-J3 (Restriction of Transmission Revenue: Allowed Pass-through Items) of the OFTO Licence, being an event or circumstance arising from (a) Force Majeure, (b) an amendment to the STC not allowed for when the OFTO's revenue was determined, or (c) an event or circumstance which in the opinion of Ofgem is an IAE, where the event or circumstance has increased or decreased costs by more than the threshold amount.
Local Charges	Components of generation TNUoS charges relating to local transmission infrastructure connecting a generator to the wider transmission network.

	These include local circuit and local substation charges and may apply to both onshore and offshore generators.
NoA	The Notice of Appeal by RWE dated 26 May 2026.
National Grid Electricity System Operator Limited	National Grid Electricity System Operator Limited, the ESO before 1 October 2024.
NESO	National Energy System Operator Ltd.
NETS	The National Electricity Transmission System, being the high-voltage electricity network in Great Britain operated by the National Energy System Operator, comprised of onshore and offshore assets owned by Transmission Owners or Offshore Transmission Owners, as applicable.
OAR	Operating All Risks, a type of insurance product.
Ofgem	The Office of Gas and Electricity Markets to which GEMA delegates operational activities.
Ofgem IAE Policy	The policy titled 'Income Adjusting Events in Offshore Transmission Owner Licences' issued by Ofgem on 28 November 2018.
OFTO	Offshore Transmission Owner, a party responsible for owning, operating and maintaining offshore transmission assets pursuant to a transmission licence issued by GEMA.
OFTO Licence	The OFTO's offshore transmission licence.
Proposal	CUSC modification proposal 344 (ie CMP344)
Proposer	RWE Renewables, the party which assumed responsibility for CMP344 since 2021.
RWE Group	RWE group of companies.
RWE Renewables	The Second Appellant, RWE Renewables UK Limited, in effect the Proposer of CMP344 and a member of the RWE Group.
RWE Swindon	The Third Appellant, RWE Renewables UK Swindon Limited.
SEF	Specific Expansion Factor, a factor used in calculating onshore local circuit charges, reflecting the cost of the relevant transmission circuit. It may be updated, including following the repair or replacement of an onshore local circuit.
SHETL	Scottish Hydro-Electric Transmission Plc (previously Scottish Hydro Electric Transmission Ltd), being the onshore Transmission Owner in the north of Scotland.
SHVL	Shetland High-Voltage Direct Current Link connecting Shetland to the mainland.
System Operator Transmission Owner Code / STC	The code governing the relationship and arrangements between NESO and TOs, including onshore TOs and OFTOs.

Tender Revenue Stream / TRS	The total allowed revenue of an OFTO set following the tender process immediately prior to the point of the transfer of the transmission assets from the offshore generator to the OFTO, fixed for up to 25 years and based on each successful OFTO tenderer's required return on investment, the cost of financing its investment in acquiring the assets and the ongoing cost of financing, operating and maintaining the assets.
Transmission Demand Residual / TDR	The residual element of demand TNUoS charges, levied on final demand sites, which recovers transmission network revenue not recovered through the locational elements of TNUoS charges.
TNUoS charges	Transmission Network Use of System charges, which recover the annual cost of investing in, maintaining and financing the GB transmission system. Generators are typically charged according to their TEC. Suppliers are charged based on their demand. Generators' TNUoS charges currently comprise Local Charges, Wider Locational Charges, and an 'Adjustment element' pursuant to EU regulation. TNUoS tariffs are published annually by 31 January and take effect from 1 April each year.
Transmission Owners / TOs	These are companies that own and maintain the physical high-voltage electricity transmission infrastructure, including OFTOs offshore.
Use of System Charging Methodology	The charging methodology contained in Section 14 of the CUSC, it defines how NESO calculates and recovers the costs of using the national electricity transmission system.
WACM	A Workgroup Alternative CUSC Modification - an alternative proposal (to the original proposal) which may be raised during the Workgroup process.
Wider Locational Charges	One element of TNUoS charges. Wider Locational Charges are a locationally varying charge, which relates to the cost of installing and maintaining the assets which form the MITS.
Workgroup	A Workgroup stage may be established to assist the CUSC Modifications Panel to consider whether a CMP better meets the ACOs and consider alternatives (see CUSC section 8.20). The Workgroup consists of at least 5 persons selected by the CUSC panel.

