SSE Code Modifications Appeal 2021

An appeal under section 173 of the Energy Act 2004

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

Decision

Notified: 30 March 2021

The appeal was heard by the following group of Competition and Markets Authority Panel Members

Kirstin Baker *(Chair of the Group)*

Colleen Keck

Frances McLeman

Chief Executive of the Competition and Markets Authority

Andrea Coscelli

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1. Introduction

The appeal

1.1 This is an appeal by SSE Generation Limited (**SSE)** and a number of separate companies within the SSE corporate group that are licensed electricity generators and/or generation asset owners (together, **the Appellants**) against two decisions of the Gas and Electricity Markets Authority (**GEMA**) dated 17 December 2020.

1.2 By these decisions, GEMA approved two modifications to the Connection and Use of System Code (**CUSC**):

(a) CUSC Modification Proposal (**CMP**) 317/327, which amalgamated; and

(i) CMP317: 'Identification and exclusion of Assets Required for Connection when setting Generator Transmission Network Use of System (**TNUoS**) charges'; and

(ii) CMP327: 'Removing the Generator Residual from TNUoS Charges'; and

(b) CMP339: 'Consequential changes for CMP317 and CMP327'.

1.3 We refer below to the CMP317/327 decision as the **Decision**, and to both the CMP317/327 and CMP339 decisions together as the **Decisions**.[1]

1.4 The appeal is made pursuant to section 173 of the Energy Act 2004 (**EA04**).

1.5 The grounds of the appeal are, in summary, as follows:[2]

(a) Ground 1: error of law and/or fact in relation to the construction and/or application of the Connection Exclusion.

(b) Ground 2: the Decision is vitiated by breaches of public law principles.

(c) Ground 3: error of law in relation to the construction of the Ancillary Services Exclusion.

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[1] The Appellants objected to the outcome of CMP317 and brought this appeal also against the findings in each of CMP327 and CMP339 for the sake of consistency, since the Appellants submitted that they stood or fell together. NoA, paragraph 6.

[2] The grounds of appeal concerned errors of law and/or factual appraisal alleged to have been made by GEMA in relation to the construction of certain legal provisions, as well as certain related matters. They are summarised at paragraph 4.94

(d) Ground 4: fundamental errors of appraisal in relation to the assessment of Consumer benefit and Generator detriment.

(e) Ground 5: failure to have proper regard or give due weight to the statutory and CUSC objectives when setting a target towards zero charging for Generators.

(f) Ground 6: failure to provide for the phased introduction of the new provisions.

Conduct of the appeal

1.6 By a Notice of Appeal (**NoA**) served on 12 January 2021, the Appellants sought permission to appeal against the Decisions. The Appellants' NoA was published on a case page for this appeal on the Competition and Markets Authority (**CMA**) website on 14 January 2021.

1.7 The CMA granted the Appellants permission to appeal on 21 January 2021, and appointed the members of the Appeal Group to conduct the appeal.

1.8 The administrative timetable for the appeal was published on the CMA's case page on 22 January 2021 and updated on 12 February 2021, reflecting our decision of 8 February 2021 to extend the deadline by 10 working days to 30 March 2021, due to (i) the breadth and complexity of the issues under appeal, and (ii) the operational challenges in the current Coronavirus (COVID-19) pandemic.

1.9 On 2 February 2021, GEMA submitted its reply (the **Reply**) to the grounds in the NoA and on 10 February 2021, the Appellants submitted their response (the **Response**) to GEMA's Reply.

1.10 On 9 February 2021, National Grid Electricity System Operator Limited (**NGESO**) and British Gas Trading Limited (**BGT**) made applications to become parties to the appeal pursuant to Rule 7 of the Energy Code Modification Rules 2005.[3] On 10 February 2021, BGT amended its application to include Centrica plc (**Centrica**) as a joint applicant to become a party to the appeal. On 10 February 2021, the CMA granted NGESO and Centrica/BGT permission to intervene in the appeal.

1.11 We held Clarification Hearing with the Appellants and GEMA (together, the **Parties**), observed by the NGESO and Centrica/BGT (together, the **Interveners)** on 11 February 2021 in order to better understand the issues

[3] Competition Commission, 2005, The Energy Code Modification Rules (CC10)

and facts. Main Hearings with the Parties and Interveners were held over 4 and 5 March 2021.

1.12 Before the Clarification Hearing, the Appellants and GEMA submitted an agreed **List of Issues** and a presentation (**Teach-in Slides**) providing factual background to the appeal.

1.13 On 16 February 2021, the Appeal Group directed the Appellants and GEMA to submit successive skeleton arguments which were submitted on 18 February 2021 (the Appellants) and 25 February 2021 (GEMA).

1.14 On 19 February 2021, the Appeal Group issued an Order to SSE and GEMA to establish a confidentiality ring within which specified confidential information would be exchanged.

1.15 In the course of the appeal we considered a large number of documents, submissions and oral evidence from the Parties and Interveners. In support of the NoA, Reply and Response, the Parties also filed witness statements from Garth Graham (Head of Electricity Codes, SSE), John Tindal (Head of Electricity Economics, SSE) and Andrew Self (Deputy Director for Network Charging and Access, GEMA). In support of their Notice of Intervention, Centrica/BGT submitted witness statements from Andrew Manning (Head of Industry Transformation, Governance and Forecasting, Centrica) and George Moran (Senior Regulatory Manager, Centrica). The Parties and the Interveners together submitted in excess of 150 supporting documents, including legislation and court authorities. The Appellants, GEMA and NGESO responded to our requests for information. In addition, the Appellants and GEMA provided clarification of issues raised at the hearings.

1.16 The NoA, the Reply, the Notices of Intervention, our permission decisions, order, direction and this decision were published on our case page, as required by the EA04 and the Energy Code Modification Rules.

Our decision

1.17 The decision is structured as follows:

(a) Industry background

(b) Legal framework

(c) Background to the appeal

(d) The grounds of appeal

(e) Relief; and

(f) Order

1.18 The accompanying Appendix and glossary comprise:

(a) Appendix: CUSC Connection Charges and TNUoS charges levied on Generators; and

(b) Glossary.

1.19 We note at the outset that the Appellants and GEMA have advanced a large number of arguments and submissions during the course of this appeal, some of which have been expressed in multiple ways. We have carefully considered all of the arguments and submissions made, but in the interests of keeping our reasons for determining the appeal within manageable bounds we focus on what we consider to be the key points within the Parties' arguments and submissions.

1.20 We note that 31 December 2020 marked the end of the UK's transition period after leaving the European Union (**EU**). Below we describe the law as it applied when the Decisions were made on 17 December 2020, unless the context otherwise requires.

2. Industry background

2.1 This section describes in outline the electricity industry in Great Britain (**GB**) in relation to transmission and balancing services, the charges for which are the substance of this appeal. It then outlines the Appellants' and the Interveners' roles within the industry. We cover connection to the transmission network in Chapter 4, Background to the appeal.

Electricity generation, transmission and balancing

2.2 Electricity is produced at generating stations and consumed in homes and businesses. The infrastructure required to transport electricity comprises the transmission network and the distribution network. The transmission network comprises infrastructure to transport electricity at high voltages. The infrastructure that makes up the transmission network is owned, maintained and developed by transmission owners (**TOs**).

2.3 Generators produce electricity through a variety of means, ranging from conventional coal and gas fired power stations to renewable generation such as wind and solar power. In GB, generators can be connected: *(a)* directly to the transmission network (**Transmission-Connected Generators**);

(b) directly to the distribution network (**Embedded Generators**); or *(c)* directly to a customer's premises. For the purposes of this decision, reference to '**Generators**' means both Transmission-Connected Generators and large Embedded Generators (>100MW capacity) unless otherwise specified.[4]

2.4 There are currently three TOs who each hold a licence to develop, own and then maintain a high voltage system within their own distinct onshore transmission areas in GB. These are National Grid Electricity Transmission plc for England and Wales, Scottish Power Transmission Limited for southern Scotland and Scottish Hydro Electric Transmission plc for northern Scotland and the Scottish islands.[5]

2.5 There are also 20 Offshore Transmission Owners (**OFTOs**), which own and maintain offshore transmission assets.[6]

2.6 The electricity transmission network in GB transmits high-voltage electricity from where it is produced to where it is needed throughout the country. It does so by transmitting electricity from Generators and interconnectors (the physical links which allow the transfer of electricity across borders) directly to transmission-connected customers, such as a steel works, and for onward transport to consumers, using lower voltage pieces of network known as the distribution network.[7]

2.7 The distribution network is used to distribute electricity to distribution-connected consumers, either from the transmission system or directly from Embedded Generators.

2.8 The GB electricity transmission network is known as the National Electricity Transmission System (**NETS**), to which Generators apply to connect. The NETS is made up of the local network and the wider network, the latter of which is known as the Main Integrated Transmission System (**MITS**). A MITS node is a predetermined place on the transmission network at which local circuits can join. Typically, a Transmission-Connected Generator will connect via a connection asset to a local substation. There is then a local circuit asset connecting into a MITS substation (the **MITS node**).[8]

2.9 To maintain safe operation of the electricity grid, electricity supply and demand must be balanced, and the system's frequency and voltage levels

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[4] References to 'generator' or 'generators' are to generator(s) generically.
[5] NoA, paragraph 12.
[6] *Self*, paragraph 18.
[7] NoA, paragraphs 11 and 14.
[8] NoA, paragraph 14.

kept within strict operational limits at all times. The amounts of electricity being transported across particular pieces of infrastructure must also be kept within relevant operational limits (sometimes known as 'constraints').[9]

NGESO operates the transmission system in GB

2.10 The TOs and the OFTOs own and maintain the physical transmission infrastructure but they do not operate it. The system as a whole is operated by a single system operator: the Transmission System Operator (**TSO**). The TSO functions for the whole of GB, including offshore transmission, are performed by a separate system operator entity, NGESO.

2.11 The TSO is also responsible for keeping the electricity system balanced in real-time by coordinating the output of generating stations and ensuring that supply and demand are exactly matched, and all equipment is being operated within safe physical limits at all times. The tools and actions that NGESO use to do this are known as '**Balancing Services**', and include, for example, paying particular generators to reduce or increase their output. Balancing Services are essential to the safe operation of the GB transmission system.[10]

2.12 The nature of Balancing Services is that one balancing action can be used to serve multiple purposes (for instance imbalance, network constraints, voltage issues). Where a constraint on the capacity of a piece of infrastructure is the initial driver of a balancing action, the costs of that action will be categorised as a system 'constraint' cost in NGESO's reporting of charges for Balancing Services, even in instances where taking that action has also resolved multiple issues that are not constraint-related.[11]

2.13 The characteristics of electricity mean that quantities of energy generated and consumed are very likely to differ from the quantities for which contracts have been struck in advance. Consequently, central arrangements are required to: (a) meter the quantities produced and consumed; (b) compare these with the quantities covered by bilateral contracts between generators, interconnectors and suppliers; and (c) provide financial settlement for the differences (known as 'imbalances').[12]

2.14 We set out in Chapter 3, Legal framework below the legal framework governing electricity transmission and balancing in GB.

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[9] *Self*, paragraph 36.
[10] *Self*, paragraph 37.
[11] *Self*, paragraph 39.
[12] *Self*, paragraph 48.

The Appellants and Interveners

The Appellants

2.15 Permission to appeal was sought by SSE Generation Limited along with the following companies within the SSE Corporate Group: Keadby Generation Limited; Medway Power Limited; Griffin Windfarm Limited; SSE Renewables (UK) Limited; and Keadby Windfarm Limited (together the **Appellants**).

2.16 The Appellants are each holders of licences issued by GEMA to generate electricity and/or generation asset owners, that is generators.[13] The generation assets include both onshore and offshore installations.[14]

The Interveners

2.17 NGESO, as explained above, is the TSO. It has licence obligations to maintain the CUSC,[15] and it is entitled and required to levy transmission charges on Generators.[16] It would be required to implement and monitor consequences of the CMA's decision.[17] It intervened in support of GEMA.

2.18 BGT is an energy supplier, of both gas and electricity. As an electricity supplier, BGT pays some of the costs of the electricity transmission network. As noted below, the costs of the network are paid for partly by suppliers and partly by generators. The Decisions affect how the costs of the network are shared, and therefore the amount that BGT will have to pay for the costs of the electricity transmission network.[18] BGT is part of the Centrica plc corporate group. Centrica plc owns and operates generators in GB, and has interests in other GB generation facilities.[19] Centrica/BGT intervened in support of GEMA.

3. Legal framework

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

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[13] Electricity licensees (ofgem.gov.uk)
[14] NoA, Appendix 1.
[15] NGESO summary NoI, paragraph 1(b).
[16] NGESO summary NoI, paragraph 1(c).
[17] NGESO summary NoI, paragraphs 1(d)(i) and 1(d)(ii).
[18] Centrica/BGT NoI, paragraph 2.1.1.
[19] Centrica/BGT NoI, paragraph 2.1.2.

The legislative framework

3.2 The Electricity Act 1989 (**EA89**) privatised the wholesale electricity industry. It replaced the supply of electricity to consumers in GB 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. The EA04 extends this licensing regime to electricity interconnectors. The Appellants hold generation licences under section 6 of the EA89 and/or are generation asset holders.[20]

3.3 GEMA was established by section 1 of the Utilities Act 2000 as the regulatory authority for GB, in place of the former offices of the Director General of Gas Supply and the Director General of Electricity Supply. GEMA operates through the Office of Gas and Electricity Markets (**Ofgem**).

The principal objective and general duties of GEMA

3.4 Section 3A(1) of the EA89 provides that the principal objective of GEMA in carrying out its functions is to protect the interests of existing and future consumers in relation to electricity conveyed by distribution systems or transmission systems.

3.5 Those interests of existing and future consumers are specified by section 3A(1A) of the EA89 to be their interests taken as a whole, including: (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 to them; and (c) their interests in the fulfilment by GEMA, when carrying out its designated regulatory functions, of the designated regulatory objectives.

3.6 Section 3A(1B) of the EA89 provides that GEMA must carry out its functions in the manner in which it considers is best calculated to further the principal objective, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the generation, transmission, distribution or supply of electricity or the provision or use of electricity interconnectors.

3.7 Before deciding to carry out functions with a view to promoting competition as mentioned in section 3A(1B), GEMA is required by section 3A(1C) to consider: (a) to what extent the interests of consumers would be protected by that manner of carrying out those functions; and (b) whether there is any other

[20] NoA, paragraph 4.

manner (whether or not it would promote competition) in which it could carry out those functions which would better protect those interests.

3.8 Section 3A(5A) of the EA89 provides that in carrying out its functions, in accordance with the preceding provisions of section 3A, GEMA must have regard to: (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and (b) any other principles appearing to it to represent the best regulatory practice.

Licences and Industry Codes

3.9 The EA89 sets out a licensing scheme for the industry. Section 6 provides that GEMA can grant licences, including generation and transmission licences. Section 7 allows GEMA to set general conditions, and section 8A allows GEMA to set standard conditions, of those licences. Section 11A gives GEMA power to modify standard conditions. We deal below with the provisions of NGESO's transmission licence in the order in which they appear in that licence.

Balancing and Settlement Code

3.10 Standard condition C3 of NGESO's transmission licence requires it at all times to have in force a Balancing and Settlement Code (**BSC**). The BSC contains the governance arrangements for electricity balancing and settlement in GB. It sets out the arrangements for increasing or decreasing the quantities of electricity to be delivered to, or taken off, the total system at any time to balance the national electricity transmission system, and the settlement of consequential financial obligations between BSC parties and NGESO.

3.11 The balancing mechanism provides a means by which NGESO can buy or sell additional energy close to real-time to maintain energy balance, and also to deal with other operational constraints of the transmission system. The energy balancing aspect of the BSC specifies how parties can make submissions to NGESO to either buy or sell electricity into/out of the market at close to real time through the balancing mechanism. [21]

3.12 The settlement aspect of the BSC specifies how the actual positions of generators and suppliers (and interconnectors) against their contracted

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[21] *Self*, paragraph 47.

positions are monitored and metered and how imbalances are settled when actual delivery or offtake does not match contractual positions.

3.13 The BSC is administered by Elexon Limited (**Elexon**), a not-for-profit company which carries out this financial settlement process.[22] Elexon's administrative costs are recovered through BSC charges. The method of calculation of these is set out in Section D of the BSC.

Use of System charges

3.14 Standard condition C4 of NGESO's transmission licence sets out the basis for certain 'Use of System' charges. These are the Transmission Network Use of System (**TNUoS**) and Balancing Services Use of System (**BSUoS**) charges.

3.15 The licence conditions include the following: Condition C4.1(a) requires NGESO to set a use of system charging methodology which will be approved by GEMA; and C4.1(b) requires NGESO to conform to the methodology (as modified in accordance with standard condition C5 (Use of system charging methodology) and standard condition C10 (Connection and Use of System Code)). Standard condition C4 paragraph 7 states that for these purposes 'charges do not include references to: (a) connection charges'.

3.16 By way of standard condition C10.2(d), the charging methodology[23] is to be set out in the CUSC which NGESO is required by standard condition C10 to establish (see paragraph 3.21 below). The methodology for calculating TNUoS and BSUoS charges is in section 14 of the CUSC.[24]

CUSC objectives in relation to modification of the use of system charging methodology

3.17 Standard condition C5.1 of NGESO's transmission licence requires it to keep the use of system charging methodology under review at all times. Under paragraph 7(a) of condition C10 of the licence, (proposed) modifications of the methodology are to be assessed against specified objectives (referred to in this decision as the 'Applicable CUSC objectives' (or **ACOs**)) (see paragraph 3.28 below).

3.18 The ACOs are specified by standard condition C10.15 to be those set out in standard condition C5.5. They are, in outline:

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[22] *Self*, paragraph 50.
[23] And that for connection – see paragraph 3.19 below
[24] See paragraphs 4.17–4.19 for further explanation of BSUoS and BSC charges

(a) that compliance facilitates effective competition in the generation and supply of electricity and facilitates competition in the sale, distribution and purchase of electricity;

(b) that compliance results in charges which reflect the costs incurred by transmission licensees in their transmission businesses;

(c) that the charging methodology takes account of the developments in transmission licensees' transmission businesses;

(d) compliance with the EU Electricity Regulation 2009 on conditions for access to the network for cross-border exchanges in electricity (the **Electricity Regulation**)[25] and any relevant legally binding decisions of the European Commission; and

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

Connection charging methodology

3.19 Standard condition C6 paragraph 1 of NGESO's transmission licence requires that NGESO also (a) determine a connection charging methodology approved by GEMA; and (b) conform to the connection charging methodology, as modified in accordance with standard condition C10 (the CUSC) and in accordance with the relevant provisions of the CUSC.

3.20 Standard condition C6 paragraph 4 requires NGESO to prepare a statement approved by GEMA of the connection charging methodology, including charges: (a) for the carrying out of works and the provision and installation of electrical lines or electrical plant or meters for the purposes of connection (at entry or exit points) to the national electricity transmission system (NETS); (b) in respect of extension or reinforcement of the national electricity transmission system rendered necessary or appropriate by virtue of NGESO providing connection to, or use of, system to any person.

[25] Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ [2009] L 211/15, 14.8.2009 as amended, and that has now been repealed and consolidated by Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast) (Retained EU Legislation) (**the Recast Electricity Regulation**). A correlation table in Annex III to that Regulation shows how the provisions of the Recast Electricity Regulation correspond to the provisions of Regulation (EC) No 714/2009.

The Connection and Use of System Code

3.21 Standard condition C10 of NGESO's transmission licence requires NGESO to establish arrangements for the CUSC. Under standard condition C10(2) the CUSC must set out the charging methodologies described above, and NGESO must establish a Code Administrator and a CUSC Panel. Standard condition C10(6) establishes a procedure by which modifications can be made to the CUSC including the charging methodology. GEMA can impose modifications where these are necessary for compliance with the Electricity Regulation.

CUSC modification procedure

3.22 The CUSC modification process is set out in Section 8 of the CUSC.[26] The procedures under the CUSC envisage a largely stakeholder and industry led, open governance process.

3.23 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 BSC Party;

(b) under Paragraph 8.28.5, by the CUSC Modifications Panel;

(c) a Relevant Transmission Licensee, in specified circumstances;

(d) GEMA; or

(e) NGESO.

3.24 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 required, it sets out the terms of reference, forms a workgroup 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

[26] Section 8 can be downloaded here.

consultation. This stage can result, as it did in this case, in a range of WACMs being considered alongside the original proposal(s).

(d) Code administrator (NGESO) 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 (8.23.6)

(h) GEMA decision (8.23.7 and 8.23.10).

3.25 Slightly different processes and requirements apply to a modification proposal which is assessed to have impacts on the Electricity Balancing Guideline. These are not set out here, as they do not apply to CMP317/327 or CMP339.

3.26 It is also possible for the CUSC panel to request that GEMA grant 'urgent' status for a modification. If a modification has 'urgent' status, the paragraphs in 8.24 of the CUSC allow 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

3.27 Paragraphs 8.23.7, and 8.23.12 of the CUSC set out GEMA's decision-making options (see paragraph 3.31 below) when it receives a Final Modification Report.

3.28 In accordance with paragraph 7(a) of condition C10 of NGESO's licence, GEMA may approve a CUSC Modification Proposal contained in a Final Modification Report, if it is of the opinion that it would:

> as compared with the then existing provisions of the CUSC and any alternative modifications set out in such report, better facilitate achieving the applicable CUSC objectives the Authority may direct the licensee to make that modification.[27]

[27] Electricity Transmission Standard Licence Conditions, page 217, Condition C10, paragraph 7

3.29 If the Authority believes that neither the CUSC Modification Proposal (nor any Workgroup Alternative CUSC Modification(s) (**WACM**)) would better facilitate achievement of the ACOs, then there will be no approval.

3.30 If GEMA determines that the CUSC Modification Report 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).

(b) Requiring the Modification Report to be revised and to be resubmitted (the option of requiring revision and re-submission is known as the 'send-back' option).

3.31 GEMA's options on receipt of a Modification Report are therefore:

(a) To approve the proposal or one of the workgroup alternatives;[28]

(b) To reject the proposal and all of the workgroup alternatives;[29]

(c) To 'send back' the Report, for revision and re-submission.[30]

EU measures

3.32 The UK is no longer a Member State of the EU. However, by virtue of section 2(1) of the European Union Withdrawal Act 2018, EU-derived domestic legislation which applied before 31 December 2020 continues to have effect from that date (and, where it may be relevant in this decision, we consider the position after this date).[31] In addition, direct EU legislation which was operative immediately before 31 December 2020 forms part of domestic law on and after that date.[32] Against that backdrop, the following provisions are relevant to the charging methodologies referred to in preceding paragraphs and to the issues in this appeal.

[28] CUSC 8.23.7.
[29] CUSC 8.23.7.
[30] CUSC 8.23.12.
[31] For example, in relation to Ground 3 of the appeal.
[32] Section 3(1) of the European Union Withdrawal Act 2018.

The Electricity Directive

3.33 In 2009, as part of the steps taken at EU level to establish the internal market in electricity, the European Parliament and Council adopted the Electricity Directive, concerning common rules for the internal market in electricity (the **Electricity Directive**).[33] The Electricity Directive has now been repealed and replaced by the recast Electricity Directive (the **Recast Electricity Directive**).[34]

The Electricity Regulation

3.34 As part of the steps taken in 2009, the EU also adopted the Electricity Regulation. Article 1(a) of that Regulation recorded that it aimed at:

> …. setting fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal market in electricity, taking into account the particular characteristics of national and regional markets. This will involve the establishment of a compensation mechanism for cross-border flows of electricity and the setting of harmonised principles on cross-border transmission charges and the allocation of available capacities of interconnections between national transmission systems

3.35 Article 2(1) of the Electricity Regulation stated that, with the exception of 'interconnector', which was specifically defined, the definitions given in the Electricity Directive would apply to the Electricity Regulation. The relevant definitions included the following:

> "transmission" means the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply; and
>
> "ancillary service" means a service necessary for the operation of a transmission or distribution system.

3.36 Article 2(2)(c) of the Electricity Regulation also contained an additional definition, not in the Electricity Directive, of 'congestion' as follows:

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[33] Directive 2009/72/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.
[34] Directive (EU) 2019/944 of the European Parliament and of the Council on common rules for the internal market for electricity and amending Directive 2012/27/EU. The due date for implementing the Recast Electricity Directive was 31 December 2020, and so it was not transposed into domestic law, nor does it have effect as direct EU legislation.

> ”congestion” means a situation in which an interconnection linking national transmission networks cannot accommodate all physical flows resulting from international trade requested by market participants, because of a lack of capacity of the interconnectors and/or the national transmission systems concerned;

3.37 Article 8(7) of the Electricity Regulation required network codes to be developed for cross-border network and market integration issues, without prejudice to Member States' rights to establish national network codes which do not affect cross-border trade. Article 14 required charges for access to networks to be transparent and to reflect the actual costs incurred insofar as they correspond to those of an efficient and structurally comparable network operator. Article 18.2, meanwhile, provided that:

> Guidelines may also determine appropriate rules leading to a progressive harmonisation of the underlying principles for the setting of charges applied to producers and consumers (load) under national tariff systems, including the reflection of the inter-transmission system operator compensation mechanism in national network charges, in accordance with the principles set out in article 14.
>
> The Guidelines shall make provision for appropriate and efficient harmonised locational signals at Community level.
>
> Any such harmonisation shall not prevent Member States from applying mechanisms to ensure that network access charges borne by consumers (load) are comparable throughout their territory.

3.38 The Electricity Regulation was repealed and replaced in 2019. The Recast Electricity Regulation applies from 1 January 2020 (the **Recast Electricity Regulation**)[35]. Article 1(c) of the Recast Electricity Regulation sets out similar aims to the Electricity Regulation.[36]

3.39 Under Article 2(60), the Recast Electricity Regulation incorporates this definition of 'ancillary service' from the Recast Electricity Directive:

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[35] Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast).

[36] It says that Regulation aims to, ' … set fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal market for electricity, taking into account the particular characteristics of national and regional markets, including the establishment of a compensation mechanism for cross-border flows of electricity, the setting of harmonised principles on cross-border transmission charges and the allocation of available capacities of interconnections between national transmission systems;'

> a service necessary for the operation of a transmission or distribution system, including balancing and non-frequency ancillary services, but not including congestion management.

3.40 The Recast Electricity Regulation also contains the following definition of 'congestion' (in Article 2(4)):

> "congestion" means a situation in which all requests from market participants to trade between network areas cannot be accommodated because they would significantly affect the physical flows on network elements which cannot accommodate those flows;

3.41 Also related to these EU measures, on 31 December 2020 The Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020[37] (the **Amendment Regulations**) made some amendments to the Recast Electricity Regulation for the purposes of domestic law. These amended certain definitions in Article 2 thereof, including that of 'congestion.'[38]

3.42 Table 3.1 shows the key definitions as set out in the Electricity Regulation (from 2009) and the Recast Electricity Regulation (from 2019), with changes made by the Amendment Regulations (in 2020).

Table 3.1 Key definitions in the Regulations

Defined term	2009 Regulation	2019 Regulation
'ancillary service'	'a service necessary for the operation of a transmission or distribution system'	'a service necessary for the operation of a transmission or distribution system, including balancing and non-frequency ancillary services, but not including congestion management'
'congestion'	'a situation in which an interconnection linking national transmission networks cannot accommodate all physical flows resulting from international trade requested by market participants, because of a lack of capacity of the interconnectors and/or the national transmission systems concerned'	'a situation in which ~~all requests from market participants to trade between network areas cannot be accommodated because they would significantly affect the physical flows on network elements which cannot accommodate those flows~~ an interconnection linking the Great Britain transmission network with the transmission network of another country or territory cannot accommodate all physical flows resulting from international trade required by market participants, because of a lack of capacity of the interconnectors or the transmission systems concerned'

Source: Reply, pages 53–54.
Notes: (1) text which is struck through no longer applies in GB.
(2) Underlined text was inserted with effect from the end of the Transition Period.

[37] SI 2020 No 1006.
[38] See Regulation 7 and Schedule 4.

The ITC Regulation

3.43 The Guidelines referred to in Article 18.2 of the Electricity Regulation are set out in Regulation 838/2010 (referred to as the Inter-Transmission Compensation or **ITC Regulation**).[39] Recital (10) of the ITC Regulation states that:

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

3.44 Article 2 of the ITC Regulation states that: 'charges applied by network operators for access to the transmission system shall be in accordance with guidelines set out in Part B of the Annex.' Part B of the Annex requires annual average transmission charges paid by producers in GB to be within a range of €0/MWh to €2.50/MWh (the **Permitted Range**). Point 2 of Part B states:

> Annual average transmission charges paid by producers is annual total transmission tariff charges paid by producers divided by the total measured energy injected annually by producers to the transmission system of a Member State.
>
> … transmission charges shall exclude:
>
> (1) charges paid by producers for physical assets required for connection to the system or the upgrade of the connection;
>
> (2) charges paid by producers related to ancillary services;
>
> (3) specific system loss charges paid by producers.

3.45 For ease of presentation, in various parts of this decision we refer to Part B of the Annex to the ITC Regulation as 'the ITC Regulation.' The provision within the ITC Regulation that 'transmission charges shall exclude charges paid by producers for physical assets required for connection to the system or the upgrade of the connection' is known as the **Connection Exclusion**.[40] The provision that 'transmission charges shall exclude charges paid by producers

[39] Commission Regulation (EU) No 838/2010 of 23 September 2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging OJ (2010) L250/5 24.9.2010.
[40] The ITC Regulation, Annex, Part B point 2(1).

related to ancillary services' is known as the **Ancillary Services Exclusion** (**ASE**).[41]

The appeal provisions

3.46 This appeal is against decisions GEMA made in respect of modifications to the CUSC.

3.47 Section 173 of the EA04 allows for such an appeal to be made if certain conditions are satisfied. The Secretary of State has designated the circumstances in which an appeal against a decision of GEMA in respect of the CUSC may be appealed under section 173.[42] The conditions in section 173 include that the appeal is brought by a person whose interests are materially affected by it, or by a representative body;[43] and that permission for the appeal has been given by an authorised member of the CMA.[44]

3.48 The Parties agreed that the relevant conditions were satisfied in the case of this appeal.[45] [46]

3.49 The relevant procedures for the appeal are set out in Schedule 22 to the EA04, and the CMA Energy Code Modification Rules.

3.50 Section 175 of the EA04 provides that the CMA may allow the appeal only if it is satisfied that the decision appealed against was wrong on one or more specified grounds.[47] The grounds relied upon by the Appellants include that the Decision was based, wholly or partly, on an error of fact; that the Decision was wrong in law; and that the Decision was wrong because GEMA failed properly to have regard to relevant matters and/or to give appropriate weight to them.[48]

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[41] The ITC Regulation, Annex, Part B point 2(2).
[42] The Electricity and Gas Appeals (Designation and Exclusion) Order 2014, SI 2014/1293 Article 3(b).
[43] Section 173(3) of the EA04.
[44] Section 173(4) of, and paragraph 1(9) of Schedule 22 to, the EA04.
[45] GEMA's 15 January 2021 letter to the CMA acknowledging receipt of the NoA stated that it did not contest the application for permission to appeal.
[46] GEMA noted that permission had been granted (Reply, paragraph 3).
[47] Section 175(4) of the EA04.
[48] The Appellants objected to the outcome of CMP317 and brought this appeal also against the findings in each of CMP327 and CMP339 for the sake of consistency, since the Appellants submitted that they stood or fell together. NoA, paragraph 6

3.51 Section 175 also provides that where the CMA does not allow the appeal, it must confirm the decision appealed against.[49] Where the CMA does allow the appeal, it must do one or more of the following:[50]

(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.

3.52 The decision of the CMA on the appeal must be contained in an order; must set out the reasons for its decision; and must be published by the CMA.[51]

3.53 The CMA is required to make its determination of the appeal before the end of thirty working days following the last day for the making of representations or observations by GEMA about (among other matters) the NoA.[52] If the CMA is satisfied that there are good reasons for departing from the normal requirements in respect of an appeal, it may (on one occasion only) extend that period by not more than ten more working days.[53] As noted in paragraph 1.8, the CMA made such an extension in this case.

3.54 In determining the appeal, the CMA must have regard to the same matters to which GEMA must have regard in the carrying out of its principal objectives under section 3A of the EA89 and in the performance of its duties under that section.[54] The CMA may have regard to any matter to which GEMA was not able to have regard in the case of the decision appealed against; but the CMA 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.[55]

4. Background to the appeal

4.1 In this chapter we set out the context for this appeal including:

(a) the charges levied on GB Generators;

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[49] Section 175(5) of the EA04.
[50] Section 175(6) of the EA04.
[51] Section 175(9) of the EA04.
[52] Paragraph 6(1) of Schedule 22 to the EA04.
[53] Paragraph 6(2) of Schedule 22 to the EA04.
[54] Section 175(2) of the EA04.
[55] Section 175(3) of the EA04.

(b) the proposal, decision to reject and appeal, of CMP261;

(c) GEMA's Targeted Charging Review (**TCR**) Decision in 2019 (**TCR Decision**);

(d) the Decisions which are the subject of this appeal;

(e) the appeal; and

(f) our approach to determining the appeal.

Charges levied on GB Generators

Transmission system network use of system (TNUoS) charges and revenues

TNUoS charges

4.2 Each year, GEMA sets the total amount that can be charged by transmission network owners to recover the cost of investing in, maintaining and financing their respective transmission networks.

4.3 Onshore TOs' allowed revenue, to be recovered via TNUoS charges, is set periodically by GEMA through price controls.[56]

4.4 OFTOs receive a revenue stream as set out in their licence. Their allowed revenue reflects the outcome of a tendering process (run by GEMA). Their revenue streams are intended to reflect the costs of building, operating and maintaining the offshore generation asset for the 20-year period of its licence. These revenues, like the allowed revenues in respect of onshore networks, are recovered via TNUoS charges.

4.5 NGESO levies these charges annually on transmission users, such as Transmission-Connected Generators, large Embedded Generators over a certain size and demand-users (ie suppliers who buy electricity from generators and sell it to end-users, and directly connected demand (eg steelworks)) (**Demand**).[57] NGESO then pays the TO's (including the OFTOs) the share of the revenues arising from TNUoS charges that relates to each TOs' transmission activities.

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[56] These price controls do not cover that part of the transmission network the cost of which is recovered through GB connection charges ie connection charges levied under the CUSC.
[57] In accordance with section 14 of the CUSC. All sections of the CUSC can be accessed here.

Signals given by TNUoS charges

4.6 Generator TNUoS charges comprise Local Charges, Wider Locational Charges, and, up to the year 2020/21, Generator Residual Charges.[58] All of these charges are levied on Generators based on the maximum amount of power a Generator has a contractual right to put onto the transmission system at any one time (their Transmission Entry Capacity (in MW)), rather than on the basis of their actual output. Together these charges, along with charges levied on suppliers, seek to recover the total cost of owning and maintaining the transmission infrastructure assets, including a rate of return.

4.7 The levels of both Local Charges and Wider Locational Charges (sometimes referred to together as Locational Charges), vary according to the characteristics of the Generators including the location of the Generator. Local Charges are levied on Transmission Connected Generators only, while the Wider Locational Charges as well as Residual Charges are levied on both Transmission Connected Generators and larger Embedded Generators. Local Charges are intended to reflect the cost of assets (**Local Assets**) needed to connect the power station to the MITS. While not necessarily calculated with reference to specific individual assets, they are calculated taking into account the individual Generator's connection design and location.[59]

Transmission Generator Residual (TGR) charges[60]

4.8 Local Charges and Wider Locational Charges, taken together, do not necessarily fully recover all the costs of transmission infrastructure assets to which they relate. Residual Charges on both **Generation** (Generators) and Demand have been historically used to recover the difference between the total of all transmission charges and those recovered from Locational Charges, such that total TNUoS charges meet the amounts allowed under the regulated price caps set by GEMA and OFTO tender revenue streams.

4.9 Historically, a fixed proportion of 27% of total TNUoS revenues were recovered from Generators, and the remaining 73% from Demand (this is known as the 'G:D Split').

4.10 Since 2014, the proportion of total TNUoS revenues payable by Generators each year has been set by a formula which aims to ensure that average TNUoS charges paid by Generators do not exceed the €2.50/MWh upper limit

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[58] The Decision by having approved the Original Proposal would remove Residual Charges from Generators from 1 April 2022.
[59] CMA 2018 Decision, C20, paragraphs 3.24–3.30
[60] Sometimes referred to as Transmission Generation Residual charges

of the Permitted Range in any charging year.[61] The formula did not, however, deduct any charges pursuant to the Connection Exclusion. Under this approach the proportion of charges payable by Generators fell below 27%, in the 2020/21 charging year, Generator TNUoS charges amount to approximately 13.2% of TNUoS revenues recovered.[62]

4.11 Since the charging year 2017/18 the value of the TGR, and therefore the associated Generator Residual Charges, have been negative – resulting in certain Generators getting a credit that is set against Local Charges and Wider Locational Charges. In 2017/18 the value of the TGR was around negative £125 million and this has since risen to around negative £340 million for 2020/2021.[63] This change in the TGR has been, at least in part, attributable to increasing offshore Local Charges meaning a larger TGR reduction was applied so that charges did not exceed €2.50/MWh. Following the TCR, GEMA directed NGESO to bring forward a CUSC modification proposal setting the TGR to £zero as from 1 April 2021. Since the Decision has been confirmed as a result this appeal Residual Charges will no longer be applied to Generators from that date: an alternative adjustment mechanism would be introduced as a result of CMP317/327 (see paragraph 13.1).[64]

Connection charges

4.12 Connection charges pursuant to the CUSC (**CUSC Connection Charges**) are separate from, and payable in addition to, TNUoS charges.[65] In its decision dated 28 February 2018, the CMA dismissed the appeal and ordered that the CMP261 Decision (rejecting CMP261) be confirmed (**the CMA 2018 Decision**),[66] and it was noted that CUSC Connection Charges apply to assets used by a single Generator and which could not generally be shared with another user. Assets which are shared, or could at least potentially be shared if another Generator submitted a connection application related to that connection site, are generally defined as 'transmission infrastructure assets', and are funded via TNUoS charges, not CUSC Connection Charges. However, under the CUSC, even if a transmission cable is non-shareable (neither currently shared nor likely to be shared in the foreseeable future), it is only classed as a connection asset if it is equal to or less than 2km in length.[67]

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[61] *Self*, paragraph 27]
[62] *Self*, paragraph 27.
[63] *Self*, paragraph 34.
[64] See CUSC Direction, A21.
[65] NoA, paragraph 23.
[66] CMA, Decision and Order, EDF Energy Limited/SSE Generation Limited v Gas and Electricity Markets Authority and National Grid Electricity Transmission, 28 February 2018 (CMA 2018 Decision).
[67] CMA 2018 Decision, C20, paragraph 3.22

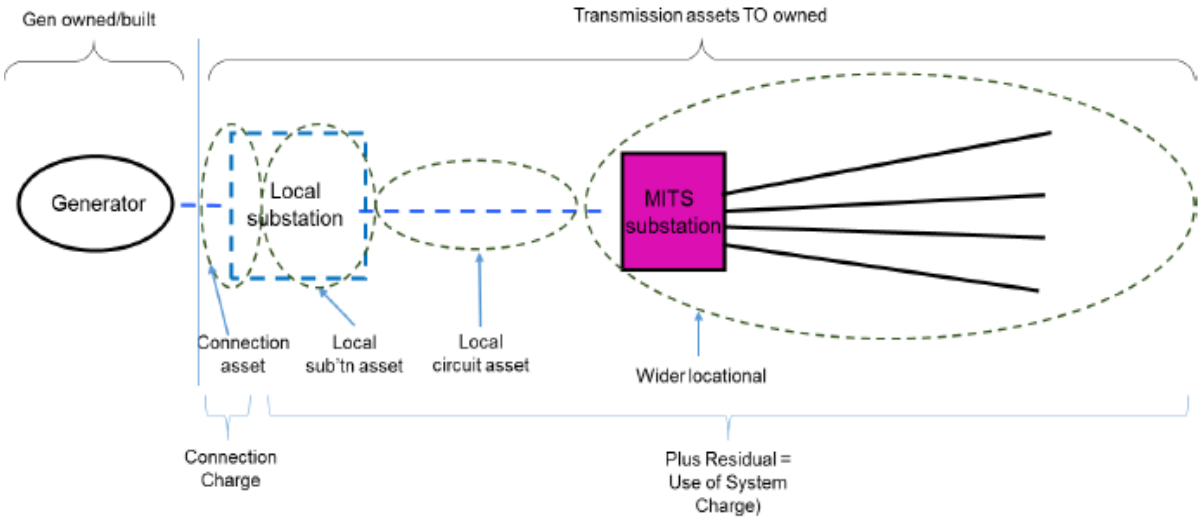
Further information on CUSC Connection Charges and TNUoS charges levied on Generators

4.13 More information about CUSC Connection Charges and TNUoS charges in so far as they affect Generators is set out in Appendix: CUSC Connection Charges and TNUoS charges to Generators. Appendix Table 1 compares and contrasts the three broad types of charges Generators face, namely CUSC Connection Charges, Locational Charges and Residual Charges. Appendix Table 2 provides further detail on the two broad types of locational charges that Generators face on an ongoing basis, namely Local Charges and Wider Locational Charges.

Assets that comprise the transmission network and relevant charges

4.14 Figure 4.1 below was submitted by GEMA, and illustrates the distinction between *(a)* assets built and owned by the Generator, in respect of which no charges are levied; *(b)* connection assets, which are owned by the TO, and in respect of which CUSC Connection Charges are levied; *(c)* Local Assets, which are owned by the TO, and in respect of which Local Charges are levied; and *(d)* the MITS, which is owned by the TO, and in respect of which Wider Locational Charges are levied.

Figure 4.1: Depiction of the assets that comprise the transmission network and relevant charges



Source: *Self*, Figure 1 paragraph 35, and CMA 2018 Decision, page 17, Figure 1
Note: Figure 1 assumes that the cable between the power station and the Local Substation is equal to or less than 2km in length and is therefore classified as a connection asset for CUSC charging purposes.

4.15 Wider Locational Charges Generators face are averaged by zone[68] and, at each price control, the boundaries of each of the zones can change. That might mean a Generator moving from one zone into another, affecting the level of charges it faces. There is also some potential for circuits to swap between being classed as falling within the MITS or falling within the local network (ie NETS), affecting the way that Generators are charged for those particular circuits.[69] See Appendix Table 2 for more details.

Size of charges

4.16 Table 4.1 below shows the forecast breakdown of Generator and Demand transmission charges in GB for 2021/22 in relation to GB transmission networks, both onshore and offshore (note this forecast from NGESO was made on the basis that the Decision is implemented which, as is set out in Table 4.3 below, leads to an increase in Generator charges). This demonstrates that the bulk of charges Generators face comprise Locational Charges, whereas almost the entirety of the charges that Demand (including suppliers) face, in line with the TCR Decision, comprise Residual Charges.

Table 4.1: Charges levied on Generators and Demand in respect of GB transmission networks (forecast 2021/22 £ million)

Generators	Offshore Local Charges	423
	Onshore local substation charges	11
	Onshore local circuit charges	15
	Total Local Charges	449
	Wider Locational Charges	366
	Total Locational Charges	816
	Adjustment revenue (Note 1)	(2)
	Total Generator TNUoS charges	814
Demand	Residual Charges	2,716
	Locational charges	(105)
	Embedded Export Tariffs (Note 2)	(15)
	Total Demand TNUoS charges	2,597
	Total TNUoS charges	3,410
Generators	Connection Charges	52
	Total of above charges	3,461

Source: CMA Analysis based on Draft TNUoS tariffs for 2021/22, November 2020, A73, Tables 18, 16 and 15.

Note 1: For explanation of Adjustment revenue see paragraphs 4.65 to 4.70, Table 4.3.
Note 2: Embedded Export Tariffs relates to amounts paid to certain Demand customers and Embedded Generators which export electricity onto transmission networks.
Note 3: For display purposes figures are rounded to nearest £ million.

[68] There are currently 27 zones. See NGESO Draft TNUoS Tariffs for 2021-22, A73, page 72 for Generation Zones map.
[69] Teach-in and Clarification Hearing, Transcript, page 37, lines 1 to 7. GEMA described the MITS as the core part of the NETS and referred to the rest of the NETS as the Local Network (CMP317/327 Decision, A27, page 34, paragraph 6).

Charges relating to Balancing Services

4.17 There are two sets of charges incurred by Generators associated with Balancing Services. One set relates to recovering the costs of the actions that the TSO, NGESO, takes as described above to balance the electricity system. The other set relates to recovering the cost of administering the financial settlement system process needed to address the costs imposed on the TSO when the forecasts of electricity generated and electricity consumed that generators and suppliers supply the TSO for each half hour settlement period prove to be inaccurate. The arrangements to recover the former costs through Balancing System Use of System (**BSUoS**) charges[70] are set out in the CUSC, whereas arrangements to recover the latter costs through BSC charges[71] are set out in the BSC.

Balancing Services Use of System (BSUoS) Charges

4.18 The costs incurred by NGESO for the procurement and use of Balancing Services are recovered through BSUoS charges. BSUoS charges include recovery of the external costs of the payments NGESO makes to providers for delivering Balancing Services, and the internal administrative costs NGESO incurs in carrying out these activities (including, for example, staff and buildings). BSUoS charges are charges in relation to an aggregation of various balancing services procured by NGESO required in each half-hourly settlement period. [72] The nature of Balancing Services is that one balancing action can be used to serve multiple purposes (for instance imbalance, network constraints, voltage issues).[73] BSUoS charges are payable by Transmission Connected Generators, large Embedded Generators, and suppliers and are charges in accordance with volumes of electricity taken off or put onto the energy network. Section 14 of the CUSC sets out the relevant provisions as to the calculation and reconciliation of BSUoS charges. [74]

Size of charges

4.19 BSUoS charges are payable by Transmission Connected Generators, large Embedded Generators, and suppliers. Section 14 of the CUSC sets out the relevant provisions as to the calculation and reconciliation of BSUoS charges. Generally, a little under half of BSUoS charges are recovered from liable

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[70] *Self,* paragraphs 38 and 39.
[71] *Self*, paragraph 56.
[72] The GB electricity market is divided into half hourly trading or settlement periods. Electricity is traded for supply and demand for each half hour period in advance. Trading can continue to trade up to 1 hour beforehand, at which point the market for that settlement period is closed.
[73] *Self,* paragraphs 38 and 39.
[74] *Self,* paragraphs 38 and 39.

Generators based on the amount of energy imported or exported onto the network (£/MWh) within each half-hourly settlement period, while the rest is recovered from demand consumers via their supplier. The value of BSUoS charges varies in each half-hourly settlement period reflecting the different costs incurred by NGESO in each period. NGESO calculates BSUoS charges for each half-hourly settlement period daily and provides a monthly forecast. NGESO recovered £1,609 million of revenue from BSUoS charges for the year ending 31 March 2020. [75]

The proposal, decision to reject and appeal, of CMP261

4.20 In the course of the charging year 2015/16, it became apparent that average TNUoS charges paid by Generators in respect of that charging year might exceed €2.50/MWh. The Appellants (and/or other entities in their corporate group) assumed that, if this happened, it would entail a breach of the upper limit of the Permitted Range. They therefore proposed that the CUSC be modified in such a way that (in broad terms) Generators would receive rebates, to the extent that average TNUoS charges paid by Generators exceeded €2.50/MWh.[20] This proposal to modify the CUSC was known as '**CMP261**'.[76]

4.21 GEMA was asked to grant CMP261 'urgency' status, basis, but rejected this request on 17 March 2016. This rejection was based on the recommendation of the CUSC Panel that careful consideration and consultation was required, and on GEMA's view that this would not have a significant commercial impact on parties given that any rebate would necessarily be paid after the end of the charging year.

4.22 GEMA received the original Final Modification Report on 30 November 2016 from the CUSC Panel (**CMP261 FMR**).

4.23 On 22 February 2017, GEMA directed that the CMP261 FMR be revised and resubmitted.

4.24 Following the send-back letter, the CMP261 workgroup revised the CMP261 FMR and it was re-submitted by the CUSC Panel to GEMA for decision on 23 June 2017, adopting the narrow interpretation of the ITC Regulation in line with the CMP224 Decision[77] and proposing a mechanism by which compliance with the upper limit could be restored and maintained.

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[75] *Self,* paragraphs 40-42.
[76] NoA, paragraph 29.
[77] CMP224, dated 19 September 2013, 'Cap on the total TNUoS target revenue to be recovered from Generation Users';

4.25 GEMA disagreed with the interpretation of the Connection Exclusion which had been put forward as part of CMP261 and consequently rejected CMP261 by a decision dated 16 November 2017 (**the CMP261 Decision**).

4.26 The CMP261 Decision was appealed by EDF Energy Limited and SSE Generation Limited on a number of grounds, including that GEMA erred in treating generation only spurs and local circuits/local substations as connection assets, rather than as transmission assets for the benefit of the transmission system as a whole.

4.27 In the **CMA 2018 Decision**, the CMA came to a number of conclusions in relation to the Connection Exclusion and these are addressed in our assessment of sub-ground 1(c).

The Targeted Charging Review (TCR)

4.28 In August 2017, GEMA commenced a significant code review[78] looking at various aspects of electricity network charging. This review was known as the TCR. The main objectives of the TCR were to:

(a) consider reform of residual charging for transmission and distribution, for both Generation and Demand, to ensure it meets the interests of consumers, both now and in future; and

(b) keep the other 'embedded benefits'[79] that may be distorting investment or dispatch decisions under review. [80]

4.29 The TCR process involved significant engagement with stakeholders, via consultations, workshops, and industry-wide fora.[81]

4.30 During the course of the TCR, following the CMA 2018 Decision, GEMA circulated an open letter on 4 May 2018, which stated that GEMA considered (i) that there was no need for an immediate change to the CUSC Calculation, providing there continued to be no breach of the Permitted Range; and (ii) that it would make sense to consider the possibility of any change to the CUSC Calculation alongside the TCR.[82]

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[78] A Significant Code Review entitles GEMA to holistically review a code-based issue (*Self*, paragraph 67).
[79] "Embedded Benefits" is the name given to the differences in charging arrangements between (i) Small Embedded Generators and, on the other hand (ii) Transmission-Connected Generators and Large Embedded Generators (*Self*, paragraph 10).
[80] GEMA, Targeted Charging Review - Significant Code Review launch statement 4 August 2017, page 1
[81] These are detailed on the GEMA Targeted Charging Review: Significant Code Review webpage.
[82] GEMA, Open letter following GEMA's decision to reject CMP261, 4 May 2018. (A78)

4.31 As part of the review of embedded benefits within the TCR, GEMA identified the fact that some generators received a benefit in the form of the TGR which other generators did not. GEMA concluded that the TGR represented a benefit to those generators who paid TNUoS charges (Transmission-Connected Generators and large Embedded Generators) and a disbenefit to those who do not (ie small distribution-connected generators) and that the fact that some generators receive the TGR and others did not would tend to distort competition between generators.[83]

4.32 On 28 November 2018, GEMA published its 'minded to' TCR Decision and draft Impact Assessment. The TCR 'minded to' Decision included a decision to:

> Set the Transmission Generation Residual to zero, subject to maintaining compliance with 838/2010 [the ITC Regulation]. The ESO is developing a modification which would enact the post CMP261 definition of the 838/2010 range, and would allow us to direct that our policy position of no residuals charged to generation is met.[84]

4.33 In its TCR 'minded to' Decision, and its TCR Decision, GEMA took into consideration compliance with the ITC Regulation.

4.34 In November 2019, GEMA published its final TCR Decision and Impact Assessment on the TCR.[85] It stated that:

> For the avoidance of doubt, we consider that the CUSC is compliant with EU Regulation 838/2010 except for the interpretation of the 'exclusion connection' which needs to have the correct interpretation, in accordance with the CMA appeal regarding CMP261. We think that generators should face transmission charges for:
>
> - off-shore local charges,
> - on-shore local charges (less those which fall into the 'Connection Exclusion'), and

[83] *Self*, paragraph 70.
[84] GEMA, Targeted charging review: minded to decision and draft impact assessment, 4 February 2019, paragraph 8.11.c.
[85] GEMA, Targeted Charging Review: Decision and Impact Assessment, 21 November 2019, (TCR Decision), A20

- wider locational charges.

For compliance with the EU Regulation 838/2010 we expect these annual average transmission charges paid by producers to not to exceed €2.50/MWh or fall below €0/MWh. We accept that an 'adjustment charge' may be necessary to rectify this. [86]

The CUSC Direction

4.35 Following its decision on the TCR, GEMA issued a Direction to NGESO (**CUSC Direction**) to bring forward a modification to the CUSC to implement the setting of the TGR to £zero, subject to compliance with the ITC Regulation:

> In particular, the Authority considers for the reasons set out in Chapter 3 (Decision on Residual Charges) and Chapter 4 (Decision on 'non-locational' Embedded Benefits) of the TCR Decision that proposals should be developed to:
>
> i) reform the residual charging provisions;
>
> ii) set the Transmission Network Use of System (TNUoS) Generation Residual to zero (subject to ensuring ongoing compliance with EU Regulation 838/2010 [the ITC Regulation]); and
>
> iii) reform the basis on which balancing services charges are applied to suppliers so that they are charged on the basis of gross demand measured at the Grid Supply Point (as opposed to being charged on the basis of net demand).[87]

CMP317/327

Modification Process

4.36 To address NGESO's concern that compliance with the ITC Regulation would need to be addressed within timescales that would not be feasible under the TCR, it raised CMP317 in May 2019. The purpose of the proposal was to define, for the purposes of compliance with the ITC Regulation, which specific elements of Generator TNUoS charges pertain to assets required for

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[86] TCR Decision, A20, paragraph 4.79.
[87] CUSC Direction, A21, page 2.

connection and to establish a methodology for maintaining compliance on an ex ante and an ex post basis.[88]

4.37 In November 2019, GEMA published its TCR Decision and Impact Assessment, and issued the CUSC Direction.

4.38 Following the CUSC Direction, in November 2019 NGESO raised the modification proposal CMP327 to give effect to the Direction.[89]

4.39 On 2 December 2019, the CUSC panel requested urgent status for CMP 327 on the basis that 'it has to be implemented by April 2021, which means the solution to this, and CMP317, on which it is contingent, must be approved and in place by October 2020'.[90]

4.40 On 29 January 2020, GEMA gave permission for CMP317 and CMP327 to be joined together concluding that 'the Proposals are sufficiently proximate to justify amalgamation on the grounds of efficiency and are logically dependent on each other.'[91]

4.41 On 7 February 2020, GEMA rejected the request for urgent status:

> Our view is that the requests did not contain sufficient evidence that there were issues linked to these modifications which would be mitigated through urgency. This is because the timetables set out in the PID [[92] [93]] show that there is sufficient time for standard consultation periods for these modifications and these timelines will allow for the required TCR changes to be implemented in time for April 2021. Further, we consider that the CUSC modification process should allow sufficient opportunity for industry to consider and submit their views in respect of these modification proposals and that a non-urgent timetable can deliver this outcome if used appropriately.[94]

4.42 The CMP317/327 workgroup convened 19 times between June 2019 and June 2020[95] and following the standard workgroup consultation for 15 working days it identified 84 potential options (including NGESO's '**Original**

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[88] CMP317 Modification Proposal.
[89] CMP327 Modification Proposal.
[90] NGESO Urgency letter on behalf of the CUSC Panel 2 December 2019.
[91] GEMA letter on consent to amalgamate CMP317 and CMP327 29 January 2020.
[92] TCR Project Initiation Document (PID), submitted by the Energy Networks Association to GEMA on 20 December 2019.
[93] TCR Project Initiation Document (PID), submitted by the Energy Networks Association to GEMA on 20 December 2019.
[94] GEMA, response to urgency request 7 February 2020.
[95] CMP317/327 FMR, (FMR), A23, page 15.

Proposal'[96] and 83 workgroup alternatives or WACMs) and concluded as follows:

(a) by majority (eight or more) that 44 of the potential 84 solutions were better than the status quo (this did not include the Original Proposal), and that 62 of the 83 WACMs were better than the Original Proposal.

(b) The workgroup did not come to a majority consensus on which option was best.

(c) WACM72 received the most votes as the best option with four.[97]

4.43 Following the Code Administrator consultation undertaken by NGESO on 29 June 2020 the draft modification report was presented to the CUSC Panel on 23 July 2020. On 31 July 2020 the CUSC Panel voted on 'whether the Original Proposal or one of the WACMs put forward under CMP317/327 better facilitated the CUSC Objectives than the Baseline [status quo]'. The CUSC Panel recommended by majority that, of the Original Proposal and WACMs 1–83, the following better facilitated the ACOs than the status quo (also known as the **Baseline**): WACMs 7, 8, 14, 15, 49, 50, 52, 53, 56, 57, 59, 60, 70, 71, 73, 74, 77, 78, 80 and 81.[98]

4.44 On 13 August 2020, the CMP317/327 Final Modification Report (**FMR**) was published and sent to GEMA.[99] After consideration of the FMR, GEMA published its decision on CMP317/327 on 17 December 2020 (**Decision**).[100]

GEMA Decision on CMP317/327 (the Decision)

4.45 The FMR contained NGESO's Original Proposal and 83 WACMs. Each of these proposals included a solution to set the TGR to £zero but they also incorporated different options around that.

4.46 GEMA noted that the 84 proposals comprised various permutations of options within seven discrete modules and that in practical terms, this meant that if it reached a conclusion as to which option within each module it wished to approve, the others (in that particular module) effectively fell to be rejected. The seven modules were:

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[96] The original NGESO proposal for CMP317/327, FMR, A23, pages 13–15.
[97] FMR, A23, page 2 and pages 46-55.
[98] FMR, A23, page 5.
[99] FMR.
[100] Decision, A27, pages 7 and 8.

(a) **Module 1: Treatment of BSC charges**: alternatives in relation to whether some elements of BSC charges would be included or excluded from the CUSC Calculation.

(b) **Module 2: Treatment of BSUoS charges** (congestion management): alternatives which would include or exclude certain BSUoS charges (related to congestion management) within or from the CUSC Calculation.

(c) **Module 3: Two-step ex ante adjustment:** one of the options in this module would incorporate a two-step process to set and, in certain circumstances, adjust charges to be paid in an upcoming charging year. The other option does not include such a process. The options under this module were only applicable if any element of BSC charges and/or BSUoS charges is included in the CUSC Calculation.

(d) **Module 4: Phasing of implementation:** options to phase implementation, where changes may be introduced gradually over a period of up to three years.

(e) **Module 5: Target:** options that provide for the inclusion of a target for annual average transmission charges within the Permitted Range.

(f) **Module 6: Error margin**: options for the inclusion (or otherwise) of an error margin in the CUSC Calculation to reduce the risk of a breach of the ITC Regulation.

(g) **Module 7: Definition of charges for assets required for connection**: alternative definitions of the charges that fall within the Connection Exclusion and are therefore excluded from the CUSC Calculation.[101]

4.47 The approach taken by GEMA to assessing each of the modules in its decision was:

1. Compliance: it first assessed whether the options (if implemented) would achieve compliance with i) the Limiting Regulation [ITC Regulation] and ii) the [CUSC] Direction in which GEMA required NGESO to make proposals to amend the CUSC to set the TGR to zero and ensure compliance with the Permitted Range for the purpose of the ITC Regulation;

2. Applicable Charging Objectives: it then assessed the options against the ACOs; and

[101] Decision, A27, pages 7 and 8.

3. Principal objective and statutory duties: finally, it considered the application of our principal objective and statutory duties, including in particular section 3A of the EA89 (which provides that the Authority's principal objective is "to protect the interests of existing and future consumers in relation to electricity conveyed by distribution systems or transmission systems"). [102]

Basis of the Decision

4.48 In deciding to approve the Original Proposal GEMA stated:

> We do not consider that any of the proposals incorporate the correct interpretation of the Connection Exclusion. Notwithstanding this, we have concluded that the Original Proposal would be likely to avoid the imminent risk of a breach of the Limiting Regulation [ITC Regulation] that is posed by the status quo, and better facilitate achievement of the ACOs than either the status quo or any of the WACMs. We also consider that approval of the Original Proposal would be consistent with our principal objective and statutory duties. [103]

GEMA's Assessment of the first six modules

4.49 On the Treatment of BSC and BSUoS charges, GEMA set out in Legal Annex One to the Decision why its considered that these charges did not fall within the scope of the Ancillary Services Exclusion and therefore should not be taken into account when assessing compliance with the Permitted Range. GEMA also concluded that not excluding BSC and BSUoS charges from the 'CUSC Calculation'[104] would better meet the ACOs. It therefore decided to reject proposals which would include BSUoS and/or BSC charges in the CUSC Calculation.[105] Aspects of this assessment are subject to challenge by the Appellants and we discuss these issues in detail in Chapter 8 on Ground 3.

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[102] Decision, A27, page 9.
[103] Decision, A27, page 10.
[104] GEMA notes that Part 2 of Section 14 of the CUSC includes a mechanism which has the aim of ensuring ongoing compliance with ITC Regulation. It is this calculation is that it refers to as the 'CUSC Calculation'
[105] Decision, A27, pages 11-14.

(a) On the incorporation of a two-step ex ante adjustment process GEMA concluded that this would only be relevant if the CUSC Calculation was to include BSC charges and/or BSUoS charges.[106]

(b) On the possibility of phased implementation GEMA concluded that it had been clear that the relevant aspects of its TCR decision were to be implemented to take effect from April 2021 and that the CUSC Direction to NGESO was clear in this respect. GEMA also concluded that proposals which did not involve phased implementation would better facilitate ACOs a), b), c), d) and e), compared to options which involve phasing.[107] Aspects of this assessment are subject to challenge by the Appellants and we discuss these issues in detail in Chapter 11 on Ground 6.

4.50 In deciding between proposals that provided for a target for annual average transmission charges within the Permitted Range compared to those which provided for an error margin GEMA concluded introduction of a target is not necessary for the purpose of complying with the Direction [and hence the ITC Regulation]. [108] GEMA also concluded that proposals that provided for an error margin better met ACO (a) and (b) and were neutral against ACOs (c), (d) and (e).[109] Aspects of this assessment are subject to challenge by the Appellants and we discuss these issues in detail in Chapter 10.

GEMA's assessment of the options for the definition of 'Charges for Physical Assets Required for Connection'

4.51 81 of the 84 proposals put to GEMA were rejected on the basis of its conclusions in respect of the previous six modules. The remaining three options (the Original Proposal, WACM7 and WACM14) differed solely by their definition of 'Charges for Physical Assets Required for Connection'. These different definitions are set out in Table 4.2 below. [110]

[106] Decision, A27, page 14.
[107] Decision, A27, page 15.
[108] Decision, A27, page 17.
[109] Decision, A27, page 17.
[110] Decision, A27, page 17.

Table 4.2 Options for definition of 'Charges for Physical Assets Required for Connection' [111]

Proposal	*Definition of 'Charges for Physical Assets Required for Connection'*
The Original Proposal (All Local Charges)	Connection Charges and charges in respect of an Onshore local circuit, Onshore local substation Offshore local circuit and Offshore local substation
WACM7 (Generator Only Spurs)	Connection Charges and charges in respect of an Onshore local circuit and Onshore local substation, where they form part of an Onshore Generator Only Spur and charges in respect of an Offshore local circuit and Offshore local substation where they form part of an Offshore Generator Only Spur. This definition also relies on the following additional definitions: Offshore Generator Only Spurs: These consist of (a) an Offshore substation (the Offshore local substation) where that sub-station is not shared with demand or another Generator; and (b) cable(s), (where those cable(s) are not shared with demand or another Generator) which run from the Offshore local substation to an Onshore substation; and Onshore Generator Only Spurs: These consist of (a) an Onshore substation (the Onshore local substation) where that sub-station is not shared with demand or another Generator; and (b) underground cable(s), or overhead line(s) (that are not shared with demand or another Generator), which run from the Onshore local substation to an Onshore substation
WACM14 (Pre-existing / shared)	Connection Charges and charges in respect of an Onshore local circuit, Onshore local Substation, Offshore local circuit and Offshore local substation except for those charges that are for Shared Assets or Pre-Existing Assets This definition also relies on the following additional definitions: Pre-Existing Assets: in respect of a Generator Onshore local circuit and/or Onshore local substation and/or Offshore local circuit and/or Offshore local substations that existed prior to the connection of that Generator to the NETS; and Shared Assets: An Onshore local circuit and/or Onshore local substation and/or Offshore local circuit and/or Offshore local substation that are or could be used without the need for new assets or could be used just by switching, by either (i) more than one Generator or (ii) a single Generator and demand that is not Station Demand for that Generator

4.52 GEMA concluded that the Connection Exclusion included all charges paid by Generators in respect of Local Assets (whether shared, shareable or otherwise) that were required to connect the Generator(s) in question to the NETS as the NETS existed at the time the Generator(s) wished to connect. It considered that charges paid by Generators in relation to Local Assets which existed at the point at which such Generator(s) wished to connect to the NETS did not fall within the Connection Exclusion. GEMA further concluded that 'Neither the existing provisions of the CUSC Calculation nor any of the proposals in the FMR reflect this interpretation.' [112]

4.53 GEMA also concluded that the status quo presented an immediate risk of non-compliance with the ITC Regulation (we summarise GEMA's evidence for this in paragraphs 4.60 to 4.73 below) and therefore, that a proposal which would secure compliance (or reduce the risk of such non-compliance) would represent an improvement on the status quo. Approval of such an option

[111] Decision, A27, pages 17-18.
[112] Decision, A27, pages 18-19. See also Legal Annex Two, pages 33-35.

would be preferable to allowing the status quo to remain.[113] GEMA noted that it had focused on the risk of a breach in the short term, ie in the period between the date of the Decision and 1 April 2022, after which it anticipated that a further modification would be implemented.[114]

4.54 GEMA further concluded that WACM14 was inferior to WACM7. It concluded that WACM14 was more 'under-inclusive' than WACM7 and that this would result in a significant amount of charges being incorrectly factored into the CUSC Calculation. GEMA also concluded that there was a problem with the definition of 'pre-existing assets' used in WACM14, it noted that 'read literally, the definition of "Pre-Existing Assets" provided by the Workgroup would treat very little (if anything) as falling within the Connection Exclusion since at the moment of connection, the assets (or virtually all of the assets) required for connection will have been installed'. [115]

4.55 In assessing the Original Proposal against WACM7, GEMA drew on analysis from NGESO which showed:

(a) The difference between total charges treated as falling within the Connection Exclusion under the Original Proposal and under WACM7 would be less than £3 million for each of 2021/22, 2022/23 and 2023/24.[116]

(b) The value of the correct interpretation of the Connection Exclusion would sit somewhere between both of these options. [117]

4.56 GEMA also noted that NGESO would set TNUoS charges using an Error Margin, to reduce the risk of charges falling outside of the Permitted Range.[118]

4.57 In light of these factors GEMA assessed that both the Original Proposal and WACM7 would be likely to result in compliance with the Permitted Range for each of the next 3 years, but in terms of acting as a stop-gap until the future modification would be made, it considered that the Original Proposal was preferable to WACM7 as it was administratively simpler. This was because:

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[113] Decision, A27, pages 19-20.
[114] Decision, A27, page 22.
[115] Decision, A27, page 21.
[116] Although GEMA noted the difference in value would become more significant in the following years (2024/2025 and 2025/26), by which time it is expected that a greater proportion of Local Assets will be shared, with the estimated charges associated with these shared assets being in the region of £80m. Decision, A27, page 22.
[117] Decision, A27, page 22.
[118] Decision, A27, page 22.

(a) it would be administratively simpler to identify all charges in respect of Local Assets than charges for Generator Only Spurs (**GOS**) (since the latter would require an assessment of which assets are shared).

(b) It did not involve the concept of 'shared' assets, which would be introduced by WACM7. [119]

4.58 GEMA concluded that each of the options better facilitated ACOs a) and b) than the baseline [status quo] as they implemented the setting of the TGR to £zero. GEMA also concluded that each option was better than the baseline [status quo] against ACOs c) and d) as they would represent (i) a more accurate implementation of the Connection Exclusion, as required by the CUSC Direction and (ii) be more likely to result in compliance with the ITC Regulation. Finally, for the reasons set out above, it concluded the Original Proposal to be better than the Baseline and the other options against ACO e): Promoting efficiency in the implementation and administration of the use of system charging methodology. [120]

4.59 Aspects of GEMA's assessment of the correct definition of 'Charges for Physical Assets Required for Connection' are subject to challenge in the present appeal and are covered in Chapters 6 and 7.

GEMA's view of risk of non-compliance with the Permitted Range under the status quo, the Original Proposal and WACM7

4.60 As explained above,[121] in making its Decision GEMA considered that it was preferable to approve the Original Proposal due to there being an immediate risk of non-compliance with the ITC Regulation if it were to allow the status quo to remain.[122] In making its assessment of the proposals put to it GEMA also noted that the difference between total charges treated as falling within the Connection Exclusion under the Original Proposal and under WACM7 would be less than £3 million for each of 2021/22, 2022/23 and 2023/24.[123]

4.61 In summary, this section addresses GEMA's assessment of whether there was a serious and imminent risk of a breach of the ITC Regulation, as this

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[119] Decision, A27, page 22.
[120] Decision, A27, page 23.
[121] Paragraphs 4.53 to 4.57
[122] Decision, A27, page 20
[123] Although GEMA noted the difference in value would become more significant in the following years (2024/2025 and 2025/26), by which time it is expected that a greater proportion of Local Assets will be shared and that the estimated charges associated with these shared assets being in the region of £80m. (Decision, A27, page 22.)

understanding influenced GEMA's view of the action it should take when faced with the range of proposals within the FMR. [124]

In August 2020, NGESO reported to GEMA a real and imminent risk of a breach in 2021/22 under the status quo

4.62 NGESO raised CMP317 because in its view there was a risk of a breach of the lower limit of the Permitted Range in 2021/22. This risk arose because, under the status quo, forecast Generator TNUoS charges (Local Charges; Wider Locational Charges; and Residual Charges) less the relevant exclusions (the Connection Exclusion) would be below €0/MWh:

4.63 It was stated in the FMR that NGESO 'raised CMP317 in June 2019 because its TNUoS forecasts indicated that it would not be in compliance with the Limiting Regulation [ITC Regulation] for the charging year 2021/22 unless it changed the charging formula in the CUSC'. [125]

4.64 The FMR further stated that, according to NGESO, 'there was a risk that without changes to the methodology and allowances for costs being made in the 2021/22 charging year that the [Permitted Range] could be breached.' The FMR further noted in March 2020 NGESO had forecast that [offshore] GOS charges would be in the region of £444 million and Wider Locational Charges around £375 million. This would lead to NGESO potentially recovering less than €0/MWh once the exclusions were applied. [126]

In making its Decision GEMA analysed the risk of a breach under the status quo, the Original Proposal and WACM7

4.65 GEMA submitted that in making its Decision it had used updated figures (to those quoted from the FMR above) provided by NGESO in November 2020[127] to calculate forecast annual average transmission charges for the purposes of assessing likely compliance with the Permitted Range under each of the status quo, the Original Proposal and WACM7.[128] Table 4.3 below, which

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[124] We note that GEMA refers to the likelihood of an *imminent* breach of the ITC Regulation with respect to the 2021/22 charging year (see, for example, Decision, A27, pages 10 and 20). Compliance with the ITC Regulation can only be definitively determined once this charging year is over ie in April 2022 at the earliest.
[125] FMR, A23, page 16, paragraph 1.1.1. Text in square brackets added by the CMA. We note that on page 1 of the CMP317 Proposal Form, A60, states that CMP317 was raised on 21 May 2019
[126] FMR, A23, paragraph 9.3.17
[127] NGESO Draft TNUoS Tariffs for 2021-22, November 2020, A73. Forecasts included: €:£ Exchange Rate - 0.8259; Total chargeable volumes: 223m MWh; Total Local Charges: £449.29m / €544.00m; Total Wider Locational Charges: £366.40m / €443.64m.
[128] On GEMA's interpretation of the Connection Exclusion, NGESO forecast that only £1.7m / €2.06m of Local Charges would fall outside the Connection Exclusion (the figure would be slightly higher under the interpretation on which WACM7 is based). On this basis, the relevant charges to take into account when calculating forecast "annual average transmission charges paid by producers" (within the meaning of the ITC Regulation) would be (i)

summarises the GEMA's assessment of the likelihood of a breach of the Permitted Range for the: status quo; the Original Proposal; and WACM7, below shows that:

(a) a breach was forecast under the status quo: charges would be below the lower limit of the Permitted Range at – €0.45/MWh; and

(b) charges were forecast to be well within the range for both the Original Proposal (at €1.99/MWh) and WACM7 (at €1.97/MWh). [129]

4.66 The assessment of the likely compliance with the Permitted Range can be separated into three broad stages, each of which is summarised in the Table 4.3:

(a) Forecasting of TNUoS Locational Charges (Local Charges and Wider Locational Charges).

(b) Calculation of the adjustment to TNUoS Locational Charges (less any charges considered to fall under the Connection Exclusion) required to achieve compliance with the upper limit of the Permitted Range.

(c) Calculation of likely compliance with the ITC Permitted range.

4.67 The forecasting of TNUoS Local Charges and Wider Locational Charges is a task undertaken by NGESO. At the time of the Decision the latest NGESO forecasts were set out in its 'Draft 2020/21 Tariff forecasts' published in November 2020.[130]

4.68 If TNUoS Local Charges and Wider Locational Charges (after allowing for charges falling with the definition of the Connection Exclusion) are forecast to exceed the upper limit of the Permitted Range then a downward adjustment is applied. Under the status quo this adjustment is the TGR, whereas under the Original Proposal and WACM7 this was called the 'adjustment revenue'. This adjustment is the ex ante CUSC Calculation set out in paragraph 14.14.5. of the CUSC and described in paragraphs 4.75 to 4.81 below.

4.69 The three proposals assessed by GEMA differ only in terms of the amount of Local Charges which fall within the definition of the Connection Exclusion they apply when calculating the downward adjustment:[131]

€2.06m of Local Charges; (ii) €443.64m of Wider Locational Charges; and (iii) whatever negative adjustment charge is applied. GEMA 17 February 2021 Letter, C34, page 3..

[129] GEMA 17 February 20201 Letter, C34, page 3 and GEMA 10 March 2021 Response, pages 1–3.

[130] NGESO Draft TNUoS Tariffs for 2021-22, November 2020, A73.

[131] See the Original Proposal and WACM7 options shown in Table 4.2 above

(a) Under the status quo there is no definition of the Connection Exclusion and therefore no Local Charges are within the Connection Exclusion. [132]

(b) Under the Original Proposal all Local Charges are considered to fall under the Connection Exclusion. [133]

(c) Under WACM7, all but £3 million, of Local Charges are considered to fall under the Connection Exclusion.[134]

4.70 Under the status quo, no Local Charges are considered to fall within the Connection Exclusion. Therefore, all locational TNUoS charges are included within the ex ante CUSC Calculation of the downward adjustment required to achieve compliance with the upper limit of the Permitted Range. As we set out in Table 4.3, this would result in a much larger downward adjustment to TNUoS charges to achieve compliance with the upper limit of the Permitted Range (-£451 million) than would be the case under the Original Proposal (-£2 million) or WACM7 (-£5 million). Also, as a consequence of this the amount of TNUoS charges that are forecast to be paid by Generators in 2021/22 under the Original Proposal and WACM7 was much higher (£814 million and £811m) than under the status quo (£365 million).

4.71 The calculation of the adjustment to TNUoS charges required to achieve compliance with the upper limit of the Permitted Range is separate to the calculation of likely compliance with the Permitted Range. At this stage of calculating likely compliance with the Permitted Range, GEMA applied its view of the correct definition of the Connection Exclusion (all but £1.7 million of Local Charges are considered by GEMA to fall under the Connection Exclusion, which is different from that set out in the status quo, Original Proposal and WACM7[135]).

4.72 We note that because under the status quo no Local Charges are considered to fall within the Connection Exclusion, when calculating the downward adjustment to achieve compliance with the Permitted Range, this results in a large downward adjustment to TNUoS charges which leads to a seemingly contradictory outcome. Under the status quo, in 2021/22 the downward adjustment to Generator TNUoS charges aimed at bringing them below the upper limit of the Permitted Range would in practice result in a likely breach of the lower limit.

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[132] Decision, A27, page 19.
[133] Decision, A27, page 2.
[134] Decision, A27, page 22.
[135] Self, paragraph 91.1.

In December 2020, GEMA concluded in its Decision that there was a serious and imminent risk of a breach under the status quo

4.73 On page 20 of its Decision, GEMA set out some figures that underpinned its view that 'Under the status quo, there is a serious and imminent risk of a breach of the lower limit of the Permitted Range.' In particular, it explained that a large amount of offshore Local Charges that should be deducted from the transmission charges for the purposes of calculating compliance with the Permitted Range, under the status quo would not be deducted. This meant that the total level of charges would be £423 million higher than it should have been. Consequently, the TGR reduction would reduce transmission charges by €2.09/MWh more than it should. This led GEMA to conclude that there was a serious risk that charges would fall below the lower limit of the Permitted Range.[136]

[136] 'We understand from the ESO [NGESO] that the estimated value of offshore Local Charges in Charging Year 2021-2022 is c. £423m and estimated Generator output is […] 223 million MWh […] the vast majority, if not all, of these charges would fall within the Connection Exclusion, but the current CUSC Calculation assumes that they do not […] The effect of including these charges in the CUSC Calculation is to increase calculated average charges by £1.90/MWh […] (and thus to produce a matching increase in the negative adjustment made by the TGR). […] this is equivalent to €2.09/MWh. Taking into account a c.20% ex ante error margin, there is therefore a serious risk under the status quo that annual average transmission charges […] will fall below the lower limit of the Permitted Range.' Decision, A27, page 20.

Table 4.3: Forecast average annual GB transmission charges for 2021/22 under the status quo, Original Proposal and WACM7, using GEMA's view of the correct interpretation of the Connection Exclusion

	Forecast 2021/2022 TNUoS charges (note 1)			*Calculation of the revenue adjustment required to achieve likely compliance with the upper limit of the Permitted Range*					*Calculation of expected 'average annual transmission charges' to ascertain likely compliance (or not) with the Permitted Range*			
Proposal	*Wider Locational Charges £m*	*Local Charges £m*	*Total Locational Charges £m*	*Approach to defining which Local Charges fall within the Connection Exclusion*	*Resultant deduction from Locational Charges £m*	*Max transmission charges consistent with the upper limit (allowing for an error margin) £m*	*Downward adjustment (ie Adjustment revenue/ TGR) £m*	*Total Locational Charges less Adjustment revenue £m*	*GEMA's 'correct' value for Local Charges falling within the Connection Exclusion*	*Total ITC Regulation transmission charges £m*	*Forecast Generation output (MWh)*	*Annual Average ITC Regulation transmission charges (adjusted for 1.21 exchange rate) €/MWh*
					Note 3	*Notes 1& 2*			*Note 4*		*Note 2*	*Note 5*
Formula	*A*	*B*	*A+B = C*		*D*	*E*	*E-(C-D) = F*	*C+F = G*	*H*	*G-H = I*	*J*	*I/J x 1.21 = K*
Status quo	366	449	816	No Local Charges	0	365	-451	365	448	-83	223	**-0.45**
Original Proposal	366	449	816	All Local Charges	449	365	-2	814	448	366	223	**1.99**
WACM7	366	449	816	Generator-only spur charges	446	365	-5	811	448	363	223	**1.97**

Source: CMA analysis based on information within a) GEMA Letter to CMA dated 17 February 2021 (GEMA 17 February 2021 Letter (C34)) and b) GEMA's 10 March 2021 written response to CMA's 5 March 2021 request for information (GEMA 10 March 2021 Response)
Notes:
1. NGESO Draft TNUoS Tariffs for 2021-22, November 2020, A73. Forecast include: €:£ Exchange Rate - 0.8259; Total chargeable volumes: 223m MWh; Total Local Charges: £449.29m; Total Wider Locational Charges: £366.40m.
2. Max transmission charges consistent with the upper limit of the Permitted Range (allowing for an error margin) = €2.5.MWh x €:£ Exchange Rate [= 0.8259] x forecast Generation output [= 223 MWh] x (1-error margin [= 0.208].
3. The Connection Exclusion deduction from total Locational Charges under WACM7 is the value of all Local Charges less £3m - which is the difference between the Original Proposal and WACM7 identified on page 22 of the Decision
4. In its letter dated 17 February 2012 GEMA confirmed that under its view of the correct interpretation of the Connection Exclusion all but £1.7m of Local Charges would be excluded under the Connection Exclusion.
5. Exchange rate of 1.21 derived by dividing 1 by 0.8259. See note 1.
6. For display purposes £m figures are displayed to nearest £m.

The incorporation of the ITC Regulation into the CUSC under the status quo and under the Original Proposal

4.74 In the Decision GEMA referred to the 'CUSC Calculation'. It noted:

> Part 2 of Section 14 of the CUSC includes a mechanism which has the aim of ensuring ongoing compliance with Limiting Regulation [ITC Regulation], in particular the Permitted Range. This calculation is referred to in this letter [the Decision] as the 'CUSC Calculation'[137]

Status quo

4.75 Paragraph 14.15.5.v deals with compliance with the ITC Regulation (to which it refers as 'the Limiting Regulation').[138] In the current version of the CUSC this calculation is outlined in paragraph 14.14.5.v (the 'status quo CUSC Calculation'). This paragraph is in Part 2 of Section 14 of the CUSC entitled 'The Statement of the Use of System Charging Methodology'. This part of the CUSC sets out the methodology for calculating TNUoS charges.

4.76 The status quo CUSC Calculation is an ex ante calculation undertaken before the charging year in question. The effect of this calculation is to set a limit or cap on the Generator share of TNUoS charges[139] for that charging year such that average forecast TNUoS charges will be €2.50 MW/h, less an error margin to allow for differences between forecast and outturn values for elements of the calculation such as the exchange rate and Generation power output.[140]

4.77 In the status quo CUSC Calculation there is no reference to 'charges for physical assets required for connection' or any other reference to the Connection Exclusion. As a consequence, no TNUoS charges are excluded from the calculation on the basis of the Connection Exclusion. Furthermore, as BSUoS charges and BSC charges are different from TNUoS charges there is no reference to them in the status quo CUSC Calculation, and therefore there is no consideration of these charges in this calculation.

4.78 Under the status quo, there is no mechanism provided within the CUSC to adjust outturn annual average transmission charges to bring them back within

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[137] Decision, A27, page 5. Text in square brackets added by the CMA.
[138] Section 14 of the CUSC, paragraph 14.14.5.v.
[139] The 'MAR' or Forecast TO Maximum Allowed Revenue (£) for charging year n is what is to be recovered through TNUoS charges and it is the methodology for setting how these charges that will be levied on various parties that is set out in Section 14 Part 2 of the CUSC.
[140] Note there is no provision in the status quo version of the CUSC to make adjustments to TNUoS in the event of a breach of the lower limit of the Permitted Range.

the Permitted Range if they differ from forecast charges and fall outside the Permitted Range. The Original Proposal introduced such a mechanism. See paragraphs 4.82 to 4.84 below.

Original Proposal

4.79 The Original Proposal sought to amend how the CUSC calculated Generator TNUoS charges in two main ways:

(a) It amended the ex ante calculation of TNUoS charge to be recovered from Generators in paragraph 14.14.5 in the charging year (the 'Original Proposal ex ante CUSC Calculation').

(b) It introduced an ex post reconciliation mechanism which allowed for Generator TNUoS charges to be adjusted if they fell outside the Permitted Range (the 'Original Proposal ex-post reconciliation mechanism').[141]

4.80 The Original Proposal ex ante CUSC Calculation made changes to paragraph 14.14.5. of the CUSC which result in adjustments to TNUoS charges in the following circumstances:

(a) If **forecast** average Generator TNUoS charges excluding charges relating to 'charges for physical assets required for connection' exceeded the upper limit of the Permitted Range – less an 'error margin' – a downward adjustment would be made to these charges.

(b) If **forecast** average Generator TNUoS charges excluding charges relating to 'charges for physical assets required for connection' were less than the lower limit of the Permitted Range an upward adjustment would be made to these charges.

4.81 The definition of 'charges for physical assets required for connection' for the purposes of implementing CMP317/327 is set out in CMP339, which is a modification that is consequential on CMP317/327. CMP339 set out the CUSC definitions required to give effect to the various proposals put forward in CMP317/327. In the case of the Original Proposal, this definition was 'Connection Charges and charges in respect of an Onshore local circuit,

[141] FMR, A23, Annex 2: legal text (CMP317/327 Original WACM7 WACM14), paragraph 14.14.5.

Onshore local substation, Offshore local circuit and Offshore local substation'[142,143]

4.82 In addition to a possible ex ante adjustment to Generator TNUoS charges in the event of a forecast breach of the Permitted Range, the Original Proposal also allowed for the possibility of an ex post adjustment if the Permitted Range were to be breached.[144]

4.83 We do not repeat here the amendments to the CUSC set out in the Original Proposal outlining the detailed calculation of the adjustments to Generator TNUoS charges necessitated by the Original Proposal ex post reconciliation mechanism. However, we note that adjustments to TNUoS charges would result in the following circumstances:

(a) If **actual** outturn average Generator TNUoS charges exceed the upper limit of the Permitted Range a downward adjustment would be made to these charges.

(b) If **actual** outturn average Generator TNUoS charges breach the lower limit of the Permitted Range an upward adjustment would be made to these charges.

4.84 The proposed amendments to the CUSC set out in the FMR show, the Original Proposal ex post reconciliation mechanism provided for any required adjustment being calculated and invoiced 'at the time of generation reconciliation and initial demand reconciliation'.[145]

Future modification

4.85 In the Decision, GEMA stated that it expected NGESO to bring forward modification proposals to fully implement the correct interpretation of the Connection Exclusion. It stated that the modification should be raised in sufficient time to enable the modifications in question to be effective as of 1 April 2022.[146]

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[142] GEMA, CMP339 Decision, page 4.

[143] In effect this definition comprises all connection charges and all TNUoS charges which relate to local assets. As it is already the case that no connection charges are included in TNUoS charges this means that only local TNUoS charges are excluded from the Original Proposal ex ante CUSC Calculation.

[144] FMR, A23, Annex 2: legal text (CMP339 Definitions Original).

[145] The process for demand and generation reconciliation is set out in Section 3 Part IIB of the CUSC. CUSC Section 3, Paragraphs 3.13.2 and 3.13.3. FMR, A23, Annex 2: legal text (CMP317/327 Original WACM7 WACM14), paragraph 14.17.37.

[146] Decision, A27, page 2.

4.86 GEMA stated that the scope of this modification proposal should be to provide for the appropriate treatment of charges for Local Assets that were 'pre-existing' at the time a particular Generator wished to connect to the NETS (ie to ensure that these charges are included in the CUSC Calculation, and not treated as if they fell within the Connection Exclusion). In terms of the relevant point in time at which determination is made as to which Local Assets are considered 'pre-existing' (ie part of the NETS), GEMA's initial view was that the date of execution of the contracts between NGESO and the relevant Generator would be a reasonable proxy as to when a Generator wished to connect. [147]

CMP339

4.87 NGESO raised CMP339 as a consequential modification to incorporate new definitions into Section 11 of the CUSC to support the proposals being developed under CMP317/327. CMP339 was progressed alongside CMP317/327 as part of a joint workgroup.[148]

4.88 CMP339 provided a range of definitions required to support implementation of the various proposals under CMP317/327. Overall, there were 13 new defined terms proposed by the workgroup including the definition of 'Charges for Physical Assets Required for Connection'.[149]

4.89 GEMA published its decision for CMP339 (**CMP339 Decision)** at the same time as the Decision. As GEMA approved the Original Proposal for CMP317/327, for CMP339 it approved only the changes to the CUSC definitions required to give effect to the Original Proposal. [150]

4.90 The Appellants sought permission to appeal the CMP339 Decision, because it is consequential on GEMA's approval of CMP317/327. However, the Appellants noted that they do not have separate objections in principle to the changes in CMP339.[151]

The appeal

4.91 Section 173 of the EA04 allows for a party affected by a decision by GEMA to seek permission from the CMA to appeal. Schedule 22, paragraph 1(3)

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[147] Decision, A27, page 26.
[148]GEMA, 339 Decision, A25, page 2.
[149]GEMA, 339 Decision, A25, page 2.
[150]GEMA, 339 Decision, A25, pages 3–4.
[151] NoA, paragraph 6.

provides that permission must be sought no later than fifteen working days after the Decision was taken.

4.92 GEMA's Decisions on CMA 317/327 and CMP339 were made on 17 December 2020.

4.93 The Appellants sought permission to appeal the Decisions on 12 January 2021. The CMA granted permission on 21 January 2021.

4.94 The Appellant appealed against GEMA's Decision on the following grounds:

(a) **Ground 1**: GEMA's construction of the 'Connection Exclusion' in the ITC Regulation is wrong in law and/or based on clearly erroneous appraisals of fact as to the nature of charges incurred which are required for connection of a Generator to the relevant electricity transmission system.[152]

(i) Ground 1(a): the construction adopted by the Original Proposal which GEMA has approved fails to give an autonomous EU law meaning to the Connection Exclusion.[153]

(ii) Ground 1(b): GEMA's construction fails to give a teleological interpretation of the Connection Exclusion in the light of the 'travaux préparatoires' for the ITC Regulation.[154]

(iii) Ground 1(c): GEMA's construction is wrong in principle and/or based on errors in its factual appraisal.[155]

(iv) Ground 1(d): GEMA's favoured construction imposes disproportionate costs and operates in a discriminatory manner against GB Generators and in favour of Suppliers and/or the final Consumer as well as affecting cross-border trade and undermining the internal market.[156]

(v) Ground 1(e): GEMA failed to comply with the statutory requirement to act with regulatory consistency, since it has approved the Original Proposal which is contrary to GEMA's conclusions in the TCR Decision, and which NGESO was directed to follow when formulating its modifications to the CUSC. [157]

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[152] NoA, paragraph 7.1.
[153] NoA, paragraph 115.1.
[154] NoA, paragraph 115.2.
[155] NoA, paragraph 115.3.
[156] NoA, paragraph 115.4.
[157] NoA, paragraph 115.5.

(b) **Ground 2**: GEMA's Decision is vitiated by its recognition that the Original Proposal does not apply the correct interpretation of the 'Connection Exclusion' regardless of whether or not SSE's construction is the right one. The Decision infringes a number of principles of public law. It is internally inconsistent and/or procedurally flawed in being motivated by an improper purpose of avoiding a breach of the ITC Regulation at all costs, rather than applying the legally correct definition and making appropriate adjustments other than through the TGR. GEMA unlawfully excluded relevant considerations from its analysis of what could be done. [158]

(c) **Ground 3**: GEMA's construction of the Ancillary Services Exclusion (**ASE**) and its treatment of: (i) the relevant BSUoS charges; and (ii) the relevant BSC charges is wrong in law. [159]

(d) **Ground 4**: GEMA made fundamental errors of appraisal which led to it overstating the Consumer benefit and understating the Generator detriment, including the detriment to the long-term generation of renewable energy, arising from the Decision. [160]

(e) **Ground 5**: GEMA should have followed a policy which aimed at achieving a level of annual average charging for Generators for transmission costs which tended towards €0.00/MWh, as a matter of good regulatory practice and in order to have proper regard and give due weight to its statutory objectives and the ACOs. [161]

(f) **Ground 6**: GEMA erred in failing to put in place transitional arrangements for the introduction of the change to set the TGR at £zero. Some form of phasing of the introduction of the change would have ameliorated many of the financial disadvantages and economic disturbance suffered by Generators as a result of the Decision. In so doing, GEMA again failed to have proper regard and give due weight to its statutory objectives, including good regulatory practice, and the ACOs.[162]

Our approach to determining the appeal

4.95 In the rest of the report we consider first the preliminary matters raised in the Parties' agreed List of Issues. We then consider each of the Grounds of the appeal.

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[158] NoA, paragraph 7.2.
[159] NoA, paragraph 7.3.
[160] NoA, paragraph 7.4.
[161] NoA, paragraph 7.5.
[162] NoA, paragraph .6.

5. Preliminary issues

5.1 As noted at paragraph 1.19 above, the Parties advanced a large number of arguments in support of their own positions, and in response to the arguments of the other Party. We have therefore focused in this decision on identifying and making determinations on the key points arising.

5.2 In doing so, we have identified a number of preliminary issues, the resolution of which is relevant to a number of the grounds of challenge and/or relief. For the most part, these issues are of particular relevance to the determination of Grounds 1 and 2 of the Appellants' appeal.

5.3 It was common ground in this appeal that the Original Proposal does not reflect the correct interpretation of the Connection Exclusion. Much of the debate between the Parties under Grounds 1 and 2 arose from, or was connected to, their different views as to the implications and consequences of this agreed starting position. To arrive at our own view of what the implications and consequences of this common ground were, we found it helpful to consider the following points as preliminary issues (building upon the approach taken by the Parties in their agreed List of Issues):[163]

(a) the standard of review;

(b) the nature of the obligations imposed by the ITC Regulation;

(c) the relationship between the ITC Regulation and the CUSC;

(d) the nature and scope of the Decision;

(e) the scope of GEMA's powers and its options in respect of the modification proposals; and

(f) the implications of accepting a proposal based on an incorrect definition.

5.4 In this chapter, we do not purport to summarise every point made by the Parties in respect of the issue raised. We provide a fuller summary of the Parties' arguments, to the extent necessary, under each of the Grounds.

The standard of review

5.5 The Parties disagreed as to the standard of review applicable to appeals under section 173 of the EA04. In summary, the Appellants' view was that this appeal was a full merits appeal. GEMA disagreed, noting that section 175(4)

[163] List of Issues, Issues 1–3.

of the EA04 provides that the appeal may only be allowed if the CMA is satisfied that the appealed decision was 'wrong' on one or more of the specified grounds.

The Appellants' submissions

5.6 The Appellants submitted that this appeal involved a full merits review, based on alleged errors of law or fact or on a failure to have regard to or give proper weight to the statutory objectives.[164] Such issues would be determined by the CMA, which was a specialist appellate body, on their merits.[165] It is no defence to an error of law for a regulator to contend that the error was made by it in the exercise of its regulatory jurisdiction.[166] In the Appellants' view, the question of construction of statutory legislation (in the present case, the ITC Regulation) was a 'hard-edged' question of law leaving no room for deference or respect to the views of the respondent authority.[167] The concept of reasonable judgment, as embodied in the *Wednesbury*[168] test, simply had no part to play.[169]

5.7 The Appellants added that although matters which are strictly issues of regulatory judgement may lead to the recognition of some form of discretion vested in GEMA as a regulator, that discretion was relatively constrained where, as in the present case, the specialist statutory appellate body was itself expected to consider overall regulatory issues as part of the merits review.[170]

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[164] Response, paragraph 5, citing section 175(2) and (4) EA04. The Appellants added that the review went beyond that typically found in a judicial review and cited the Competition Commission's Determination in *E.ON UK Plc v GEMA (CC02/07*) 10 July 2007, paragraph 5.3. The Appellants noted also that the Competition Commission had made clear that its observations on the ambit of a margin of discretion to be afforded to GEMA did not apply in cases of errors of law (paragraph 5.11).
[165] Response, paragraph 5, citing *Everything Everywhere Ltd v. Competition Commission [2013]* EWCA Civ 154 per Moses LJ at [15], [16] and [39].
[166] Response, paragraph 5, citing *R v. Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd [1993] 1 WLR 23*, at p. 32 per Lord Mustill. The Appellants also cited *R v. Central Arbitration Committee ex p. BTP Tioxide Ltd* [1981] ICR 843, at p. 855-856, per Forbes J for the proposition that 'error of law' was a distinct ground of challenge for invalidating a decision taken by a public body such as GEMA and that it did not require a separate consideration as to whether the construction of a statutory provision was one which a public body might reasonably have reached (Response, paragraph 6).
[167] Response, paragraph 7, citing *R (Gillan) v. Commissioner of the Police of the Metropolis* [2004] EWCA Civ 1067, [2005] QB 388, CA at [30] per Lord Woolf CJ. See also the Appellants' Skeleton, paragraph 2]
[168] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. Case citation added by the CMA.
[169] NoA, paragraph 169, citing *R (Goodman) v. London Borough of Lewisham* [2003] EWCA Civ 140, [2003] Ev LR 644, CA at [8], per Buxton LJ.
[170] Response, paragraph 8 citing *Hutchison 3G Ltd v. Ofcom* [2008] CAT 11 at [44] and *British Telecommunications plc v. Ofcom* Case 1180/3/3/11, 9 February 2012, at [1.26]-[1.33]. See also the Appellants' Skeleton, paragraph 2.

GEMA's submissions

5.8 GEMA disagreed with the Appellants' submission that this was a full merits appeal. GEMA cited the *E.ON UK Plc v GEMA* determination in which the (then) Competition Commission had, in the context of an appeal brought under section 173 of the EA04, emphasised that: 'leaving to one side errors of law, it is not our role to substitute our judgment for that of GEMA simply on the basis that we would have taken a different view of the matter were we the energy regulator'.[171]

5.9 GEMA added that the various telecommunications cases cited by the Appellants concerned a different statutory appeal framework which, unlike the framework that governs the present appeal, provided for an appeal 'on the merits'. Those cases were irrelevant to the present appeal which, pursuant to section 175(4) of the EA04, the CMA was only permitted to allow if satisfied that the appealed decision was 'wrong' on one or more specified grounds.[172]

5.10 GEMA stated that it did not contend that it had discretion as to the proper interpretation of the ITC Regulation – there was no role for 'regulatory judgement' in that connection. However, GEMA submitted that the CMA should be slow to interfere with GEMA's regulatory judgement on matters other than the construction of legislation.[173]

5.11 As regards error of fact, GEMA submitted any such error would only provide a basis for appeal if it were material to the decision under challenge.[174]

Our decision

5.12 Our consideration of this appeal, which is brought under section 173 of the EA04, is governed by section 175(4). That section provides that the CMA may allow an appeal 'only if it is satisfied that the decision appealed against was wrong on one or more of the [specified] grounds',[175] which, insofar as relevant to this appeal, are as follows.

(a) The decision was wrong in law.

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[171] GEMA's Skeleton, paragraph 3, citing *E.ON UK Plc v GEMA* (CC02/07) 10 July 2007, paragraph 5.11. GEMA also referred to a number of other passages from the Competition Commission's determination, which we address in our decision below.
[172] GEMA's Skeleton, paragraph 3, citing s.175(4) EA04.
[173] GEMA's Skeleton, paragraph 2 and Reply, paragraphs 90.5, 128 and 145. GEMA gave the examples of (i) which of a series of imperfect options was best as a stop-gap measure; (ii) whether or not the ACOs would be better served by a target of zero; and (iii) whether or not the ACOs would be better served by phasing (GEMA's Skeleton, paragraph 2).
[174] Reply, paragraph 113. See also Reply, paragraph 48.4, citing *E.ON UK Plc v GEMA* (CC02/07) 10 July 2007, paragraph 5.17.
[175] Relevant provisions of section 175 of the EA04 are referred to in Chapter 3, paragraphs 3.50 to 3.51.

(b) The decision was based on error of fact.

(c) GEMA failed properly to have regard, or to give appropriate weight, to the principal objective and general duties under the EA89.

5.13 Given the scope of the above grounds, the appeal is not limited to the traditional judicial review grounds of illegality, irrationality and procedural impropriety. This is evident on the face of the legislation.

5.14 However, the legislation does not confer a full merits jurisdiction on the CMA. That is because section 175(6) of the EA04, which prescribes the actions to be taken if the CMA allows an appeal, does not include any reference to the CMA substituting its own decision for that of GEMA.

5.15 We set out here the guiding principles we apply in approaching our review of the grounds of appeal advanced in this case.

5.16 First, we agree with the point made by the Competition Commission in *E.ON UK Plc v GEMA*, which also concerned an appeal brought under section 173 of the EA04, relied upon by GEMA and quoted above at paragraph 5.8. Beyond cases involving errors of law, we do not intervene simply because we might have reached a different view if we were the primary energy regulator. The test under section 175 of the 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.[176]
>
> That is not to say that every aspect of a code modification decision will be a matter for GEMA's discretion. There may be issues in respect of which it can more easily be said that GEMA's decision is wrong - for example, if GEMA has made an error of principle. The [CMA] will therefore consider on a case by case, and issue by issue, basis whether GEMA's decision is wrong on one or more of the statutory grounds.[177]

5.17 Second, in the context of challenges relying on an alleged error of law, it was common ground between the Parties that there was no role for 'regulatory judgement' or discretion on the question of what is the correct construction of legislation (in the present case, the ITC Regulation). We agree with that and

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[176] *E.ON UK Plc v GEMA* (CC02/07) 10 July 2007, paragraph 5.12. The Competition Commission added: 'For example, GEMA may have taken a view as to the weight to be attributed to a factor which differs from the view we take, but which we do not consider inappropriate in the circumstances.'
[177] *E.ON UK Plc v GEMA* (CC02/07) 10 July 2007, paragraph 5.13.

we agree also with the Appellants that, on that question, the concept of reasonable judgement, as embodied in the *Wednesbury* test,[178] has no part to play.

5.18 Third, in the context of challenges made to findings of fact, we note that:

> GEMA, as the specialist regulator may well have an advantage over the CC in finding the relevant primary facts. … GEMA … has an advantage of experience, and will often have the benefit of having conducted a consultation with the industry … . For these reasons, the CC will be slow to impugn GEMA's findings of fact. Nevertheless, the CC has a clear jurisdiction in respect of factual errors, and we will exercise that jurisdiction where we conclude that GEMA has based its decision on a plain error of fact.[179]

5.19 It is also clear that for an error of fact to be capable of rendering a decision unlawful, the appellant must show that the error identified is a material one:

> In considering whether GEMA's decision is wrong for an error of fact, the words 'based … on' in section 175(4)(d) must be accorded their full weight. It is not enough to succeed under that section for an appellant to demonstrate that some error of fact, whether consequential or inconsequential, has been made by GEMA in its decision. Rather, an appellant will need to demonstrate that the error was material to the outcome of the decision. Only if the error was material in this way will we regard the decision as 'wrong' under section 175(4)(d).[180]

The nature of the obligations imposed by the ITC Regulation

5.20 The Parties disagreed over the nature of the obligations imposed by the ITC Regulation. As set out in more detail below, the Appellants' position was essentially that as the correct definition of the Connection Exclusion is a matter of EU law, any departure from that definition amounted to a breach of EU law, rendering the Decision unlawful. By contrast, GEMA argued that the obligation imposed by the ITC Regulation was one of result, ie compliance with the Permitted Range. A departure from the correct definition was not in itself a breach of the ITC Regulation.

5.21 It was therefore appropriate to start our consideration of these issues by assessing what obligations the ITC Regulation does in fact impose on

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[178] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.
[179] *E.ON UK Plc v GEMA* (CC02/07) 10 July 2007, paragraph 5.16.
[180] *E.ON UK Plc v GEMA* (CC02/07) 10 July 2007, paragraph 5.17.

Member States, and now the UK (see paragraphs 3.43 to 3.45). In this subsection, we consider this issue as a matter of principle. In the next subsection, we consider the particular relationship between the ITC Regulation and the CUSC arrangements (see paragraphs 5.42 to 5.60 below).

The obligations

5.22 As outlined at paragraph 3.44, Article 2 of the ITC Regulation provides: 'Charges applied by network operators for access to the transmission system shall be in accordance with guidelines set out in Part B of the Annex.' Part B of the Annex to the ITC Regulation then prescribes permissible ranges for the 'annual average transmission charges paid by producers' in the EU Member States. It sets out the principal obligation as follows:

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

5.23 For GB, when a Member State, the Permitted Range was set at €0/MWh to €2.5/MWh. This is the principal or primary obligation imposed by the ITC Regulation. A breach arises where annual average charges are above or below this Permitted Range.

5.24 The ITC Regulation also sets out how these average charges are to be calculated, as follows (emphasis added)

> 2. Annual average transmission charges paid by producers is annual total transmission tariff charges paid by producers divided by the total measured energy injected annually by producers to the transmission system of a Member State.
>
> For the calculation set out at Point 3, transmission charges **shall exclude**:
>
> (1) **charges paid by producers for physical assets required for connection to the system or the upgrade of the connection [the Connection Exclusion**];
>
> (2) charges paid by producers related to ancillary services;
>
> (3) specific system loss charges paid by producers.

5.25 Thus, the ITC Regulation does impose requirements on how the calculation of average charges is to be arrived at. For this purpose, the calculation must exclude the Connection Exclusion. It is not a matter of discretion whether charges falling within the Connection Exclusion should be discounted for the

purposes of assessing compliance with the primary obligation, ie compliance with the Permitted Range. This was acknowledged in the Decision itself, where it was stated that the ITC Regulation 'prescribes the calculation required to determine compliance'.[181]

5.26 At the same time, however, it is important to note the findings reached by the CMA in the CMA 2018 Decision:[182]

(a) The ITC Regulation did not intend to harmonise the charging practices in each Member State.[183] That remains a matter for domestic policy. The CUSC defines GB charging and the ITC Regulation sets caps or, more strictly, ranges only. It does not prescribe a charging methodology, ie how the domestic charges are formulated and applied. The flexibility afforded to Member States is evidenced by the range of different connection boundaries across the EU.[184]

(b) As agreed by the parties in that appeal, the interpretation of an EU instrument could not ordinarily depend on the approach taken in domestic law.

5.27 Neither of the Parties suggested that the CMA 2018 Decision was wrong in this regard. As the ITC Regulation does not purport to prescribe how the domestic charging arrangements are formulated and applied, it follows that, inter alia, there is no obligation for the calculation to be directly incorporated into the domestic charging arrangements. It is for each Member State to decide how to comply with the applicable Permitted Range as part of its domestic arrangements.

5.28 We also note that the obligation on Member States is to ensure that the annual average charges actually paid by producers do not fall outside the relevant Permitted Range. Whether or not a breach is likely to occur can be assessed on an ex ante, forecast, basis. However, the final determination of (non-)compliance has to be assessed on an ex post basis because, for example, unforeseen circumstances such as currency fluctuations may render the forecast position inaccurate.

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[181] The ITC Regulation, A43, page 2.
[182] CMA 2018 Decision, C20, paragraphs 5.81-5.82.
[183] GEMA referred to, for example, Section 5.2 of the Commission Staff Working Document Impact Assessment, A30,under the title Economic Impacts, pages 25 and 26. See also recital 10 of the ITC Regulation, C20 . (see CMA 2018 Decision, C20, paragraphs 5.81 and footnote 232)
[184] ACER Opinion, 15 April 2014, B25, Table 8 *Connection Charges* and CEPA slides titled 'European transmission tariff structures', dated 24 March 2015, slide 20. See also CMA 2018 Decision, (C20), paragraphs 3.35 to 3.39. See also Reply, paragraph 26.2.

5.29 It is necessary to take these points into account when assessing the Parties' arguments in respect of the nature of the obligations imposed by the ITC Regulation.

Summary of the Parties' positions

5.30 The Appellants' position, as set out in more detail below at paragraph 5.131, and in the summary of the Appellants' arguments under Grounds 1 and 2,[185] was that any error in the calculation as incorporated into the domestic arrangements amounted to a legal error, rendering those arrangements unlawful.

5.31 One of GEMA's core arguments in response to the Appellants' appeal was that the ITC Regulation imposes an obligation of result only. GEMA emphasised that:

(a) There is only a breach of the ITC Regulation if the annual average charges fall outside the Permitted Range.[186]

(b) The ITC Regulation does not require that the domestic charging arrangements include the correct interpretation of the Connection Exclusion or that those arrangements be on all fours with the definitions.[187]

(c) Illegality would only arise if there was a breach of the Permitted Range.[188]

(d) The fact that the CUSC Calculation is based on an incorrect interpretation of the Connection Exclusion is not in itself unlawful.[189]

5.32 This argument was a core component of GEMA's defence of its decision to adopt the Original Proposal even though the Original Proposal was based on an, admitted, incorrect construction of the Connection Exclusion.

5.33 We asked GEMA about the wording of paragraph 2 of Part B of the Annex, emphasised at paragraph 5.24 above, at the Main Hearing, which emphasises that the Connection Exclusion must be complied with in order to perform the relevant calculation for determining compliance. GEMA's response was that the purpose of the calculation set out therein is to allow the determination of

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[185] See paragraphs 6.9 6.15 to 6.18, 6.31 to 6.36 and 7.4 to 7.6
[186] Response, paragraphs 28.2, 35.4, 89.1 and 90.6; GEMA's Skeleton, paragraphs 6 and 23. See also Main Hearing, 4 March 2021, Transcript, page 93, lines 1–10.
[187] Main Hearing, 4 March 2021, Transcript, page 93, lines 10–16.
[188] Response, paragraph 26.2, 89.1; GEMA's Skeleton, paragraphs 6 and 23. Main Hearing, 4 March 2021, Transcript, page 93, lines 12–18.
[189] GEMA's Skeleton, paragraphs 23 and 26.5.

whether or not annual average charges fall within the Permitted Range. The Connection Exclusion is applied in order to determine compliance with the obligation of result, ie that charges must fall within the Permitted Range.[190] The definition of the Connection Exclusion would serve no other purpose beyond feeding into the calculation required for assessing compliance with this obligation.[191]

Our decision

5.34 We do not agree with GEMA that the obligations imposed by the ITC Regulation should be viewed exclusively as an obligation of result. The correctness of that result depends upon whether the necessary calculation is performed in accordance with the mandatory requirements that are also included in the ITC Regulation in this regard.

5.35 That said, we do accept GEMA's submission that the purpose of the calculation prescribed in Part B is to enable the assessment of whether or not the average annual charges fall within the relevant Permitted Range. It is the obligation to comply with the Permitted Range which is the primary or principal obligation imposed by the ITC Regulation. The ITC Regulation does not introduce freestanding obligations on Member States or now the UK to incorporate the definitions directly into the domestic charging arrangements and/or otherwise prescribe how those arrangements should be formulated and applied. The definitions in Part B, including the definition of the Connection Exclusion, are instead the constituent elements for assessing whether the primary obligation is met (see paragraphs 5.23 and 5.25).

5.36 Applying the reasoning of the CMA 2018 Decision, as set out at paragraph 5.26 above, the fact that the domestic arrangements do not mirror precisely the calculations required for assessing compliance is not therefore in itself a breach of the ITC Regulation. It is possible that a relevant regulator within an EU Member State could assess, separately, whether compliance has been achieved with the Permitted Ranges, applying the correct construction of the required exclusions. EU Member States, and now the UK, have flexibility in designing and structuring their domestic arrangements so long as the Permitted Ranges are not breached (correctly calculated).

5.37 This point is demonstrated by the fact that there are a number of circumstances in which a domestic ex ante calculation and/or built-in

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[190] Main Hearing, 4 March 2021, Transcript, page 102, lines 12–25, page 103, lines 1–13.

[191] Main Hearing, 4 March 2021, Transcript, page 102, lines 12–25, page 103, lines 1–13.

reconciliation process could fail to reflect the definitions prescribed by the ITC Regulation, but in practice there could be no breach of the Permitted Range. For example:

(a) It is open, in principle, to Member States, to conduct a separate calculation of the annual average transmission charges to determine whether they fall within the Permitted Range, alongside, but separate from, their domestic charging arrangements. If the charges fall within the Permitted Range, there would be no breach of the ITC Regulation in those circumstances, even if the domestic arrangements did not incorporate directly a means of calculating or estimating whether compliance could be achieved.

(b) Even if the basis upon which the domestic arrangements are applied in fact forecasts, on an ex ante basis, that a breach of the Permitted Range is likely to occur, such non-compliance could be avoided by modifications applied to the domestic arrangements within or at the conclusion of the charging year. The precise means of addressing any potential or actual non-compliance will depend on the specific domestic arrangements in place. However, there is no barrier to ensuring compliance through a combination of ex ante, in-year, and/or ex post means (for example, modifications of the charging regime during the year, ex post reconciliation measures, charges or refunds at the end of the year).[192]

5.38 Moreover, even if the correct construction was used in the domestic calculation, if that calculation is determined on an ex ante forecast basis, there could still be a breach of the Permitted Range.[193] Forecasts can prove to be incorrect in practice.[194] The Appellants explained at the Main Hearing that there always has to be a reconciliation process for the charges at the end of the year.[195] Compliance can ultimately only be verified at the end of the relevant period.

5.39 If the method of calculation used in the domestic arrangements is incorrect, however, this has the potential to increase the risk of a breach. This is because the greater the departure of the domestic charging methodology from the calculation required to determine compliance with the Permitted Range,

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[192] Main Hearing, 4 March 2021, Transcript, page 34, lines 15-25, page 35, lines 1-11. In paragraphs 26-30 of the NoA, the Appellants explained, in respect of the UK for example, that it is open to NGESO to ensure compliance with the ITC Regulation in a given charging year by adopting the mechanism of adjusting the total TNUoS revenue collected from GB Generators. At the Main Hearing, the Appellants recognised that there can be a number of reconciliation processes that could be used (for example, *ex post* amendments to the tariffs, and mid-year tariff changes) (Main Hearing, 4 March 2021, Transcript, page 34, lines 15-25 and page 35, lines 1-11).

[193] Main Hearing, 4 March 2021, Transcript, page 36, lines 9-14.

[194] Main Hearing, 4 March 2021, Transcript, page 36, lines 16-25, page 37, lines 1-9.

[195] Main Hearing, 4 March 2021, Transcript, page 38, lines 2–25, page 39, lines 1–4, 10–25, page 40, lines 1–3.

the more likely it is that the Permitted Range will not be complied with. However, as we have explained, as a matter of principle, it does not necessarily follow that if the domestic regime includes an ex ante domestic calculation for determining whether the Permitted Range is expected to be complied with, any error within it will automatically give rise to a breach as a matter of EU law. We therefore accept GEMA's submissions on the nature of the obligations imposed by the ITC Regulation to that extent.

5.40 Thus, in assessing whether a domestic charging regime is compatible with the obligations imposed by the ITC Regulation, it is necessary to consider any relevant measures identified by the regulator (or any other relevant party) for achieving compliance, in order to understand how compliance is assessed and could be achieved. It is also necessary to consider the degree of risk that the application of the domestic charging methodology will give rise to a breach of the Permitted Range, and how any such non-compliance can be identified and addressed by the relevant authority in that Member State. We therefore considered how in practice GEMA seeks to comply with the obligations imposed by the ITC Regulation within the domestic framework. This is discussed in the next section.

5.41 We return to the Appellants' argument that any departure from the relevant definitions amounts to a clear error as a matter of public law, vitiating the Decision, relating to Grounds 1(a), 1(b) and 1(c).

The relationship between the ITC Regulation and the CUSC

5.42 As outlined above, as a matter of principle, the ITC Regulation does not prescribe how the domestic charging arrangements should operate. There is therefore no requirement imposed by the ITC Regulation that the CUSC must contain an ex ante (or ex post) means of calculating whether the charges applied fall within the Permitted Range. The primary obligation imposed is to ensure that the average charges imposed in a given year fall within the Permitted Range, which must be calculated in accordance with the ITC Regulation.

5.43 We have therefore considered how the UK seeks to comply with this primary obligation. This issue arises as a consequence of GEMA's argument that it was open to it to adopt the Original Proposal, even though it was based on the incorrect interpretation of the Connection Exclusion. We have considered this argument as a matter of principle in paragraphs 5.34 to 5.40. above. In this section, we consider how those issues of principle actually apply in the domestic context.

The position in GB

5.44 The starting point in GB is the CUSC and, in particular, the CUSC Calculation (as in force at the relevant time). It is plain that the CUSC Calculation was intended to be the principal means of ensuring compliance, at least on a forecast basis. This was stated in terms by GEMA in the Decision: 'Part 2 of Section 14 of the CUSC includes a mechanism which has the aim of ensuring ongoing compliance with [the ITC Regulation], in particular the Permitted Range.'

5.45 As this ex ante calculation is based on forecasts, there is always going to be the potential for error. It is therefore necessary to continue to assess whether the actual figures charged within the period fall within the Permitted Range, and that can be done, at least in principle as GEMA contended, having regard to what is considered to be the correct construction of the Connection Exclusion.[196]

5.46 However, focusing first on the position which will apply under the Decision, while the Original Proposal contains a margin of error, and an in-built reconciliation mechanism, these are equally based on an incorrect construction of the Connection Exclusion (GEMA concluded all proposals put to it, including the Original Proposal were based on an incorrect construction, see paragraph 4.48). We therefore explored what would likely happen if it was determined that outturn average transmission charges fell outside the Permitted Range.

5.47 If NGESO, GEMA or any other stakeholder foresaw that increasing levels of TNUoS charges would lead, or would likely lead, to a breach of the Permitted Range, they could, in principle, raise a new modification proposal designed to ensure that there was a reconciliation of the charges paid during the charging year. This was what SSE sought to do in raising CMP261[197] (although this proposal was unsuccessful as it was rejected by GEMA, as upheld by the CMA).

5.48 GEMA also told us that in such circumstances it would anticipate that NGESO or one or more industry participants would be likely to bring forward a CUSC modification proposal to provide for an ex post reconciliation.[198] It would be in the interests of whichever participants stood to benefit from such a reconciliation to put forward a proposal.[199] If such a proposal was made,

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[196] Main Hearing, 4 March 2021, Transcript, page 104, lines 5–18.
[197] NoA, paragraphs 35-36. See also the CMP261 FMR, paragraph 1.2.
[198] GEMA 10 March 2021 Response, pages 4–6.
[199] GEMA 10 March 2021 Response, pages 4–6.

GEMA would then consider it in accordance with the relevant CUSC procedures (see further below). [200] If, however, no industry participant brought forward a suitable proposal to remedy the breach within a reasonable time, GEMA would consider using its powers under section 8.17A.1 of the CUSC (see paragraph 5.85 below) in order to ensure that such a proposal was brought forward. [201]

5.49 It is also relevant to consider how GEMA has purported to comply with its monitoring obligations to the Agency for the Cooperation of Energy Regulators (**ACER**) in the past and how it intends to do so now. In response to a request for information GEMA confirmed that:[202]

(a) GEMA has made compliance submissions to ACER for each of the 2018/19, 2017/18, and 2016/17 charging years.

(b) Upon receipt of the relevant questionnaire from ACER, GEMA requested figures from NGESO for the relevant reporting period(s). NGESO provided details of:

(i) the total value of transmission charges for the relevant charging year, excluding charges which were treated as falling within any of the exclusions; and

(ii) the total output volumes for the relevant charging year.

(c) Based on the information provided by NGESO, GEMA calculated a figure for annual average transmission charges. GEMA did this by dividing the total value of the transmission charges for the relevant charging year, excluding charges which were treated as falling within any of the exclusions, by the total output volumes for the relevant charging year.

(d) As outlined at paragraphs 4.72 to 4.77, under the status quo, the CUSC Calculation has been performed on the basis that all TNUoS charges should be taken into account, and that only CUSC Connection Charges should be excluded.

(e) In the light of the CMA's decision on CMP261, GEMA changed the basis of its reporting from the 2017/18 charging year. The figures reported to ACER for the 2017/18 and 2018/19 charging years[203] were calculated on the basis that Offshore Local Charges (as well as CUSC Connection

[200] GEMA 10 March 2021 Response, pages 4–6.
[201] GEMA 10 March 2021 Response, pages 4–6.
[202] GEMA 10 March 2021 Response, pages 4–6.
[203] GEMA submitted that these were the most recent years for which data had been reported. GEMA 10 March 2021 Response, pages 4–6.

Charges) should be excluded. This change was applied even though the status quo CUSC Calculation was not modified or changed.

(f) This amended calculation did not reflect GEMA's view, as expressed within the Decision, of the correct construction of the Connection Exclusion (which is considered at paragraphs 6.27 to 6.29 below). The reporting was historically done on what GEMA described as a cautious basis because it reflected the interpretation of the Connection Exclusion which was incorporated in the status quo CUSC Calculation, prior to the CMA's clarification of its scope with its final determination in the CMP261 appeal.

5.50 The reporting was therefore done, according to GEMA, on an 'under-inclusive' interpretation of the Connection Exclusion.[204] As we set out below at paragraphs 6.85 to 6.99, in response to Ground 1(c), we have dismissed the Appellants' arguments that GEMA's own construction of the Connection Exclusion, as set out in the Decision, was wrong. We therefore accept GEMA's position that its reporting since 2017/18 was done on an under-inclusive basis.

5.51 We also understand that despite the fact that, in previous years, the approach to the Connection Exclusion under the status quo CUSC Calculation was incorrect, it is not anticipated that those years would show any non-compliance with the Permitted Range (assessed under GEMA's construction of the Connection Exclusion as set out in the Decision), save in respect of 2020/21. GEMA has however made clear that NGESO should verify this and bring forward proposals to address any non-compliance.

5.52 Looking forward, GEMA submitted that it intends to continue to seek to establish outturn average transmission charges [after the end of each charging year] in respect of future charging years (from 2021/22 onwards).[205] It is clear that as GEMA has now identified what it says is the correct interpretation of the Connection Exclusion, it has compared the impact of implementing the Original Proposal against what GEMA considers to be the correct interpretation of the Connection Exclusion. At paragraph 91.1 of his witness statement, Mr Self explained that NGESO has estimated that the erroneous inclusion of Local Charges for pre-existing assets in the Connection Exclusion, as contemplated by the Original Proposal, would increase Generator charges by circa £1.7 million in charging year 2021/22 versus the correct interpretation as set out in the Decision.[206] GEMA will be able to verify

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[204] GEMA 10 March 2021 Response, pages 4–6.
[205] GEMA 10 March 2021 Response, page 6.
[206] *Self*, paragraph 91.1.

whether compliance was achieved at the conclusion of the charging year. It anticipates that new arrangements will be in place in time for the 2022/23 charging year.

Our decision

5.53 Taking into account the Parties' arguments on the nature of the obligations imposed by the ITC Regulation (summarised at paragraphs 5.30 to 5.33 above), and our conclusions at paragraphs 5.34 to 5.40 above, we have considered what the implications are of the manner in which the status quo and the new arrangements under the Original Proposal have sought to achieve compliance in practice.

5.54 It is plain that the CUSC Calculation and the related measures, either under the status quo or the Original Proposal, are designed to achieve compliance with the Permitted Range. While it is always possible for new proposals to be brought forward to address potential compliance mid-year, or as part of a subsequent reconciliation process, the UK's domestic arrangements are actually intended to ensure (as far as possible) that compliance will be achieved on an ex ante basis.

5.55 We therefore accept the Appellants' overarching argument that it would be better for the CUSC Calculation to be based on the correct construction of the Connection Exclusion (which would include the ex ante calculation and the reconciliation process now built into the CUSC). Thus, while a departure from the definitions used in the ITC Regulation does not necessarily result in a breach of the Permitted Range prescribed for average charges in GB, there is force in the Appellants' argument that:

> Anyone applying that calculation, be it NGESO or GEMA will be applying a calculation [under the modified CUSC] that is wrong in law. Faithfully applying the CUSC as amended, the calculation will therefore give the wrong results. As they say in the IT industry, rubbish in, rubbish out.[207]

5.56 GEMA also accepted the basic premise of this point. GEMA accepted that it was less likely that a breach would occur if the domestic charging regime more closely reflected the definitions included in the ITC Regulation, including the correct interpretation of the Connection Exclusion.[208]

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[207] Main Hearing, 5 March 2021, Transcript, page 5, lines 7–10.

[208] Main Hearing, 4 March 2021, Transcript, page 93, lines 10–13.

5.57 Equally, GEMA's monitoring of compliance to submit to ACER and/or monitoring more generally is not a substitute for incorporating the correct definition of the Connection Exclusion within the CUSC Calculation, improving the prospect of the output charges complying with the Permitted Range.[209] This is especially so in circumstances where that reporting for compliance purposes has in the past not reflected what GEMA now considers to be the correct interpretation of the Connection Exclusion (although this reporting was done on an under-inclusive basis).

5.58 However, we do not consider that any failure to fully implement the definitions included in Part B of the Annex to the ITC Regulation as part of the domestic charging arrangements automatically renders the CUSC (or other domestic arrangements) incompatible with the ITC Regulation. We have set out our decision in this regard as a matter of principle at paragraphs 5.34 to 5.40 above. Applying this to the facts:

(a) The ex ante CUSC Calculation is not the only means of achieving compliance with the Permitted Range. The inclusion of an error margin and reconciliation process within the CUSC as a result of the Original Proposal, also reduces the risk of non-compliance (although it is noted that these measures also reflect the incorrect definition of the Connection Exclusion). Moreover, it remains possible for any relevant party to bring forward a proposal to address, mid-year or as part of the end of year reconciliation process, any non-compliance identified. While the CUSC Calculation is intended to be the central means by which compliance is ensured, it is not the only means.

(b) If GEMA's construction of the Connection Exclusion is correct, the gap between the correct level of charges under that construction and those included under the Original Proposal's incorrect interpretation, is marginal in the short term. NGESO estimated this on behalf of GEMA to be £1.7 million for the year 2021/22.[210] The Appellants have submitted that a different definition of the Connection Exclusion is the correct legal interpretation for compliance with the ITC Regulation[211] and their view was that the impact on charges of adopting the Original Proposal would be £3 million in 2021/22.[212] This means that whether one relies on GEMA's £1.7 million assessment or the Appellants' £3 million

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[209] As the Appellants submitted. See, for example, Main Hearing, 5 March 2021, Transcript, page 6, lines 12–25, and page 7, lines 1–6.
[210] *Self*, paragraph 91.1.
[211] WACM79 see Main Hearing, 4 March 2021, Transcript, page 12, line 25 and page 13, line 1.
[212] *Tindal 1*, paragraph 7.11.

assessment the impact for the 2021/22 charging year is not material (see paragraph 6.109 below). As outlined above, in our view the degree of risk resulting from the use of the incorrect construction as set out in the Original Proposal is relevant to assessing the related risk of non-compliance arising. [213]

(c) As GEMA emphasised, it had relied on what it considered to be the correct construction of the Connection Exclusion (which we address under Ground 1(c) below) in assessing which of the options before it should be preferred. It was seeking to get as close as possible to the calculation required by the ITC Regulation.[214] As we have dismissed the Appellants' appeal against GEMA's construction of the Connection Exclusion (see paragraphs 6.91 to 6.93 and 6.97 below), GEMA will be able to monitor any non-compliance by comparing the position under the CUSC Calculation set out in the Original Proposal with that which would apply under the construction set out in the Decision.

5.59 In view of the above, we conclude that, the fact that the Original Proposal does not contain the correct construction of the Connection Exclusion does not mean that there has been or there automatically will be a breach of the ITC Regulation.

5.60 We take into account this conclusion in assessing whether GEMA erred in law in deciding to adopt the Original Proposal in the manner it did in the Decision in response, in particular, to Ground 2 of the appeal.

The nature and scope of the Decision

5.61 The Parties disagreed on the nature and scope of the Decision.[215] There were two main disputes between the Parties in this regard:

(a) First, the Parties disagreed over how the Decision should be characterised: did it involve the approval of the Original Proposal, or approval of a change in the wording to the CUSC as set out in the Original Proposal.

(b) Second, the Parties disagreed over the legal relevance of GEMA's reasons for adopting the Original Proposal, despite its departure from the

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[213] For the reasons that we have set out in our analysis of Ground 3, we consider that GEMA was not wrong to take the view that it did in relation to the Ancillary Services Exclusion. Accordingly, GEMA was not wrong in its assessment of the relative risks of the status quo and the Original Proposal. See our analysis of Ground 3 for further detail.

[214] Main Hearing, 4 March 2021, Transcript, page 103, lines 16–19

[215] List of Issues, Issue 2.

correct definition of the Connection Exclusion (including, in particular, GEMA's expectation, as set out in the Decision, that NGESO would bring forward a further CUSC modification proposal that would implement the Connection Exclusion correctly from charging year 2022/23).

5.62 We address (a) in this section. We address (b) at paragraphs 5.53 to 5.59 as part of our discussion of the Appellants' wider argument that the Decision must be considered to be unlawful on the basis that it adopted a Proposal which incorporated an incorrect construction of the Connection Exclusion.

The Parties' submissions on the nature and legal effect of the Decision

5.63 The Appellants submitted that the Decision involved approving the Original Proposal as found in CMP 317, as the Decision itself stated at page 2 (see below).[216] The formal effect of the Decision is to exclude all Local Charges from the calculation performed for the purposes of compliance with the ITC Regulation.[217] The Appellants submitted that GEMA was wrong to characterise the Decision as merely approving a change in wording to the CUSC, since it was the approval of a defined proposal (contrary to the recommendations of the CUSC Panel) which conferred the statutory right of appeal: section 173(2) EA04. If GEMA had approved an original proposal or WACM which commanded majority support from the CUSC Panel, the only remedy would have been by way of judicial review: Article 6 of the Electricity and Gas Appeals (Designation and Exclusion) Order 2014.[218]

5.64 Even if the Decision was construed as merely approving a formal change in wording to the CUSC, the Appellants submitted that this is a distinction without a difference. The changes to the wording implemented the incorrect interpretation of the Connection Exclusion.[219]

5.65 GEMA submitted that the Decision involved the approval of a change in the wording to the CUSC as set out in the Original Proposal. [220] Their core point was that this did not involve 'approving' or 'endorsing' the interpretation of the Connection Exclusion set out in the Original Proposal.[221] A regulator should not be taken to adopt the reasoning behind a proposal in circumstances where the regulator has (i) approved the implementation of the change proposed, but expressly rejected the reasoning on the basis of which the

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[216] List of Issues, Issue 2.1; Appellants' Skeleton, paragraph 3.
[217] Main Hearing, 4 March 2021, Transcript, page 6, lines 1–4.
[218] Appellants' Skeleton, paragraph 3.
[219] Appellants' Skeleton, paragraphs 4-5.
[220] List of Issues, Issue 2.2; GEMA's Skeleton, paragraph 4.
[221] Main Hearing, 4 March 2021, Transcript, page 92, lines 16–22. GEMA's Skeleton, paragraphs 5 and 20.

proposal had been devised; and (ii) made clear that it is only approving the change because it is better than the status quo and the other imperfect options available.[222]

The terms of the Decision

5.66 We note that in the Decision:

(a) At page 2, GEMA stated: 'We have approved the Original Proposal, which has the following characteristics', and then lists the relevant characteristics, including no target, all Local Charges for 'Local Circuits and Local Substations' shall be excluded etc.

(b) At page 10, GEMA then stated that:[223]

> We do not consider that any of the proposals incorporate the correct interpretation of the Connection Exclusion. Notwithstanding this, we have concluded that the Original Proposal would be likely to avoid the imminent risk of a breach of the Limiting Regulation [the ITC Regulation] that is posed by the status quo, and better facilitate achievement of the ACOs than either the status quo or any of the WACMs. We also consider that approval of the Original Proposal would be consistent with our principal objective and statutory duties.
>
> **Accordingly, our decision is to approve the Original Proposal and direct that it be implemented**. (emphasis added)

Our decision

5.67 We do not accept GEMA's position on the correct characterisation of the Decision. It is plain that the Decision 'approved' the Original Proposal in the sense that it was this proposal which was given legal effect.

5.68 Thus, in our view, the Appellants are right to say that the distinction GEMA seeks to draw between an approval of the Original Proposal, and the approval of the amendments to the wording of the CUSC which flowed from that proposal, is a distinction without a difference. Both characterisations give rise to the same outcome as a matter of substance: the CUSC Calculation is to be applied in a manner which both Parties accept does not reflect the correct construction of the Connection Exclusion. GEMA cannot sidestep this

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[222] GEMA's Skeleton, paragraph 5.
[223] See also pages 24-25 and 27.

outcome by characterising the Decision as the approval of a change of wording.

5.69 GEMA's point of substance is that even though it adopted the Original Proposal, it did not agree with or endorse the construction of the Connection Exclusion which it implements, as it set out in the Decision itself. That is, in our view, a separate issue. It does not change the characterisation of the legal effect of the Decision insofar as it implemented modifications to the CUSC.

5.70 This raises the further question as to whether it is relevant that GEMA has made clear in the Decision (a) what its own construction of the Connection Exclusion is, and (b) that it expects this interpretation to be implemented for the next charging year. We return to these issues at paragraphs 5.136 to 5.148 below.

The scope of GEMA's powers and its options in respect of modification proposals

5.71 A key question raised by the dispute between the Parties in this appeal is: 'What options were available to GEMA as a Regulator when asked to approve the Original Proposal or any of the WACMs in CMP317?'[224]

5.72 This question arises because the role of GEMA in the CUSC modification process is governed by the procedures included within it. It is not a situation in which the process is driven and determined wholly independently by the regulator. In many cases, a regulator or decision-maker, when faced with an EU obligation, would consider how best to implement the requirement, draw up proposals, potentially consult upon them, and reach its own decision. In the context of proposals for the modification of the CUSC, the process is different, as set out in more detail below. The process is designed and envisaged as an open governance process, with the relevant industry stakeholders having a direct role in the proposal and decision-making process.

5.73 On this issue, the Parties' positions were, in brief summary, as follows:

(a) The Appellants contended that on considering the proposals before it, GEMA should have rejected them. It should have then exercised its power to send back the proposals to the working group and/or otherwise taken further steps (a direction to NGESO and/or raising its own proposal) in order to secure that a new proposal which did properly reflect the correct

[224] List of issues, Issue 13.

interpretation of the Connection Exclusion could be implemented in time for the 2021/2022 charging year (see paragraph 5.100 to 5.101 and 5.105 below).

(b) GEMA contended that either the options relied upon by the Appellants were not available to it and/or it was not possible to exercise any such options in time for a new proposal to be implemented for the 2021/2022 charging year. This would have had the effect of leaving in place the status quo, under which there was an imminent risk of significant breach of the Permitted Range (see paragraphs 5.102 to 5.103 below).

5.74 There are two elements that need to be considered in assessing the options available to GEMA and, accordingly, the dispute between the Parties. First, the test GEMA had to apply in determining what decision it should take. Second, the procedures which have to be followed in relation to modifications to the CUSC, and the powers GEMA enjoys within those procedures.

The test

5.75 Pursuant to NGESO's licence conditions, GEMA was required to take the Decision by reference to whether the Original Proposal:

> would, as compared with the then existing provisions of the CUSC and any alternative modifications set out in such report (ie the report proposing the modification), better facilitate achieving the applicable CUSC objectives.[225]

5.76 We will refer to this as the 'better than the status quo test'.

5.77 Paragraph 8.23.7 of the CUSC provides: 'If [GEMA] believes that neither the original modification proposal nor any of the WACMs in the report would better facilitate achievement of the ACOs, then there will be no approval.'

5.78 As set out at paragraph 3.17 above, the ACOs are, in summary, that the charging methodology should: (a) facilitate competition; (b) result in charges that, as far as reasonably practicable, reflect the costs incurred by TSOs; (c) take account of developments in TSOs' businesses; (d) comply with EU law; and (e) promote efficiency in the implementation and administration of the system charging methodology. GEMA also had regard to its principal objective (under section 3A of the E A89) to protect the interests of existing and future consumers, and to its other duties.

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[225] Electricity Transmission Standard Licence Conditions, page 217, Condition C10, paragraph 7(a)

5.79 The better than the status quo test falls to be applied at the conclusion of the modification process established in the CUSC.

The procedures under the CUSC

5.80 The procedures under the CUSC envisage a largely stakeholder and industry led, open governance process. The standard modification process involves multiple steps and extensive consultation. In summary:[226]

(a) A proposal is made.

(b) The CUSC Panel[227] conducts an initial evaluation and, if they consider it necessary, they set out the terms of reference for a workgroup and set out a timetable.

(c) There is then a workgroup stage to consider whether the proposal better meets the ACOs and consider alternatives. This can result, as it did in this case, in a range of WACMs being considered alongside the original proposal(s). This stage normally involves a working group consultation.

(d) Then there is a Code Administrator[228] consultation.

(e) The Code Administrator then presents a draft modification report to the CUSC Panel, referred to as the Draft Modification Report.

(f) There is then a CUSC Panel Recommendation Vote.

(g) The final CUSC Panel report is sent to GEMA, referred to as the Final Modification Report.

(h) Thereafter GEMA makes a decision.

5.81 On making a decision, GEMA does not have a free hand in what proposals to adopt. It cannot adopt a 'pick and mix' approach. It either accepts or rejects the proposals as articulated in the Final Modification Report. In doing so, as outlined above, it must apply the better than the status quo test.

5.82 As to GEMA's power to send back proposals, this is addressed in paragraph 8.23.12 of the CUSC as follows (emphasis added):

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[226] See also Reply, paragraph 38; and paragraphs 3.233.31 above.
[227] The CUSC Modification Panel is established by section 8.3 of the CUSC.
[228] The Code Administrator (NGESO) is established in accordance with section 8.2 of the CUSC.

If the Authority determines that the CUSC Modification Report is such that the Authority **cannot properly form an opinion** on the CUSC Modification Proposal and any Workgroup Alternative CUSC Modification(s), or where the CUSC Modification Proposal and/or any Workgroup Alternative CUSC Modification(s) constitutes an EBGL[229] Amendment where the Authority requires an amendment to CUSC Modification Proposal and/or any Workgroup Alternative CUSC Modification(s) in order to approve it, it may issue a direction to the CUSC Modifications Panel:

(a) specifying the additional steps (including drafting or amending existing drafting associated with the CUSC Modification Proposal and any Workgroup Alternative CUSC Modification(s)), revision (**including revision to the timetable**), analysis or information that it requires in order to form such an opinion; and

(b) requiring the CUSC Modification Report to be revised and to be resubmitted.

5.83 Unless GEMA has issued a direction that specifies the ultimate relevant timetable, ie the deadline for a proposal to be implemented, the CUSC leaves matters of timetable to the industry participants (see paragraph 8.23.13 of the CUSC):

If a CUSC Modification Report is to be revised and re-submitted in accordance with a direction issued pursuant to Paragraph 8.23.12, it shall be re-submitted as soon after the Authority's direction as is appropriate, (and in the case of an EBGL Amendment within 2 months), taking into account the complexity, importance and urgency of the CUSC Modification Proposal and any Workgroup Alternative CUSC Modification(s). The CUSC Modifications Panel shall decide on the level of analysis and consultation required in order to comply with the Authority's direction and shall agree an appropriate timetable for meeting its obligations.

5.84 GEMA does have specific powers to direct NGESO to raise CUSC Modifications or raise its own proposals following the conclusion of a

[229] Electricity Balancing Guideline, not relevant to CMP317/327.

Significant Code Review in certain circumstances (paragraphs 8.17.6 and 8.17.9).[230]

5.85 GEMA also has certain circumscribed powers to take such steps in other situations, as set out in paragraph 8.17A of the CUSC (emphasis added):

> The Authority may: (a) itself; or (b) direct The Company, to raise a CUSC Modification Proposal **where the Authority reasonably considers that such CUSC Modification Proposal is necessary to comply with or implement the Electricity Regulation** and/or any relevant legally binding decisions of the European Commission and/or the Agency or in respect of a Significant Code Review.

5.86 Where GEMA itself makes a proposal or directs NGESO (referred to as the Company) to raise a proposal, the CUSC modification process must proceed in accordance with a timeline set out by GEMA (emphasis added):

> **The Company shall comply with any directions from the Authority in relation to setting and/or amending a timetable for; (a) the raising of a CUSC Modification Proposal pursuant to Paragraph 8.17A.1(b)**; and/or (b) where the Authority has approved a CUSC Modification Proposal raised pursuant to Paragraph 8.17A.1, implementation of such CUSC Modification Proposal. (18.17A.2).
>
> In respect of a CUSC Modification Proposal raised pursuant to Paragraph 8.17A.1, **the CUSC Modification Panel shall comply with any timetable(s) directed by the Authority** in relation to setting and/or amending a timetable for the completion of all relevant steps of the CUSC Modification Process or such other processes set out in this Section 8. (18.17.3)

5.87 However, even though it has greater control over the timetable, the standard process still ultimately has, in normal circumstances, to be followed involving the Panel, consultation, etc. This is in line with the open governance approach which applies in this context.

5.88 As to more general issues of urgency and timetable, under the standard process, the timetable is not wholly within the control of GEMA:

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[230] CUSC direction, A21. It was this power which GEMA relied upon in directing NGESO to raise 'the necessary code modification proposal(s) in sufficient time to enable the modifications to be effective as of 1 April 2021.'

The CUSC Modifications Panel shall establish the part of the timetable for the consideration by the CUSC Modifications Panel and by a Workgroup (if any) which shall be no longer than four months unless in any case the particular circumstances of the CUSC Modification Proposal (taking due account of its complexity, importance and urgency) justify an extension of such timetable. (8.19.1.b)

The Code Administrator shall establish the part of the timetable for the consultation to be undertaken by the Code Administrator under this Section 8 and separately the preparation of a CUSC Modification Report to the Authority. Where the particular circumstances of the CUSC Modification Proposal (taking due account of its complexity, importance and urgency) justify an extension of such timescales and provided the Authority, after receiving notice, does not object, taking into account all those issues, the Code Administrator may revise such part of the timetable. (8.19.1.c)

5.89 There is, however, an urgency procedure. In summary:

(a) If a Relevant Party recommends to the Panel Secretary that a proposal should be treated as Urgent, the Secretary notifies the Panel Chairman (paragraph 8.24.1). Any Relevant Party includes a CUSC Party, Citizens Advice, the CUSC Modifications Panel, a Relevant Transmission Licensee, a Materially Affected Party, the Authority (ie GEMA) or NGESO (paragraph 8.18.2 of the CUSC).

(b) Thereafter the Panel Chairman, with the assistance of the Panel Secretary, arranges for the CUSC Panel to take a vote on whether to recommend urgency and the decision on whether a proposal should be treated as urgent falls to GEMA (paragraph 8.24.4 of the CUSC, by reference to the criteria set out in 8.42(a)-(e)).

(c) A recommendation is then made to GEMA and the Panel Chairman consults with GEMA on urgency/timetable (paragraphs 8.24.4-8.24.5 of the CUSC).

(d) The Panel can then only treat a Proposal as Urgent if GEMA consents to this – and then the Panel has to comply with the procedure/timetable/directions laid down by GEMA (paragraph 8.24.6).

The CUSC Modifications Panel shall:

(a) not treat any CUSC Modification Proposal as an Urgent CUSC Modification Proposal except with the prior consent of the Authority;

(b) comply with the procedure and timetable in respect of any Urgent CUSC Modification Proposal approved by the Authority; and

(c) comply with any direction of the Authority issued in respect of any of the matters on which the Authority is consulted pursuant to Paragraph 8.24.4 or Paragraph 8.24.5.

(e) The criteria that GEMA use to determine urgency are that an urgent modification should:[231]

1. Be linked to an imminent issue or a current issue that if not urgently addressed may cause:

a. A significant commercial impact on parties, consumers or other stakeholder(s); or

b. A significant impact on the safety and security of the electricity and/or gas systems; or

c. A party to be in breach of any relevant legal requirements.

(f) As to the procedure for an urgent modification (emphasis added):

For the purposes of this Paragraph 8.24.7, the procedure and timetable in respect of an Urgent CUSC Modification Proposal **may** (with the approval of the Authority pursuant to Paragraph 8.24.4 or Paragraph 8.24.5) **deviate from all or part of the CUSC Modification Procedures or follow any other procedure or timetable approved by the Authority**, excepting in the case of a CUSC Modification Proposal or any Workgroup Alternative CUSC Modification(s) which constitute an EBGL Amendment, which shall meet the minimum consultation requirements of the Electricity Balancing Guideline. The CUSC Modifications Panel must notify the CM Administrative Parties and the CfD [Contract for Difference] Administrative Parties of any Urgent CUSC Modification Proposal and when approving any alternative

[231] GEMA, Guidance on Code Modification Urgency Criteria, pages 1–2.

procedure or timetable, the Authority must consider whether or not such procedure and timetable should allow for the CM Administrative Parties and the CfD Administrative Parties to be consulted on the Urgent CUSC Modification Proposal and if so how much time should be allowed. Where the procedure and timetable approved by the Authority in respect of an Urgent CUSC Modification Proposal do not provide for the establishment (or designation) of a Workgroup the Proposer's right to vary the CUSC Modification Proposal pursuant to paragraphs 8.16.10 and 8.20.23 shall lapse from the time and date of such approval.

(g) The CUSC Modification Report in respect of an Urgent CUSC Modification Proposal shall include (paragraph 8.24.8):

(a) a statement as to why the Proposer believes that such CUSC Modification Proposal should be treated as an Urgent CUSC Modification Proposal;

(b) any statement provided by the Authority as to why the Authority believes that such CUSC Modification Proposal should be treated as an Urgent CUSC Modification Proposal;

(c) any recommendation of the CUSC Modifications Panel (or any recommendation of the Panel Chairman) provided in accordance with Paragraph 8.24 in respect of whether any CUSC Modification Proposal should be treated as an Urgent CUSC Modification Proposal;

(d) the extent to which the procedure followed deviated from the CUSC Modification Procedures (other than the procedures in this Paragraph 8.24); and

(e) The Company's justification for including or not including the views resulting from the relevant consultation in the CUSC Modification Proposal and if applicable, any Workgroup Alternative CUSC Modification(s).

(h) GEMA can then take a decision once the Final Modification Report has been issued.[232]

[232] Response, paragraph 26.

(i) Each CUSC Party and Panel Member is required to take all reasonable steps to ensure that an Urgent CUSC Modification Proposal is considered, evaluated and (subject to Authority approval) implemented as soon as reasonably practicable, having regard to the urgency, and this may result in the CUSC being amended on the day on which such a proposal is submitted.[233]

(j) Paragraph 8.24.10 provides for a post hoc review:

> Where an Urgent CUSC Modification Proposal results in an amendment being made in accordance with Paragraph 8.28, the CUSC Modifications Panel may or (where it appears to the CUSC Modifications Panel that there is a reasonable level of support for a review amongst CUSC Parties shall following such amendment, action a Standing Group in accordance with Paragraph 8.21 on terms specified by the CUSC Modifications Panel to consider and report as to whether any alternative amendment could, as compared with such amendment better facilitate achieving the Applicable CUSC Objectives in respect of the subject matter of that Urgent CUSC Modification Proposal.

Thus, if a proposal is rushed through without proper consultation, it may be reopened in any event.

The implications of the better than the status quo test and the CUSC procedures

5.90 The fact that GEMA could not simply impose its own solution, upon receipt of the FMR[234] is an important feature of this case. GEMA had to apply the better than the status quo test, and it had to have regard to the CUSC procedures.

5.91 In most cases, GEMA is constrained by the options put before it by stakeholders; the better than the status quo test it has to apply; and the processes prescribed by the CUSC. The Appellants accepted that GEMA could not pick and mix between the different elements of the proposals put before it.[235]

5.92 There was no dispute that the status quo reflected the wrong definition of the Connection Exclusion. This was what prompted the modification proposal in

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[233] Paragraph 8.24.9, section 8 of the CUSC.
[234] Reply, paragraph 8.2.
[235] Main Hearing, 4 March 2021, Transcript, page 40, lines 11–12.

the first place. Thus, if GEMA had (if it was able to do so) simply rejected all of the proposals brought forward, or if the CMA quashed the Decision, in practice this would mean that an incorrect interpretation of the Connection Exclusion would remain in place.

5.93 It was also common ground that none of the WACMs (or the Original Proposal) reflected GEMA's own construction of the Connection Exclusion.[236] As to the Appellants' interpretation of the Connection Exclusion, they submitted that WACMs 72 or 79 would 'substantially capture'[237] their view of the correct construction, and reflected the CMA 2018 Decision which, on the Appellants' case, only considered a narrow issue in respect of offshore GOS.[238] At the Main Hearing, the Appellants explained that their position was that both WACMs 72 and 79 complied with the CMA 2018 Decision, but as the CMA 2018 Decision only went so far, it was WACM79 that was consistent with the ITC Regulation.[239] Whether or not the Appellants' case is right in this regard turned on its arguments under sub-ground 1(c), which we consider below.

5.94 It is against this background that the Parties' core submissions on Grounds 1 and 2, discussed below, must be assessed.[240]

5.95 As discussed in more detail below, the Appellants' position was that regardless of the test to be applied, it was not open to GEMA to approve the Original Proposal as it reflected the incorrect interpretation of the Connection Exclusion. It then argued, as outlined at paragraphs 5.100 to 5.101 and 5.105 below, that there were alternative options available to GEMA in order to modify the status quo that could be implemented in time for the 2021/22 charging year.

5.96 GEMA's position was, by contrast, that there was nothing unlawful about approving the implementation of a proposal which brings the CUSC Calculation closer to the correct interpretation, and substantially reduces the risk that it will fail to deliver the result required by the ITC Regulation.[241] The Appellants are wrong to suggest that when provided with a series of imperfect solutions, GEMA had to maintain the status quo, even though there is a less imperfect alternative available (when compared with the status quo).[242] GEMA then resisted, as set out below, the suggestion that there were other means

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[236] Main Hearing, 4 March 2021, Transcript, page 32, lines 19–20.
[237] Appellants' Skeleton, paragraph 24.
[238] Main Hearing, 4 March 2021, Transcript, page 33, lines 7–11.
[239] Main Hearing, 4 March 2021, Transcript, page 33, lines 7–11.
[240] See paragraphs 6.9, 6.15 to 6.18, 6.31 to 6.36 and 7.4 to 7.6
[241] GEMA's Skeleton, paragraph 24
[242] GEMA's Skeleton, paragraph 24.

available to identify and implement a perfect solution in time for the 2021/2022 charging year.

5.97 In our view, this ultimate focus, by both of the main Parties, on what could have been achieved in the time available is driven by two factors: (a) the application of the better than the status quo test; and (b) the reality that the status quo was also based on an incorrect interpretation of the Connection Exclusion. Neither party argued that it was open to GEMA to simply reject the Original Proposal, and/or the WACMs put forward in the FMR, and do nothing, leaving the status quo in place despite the serious and imminent risk of breach in charging year 2021/2022.

5.98 Thus, while the Appellants' primary argument was that it was simply not open to GEMA to adopt the Original Proposal because it was based on an error of law (a point which we have referred to above at paragraph 5.30, and return to at paragraphs 5.129 to 5.151 below), a key issue between the Parties was what was achievable in practice in time for the 2021/22 charging year.

The Parties' submissions on the options open to GEMA in response to the FMR

5.99 Both the Appellants and GEMA advanced detailed submissions about what GEMA should have done having received a set of proposals based on the wrong construction of the Connection Exclusion, and how long it would have taken to implement a new proposal, ie what options were available to it. We set out a summary of the key points here.

5.100 The Appellants' view was that GEMA should have rejected the Original Proposal and brought forward another modification proposal in time for the 2021/22 charging year.[243] In their view, GEMA had three options when it was considering CMP317/327:

(a) To use the send-back power available to GEMA to return the proposal to the panel and set out what additional steps should be taken.[244]

(b) To reject all of the options before it, and instead direct NGESO to raise new modification proposals under 8(17A)(1A) of the CUSC.[245]

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[243] Main Hearing, 5 March 2021, Transcript, page 6, lines 12 - 17.
[244] NoA, paragraph 171; Response, paragraphs 4 and 27-28]; Main Hearing, 4 March 2021, Transcript, page 11, lines 3–10; page 40, lines 4-25, page 41, line 1.
[245] Response, paragraphs 4 and 26; Main Hearing, 4 March 2021, Transcript, page 11, lines 11–16.

(c) To reject all of the options before it, and for GEMA itself to raise its own new modification proposals under 8(17A)(b) of the CUSC.[246]

5.101 In exercising these options, the Appellants emphasised that GEMA could also have relied on the urgency procedure set out in section 8 of the CUSC, applying its published urgency criteria. Mr Graham, on behalf of the Appellants, stated that if any of these three options had been taken forward, he believed that these could have been resolved in a timescale of less than the 70 working days accorded to the appeal process. [247]

5.102 GEMA submitted that the options available to it in respect of CMP317 were, in principle, as follows: (a) to approve the implementation of the Original Proposal or any one WACM; (b) to reject both the Original Proposal and all of the WACMs, and thereby leave the status quo in place; or (c) to direct that the modification report be revised and resubmitted, with the status quo remaining in place in the meantime.[248] However, as to the availability of these options:

(a) In respect of its ability to reject all of the proposals put forward, GEMA emphasised at the Main Hearing that this option was available if none of the proposals put forward are assessed to better facilitate the achievement of the ACOs.[249] This was not the position in respect of the Original Proposal.[250]

(b) In respect of the send-back power, GEMA emphasised at the Main Hearing that this option is only available where having assessed the proposals in the FMR, GEMA 'cannot properly form an opinion' on whether they satisfy the better than the status quo test.[251] In GEMA's view, as set out in the Decision and at the Main Hearing, as it could properly form an opinion on whether the Original Proposal met the better than the status quo test, the send-back powers were not available.[252]

5.103 GEMA also contended that the Appellants were wrong to suggest that there were other alternative options open to GEMA:

(a) GEMA's power to direct NGESO to raise a CUSC modification proposal, or, in certain circumstances, to do so itself, were not alternatives to the options GEMA identified. They are things GEMA can do in addition to

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[246] Response, paragraph 25; Main Hearing, 4 March 2021, Transcript, page 11, lines 11–16.
[247] Main Hearing, 4 March 2021, Transcript, page 11, lines 15–24.
[248] Reply, paragraphs 38.5 and 89.3; GEMA Skeleton, paragraph 25.
[249] Main Hearing, 4 March 2021, Transcript, page 107, lines 17–21.
[250] Main Hearing, 4 March 2021, Transcript, page 108, lines 10–17.
[251] Main Hearing, 4 March 2021, Transcript, page 107, lines 22–25, page 108, lines 1–5. See also Response, paragraph 38.5.
[252] Decision, A27, page 20; Main Hearing, 4 March 2021, Transcript, page 107, lines 8–14.

approving or rejecting proposals. GEMA did not consider the course it adopted in the Decision to be substantially different to either of these proposed alternatives. In practice, GEMA adopted a similar approach by adopting the Original Proposal, but setting out its expectation that a new proposal would be brought forward to address the failure to implement the Connection Exclusion correctly. In the Decision, GEMA stated (emphasis added):[253]

> In addition, **we expect National Grid Electricity System Operator ('NGESO') to bring forward a further CUSC Modification Proposal (in sufficient time to enable the modifications to be effective as of 1 April 2022)** to:
>
> - Further update the CUSC charging methodology so as to include, in the assessment of compliance with the range, Local Charges in respect of Local Assets (i.e. Local Substations and Local Circuits) to the extent that such assets were pre-existing at the time the generator paying those charges wished to connect to the National Electricity Transmission System ('NETS'); and
>
> - Remove from the calculation determining compliance with the range the TNUoS Charges payable by 'Large Distributed Generators' and their associated volumes (MWh).
>
> **If we consider sufficient progress is not being made with regard to the further modification proposal, we may use the measures available to us, including issuing a further Direction to NGESO, to ensure that the necessary changes are brought forward in time to ensure implementation is effective from 1 April 2022**.
>
> We also expect NGESO to examine whether there has been historic non-compliance with the Limiting Regulation and, if so, to bring forward one or more additional CUSC Modification Proposals to address this.

As is clear from the above, GEMA expected to be able to do this within a year. Thus, the Parties agreed that any new proposal should be achievable within much less time than the CMP317/327 took to consider.

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[253] Decision, A27, page 2; see also page 26.

(b) It was not clear to GEMA that it was necessary, within the meaning of paragraph 8.17A.1 of the CUSC, for it to direct NGESO to raise a modification proposal, or for itself to do so because it believed the Original Proposal would likely secure compliance with the ITC Regulation for the coming year,[254] ie the obligation for annual average charges to fall within the Permitted Range. This argument was premised on the ITC Regulation imposing only an obligation of result.

(c) The powers GEMA has to make direct changes to the CUSC arise at the end of a Significant Code Review (section 8.17B of the CUSC). Those powers were not exercisable here.[255]

(d) If GEMA had rejected the proposals put forward or exercised the send-back option (to the extent such options were available), this would have left the status quo in place. Under the status quo, the risk of a breach of the Permitted Range was, in the view of GEMA, high. The risk was low under the Original Proposal or WACM7 for the charging year 2021/22. A high risk under those proposals only arises if the Appellants succeed on Ground 3 (which is addressed at paragraphs 8.27 to 8.63 below of this Decision). It was therefore preferable to approve the implementation of one of these proposals, rather than leave the status quo in place. But GEMA had set out how it intended to act to ensure that the CUSC Calculation reflected the correct construction of the Connection Exclusion. [256]

(e) GEMA did not accept that a new or amended proposal could have been put in place for the charging year of 2021/22 following consideration of the FMR. The Decision was taken in December, and NGESO sets final tariffs for the year ahead on 31 January. In practice there was little time for alternatives to be put in place.[257] This meant any failure to adopt the Original Proposal could leave the status quo in place into the charging year 2021/22.

5.104 Moreover, GEMA noted that the Appellants did not challenge GEMA's judgement that the Original Proposal was administratively simpler to implement than the other proposals, and so should be preferred on that basis (if a choice did have to be made).[258]

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[254] Main Hearing, 4 March 2021, Transcript, page 109, lines 5–10, 15–21.
[255] GEMA's Skeleton, paragraph 25.1; Main Hearing, 4 March 2021, Transcript, page 111, lines 12–20; page 111, lines 24–25, page 112, lines 1–9.
[256] GEMA's Skeleton, paragraphs 26-26.3.
[257] Main Hearing, 4 March 2021, Transcript, page 110, lines 12–21.
[258] GEMA's Skeleton, paragraph 26.4.

5.105 The Appellants' response to these arguments was essentially that:

(a) GEMA was wrong to rely on NGESO bringing forward a solution to the continuing problem of the construction of the Connection Exclusion. It was directed to bring forward modifications to implement the correct definition in November 2019, but failed to do so. The Original Proposal was incorrect, as is common ground (see further paragraph 5.3 above, and paragraphs 6.4, 6.76 and 6.88 below in respect of Ground 1).[259]

(b) The significant time taken already pointed against relying on NGESO to bring forward a solution. The CMA ruled on CMP261 in February 2018. GEMA had noted in its open letter of May 2018 that the interpretation issue would need to be resolved. CMP317 was then raised in May 2019, but the FMR was provided on 13 August 2020. GEMA took over four months to issue the Decision. If GEMA is right that the Decision clearly sets out the proper construction of the Connection Exclusion, 'it is difficult to see why GEMA has not simply produced its own CUSC modification proposal, requested urgency for it, granted itself that urgent request and put the matter to bed by approving its own modification. We know the CUSC procedure can work expeditiously when needed.'[260]

(c) GEMA could have implemented the new reconciliation procedure in the CUSC as a standalone modification to enable any breach of the Permitted Range to be cured if under the baseline [status quo] such breaches arose (the Appellants contended, relying on Ground 3, that under the baseline [status quo] there would be no risk of breach of the Permitted Range in this charging year)[261] (that is, 2020/21).

(d) GEMA could have used its send-back power in the way it had done so in respect of CMP261.[262]

(e) If needed, GEMA could have exercised its powers under section 11A of EA89 to modify NGESO's transmission licence.[263]

Our decision on GEMA's options

5.106 We address first the issue of what options were in fact available to GEMA under the CUSC, when faced with the proposals as set out in the FMR, and

[259] Main Hearing, 5 March 2021, Transcript, page 6, lines 2–6.
[260] Main Hearing, 5 March 2021, Transcript, page 6, lines 6–17.
[261] Main Hearing, 5 March 2021, Transcript, page 7, lines 7–13.
[262] Main Hearing, 4 March 2021, Transcript, page 41, lines 7–25, page 4, lines 1–2.
[263] Main Hearing, 5 March 2021, Transcript, page 8, lines 14–17.

then address second whether it was likely that GEMA could have identified and implemented a new proposal in time for the 2021/22 charging year.

5.107 It does not appear to us that the send-back power was available in this case. The problem with the Appellants' reliance on the send-back option is that on the face of the CUSC, as outlined at paragraph 5.82 above, this option is only available in circumstances where GEMA is unable to form an opinion on the proposals. When this was probed at the Main Hearing with the Appellants, their argument was that GEMA could not form an opinion that the Original Proposal was the best proposal because it did not correctly capture the correct legal definition.[264] This argument does not, however, engage with the terms of the better than the status quo test and the send-back power under the CUSC. GEMA must decide whether any proposal is better than the status quo. The question posed is not: do any of the proposals reflect, in the view of GEMA, the right answer. The CUSC does not give GEMA a power to send back because the proposals are imperfect, especially where they are less imperfect than the status quo. The Appellants are wrong to suggest that under the CUSC GEMA can send back an issue because it deems the proposals 'unsatisfactory'.[265]

5.108 In any event, even if the send-back option was available, there remains a question over whether it was realistic for a revised proposal to be prepared, and put in place, in time for the 2021/22 charging year, which is addressed below.

5.109 Second, as set out above, the Appellants also relied on the alleged ability of GEMA to direct NGESO, or for itself, to raise an alternative CUSC modification proposal in time for the 2021/22 charging year. GEMA denied that these powers were available for the reasons summarised at paragraphs 5.102 to 5.103 above. Essentially, GEMA's position was that these powers could only be exercised when necessary, and it was not necessary to rely on them in this case when it expected a new proposal to be in place, within a year, before any failure to comply with the Permitted Range arose. We have not reached a concluded view on this point. However, we note that while it was accepted that any failure to fully reflect the correct construction of the Connection Exclusion in the domestic arrangements does not necessarily give rise to a breach of the ITC Regulation, any such failure increases the risk of such breach and may, in certain circumstances, prevent compliance from being assessed properly or at all. It is therefore unclear to us that these powers were unavailable.

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[264] Main Hearing, 4 March 2021, Transcript, page 43, lines 13–15; lines 20–24.
[265] Main Hearing, 4 March 2021, Transcript, page 43, line 25, page 44, lines 1–5.

5.110 In any event, for our purposes, the key question is whether it was likely that the exercise of any of the options under CUSC paragraph 8.17A.1 would have resulted in a compliant CUSC Calculation in time for the charging year 2021/22. If not, then the availability of any specific power under the CUSC is not determinative.

5.111 We therefore turn to what was realistically achievable in the time available following the submission of the FMR and the new 2021/22 charging year.

What was realistically achievable in the time available before the 2021/2022 charging year?

5.112 At the Main Hearing, the Appellants emphasised that a lot of the work had already been done by the working group on the proposals for addressing the Connection Exclusion. It was emphasised by Mr Graham that if the send-back option had been exercised, identifying deficiencies in the proposals, the group would have been able to address those deficiencies very quickly. [266] He also considered it likely that if a brand new proposal was brought forward, it would be highly likely that the same working group would consider that proposal, and could look at it urgently.[267]

5.113 We do not agree that these points demonstrate that it was realistically feasible to identify and implement a new modification proposal in time for the charging year 2021/22.

5.114 We accept that a long process had already been followed in respect of the Decision under challenge. However, we also note that GEMA received a large number of proposals in August 2020 (including essentially three different, incorrect, constructions of the Connection Exclusion (see paragraphs 4.51 to 4.54)). It had to consider those options and reach a view on each of the proposals. It seems unrealistic to us that faced with a range of incorrect solutions, it could have identified the deficiencies, and sent back the FMR or otherwise directed or proposed its own solution, and have had that solution in place in time for the charging year 2021/22. This is for the following interrelated reasons.

5.115 First, the relevant timeframe for this assessment is not the gap between the submission of the FMR in August 2020 and the start of the 2021/22 charging year. GEMA needed at least some time to consider the proposals put forward, and to determine what action, if any, was required. While it was not necessarily essential that the new arrangements were in place by January

[266] Main Hearing, 4 March 2021, Transcript, page 47, lines 6–24.
[267] Main Hearing, 4 March 2021, Transcript, page 47, line 25, page 48, lines 1–14.

2021, it is obvious that the new rules would need to be in place before the new charging year (2021/22) began if the risks associated with retaining the status quo were to be avoided.

5.116 Second, while the Appellants emphasised that much work had already been done in arguing that an urgent process could have provided the correct result in time, in support of their arguments on Grounds 1 and 2, they also raised concerns about GEMA's belief that an appropriate proposal could be implemented within a year, as GEMA envisaged in the Decision.[268] Concerns were raised that it was not inevitable the CUSC process would provide a solution within that timeframe because different WACMs might be proposed, and it is not known what the new modification would look like. [269]

5.117 There is therefore an internal inconsistency in the Appellants' arguments in this regard. When the Appellants were asked about this inconsistency in the Main Hearing, their response was that without having settled upon the correct definition of what is the Connection Exclusion, then there is always a risk that the debate will continue. But they also emphasised that just because an issue is complex does not mean it cannot be resolved quickly.[270]

5.118 The problem is that at whatever stage a new or extended process commenced, before or after the Decision, there are risks that stakeholders will raise different views, and that there will still be some debate over how to implement GEMA's construction of the Connection Exclusion. Even if GEMA raised its own proposal, stakeholders may also still posit their own construction of the Connection Exclusion or amendments to GEMA's approach as part of the FMR. Moreover, we see force in GEMA's point that the availability of the Decision, which sets out its construction of the Connection Exclusion coupled with the stated expectation (reinforced by a potential direction) for NGESO to bring forward a further CUSC modification proposal, improves the prospects of a new solution being in place within a year.

5.119 Third, we have had careful regard to the availability of the urgency procedure, but we conclude that even if this process were to have been invoked, it was unlikely that a new proposal could be implemented in time. It is clear that the CUSC envisages that, if necessary, proposals can be dealt with expeditiously. The degree of expedition that is achievable, however, has to be assessed on the facts of the particular case. It is clear that stakeholders, including the

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[268] Response, paragraph 40.
[269] Response, paragraph 40; see also Main Hearing, 4 March 2021, Transcript, page 50, lines 5-17.
[270] Main Hearing, 4 March 2021, Transcript, page 49, lines 19–23.

Appellants, have views as to what the correct construction of the Connection Exclusion is. There may also be different proposals as to how that construction can be implemented. The Parties have commented that this is a complex area. This is amply demonstrated by the long process leading to the Decision under challenge and the complexity of the construction points raised in this appeal (see our discussion of, in particular, Ground 1(c) at paragraphs 6.79 to 6.99).

5.120 Even under the urgency process, there still has to be engagement between GEMA, the Panel Chair and the CUSC Panel. Stakeholders may still propose their own alternatives for inclusion within the FMR. Ultimately, GEMA also still has to apply the better than the status quo test to the proposals as included in the FMR. The extent to which the normal CUSC procedures should be deviated from is a matter of judgement for GEMA and the CUSC Panel.

5.121 Thus, this dispute between the Parties ultimately comes down to a matter of judgement over what was reasonably achievable and the best process for so doing on the facts of this case, against a background that allowing the status quo to prevail created a serious and imminent risk of breach. Our conclusion is that the Appellants have not shown that GEMA erred by proceeding on the basis that a new or amended proposal could not realistically be identified and implemented in time for the 2021/22 charging year – and instead it was appropriate to adopt the Original Proposal, and set in train a process for a new proposal to be in place for charging year 2022/23.

5.122 In reaching this conclusion, we have placed weight on the views of GEMA as the regulator with direct experience of these processes, as well as those of the Appellants who have participated as relevant stakeholders. It is clear that the implementation of the Connection Exclusion, as part of the CUSC Calculation, is a complex issue which has and continues to prompt significant debate. We also note the risk that if the urgency process had been followed, there was scope for that process to be re-opened in any event if stakeholders considered there to be better alternatives available. An appeal may also have been brought against any different decision reached by GEMA.

Was GEMA wrong to expect that a new proposal could be in place for the 2022/23 charging year?

5.123 We have also considered whether GEMA's expectation that a new proposal could be in place in time for the 2022/23 charging year was wrong in the light of the concerns raised by the Appellants. We consider the legal relevance of this issue at paragraphs 5.147 and 5.148 below.

5.124 Beyond taking into account the points discussed above, we also explored with NGESO through a request for information and also at the Main Hearing: (a) the progress that had been made to date in respect of realising this expectation; (b) the proposed timetable; and (c) whether NGESO envisaged there being any obstacles to achieving the timetable.

5.125 In response to our request for information, NGESO explained that:

(a) The timing of the raising of the new proposal, and the content of the new proposal, was discussed at a meeting of the Transmission Charging Methodology Forum on 4 February 2020. This is a forum for communication and discussion with industry of issues relating to the charging methodologies in the CUSC.[271]

(b) Following these discussions, NGESO intends to raise the new proposal in early April 2021 when the outcome of this appeal is known.[272]

(c) In raising the new proposal, NGESO will recommend that it is treated as urgent as provided for at CUSC Section 8 Paragraph 8.24, given the intent that it should be effective as of 1 April 2022. The urgency request and timetable will be put before GEMA. [273]

(d) GEMA will then make a decision on urgency in accordance with its guidance (quoted at paragraph 5.89 above). GEMA has to approve the recommended timeline and procedure provided by the CUSC Panel. [274]

(e) NGESO anticipates that an urgent timetable starting in April to deliver a new proposal by July is a reasonable one, which would allow industry input and deliver change for the 2022/23 charging year.[275]

(f) NGESO sets draft tariffs in November, with final tariffs set in January. NGESO seeks a decision on the new proposal by the end of October 2021 in order to enable the necessary calculations to be performed. [276]

5.126 At the Main Hearing, NGESO explained that in terms of potential obstacles, the main one was the operation of the open governance process itself.[277] As outlined in paragraphs 4.36 to 4.44, the process in this case (as in previous cases) has been lengthy due to the number of steps involved, and the complexities created by such wide stakeholder engagements. NGESO

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[271] NGESO written submission, 5 March 2021, paragraphs 2–3.
[272] NGESO written submission, 5 March 2021, paragraph 4.
[273] NGESO written submission, 5 March 2021, paragraphs 5–6.
[274] NGESO written submission, 5 March 2021, paragraph 7.
[275] NGESO written submission, 5 March 2021, paragraph 8.
[276] NGESO written submission, 5 March 2021, paragraph 9.
[277] Main Hearing, 5 March 2021, Transcript, page 4, lines 13–20.

confirmed that while other industry players can bring forward suggestions and other potential clarifications to the definition of the Connection Exclusion, it anticipated being able to deliver the new proposal in good time because (a) the process of engagement with the industry had begun already, (b) a request for urgency would be made to GEMA, and (c) there would be a clear expectation on industry to deliver.[278] NGESO did not envisage any technical obstacles to implementing the definition.[279]

5.127 GEMA also made similar points at the Main Hearing about the potential implications of the open governance process, as there is always a chance the process could take longer than desired. However, GEMA emphasised that there are options for expediting the process to ensure a new proposal is in place for the next charging year.[280]

5.128 In the light of the above, we are not persuaded that GEMA was wrong to expect that, in the light of the Decision, a new proposal could be in place within a year. Indeed, the Appellants' argument that a new proposal could be put in place urgently supports GEMA's views in this regard. It seems to us a far more realistic prospect that in the light of the Decision (and this appeal decision), GEMA and the industry will be able to formulate a solution in the time available before the tariffs are set for charging year 2022/23.

The implications of accepting a proposal based on an incorrect definition

5.129 A core dispute between the Parties was whether it was open to GEMA, in the exercise of its regulatory judgement, to approve a change to the CUSC that was based on an incorrect interpretation of the Connection Exclusion.[281] The Parties therefore disagreed over the effect in law of the Decision.[282]

5.130 This core dispute was relevant to, in particular, our assessment of Grounds 1 and 2, as well as relief.

The Parties' submissions

5.131 The Appellants' case was essentially that:[283]

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[278] Main Hearing, 5 March 2021, Transcript, page 4, lines 13–20.
[279] Main Hearing, 5 March 2021, Transcript, page 4, line 22.
[280] Main Hearing, 4 March 2021, Transcript, page 113, lines 21–25, page 114, lines 1–4.
[281] List of Issues, Issues 11 and 14.
[282] List of Issues, Issue 12.
[283] NoA, paragraphs 164-171; Response, paragraphs 2-9, 13, 25-27. Appellants' Skeleton, paragraphs 14-15, 20, 22, 28-29, 31-33. See also the more detailed summary of the Appellants' arguments in Chapter 6 below.

(a) By approving the Original proposal, GEMA had given effect to the construction of the Connection Exclusion it was based upon. It was common ground that this construction was incorrect.

(b) GEMA could not disclaim the effect of its approval of the Proposal. The appeal is against the Decision, not against the reasons for the Decision.[284]

(c) GEMA could also not therefore rely on the fact that the Decision set out what GEMA viewed as the correct construction of the Connection Exclusion (in the alternative the Appellants submitted that this interpretation was wrong in any event, see paragraphs 6.15 to 6.18 and 6.31 to 6.36 below in respect of the Grounds 1(b) and 1(c)). It also could not rely on its expectation that NGESO would bring forward a new proposal, and that that proposal would be implemented within a year.

(d) It followed from GEMA's acceptance that the Original Proposal did not give effect to the Connection Exclusion properly, that it was not open to GEMA to approve it as it had done in the Decision. The Decision was unlawful as a matter of public law as a consequence.

(e) There is no scope for a defence based on selection of one of a range of possible legal interpretations, judging by reference to convenience, practicality or some other extraneous factor.[285] If the legal construction is wrong in law, an appellate body can and must intervene. Nor could it be justified by reference to any margin of appreciation afforded to a regulator, the legal construction is either right or wrong.

(f) GEMA's position that it had to approve the Original Proposal as the lesser of two evils between that Proposal and the status quo amounted to a misdirection in law and/or improperly fettered GEMA's discretion. This was because GEMA had available to it a number of other options, including exercising the send-back procedure and its ability to raise its own proposal (see paragraphs 5.100 and 5.101 and 5.105 above).

5.132 GEMA submitted that it had not committed an error of law because, as outlined at paragraphs 5.102 and 5.103 above, it was faced with a range of imperfect solutions, which it had to assess pursuant to the better than the

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[284] The Appellants referred to *Everything Everywhere Ltd v. Competition Commission* [2013] EWCA Civ 154, per Moses LJ at [24].
[285] The Appellants referred to *R v. Central Arbitration Committee ex p. BTP Tioxide Ltd* [1981] ICR 843, at p. 855-856, *Forbes J; and R v. Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23, at p. 32 per Lord Mustill.

status quo test. The adoption of the Original Proposal did not amount to a breach of the ITC Regulation. The reasons for its decision, including its assessment that a new proposal could be brought forward and implemented within a year in line with its construction of the Connection Exclusion, are relevant to assessing the legality of the Decision.[286]

5.133 A further key, related, dispute between the Parties was over the relevance of GEMA's statement in the Decision that it expected NGESO to bring forward a further modification proposal to give effect to GEMA's own construction of the Connection Exclusion as set out in the Decision.[287]

5.134 In the Appellants' view, GEMA's expectation in this regard was irrelevant.[288] It was common ground that there is no legal limit on the duration of the Decision. The Appellants submitted that the expectation was not legally binding, and therefore irrelevant.[289] It could not 'cure' the error of law which vitiates the Original Proposal.[290]

5.135 GEMA submitted, however, that this expectation was relevant.[291] When faced with a range of imperfect solutions, it was relevant for GEMA to take into account its expectation that a new solution would be in place within a year. [292] GEMA's view was that this expectation was reasonable in all the circumstances, including the fact it had now set out in some detail in the Decision what it considered the correct construction of the Connection Exclusion to be.[293] The Appellants had not cited any authority for the proposition that the CMA must ignore this obviously relevant consideration.[294]

Our decision

5.136 At the heart of the Appellants' case on this key issue was the proposition that GEMA cannot disclaim the effect of its approval of the Original Proposal by reference to the fact it also set out its own construction of the Connection Exclusion (or its expectation that a new solution would be in place for the 2022/23 charging year). The appeal is against the decision, not against the

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[286] See also Response, paragraphs 45, 51, 89-90.
[287] List of Issues, Issue 3.
[288] List of Issues, Issue 3.2.
[289] NoA, paragraph 121; Response, paragraph 9; Appellants' Skeleton, paragraph 6.
[290] Response, paragraph 9.
[291] List of Issues, Issue 3.1.
[292] GEMA's Skeleton, paragraph 8; Main Hearing, 4 March 2021, Transcript, page 117, lines 6-11; page 117, lines 1–12.
[293] Main Hearing, 4 March 2021, Transcript, page 115, lines 3–10; page 116, lines 11–13.
[294] GEMA's Skeleton, paragraph 8.

reasons for the decision, citing Moses LJ in *Everything Everywhere* (see paragraph 5.141 below).[295]

5.137 The Appellants relied on this authority as part of its core case on Grounds 1 and 2 of the appeal that, as GEMA admits the Original Proposal is based on the incorrect construction, it follows automatically that it committed an error of law such that the Decision must be quashed. It was simply not open to GEMA to take this course of action.

5.138 We have explained at paragraphs 5.34 to 5.40 and 5.53 to 5.60 above why, in our view, it does not follow that any error in the definitions used in the domestic charging arrangements automatically constitutes a breach of the ITC Regulation. We have also concluded that GEMA was not wrong: (a) to proceed on the basis that there was a serious and imminent risk of breach under the status quo (paragraph 4.72 above); and (b) in construing the Connection Exclusion in the manner set out in the Decision (see further paragraphs 6.85 to 6.99). In that context, the Original Proposal constituted a material short-term improvement on the status quo, and only gave rise to a non-material difference in the charges applied (see paragraph 5.58(b) above). GEMA had also set out its expectation that a new proposal could be brought forward and implemented in time for the 2022/23 charging year.

5.139 In our view, these reasons for the Decision are relevant to our consideration. We do not accept the Appellants' arguments to the contrary for the following reasons.

5.140 First, the Appellants' reliance on the 'dicta' of Moses LJ in *Everything Everywhere* was misplaced.

5.141 That authority does not stand for the proposition that on appeal the CMA (or Tribunal) must focus exclusively on the outcome of the decision reached, and not have regard to the reasons for it. It in fact points to the opposite conclusion. Instead, it stands for the proposition that it is not enough for the appellant in a given case to identify an error in the reasoning of the decision. It must show that in the light of that error the decision as a whole cannot stand.[296]

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[295] Appellants' Skeleton, paragraph 14.

[296] The relevant passages of Moses LJ's judgment are as follows (emphasis added):

> 23. It is for an appellant to establish that Ofcom's decision was wrong on one or more of the grounds specified in s.192(6) of the 2003 Act: that the decision was based on an error of fact, or law, or both, or an erroneous exercise of discretion. It is for the appellant to marshal and adduce all the evidence and material on which it relies to show that Ofcom's original decision was wrong. Where, as in this case, the

5.142 This reasoning is therefore relevant to the applicable standard of review, explaining what burden the appellant must discharge in order to succeed on appeal. It does not follow from this burden on appellants to show that a decision cannot stand in the light of the errors of reasoning identified that we should not have regard to the reasons why GEMA adopted the decision it did. The reasons for the Decision are relevant to an assessment of its lawfulness: one cannot be divorced from the other. It cannot be assessed in a legal vacuum.

5.143 This point was in fact recognised by the Appellants at the Main Hearing, where they criticised GEMA for seeking to divorce the formal decision it had taken from the reasons it gave for the Decision, as reasons generally help a court review the legality of the Decision.[297] We agree. It is not therefore appropriate to ignore the reasons underpinning GEMA's adoption of the Original Proposal.

5.144 Second, in considering the lawfulness of the Decision, it is important to have regard to the test which GEMA had to apply under the relevant licence conditions. It was not simply 'is this Decision right?' It had to apply the better than the status quo test, which also involves considering whether the Original Proposal facilitated compliance with EU law (see paragraph 4.47). The Appellants argued that an incorrect proposal could not be the best (see paragraph 5.95 above). This does not follow. If all the solutions are imperfect, as GEMA submits, the test requires the decision-maker to assess which is the least imperfect option. Moreover, as outlined at paragraph 5.121 above, we do not consider that the Appellants have shown that GEMA erred in proceeding on the basis that any decision not to implement the Original Proposal, as the best of an imperfect pool of options, could result in leaving in place the status quo, despite the serious and imminent risk of breach in 2021/22. Thus, GEMA did not cede primacy to the CUSC, overriding its duty to comply with EU law.[298] GEMA took the steps available to it in order to seek compliance with the Permitted Range prescribed by the ITC Regulation.

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appellant contends that Ofcom ought to have adopted an alternative price control measure, then it is for that appellant to deploy all the evidence and material it considers will support that alternative.

24. **The appeal is against the decision, not the reasons for the decision. It is not enough to identify some error in reasoning; the appeal can only succeed if the decision cannot stand in the light of that error. If it is to succeed, the appellant must vault two hurdles: first, it must demonstrate that the facts, reasoning or value judgments on which the ultimate decision is based are wrong, and second, it must show that its proposed alternative price control measure should be adopted by the Commission**. If the Commission (or Tribunal in a matter unrelated to price control) concludes that the original decision can be supported on a basis other than that on which Ofcom relied, then the appellant will not have shown that the original decision is wrong and will fail.

[297] Main Hearing, 4 March 2021, Transcript, page 5, lines 21–24. See also Response, paragraph 27.

[298] Contrary to paragraphs 167-168 of the NoA.

5.145 Third, this is not a case in which the public authority's decision was based on a misdirection as to the law and/or involved a failure to take into account relevant considerations or to take into account irrelevant ones (applying the principles set out in *R v. Central Arbitration Committee*) relied upon by the Appellants. GEMA did not decide to implement the Original Proposal on the basis that the construction of the Connection Exclusion inherent within it was right. It was accepted it was wrong (although the Parties differ on why it was wrong, see Ground 1, paragraphs 6.6 and 6.7 below).

5.146 The reasons for GEMA taking this course were that:

(a) GEMA considered there was a serious and imminent risk of breach under the status quo (as outlined at footnote 554, this assessment was not, in our view, incorrect);

(b) applying the better than the status quo test, GEMA judged the Original Proposal to be an improvement. It also assessed, by reference to its own construction of the Connection Exclusion, that the difference in the charges taken into account was not material, such that there was a low level of risk of breach associated with implementing the Original Proposal for the charging year 2021/22 (see paragraph 5.58(b) above); and

(c) it expected a further modification to be brought forward to implement the correct construction for the next charging year (that is, 2022/23). As outlined at paragraph 5.103 and 5.121 above, the Appellants did not satisfy us that this expectation was incorrect.

5.147 As to the specific point about the relevance of GEMA's forward looking expectation, as summarised in (c), the Appellants are right to observe that the expectation as set out in the Decision is not in itself legally binding. We therefore asked GEMA at the Main Hearing why, at the time the Decision was made, it set out its expectations that NGESO would bring forward a new modification proposal, rather than simply issuing a direction to that effect. GEMA's answer was essentially that in its judgement setting out the expectation was sufficient. It had no reason to believe that NGESO would fail to take steps to fulfil that expectation. It was not therefore deemed necessary to exercise formal powers immediately.[299] However, GEMA made clear that it would exercise its compulsory powers if necessary. Based on all of the material before us, including that summarised at paragraph 5.128 above, we do not consider this approach to be wrong.

[299] Main Hearing, 4 March 2021, Transcript, page 112, lines 13–24.

5.148 Each of the points identified at paragraph 5.146 above is relevant to a consideration of whether the Decision was wrong for the reasons given by the Appellants (see paragraph 5.131 above). The Appellants did not cite any authority establishing the proposition that we must ignore the key reasons why GEMA adopted the course it did in assessing its legality. Indeed, the authority cited by the Appellants makes clear that in challenging a decision, appellants must engage with its reasoning and identify an error capable of showing it cannot stand (see paragraph 5.141).

5.149 Fourth, we also do not accept the Appellants' argument that GEMA's case that it had to choose between imperfect options is at best an explanation and not a justification for its decision, relying upon the judgment in *R (Good Law Project Limited & Others) Secretary of State for Health and Social Care*.[300] In *Good Law Project*, the Defendant had failed to comply with its published policy which required that contracts be published within twenty days of the award of the contract or the end of the standstill period. No positive decision had been made to that effect. Moreover, the evidence put forward provided a cogent explanation why the requirement had not been complied with, but it did not demonstrate that the Defendant or the Government had formed the view, even after the event, that the time limit requirements should have been, or should now be, modified. This case is clearly distinguishable because, in particular:

(a) GEMA addressed squarely the fact that it was selecting an option that was imperfect, and outlined what it intended to do about it. GEMA's case on this appeal did not involve advancing a retrospective explanation for a decision that was not taken. It also did not involve any reliance on a margin of appreciation in respect of what is the correct construction of the Connection Exclusion (see further below).[301] GEMA outlined what it considered the right answer to be.

(b) GEMA's decision to approve the Original Proposal was itself designed to avoid illegality, ie what it considered to be the likely imminent breach of the Permitted Range under the status quo.[302] As outlined at paragraph 5.138, we agree with GEMA's conclusion that such a breach was serious, imminent and likely. The better than the status quo test included consideration of which option would better facilitate compliance with EU law. The Original Proposal represented an improvement on the position under the status quo, in circumstances where there was no immediate

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[300] *R (Good Law Project Limited & Others) Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin), paragraphs 127–135. Main Hearing, 4 March 2021, Transcript, page 7, lines 5–9.
[301] Response, paragraph 90.8.
[302] Main Hearing, 4 March 2021, Transcript, page 94, lines 1–6.

alternative remedy that could be implemented in order to avoid a breach of the ITC Regulation.

5.150 Fifth, as outlined at paragraph 5.17 above, the Appellants are wrong to characterise GEMA's position as justifying its approval of the Original Proposal by reference to it enjoying a margin of discretion over what the correct construction of the Connection Exclusion is. It was common ground from the outset, and is clear from the Decision itself, that the Original Proposal did not properly give effect to the Connection Exclusion, and that GEMA accepted this. Its reasons for approving it were instead explained by reference to the options available to GEMA in seeking to comply with the correct construction of the Connection Exclusion. No perfect option was available.

5.151 Thus, we conclude that, as a matter of principle, it is not enough for the Appellants to argue that any failure to fully implement the correct construction of the Connection Exclusion vitiates, automatically, the legality of the Decision. In our view, it is relevant, for the reasons given above, to consider the context (including the applicable legal test) and reasons for the Decision. The onus is on the Appellants to show, on that basis, that GEMA was wrong to proceed as it did.

5.152 As we set out under Ground 2 below the Appellants have not satisfied this burden.

6. Ground 1: Error of law and/or fact in relation to construction and/or application of the Connection Exclusion

Introduction

6.1 In this section we address Ground 1. In summary, the Appellants' case under this ground is that GEMA's construction of the Connection Exclusion was wrong in law and/or based on erroneous appraisals of fact as to the nature of charges incurred which are required for the connection of a Generator to the relevant electricity transmission system.[303]

6.2 The Appellants divided Ground 1 into five 'discrete limbs' (1(a) to (e)). For ease of presentation, we refer to those as sub-grounds in this section and elsewhere in this Decision. We address each of those sub-grounds below.

[303] NoA, paragraphs 115 to 163 and Response, paragraphs 12 to 24.

6.3 Before doing so, however, it is helpful to put the Parties' arguments in context. As originally advanced in the NoA, each of these discrete limbs formed part of the Appellants' challenge of the construction of the Connection Exclusion inherent in the approval of the Original Proposal.

6.4 As outlined in the Preliminary Issues Chapter (Chapter 5), it was, however, common ground that the Original Proposal was based on an incorrect construction of the Connection Exclusion.[304] It was apparent from the pleadings that the following points were also common ground:

(a) The Connection Exclusion must be given an autonomous EU law meaning. Therefore, it should not be defined by reference to GB domestic charging concepts.[305]

(b) Applying the purposive or teleological approach to the interpretation of EU law, the meaning of the Connection Exclusion 'must be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is a part'.[306]

(c) The interpretation of the Connection Exclusion, being a matter of construction of the words in legislation, was a question of law – as to which there was no role for discretion or regulatory judgement.[307]

6.5 However, GEMA did not accept that this error in the Original Proposal rendered the Decision unlawful. In advancing that position, GEMA relied on its own construction of the Connection Exclusion as set out in the Decision. In response, the Appellants also confirmed that they challenged GEMA's own construction of the Connection Exclusion which GEMA set out in the Decision, relying upon similar arguments to those advanced in their challenge to the construction inherent in the Original Proposal (while also arguing that GEMA

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[304] List of Issues, Issue 12. See also Reply, paragraph 51. This common ground was also highly relevant to agreed Issue 9.3 which read: 'Did the contested Decision apply a construction of the Connection Exclusion which was wrong in principle or which proceeded on a flawed factual appraisal? [Ground 1(c)]'. The Parties agreed the answer to this issue was 'yes' but had different reasons for reaching that conclusion. We discuss the Appellants' challenge to the construction of the Connection Exclusion inherent in the Original Proposal, and to GEMA's own construction of the Exclusion, under sub-ground 1(c) below.
[305] NoA, paragraph 115.1; Appellants' Skeleton, paragraph 20; and Reply, paragraph 54.2 (referring to Case C-236/01 *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri*, ECLI: EU: C: 2003:431, paragraph 72).
[306] NoA, paragraph 116 and Reply, paragraph 54.1, each referring to Case C-568/15 *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main* [2017] ECLI:EU:C:2017:154, paragraph 19 and to the CMA 2018 Decision, C20, paragraph 5.76.
[307] Response, paragraph 7 (referring to *R (Gillan) v. Commissioner of the Police of the Metropolis* [2004] EWCA Civ 1067, [2005] QB 388, CA at [30]) and Reply, paragraph 90.8 (referring to *R (Goodman) v London Borough of Lewisham* [2003] EWCA Civ 140, [2003] Env LR 28); see also GEMA Skeleton, paragraph 2

could not rely on its own construction of the Connection Exclusion, to which the Decision did not give effect).[308]

6.6 Thus, while the Parties agreed that the interpretation of the Connection Exclusion inherent in the Original Proposal was wrong, they did not agree on the reasons why this was the case. In summary:

(a) The Appellants submitted that only GOS should be treated as connection assets for the purposes of the ITC Regulation. Save for GOS, no Local Assets should be treated as connection assets as they were used for the purposes of transmission of electricity across the system, not for connection. Alternatively, any Local Asset that was shared by multiple users should be treated as a transmission network asset and not as a connection asset. Charges levied for the use of such assets were not therefore within the scope of the Connection Exclusion.[309] The Appellants added that the CMA 2018 Decision had expressly declined to rule on the situations in which charges for the use of shared, shareable or pre-existing transmission network assets would fall within the Connection Exclusion.[310]

(b) Conversely, GEMA submitted that, consistent with the CMA 2018 Decision, all charges paid by a Generator in respect of assets (shared/shareable or otherwise) that were required to connect the Generator in question to the system as it existed at the time the Generator wished to connect fell within the Connection Exclusion, as did charges in respect of any upgrade to that connection.[311] By contrast, charges paid by a Generator in respect of assets which already existed at the point at which the Generator wished to connect did not fall within the Connection Exclusion, since from the perspective of that Generator such assets were part of 'the system' rather than being required for the Generator's connection to it.[312]

6.7 We note that neither of the Parties stated that they disagreed with the findings of the CMA 2018 Decision: the Appellants stated that they were not

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[308] See paragraphs 6.31 to 6.36 above.
[309] NoA, paragraphs 115.3 and 120 and Appellants' Skeleton, paragraphs 17 to 20. See also Response, paragraph 15 in which the Appellants critiqued GEMA's preferred construction of the Connection Exclusion.
[310] Appellants' Skeleton, paragraph 16.
[311] Reply, paragraph 57 and GEMA's Skeleton, paragraph 11.
[312] Reply, paragraph 58 (Case C-568/15 *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main* [2017] ECLI:EU:C:2017:154) and GEMA's Skeleton, paragraph 11 GEMA set out various examples to illustrate its interpretation of the Connection Exclusion (Reply, paragraph 59). GEMA also submitted that various hypothetical scenarios put forward by the Appellants in which non-MITS assets could be used by both a Generator and demand (NoA, paragraphs 124,140,142, 143, 145 and 148 -152) were extremely rare in practice and that the introduction of a demand-side user did not change GEMA's analysis (Reply, paragraph 60).

challenging that decision[313] and GEMA submitted that the present appeal should proceed on the footing that the CMA 2018 Decision was correct.[314] Where relevant, therefore, we have treated the reasoning set out in the CMA 2018 Decision as the relevant starting point for considering the Appellants' challenges to the construction of the Connection Exclusion (a) inherent in the Original Proposal and (b) advanced by GEMA.

6.8 We have structured the remainder of this section as follows:

(a) First, we set out the key submissions made by the Parties in respect of each of the specific aspects of Ground 1, as advanced against the Original Proposal and GEMA's own construction of the Connection Exclusion (paragraphs 6.9 to 6.71).

(b) Second, we outline our decision on the sub-grounds (paragraphs 6.72 to 6.126). Where applicable, we refer to points we have addressed in Chapter 5 (Preliminary Issues) and later chapters given the overlap with points addressed in those chapters.

Sub-ground 1(a): Failure to give an autonomous EU law meaning to the Connection Exclusion

The Appellants' submissions

6.9 The Appellants submitted that the construction of the Connection Exclusion adopted by the Original Proposal which GEMA had approved failed to give an autonomous EU law meaning to the Connection Exclusion.[315] In addition to the points summarised above, the Appellants submitted that:

(a) The Original Proposal had adopted a definition of Connection Charges which deviated from the definition given in the CUSC and the NGESO Transmission Licence: it was factually wrong for the Original Proposal to be based on the transmission system being the MITS (as considered by its proposer, NGESO), rather than the NETS.[316] The Appellants subsequently re-framed this point by submitting that the Original Proposal

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[313] Response, paragraph 10 and NoA, paragraph 47. See also various references in the NoA in which the Appellants referred to findings in the CMA 2018 Decision with which they did not disagree (for example, NoA, paragraphs 116, 145 and 160), or expressly stated that they did not seek to impugn in this appeal (NoA, paragraph 150).
[314] Reply, paragraph 32. See also various references in the Reply in which GEMA referred to the findings of the CMA 2018 Decision with approval (for example, Reply, paragraphs 54 to 57, 59, 66, 67, 70 and 71; see also GEMA Skeleton, paragraphs 9 to 11, 14, 16).
[315] NoA, paragraph 115.1.
[316] NoA, paragraphs 117 and 118.1.

treated the MITS as the relevant transmission system, but GEMA recognised that the relevant transmission system for determining connection was the NETS. Local Assets formed part of that system (that is, the NETS). Save for GOS, those Local Assets were used for the purposes of transmission of electricity across that system by one or more Generators and/or Demand. That construction fell within an autonomous EU law concept of use for the purposes of transmission not connection, and therefore the relevant charges fell outside the scope of the Connection Exclusion.[317]

(b) The Original Proposal applied the CUSC incorrectly, since it proposed to include all Local Charges on a blanket basis within the Connection Exclusion, even though the CUSC framework did not do so, and instead treated those charges as transmission charges.[318] The Decision accordingly approved a proposal which GEMA itself recognised was flawed and was inconsistent with EU law.[319]

6.10 The Appellants also submitted that it was no answer for GEMA to refer to its 'expectation' that NGESO would bring forward an appropriate proposal to rectify the position in due course.[320] In response to GEMA's reliance on its own construction of the Connection Exclusion in reply to this sub-ground, the Appellants argued that their challenge was to the Original Proposal as approved. The effect of the Decision was to give effect to the Original Proposal which, it was admitted, was based on an incorrect construction of the Connection Exclusion. GEMA could not rely on its own interpretation of the Connection Exclusion, to which the Decision did not give effect.[321]

GEMA's submissions

6.11 As outlined above, GEMA accepted, as it had in the Decision, that the Original Proposal did not reflect the correct interpretation of the Connection Exclusion.[322]

6.12 However, GEMA rejected the Appellants' submission that it had failed to give an autonomous EU law meaning to the Connection Exclusion. GEMA submitted that its own interpretation of the Connection Exclusion was formulated by reference to the assets to which charges related, and could be

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[317] Appellants' Skeleton, paragraph 20.
[318] NoA, paragraphs 117, 118.2 and 120.
[319] NoA, paragraphs 119 and 120.
[320] NoA, paragraph 121.
[321] Response, paragraphs 2, 3 and 17.
[322] Reply, paragraph 51.

applied anywhere in the EU. Its definition was not therefore formulated by reference to concepts which were peculiar to GB (eg TNUoS charges).[323]

6.13 GEMA submitted that it was the Appellants who had failed to give an autonomous EU law meaning to the Connection Exclusion: for example, by attacking the Original Proposal that GEMA had approved for deviating from definitions given in the CUSC and the NGESO Transmission Licence, the Appellants had thereby suggested that the Connection Exclusion should be defined by reference to domestic GB concepts.[324]

6.14 GEMA further submitted that, in any event, the focus of sub-ground 1(a) was on attacking the interpretation of the Connection Exclusion found in the Original Proposal. The Appellants had therefore failed to engage with, let alone show any error in (i) GEMA's interpretation of the Connection Exclusion (which, GEMA explained, differed from the interpretation within the Original Proposal); or (ii) GEMA's reasoning as to why approving the Original Proposal as a stop-gap measure had been the best of the imperfect options available to GEMA.[325]

Sub-ground 1(b): GEMA's construction fails to give a teleological interpretation or take sufficiently into account the 'travaux préparatoires' for the ITC Regulation

The Appellants' submissions

6.15 The Appellants submitted that GEMA had erred in law in failing to construe the meaning and purpose of the ITC Regulation in accordance with its 'travaux préparatoires'.[326]

6.16 The proposed application of the Connection Exclusion to all Local Assets failed, in the Appellants' view, to give proper effect to the construction of the ITC Regulation: that was because the 'travaux préparatoires' demonstrated that connection charges were understood to relate to the 'one-off' act of connection, whereas once an asset was used for transmitting electricity

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[323] Reply, paragraph 66 referring to Case C-236/01 *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri*, ECLI: EU: C: 2003:431, paragraph 72 and the CMA 2018 Decision, C20, paragraphs 5.82-5.83.
[324] Reply, paragraph 67. For the same reasons, GEMA submitted, the description in *Graham I* as to what was classed as a 'connection asset' in the domestic GB charging framework was irrelevant to the question of how the Connection Exclusion should be interpreted.
[325] Reply, paragraph 68; GEMA's Skeleton, paragraph 15.
[326] NoA, paragraph 123 and paragraph 122 referring to C-583/11 *P Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECLI:EU:C:2013:625, CJEU at [59]; Case C-477/13 *Angerer* [2015] ECLI:EU:C:2015:239, CJEU at [33]; and Case C-304/15 *Commission v. United Kingdom* [2016] ECLI:EU:C:2016:706, CJEU, per Advocate General Bobek at [39]-[45].

(perhaps over time it had become part of a shared transmission network) it should thereafter be subject to charges for the use of the transmission system.[327] The Appellants added that the CMA 2018 Decision had expressly declined to rule on the issue arising in the present appeal, since it only dealt with offshore GOS infrastructure, which the Appellants stated that, on the CMA's factual findings, never became part of a formal transmission system.[328]

6.17 The Appellants developed their submissions regarding the relevance of the 'travaux préparatoires' at great length by reference to (i) the ERGEG Guidelines[329] and (ii) the EU Commission's adoption of the Guidelines in Part B of the Annex to the ITC Regulation.[330] We do not repeat all of the points made here, but we have taken each of them into account. Key points made by the Appellants included the following:

(a) The ITC Regulation had effectively put on a formal legislative basis the ERGEG Guidelines, which had adopted the same €2.50/MWh cap for GB transmission charges and had also excluded from the scope of transmission charges (among other matters) connection charges.[331]

(b) The ERGEG Guidelines drew a distinction between the initial (that is, 'one-off') charge for connection to the transmission system and the subsequent transmission charges.[332]

(c) The Commission's Impact Assessment[333] on its proposal to adopt the ITC Regulation had made clear that charges could be for both the actual use of the transmission system and the costs of connecting to the system, with the latter being described as the 'the initial costs associated with connecting … to the network'.[334]

(d) The Commission had formally decided to adopt the ERGEG Guidelines in almost identical terms and there was nothing to indicate that it had intended to give a drastically broader construction to the concept of connection charges when it excluded them from the use of transmission charges covered by the ITC Regulation.[335]

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[327] NoA, paragraphs 123 and 124; Appellants' Skeleton, paragraph 21.
[328] NoA, paragraph 124, referring to the CMA 2018 Decision, C20, paragraph 5.99.
[329] ERGEG is an acronym for the European Regulators' Group for Electricity and Gas. The Appellants submitted that the historical genesis of the ITC Regulation was to be found in the ERGEG Guidelines of 18 July 2005 which were developed at the instigation of the EU Commission in 2005 (NoA, paragraphs 125 and 128).
[330] NoA, paragraphs 125 to 136. For ease of presentation, we refer to the Guidelines as the ITC Regulation, A43.
[331] NoA, paragraphs 125, 135 and 136.
[332] NoA, paragraphs 128 and 129.
[333] ITC Regulation Impact Assessment, A30, page 51.
[334] NoA, paragraph 133.10.
[335] NoA, paragraph 137.

6.18 The Appellants further submitted that the 'travaux préparatoires' also viewed the process of connection as an initial stage in a process leading to the use of a transmission network by a Generator or supplier. Connection was an act which was a precursor to the use of a transmission network, rather than the use of the transmission network itself.[336]

GEMA's submissions

6.19 GEMA agreed that Part B of the Annex to the ITC Regulation had its origins in the ERGEG Guidelines and the ITC Regulation Impact Assessment had indicated that this was intended to adopt the ERGEG Guidelines without any substantive modification and make them binding.[337]

6.20 However, GEMA submitted that sub-ground 1(b) was directed at an argument that only 'one-off' charges fell within the Connection Exclusion and that this was supported by the 'travaux préparatoires' for the ITC Regulation. That argument had already been considered and (rightly) rejected in the CMA 2018 Decision.[338] GEMA added that the Appellants' argument was also inconsistent with the proposals that the Appellants had put forward: both WACM7 and WACM14 would treat many TNUoS charges, which were not one-off, as falling within the Connection Exclusion.[339]

6.21 GEMA also submitted that the CMA 2018 Decision[340] had considered and (rightly) rejected the Appellants' arguments that: (a) the Connection Exclusion covered only 'charges incurred in relation to physical assets used for the act of connection', as distinguished from 'charges associated with physical assets used for transmission'; (b) there is 'some ill-defined point' at which 'a "connection asset" (whatever that might be)' ceased to be so and became a 'transmission asset'.[341]

6.22 Finally, GEMA contended that sub-ground 1(b) was, like sub-ground 1(a), focused on attacking the Original Proposal and failed to engage with, let alone show any error in, GEMA's reasoning as to why approving the Original

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[336] Response, paragraph 18.
[337] Reply, paragraph 69, referring to the ITC Regulation Impact Assessment, A30, pages 37–38.
[338] Reply, paragraph 70, referring to the CMA 2018 Decision, C20, paragraph 5.111.
[339] Reply, paragraph 70; GEMA's Skeleton, paragraph 16.
[340] Reply, paragraph 71, referring to the CMA 2018 Decision, C20, paragraphs 5.94–5.96. GEMA submitted that the Appellants had sought to avoid the implications of the CMA 2018 Decision by saying that the assets with which it was concerned 'never became part of a formal transmission system' (NoA, paragraph 124). However, in GEMA's submission, the CMA had not said this and the offshore generation-only spurs with which the CMA 2018 Decision had been concerned were part of the NETS (that is, the GB transmission system) (Reply, paragraph 71 and footnote 33).
[341] Reply, paragraph 71. GEMA referred to NoA, paragraphs 138 and 124 respectively.

Proposal had been the best of the imperfect options available.[342] GEMA submitted that its own interpretation of the Connection Exclusion was 'entirely consistent with the 'travaux préparatoires''.[343]

Sub-ground 1(c): GEMA's construction is wrong in principle and/or based on errors in its factual appraisal

6.23 The relevance and application of the distinction drawn by the Appellants between connection (or 'connection assets') and transmission (or 'transmission assets') lay at the core of the dispute between the Parties.

6.24 The arguments advanced by the Parties under this sub-ground were substantial and varied. We start by providing a summary of their respective positions (building on that provided at paragraphs 6.1, 6.5 and 6.6 above), and then we provide a more detailed overview for each Party.

6.25 In summary, the Appellants emphasised the importance of applying the Connection Exclusion taking into account the functional evolution of the transmission system. In the Appellants' view, the function of an asset was key and that function (which could change over time[344]) served to determine whether the asset was being used for connection or for transmission.[345]

6.26 For the Appellants, the sharing of assets was highly relevant. Save for GOS, Local Assets that formed part of the transmission system were used for the purposes of transmission of electricity across that system by one or more Generators and/or Demand.[346] This meant that within the meaning of EU law the assets were used for transmission, not connection. The Appellants submitted that GEMA was wrong in principle to consider that an asset which may have initially been required for connection to the transmission network retained that status for time immemorial, regardless of the developing network infrastructure of which, after connection, it formed part.[347]

6.27 GEMA's view was that the Connection Exclusion applied to charges, not assets per se, and it was entirely consistent with the Connection Exclusion to

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[342] Reply, paragraph 72.
[343] GEMA's Skeleton, paragraph 16.
[344] The Appellants provided the example of a particular section of cable which, when initially constructed served only one Generator (thereby constituting a 'connection' asset for the purposes of the ITC Regulation), but which subsequently, by virtue of other cables and Local Substations being joined to it such that a meshed network developed) changed its function from one of connection to one of transmission, since it was serving the two or more Generators and/or Demand who used the local network (of which it formed part) for the transmission of electricity (Appellants' Skeleton, paragraph 23 and NoA, paragraph 124).
[345] Appellants' Skeleton, paragraphs 23 and 24.
[346] NoA, paragraph 142; Appellants' Skeleton, paragraph 20.
[347] NoA, paragraph 149.

have a situation in which (i) two Generators both paid TNUoS charges in relation to a particular asset, (ii) the TNUoS charges paid by one of the Generators fell within the Connection Exclusion and (iii) the TNUoS charges paid by the other Generator did not.[348]

6.28 GEMA's approach was, it said, in line with the CMA 2018 Decision. All charges paid by a Generator in respect of assets (whether shared/shareable or otherwise) that were required to connect the Generator in question to the system (ie the NETS, in the context of GB) as it existed at the time the Generator wished to connect fell within the Connection Exclusion, as did charges in respect of any upgrade of that connection. By contrast, charges paid by a Generator in respect of assets which already existed at the point at which the Generator wished to connect did not fall within the Connection Exclusion: from the perspective of that Generator, such assets were part of *'the system'*, rather than being required for the Generator's connection thereto.[349]

6.29 GEMA submitted that it was common ground that some Local Assets were shared or capable of being shared, and that sharing was likely to become more common in the coming years, including through the development of an offshore meshed network. The proper interpretation of the Connection Exclusion (which must have a uniform meaning throughout the EU) was, however, incapable of being affected by what transmission infrastructure was or was not built in GB. Whether or not charges paid by particular Generators in respect of particular parts of the offshore meshed network fell within the Connection Exclusion would depend on the particular facts in question in each case.[350]

6.30 A further complexity under sub-ground 1(c), as outlined above at paragraphs 6.3 and 6.5 above, was that it was advanced ultimately on two bases. First, as a challenge to the Original Proposal as adopted by the Decision, which both Parties agreed was based on an incorrect construction of the Connection Exclusion. Second, as a challenge to GEMA's own construction of the Connection Exclusion which was also set out in the Decision. We distinguish where relevant in this section, and in our decision on sub-ground 1(c), on the Parties' positions on each aspect of this challenge to the Decision.

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[348] GEMA's Skeleton, paragraph 14.4 and Reply, paragraph 59.3.
[349] GEMA's Skeleton, paragraph 11.
[350] GEMA's Skeleton, paragraph 12.

The Appellants' submissions

6.31 Under sub-ground 1(c), the Appellants' challenge was mounted on a number of bases.[351]

6.32 The Appellants submitted that, as a matter of principle, the Connection Exclusion necessitated a distinction to be drawn, as the CMA 2018 Decision had done, between: (i) those assets required by an individual Generator[352] for connection to the transmission system; and (ii) those assets deployed in the transmission network for purposes other than being required for connection of that individual Generator to the system.[353]

6.33 The Appellants made various detailed submissions further to that point of principle which (in the course of the exchange of pleadings) distilled to the following key points:

(a) GEMA should have found that, while GOS were connection assets (since they represented radial spurs from the transmission system which only one Generator[354] used), other Local Assets (comprising Local Circuits and local substations) by their nature served to link more than one local Generator or Demand or both to the broader transmission network.[355] Thus, with the exception of GOS, those Local Assets (being part of a local network) formed part of the system (that is, the NETS) over which electricity was transmitted. Charges levied for their use were necessarily charges levied for the transmission of electricity.[356]

(b) In contrast, those specific assets (including GOS) which were required to connect a Generator to a local substation would, where they were not

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[351] NoA, paragraphs 140 to 152.
[352] The Appellants added that this applied also to the situation of two Generators in a pre-determined partnership arrangement, falling short of shared use of an identified transmission network.
[353] NoA, paragraph 141, referring to the CMA 2018 Decision, C20 paragraphs 5.86–5.87.
[354] The Appellants added that this applied also to the situation of two Generators in a pre-determined partnership arrangement, falling short of shared use of an identified transmission network.
[355] NoA, paragraph 142 (and see also NoA, paragraphs 146 and 147 as to the relevance of a generator-only spur being a radial spur for how charges for the use of assets should be categorised). The Appellants added that this was the case even if a particular Generator was, in fact, the first entity to use a given circuit (NoA, paragraph 142) and they provided an example of such a situation (NoA, paragraph 143). The Appellants further submitted that GEMA's focus should have been on whether or not a particular asset was required for transmitting electricity across a defined network or was required for connection (NoA, paragraph 144).
[356] Appellants' Skeleton, paragraph 22 (and see also Response, paragraph 21 on the relevance of the use of the assets in question). The Appellants added that the above conclusion applied even if local assets were not shared enough to form part of the MITS, since the relevant transmission system was the NETS – the MITS was a domestic construct and did not have an autonomous EU law definition (Appellants' Skeleton, paragraph 22; see also NoA, paragraph 152 noting the flaw in using the MITS to determine the basis for charges falling within or outside the Connection Exclusion, as the Original Proposal did, in the Appellants' view).

shared with any other Generator or Demand, amount to assets used for the connection of the Generator to the local network.[357]

(c) If a particular section of cable when initially constructed served only one Generator, then it would continue to be a 'connection' asset for the purposes of the ITC Regulation.[358] If, however, other cables and local substations were joined to the initial cable, then a meshed network would develop. Therefore, the function of the original cable as an asset changed from being one of connection to one of transmission, since it was serving two or more Generators and/or Demand who used the local network (of which it now formed part) for the transmission of electricity.[359]

6.34 More specifically in relation to shared assets, the Appellants submitted that the fact that either onshore or offshore Local Assets were shared between multiple users of the transmission network, which may include sharing with other Generators and/or Demand, was a highly relevant factor in how charges for the use of those assets should be categorised.[360] The Appellants made a number of points, including the following:

(a) A GOS that was shared with a Demand user was no longer a 'generator only' spur and a GOS shared with multiple Generators was no longer used by a single Generator. Where assets were subject to a shared use, the charging for the use of those assets should reflect that shared use. Treating each Generator as separately requiring all of those assets for connection made no sense.[361]

(b) The transmission network had evolved over a period of many decades and would continue to evolve. That meant that many assets that might originally have been required to connect a Generator had been subsequently swallowed up to become a fully integrated part of the core meshed MITS network. The Appellants stated that they agreed with (what they considered to be) GEMA's position that nothing in the MITS was required for connection.[362]

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[357] Appellants' Skeleton, paragraph 23. See also NoA, paragraph 150.
[358] Appellants' Skeleton, paragraph 23 and Response, paragraph 15.1.
[359] Appellants' Skeleton, paragraph 23. The Appellants submitted that the CMA 2018 Decision expressly did not address the situation in which the nature of the offshore network was developing, so that the relevant offshore assets (cables, local substations, plant etc) were 'a new segment of transmission system' (NoA, paragraph 145, referring to the CMA 2018 Decision, C20, paragraph 5.98(b)). The Appellants further submitted that the CMA 2018 Decision was not dealing with the situation of two different Generators using Local Assets having sequential connections to the transmission network Response, paragraph 20 and NoA, paragraph 145). See also Response, paragraph 15.2.
[360] NoA, paragraph 148 and Response, paragraph 20.
[361] NoA, paragraph 148.
[362] Main Hearing, 4 March 2021, Transcript, page 22, lines 4 to 9.

(c) However, the Appellants disagreed with GEMA as to where to draw the line between connection and transmission. The Appellants did not subscribe to a concept of different degrees of sharedness and in their view any sharing at all was enough (rejecting what the Appellants considered to be GEMA's view that enough sharing was achieved in the MITS).[363]

6.35 The Appellants further submitted, in the alternative, that the construction of the Connection Exclusion implemented through the Original Proposal was wrong in law, since it failed to draw relevant distinctions between the first use of a Local Asset to connect a Generator to the NETS and one or more subsequent network users who necessarily would be making use of an established transmission asset for the purposes of using a pre-existing part of the NETS infrastructure (rather than requiring a new asset to be put in place).[364]

6.36 In light of the above, the Appellants submitted that:

(a) The Original Proposal failed to deal with the issue of the functional evolution of the system, since it would wrongly exclude all of the assets in the local offshore network from the calculation for the purposes of compliance with the Permitted Range under the ITC Regulation.[365] That was because the Original Proposal would include all Local Charges on a blanket basis within the Connection Exclusion.[366]

(b) GEMA's approach (even on its preferred reasoning) was flawed since it would treat shared Local Assets which were in fact used for transmission

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[363] Main Hearing, 4 March 2021, Transcript, page 51, lines 14 to 15 and page 53, lines 5 to 7. The Appellants added that the definition set by the MITS was purely an internal construct for internal CUSC GB regulatory purposes only (Main Hearing, 4 March 2021, Transcript, page 51, lines 17 to 19). The Appellants submitted that it was wrong to focus, as GEMA had contended, on charges under the MITS rather than the underlying assets, as to do so would have recourse to domestic charging concepts rather than giving an autonomous EU law meaning to the Connection Exclusion (Main Hearing, 5 March 2021, Transcript, page 8, lines 2 to 10; the Appellants advanced a series of further arguments including that: (i) GEMA had previously submitted to the CMA Panel in the CMP261 appeal that, in order to apply the Connection Exclusion, it was necessary to look at the nature of the underlying assets funded by Local Charges not merely at their nominal classification within the domestic GB charging structure; and (ii) although the MITS charges referred to by GEMA were raised on a zonal basis, they were nonetheless charges for use of a transmission system (Main Hearing, 5 March 2021, Transcript, page 8, lines 10 to 25 and page 9, line 1)).

[364] NoA, paragraph 151. See also Response, paragraph 15.3. The Appellants added that while GEMA had indicated that in principle it would sanction such an approach, that was not in fact an approach which was followed in the Original Proposal that GEMA had approved, which drew no such distinction (NoA, paragraph 151). In the NoA, the Appellants challenged the Original Proposal, as this was what the Appellants said GEMA had endorsed through the Decision. However, in response to GEMA's reliance on its own construction of the Connection Exclusion, which was also set out in the Decision, the Appellants noted that they were challenging both GEMA's reasoning as to what GEMA saw as the correct interpretation of the Connection Exclusion, as well as GEMA's adoption of the Original Proposal (Response, paragraph 22).

[365] Appellants' Skeleton, paragraph 24.

[366] NoA, paragraphs 117, 118.2 and 120.

as nonetheless still constituting a connection asset used by the first Generator in time who happened to connect to it.[367] It would also continue to treat GOS as being connection assets, even if those radial spurs became fully incorporated in a meshed local network.[368]

GEMA's submissions

6.37 GEMA's response to this sub-ground raised essentially three lines of argument:

(a) the challenge to the correctness of the Original Proposal was a 'straw man' because GEMA did not endorse the Original Proposal through adopting the Decision;

(b) the Appellants had failed to provide any clear explanation of what they considered the Connection Exclusion to cover or why;

(c) the Appellants had failed to demonstrate that GEMA's own construction of the Connection Exclusion was wrong. In particular, the Appellants were wrong to say that in general a charge should not fall into the Connection Exclusion if it related to an asset that was shared.

6.38 We summarise each line of GEMA's argument, insofar as necessary, below.

6.39 Before doing so, we outline GEMA's own construction of the Connection Exclusion as this formed a central plank of GEMA's response to this sub-ground.

GEMA's interpretation of the Connection Exclusion

6.40 In the Decision, GEMA stated that it did not consider that any of the proposals before it incorporated the correct interpretation of the Connection Exclusion.[369] GEMA set out its analysis of the correct interpretation of the Connection Exclusion in Legal Annex Two of the Decision.

6.41 The key points of GEMA's analysis were as follows:

(a) GEMA's starting point was that it agreed with the conclusions reached in the CMA 2018 Decision. GEMA stated that the following findings were

[367] Appellants' Skeleton, paragraph 25 and NoA, paragraph 149.
[368] Appellants' Skeleton, paragraph 25.
[369] Decision, A27, page 10; see also page 24, paragraph 2.

particularly useful in determining the correct interpretation of the Connection Exclusion:

(i) The Connection Exclusion, which uses words that are not defined, 'must be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is a part'.[370]

(ii) It would be wrong in principle to seek to define the Connection Exclusion by reference to the extant GB domestic charging structure.[371]

(iii) In the context of the Connection Exclusion, 'the system' means the system as it exists at the point that a new Generator wishes to be connected to it.[372]

(iv) When deciding whether or not a charge falls within the Connection Exclusion, it is necessary to ask whether the physical asset to which it relates was 'required for' the Generator to connect to 'the system' as it existed at that point – that is the same as asking whether, 'but for' the asset, the Generator would be connected to 'the system'.[373]

(v) Equipment by which a connection to 'the system' is effected continues to be 'required for' connection to 'the system' after the initial act of connecting, and charges in respect of such equipment continue to fall within the Connection Exclusion.[374]

(b) GEMA added that, in its view, 'the system' should be interpreted as the NETS (not the MITS), as that was the entire GB transmission system and there was nothing in the ITC Regulation to suggest that 'the system' was intended to refer only to some subset of the transmission system.[375]

(c) In terms of the relevant point in time at which the determination should be made as to which Local Assets are considered 'pre-existing' (that is, part of the NETS), GEMA's initial view was that the date of execution of the

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[370] Decision, A27, page 33, paragraph 2.a.
[371] Decision, A27, page 33, paragraph 2.b.
[372] Decision, A27, page 33, paragraph 2.c.
[373] Decision, A27, page 33, paragraph 2.c.
[374] Decision, A27, page 33, paragraph 2.d.
[375] Decision, A27, page 34, paragraph 7. GEMA described the MITS as the core part of the NETS and referred to the rest of the NETS as the Local Network, comprising Local Assets, namely Local Circuits and Local Substations (page 34, paragraph 6). It added that the MITS is a GB-specific concept, so for that reason also the MITS could not serve as a basis for the uniform interpretation of the Connection Exclusion across the EU (page 34, paragraph 7.b).

contracts between NGESO and the relevant Generator would be a reasonable proxy as to when a Generator wished to connect.[376]

(d) GEMA stated also that it did not consider that the fact that an asset was shared and/or shareable precluded it from falling within the Connection Exclusion. There was nothing in the ITC Regulation to indicate that an asset being shared or shareable was determinative of the matter.[377]

6.42 In view of the above, GEMA's conclusion was, in summary, that:

(a) the Connection Exclusion includes all charges paid by Generators in respect of Local Assets/assets (whether shared/shareable or otherwise) that were required to connect the Generator(s) in question to the NETS as the NETS existed at the time the Generator(s) wished to connect (and in that respect, were not pre-existing assets), or for the upgrade of such assets; and

(b) charges paid by Generators in relation to Local Assets/assets which existed at the point at which such Generator(s) wished to connect to the NETS did not fall within the Connection Exclusion.[378] [379]

6.43 GEMA also stated, for the avoidance of doubt, that if two Generators had both wanted to connect to the NETS at the same time and Local Assets were installed for them to share a connection from the outset, the Local Charges paid by both Generators in respect of those Local Assets would fall within the Connection Exclusion.[380]

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[376] Decision, A27, page 26. GEMA explained that that was the point at which the Generator and NGESO entered into a binding commitment under which NGESO agreed to provide the Generator with a connection. The connection offer (in particular, the Bilateral Connection Agreement) would also set out the Local Assets that would be required to be built or upgraded to facilitate the connection.
[377] Decision, A27, page 35, paragraph 8. GEMA added that, in its view, the CMA 2018 Decision appeared to endorse the view that charges in respect of a Local Asset that served the connection of two Generators to the system from the outset should fall within the Connection Exclusion (page 35, paragraph 8).
[378] Decision, A27, page 18 and page 35, paragraph 9. We note that at page 18, GEMA referred to 'Local Assets', whereas at page 35, it referred to 'assets'.
[379] GEMA gave an example of two Generators connecting to the transmission system (the NETS) in a similar area at different times. GEMA explained that the Local Assets required to connect the first Generator would fall within the Connection Exclusion, but if the second Generator used the same Local Assets, the Local Charges paid by the second Generator would not fall within the Connection Exclusion as they did not relate to assets required to connect the second Generator to the NETS as it existed when the second Generator wished to connect (Decision, A27, page 19).
[380] Decision, A27, page 19.

GEMA's case in response to sub-ground 1(c), and the elements of 1(b) which go to the issue of construction

6.44 First, as noted at paragraph 6.37(a), GEMA's response to sub-ground 1(c) (and Ground 1 in general) was that much of the Appellants' argument on the correct interpretation of the Connection Exclusion was directed towards a 'straw man', since GEMA had concluded that all of the options before it were based on incorrect constructions of the Connection Exclusion.[381]

6.45 Second, according to GEMA, the Appellants' position appeared to be that the Connection Exclusion should only cover charges in respect of 'GOS'. However, in GEMA's view, the Appellants had not provided any clear or precise definition of what they meant by 'GOS' in the context of the present appeal.[382]

6.46 Third, GEMA submitted that the Appellants had failed to provide any coherent analysis as to why GEMA's own interpretation of the Connection Exclusion was wrong, and/or why the Appellants' interpretation was right.[383] Among various points it made (which included (a) and (b) in paragraph 6.47 below), GEMA submitted that the Appellants appeared to assume that an asset must be classified as either a 'connection asset' or a 'transmission asset'. However, the ITC Regulation did not draw such a distinction – the Connection Exclusion applied to charges, not to assets per se. GEMA submitted that it was entirely consistent with the wording and purpose of the Connection Exclusion to have a situation in which: two Generators both paid TNUoS charges in relation to a particular asset; and the TNUoS charges paid by one of the Generators fell within the Connection Exclusion, whereas the TNUoS charges paid by the other Generator did not.[384]

6.47 As regards shared assets, GEMA disagreed with the Appellants' suggestion that, in general, a charge should not fall within the Connection Exclusion if it related to an asset that was shared.[385] GEMA rejected that proposition by making a number of points, including the following:

(a) There was nothing in the ITC Regulation (giving its words their 'usual meaning in everyday language') which provided any support for the

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[381] Reply, paragraph 10.1.
[382] Reply, paragraphs 74 to 75.
[383] Reply, paragraph 77 and GEMA's Skeleton, paragraph 17.
[384] Reply, paragraph 77.4 and GEMA's Skeleton, paragraph 14.4.
[385] Reply, paragraph 76, referring to NoA, paragraphs 141, 142, 148 and 150.

proposition that the Connection Exclusion was to be defined by reference to whether assets were shared.[386]

(b) Neither the Appellants (nor GEMA itself) had identified anything in the 'travaux préparatoires' which would support the Appellants' interpretation. GEMA's interpretation of the Connection Exclusion was consistent with the purposes of the legislation (as reflected in the 'travaux'), and there were sound economic reasons why it made sense that certain charges in respect of shared assets should fall within it.[387]

(c) The Appellants had expressly accepted (as they must, in light of the CMA 2018 Decision) that the fact that an asset that was shared did not preclude TNUoS charges in respect of it falling within the Connection Exclusion. However, the Appellants did not identify with any precision which charges in respect of shared assets they said would fall within the Connection Exclusion.[388]

(d) It followed from the Appellants' acceptance that some TNUoS charges in respect of shared assets fell within the Connection Exclusion, that they must also accept that neither WACM7 nor WACM14 represented the correct interpretation of the Connection Exclusion. That was because, GEMA submitted, WACM7 and WACM14 treated all Local Charges in respect of shared assets as falling outside the Connection Exclusion.[389]

(e) Whether or not the charges paid by particular Generators in respect of particular parts of an offshore meshed network fell within the Connection Exclusion would depend on the particular facts in question in each case.[390]

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[386] Reply, paragraph 77.2. GEMA added that it would often be the case that assets installed to connect a Generator to the NETS (and 'required for' that Generator's connection) were used solely by that Generator, but the words of the Connection Exclusion said nothing to suggest that whether an asset was shared was in itself a relevant criterion (ibid.).
[387] Reply, paragraph 77.3, referring also to Reply, paragraphs 56 and 59 in relation to the desirability of charges being cost-reflective and setting the right locational signals for Generators so as to achieve economically efficient outcomes. Among other points made by GEMA was the point that various hypothetical examples to which the Appellants had referred in support of their submissions were described in vague terms, and as such did not provide a useful basis for analysis (Reply, paragraph 77.5).
[388] Reply, paragraph 76.2.
[389] Reply, paragraph 76.3, referring to GEMA's more detailed reasons set out in Reply, paragraphs 64 to 65. GEMA added that the CMA had already held that charges in respect of certain shared assets did fall within the Connection Exclusion (GEMA's Skeleton, paragraph 14.5, referring to the CMA 2018 Decision, C20, paragraph 5.98(b)). See also table 4.2 and paragraphs 4.52 and 4.54 to 4.55 of this decision.
[390] GEMA's Skeleton, paragraph 12.

6.48 At the Main Hearing, GEMA provided the following further information in response to questions put to it by the CMA Panel in relation to the Appellants' submissions on shared assets and the MITS:

(a) GEMA agreed with the Appellants' view that once an asset became part of the MITS network then charges relating to that asset could not be regarded as falling within the Connection Exclusion, but not for the reasons given by the Appellants.[391]

(b) GEMA emphasised that the starting point for the correct interpretation of the Connection Exclusion was the charges, not the assets.[392] GEMA added that connection assets which were initially provided as local assets may subsequently become part of the MITS, and once they did so the charges which related to their costs became wider-locational charges, rather than Local Charges. Those wider-locational charges were structured so that they were not charged to particular Generators by specific reference to the particular assets used, unlike Local Charges. So, those charges were not attributable specifically to any particular assets used by particular Generators, although they sought to recover the costs of those assets overall. Generators instead were charged wider-locational charges on the basis of the region in which they were located.[393]

(c) GEMA added that, for the purposes of the Connection Exclusion, it was not that the nature or use of the asset changed (when it became part of the MITS); rather, the nature of the charges were no longer charges that fell within the Connection Exclusion.[394]

6.49 GEMA rejected the Appellants' submission that GEMA's construction of the Connection Exclusion had failed to draw relevant distinctions between the first use of a Local Asset to connect a Generator to the NETS and one or more subsequent network users.[395] GEMA submitted that its own interpretation of the Connection Exclusion (as opposed to the Original Proposal) did distinguish between the first and subsequent users, since as it had already explained both in its Reply and in the Decision itself, TNUoS charges paid by the first user would fall within the Connection Exclusion, and those paid by subsequent users would not.[396]

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[391] Main Hearing, 4 March 2021, Transcript, page 98, lines 7 to 12.
[392] Main Hearing, 4 March 2021, Transcript, page 98, lines 12 to 15.
[393] Main Hearing, 4 March 2021, Transcript, page 98, lines 15 to 25 and page 99, lines 1 to 7.
[394] Main Hearing, 4 March 2021, Transcript, page 99, lines 10 to 17 and page 100, lines 4 to 7.
[395] Reply, paragraph 78, referring to NoA, paragraph 151.
[396] Reply, paragraph 78, referring to Reply, paragraph 59.3.

6.50 GEMA concluded that sub-ground 1(c) failed to engage with, let alone show any error in, GEMA's reasoning as to why the Original Proposal had been the best of the imperfect options available.[397]

Sub-ground 1(d): GEMA's favoured construction fails to comply with the principles of proportionality and non-discrimination

The Appellants' submissions

6.51 The Appellants submitted that the outcome of GEMA's adoption of the construction of the Connection Exclusion inherent in the Original Proposal would be that a far higher level of charges for the use of assets that transmit electricity would be paid by Generators than would otherwise be the case. GEMA's approach accordingly favoured Suppliers or the final Consumer or importers of electricity from outwith GB to a disproportionate extent. The Appellants submitted that GEMA's construction accordingly failed to comply with the following general principles of EU law which should have been respected by the Decision:

(a) The principle of proportionality: the measures adopted must be appropriate to secure the attainment of the objective which they pursue and not go beyond what was necessary in order to attain it;[398]

(b) The principle of equality and the interrelated requirement of non-discrimination: persons in like situations should not be treated differently without objective justification; and persons in different situations should not be treated in the same way.[399]

6.52 The Appellants submitted that Recital (10) to the ITC Regulation made clear that a degree of harmonisation in the range of transmission charges should strengthen the internal market for electricity. The Decision had the effect of undermining that objective, by placing a disproportionate burden of costs on GB Generators, in circumstances where interconnectors and therefore importers of electricity paid no such charges. The differential impact of the charging regime that arose from the Decision meant that GB Generation was competitively disadvantaged: (a) the scope for GB Generators to supply

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[397] Reply, paragraph 78.
[398] NoA, paragraph 153 referring to Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151, CJEU, paragraph 16; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraphs 34–35; and Case C-165/98 *Mazzoleni v. Inter Surveillance Assistance SARL* [2001] ECR I-2189, paragraph 24. See also Appellants' Skeleton, paragraph 26.
[399] NoA, paragraph 153 referring to Joined Cases 201 and 202/85 *Klensch* [1986] ECR 3477, CJEU, paragraphs 9–11. See also Appellants' Skeleton, paragraph 26.

customers in EU Member States was diminished; and (b) the scope for Generators located in other EU Member States to supply customers in GB was enhanced.[400]

6.53 The Appellants further submitted that Generators also paid a disproportionately higher share of transmission costs associated with Local Circuits and local substations than Suppliers, notwithstanding that Demand made use of Local Assets when receiving electricity onto local distribution networks. The Appellants submitted that this had a disproportionate impact on Generators, who would not be able to pass all or most of those additional costs on to the final Consumers for the reasons set out under Ground 4.

6.54 In response to GEMA's argument that the impact of adopting the Original Proposal, as compared to the Appellants' construction of the Connection Exclusion, was minimal, the Appellants submitted that GEMA's response wrongly confined the anticipated costs' burden imposed on Generators to a single charging year. It was not open to GEMA to rely on an unrealised aspiration that a further modification proposal would be raised and thereby resolve all of the issues associated with the Original Proposal; the Appellants submitted that the impact of the Decision had to be assessed on a longer-term basis, as per the figures given in Mr Tindal's witness statement.[401] See also Chapter 9, Ground 4: fundamental errors of appraisal.

GEMA's submissions

6.55 GEMA disagreed with the points raised by the Appellants under sub-ground 1(d) for four reasons.

6.56 First, GEMA submitted that the vague invocation of general principles of proportionality and equality could not be used to construe the Connection Exclusion in a way which had no support in the words of the ITC Regulation itself.[402]

6.57 Second, the factual premise of the Appellants' case that 'the outcome of GEMA's construction is that a far higher level of charges for the use of assets that transmit electricity are paid by Generators than would otherwise be the case' was wrong.[403] GEMA submitted that the Appellants accepted that the financial difference (in terms of what would be treated as falling within the Connection Exclusion) between the Original Proposal and the Appellants'

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[400] NoA, paragraph 154.
[401] Response, paragraph 23, which referred to *Tindal 1*.
[402] Reply, paragraph 80 referring to the CMA 2018 Decision, C20, paragraphs 8.7–8.20 and 8.26–8.29.
[403] Reply, paragraph 81 referring to NoA, paragraph 153, first sentence.

favoured approach was only £3 million in the charging year 2021/22. The financial difference between GEMA's own interpretation of the Connection Exclusion and the Appellants' approach was even less.[404] [405]

6.58 GEMA added that it did not envisage that the Original Proposal would be in place for more than one year.[406] Given that total TNUoS charges payable by Generators in 2021/22 were projected to be £813 million, £3 million was 'de minimis' in GEMA's view.[407]

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

(a) The Connection Exclusion was an autonomous EU law concept, having the same meaning across the EU and in the UK. GEMA submitted that the Appellants' complaint appeared to be that the upper end of the Permitted Range was higher in GB than in EU Member States (except Ireland). However, GEMA submitted that was an inherent feature of the ITC Regulation as enacted, not a consequence of GEMA's interpretation of the Connection Exclusion.[408]

(b) The fact that interconnectors, and thus importers of electricity, did not pay Local Charges did not provide a relevant point of comparison, since (i) an importer of electricity would have to pay the cost of such connection and/or transmission charges as applied in the Member State from which it was importing electricity; and (ii) Generators in GB did not have to pay those charges.[409]

6.60 Fourth, Generators were not in a relevantly comparable position to suppliers/demand, since suppliers/demand had no role in deciding where new generating facilities were located, and were thus not in a position to influence

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[404] Reply, paragraph 81 referring to *Tindal 1,* paragraph 7.11 and the table in which Mr Tindal compared the financial difference between the Original Proposal and WACM7 and showed that to be £3 million for 2021/22.
[405] We note also that the Appellants had submitted that the terms of WACM 72 or WACM 79 would 'substantially capture the "in principle" approach' to shared assets in the context of the functional evolution of the transmission system (Appellants' Skeleton, paragraph 24). At the Main Hearing, the Appellants clarified that both WACMs 72 and 79 used a definition of connection that was compliant with the CMA 2018 Decision. That decision only went so far and both of these WACMs would be consistent with that. However, in the Appellants' view there was only one correct autonomous interpretation and, of those two, WACM 79 was the one that was consistent with the ITC Regulation (Main Hearing, 4 March 2021, Transcript, page 33, lines 7 to 11]). We note that WACM 79 defined 'assets required for connection' as 'all local circuits and local substations except for pre-existing assets and shared assets' (WACM 79 [B13]).
[406] Reply, paragraph 81.
[407] Reply, paragraph 81 referring to NGESO Draft TNUoS Tariffs for 2021/22, A73, pdf page 5 (we note that the amount of £813m is shown on page 4).
[408] Reply, paragraph 82.1.
[409] Reply, paragraph 82.2.

the cost of connecting a new Generator to the NETS. GEMA submitted that the suggestion that TNUoS charges paid by Generators were in some unexplained way 'disproportionate' to those paid by demand should in any event be seen in the context that demand was forecast to pay over three times as much as Generators in TNUoS charges in 2021/22 (£2,596.5 million, as against £813 million).[410] The Appellants' arguments regarding the disproportionately higher share of transmission costs they felt they were bearing were addressed by GEMA within Ground 4.[411]

Sub-ground 1(e) Failure to comply with principles of legal certainty and regulatory consistency

The Appellants' submissions

6.61 In summary, the Appellants' case under sub-ground 1(e) was that the Decision, comprising part of the successive changes by GEMA in the interpretation of the Connection Exclusion, failed to comply with the principles of legal certainty and regulatory consistency.[412] The Appellants advanced their case on a number of bases, which are summarised below.

6.62 First, the Appellants submitted that GEMA, by the Decision, had sought to advance a 'short run' policy goal of avoiding a breach of the Permitted Range of the ITC Regulation at the expense of the wider structural security for generation, as well as undermining the internal market.[413]

6.63 Secondly, the Appellants submitted that GEMA's repeated redefinitions of the Connection Exclusion each time an impending breach of the Permitted Range of the ITC Regulation arose in GB, breached the principle of regulatory certainty.[414] The Appellants made a number of supporting points, including the following:

(a) GEMA's evidence in the CMP261 appeal before the CMA was that the Connection Exclusion did not extend to charging for Local Circuits and Local Assets found in the CUSC. GEMA's evidence was that connection

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[410] Reply, paragraph 83 referring to NGESO Draft TNUoS Tariffs for 2021/22, A73, pdf pages 5–6.
[411] Reply, paragraph 83 referring to NoA, paragraph 155. We also address those points under Ground 4.
[412] Appellants' Skeleton, paragraph 27.
[413] NoA, paragraph 156. The Appellants noted that the ITC Regulation Impact Assessment had recognised that the proposed Annex's Binding Guidelines could give rise to an incentive at a national level 'to increase charges [to Generators], and so provide a (short run) benefit to consumers', and that that would create a 'degree of legal and regulatory uncertainty, which has the potential to undermine [Generator] investment decisions in the internal market' (ibid. referring to the ITC Regulation Impact Assessment, A30, page 25).
[414] NoA, paragraph 157 referring to CMP224, CMP261 and CMP317/327 as examples of such repeated re-definitions.

assets stopped at the entry point to the local substation. The Appellants submitted that the CMA had seemingly endorsed that approach but declined to rule more widely than with regard to the proper classification of assets and use of assets on the GOS.[415]

(b) GEMA's contention in the CMP261 appeal was a distinct evolution from its historic treatment of connection assets.[416] The Appellants summarised various historical developments from 2003 to 2009[417] and concluded that the 'GB Connection Boundary' in place at the time of the ITC Regulation coming into effect included Local Circuit, local substation and GOS charges in the transmission use of system charging (not Connection Charging) structure. Those charges had been charged by NGESO to the Appellants as part of the TNUoS charges.[418]

(c) GEMA had consistently treated 'Local Charges as part of TNUoS charges, and not as connection assets outside of TNUoS';[419] and GEMA had communicated its approach to the EU Commission. In summary, while there had been adjustments in the charging arrangements over time, there had been no fundamental shift as to where the 'Connection Boundary' should be drawn in GB since 2005, or since the ITC Regulation was brought forward in 2009-10, until GEMA's decision in CMP261. The Appellants submitted that in the CMA 2018 Decision regarding CMP261, the CMA had concluded that connection assets would include GOS, but expressly had drawn no definitive conclusions about Local Assets more generally.[420]

6.64 The Appellants further submitted that GEMA, having previously redefined the boundaries from CMP 224[421] to CMP 261, had now, by its decision to approve the Original Proposal, shifted the definitional goalposts once more to advance a case which went beyond that previously put to the CMA. That, the

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[415] NoA, paragraph 157 referring to the CMA 2018 Decision, C20, paragraphs 3.33 to 3.34 and 5.86 to 5.87.
[416] NoA, paragraph 158.
[417] NoA, paragraphs 158.1 to 158.6.
[418] NoA, paragraph 159. The Appellants also referred extensively to GEMA's statement in the 2010 Great Britain and Northern Ireland National Reports to the European Commission in relation to Directives 2003/54/EC (Electricity) and 2003/55/EC (Gas), A40.
[419] Since the Appellants framed this submission by reference to 'Local Charges', we have taken the reference here to 'connection assets outside of TNUoS' to be a reference to charges (for connection assets) within the connection charging structure (drawing on the reference made to the connection charging structure at NoA, paragraph 159).
[420] NoA, paragraph 160.
[421] The Appellants submitted that the CMP224 Decision, A10, in 2014 at that stage confirmed the existing practice of treating charges associated with the use of GOS as well as the charges associated with 'local' circuits and/or 'local' substations as TNUoS charges rather than Connection Charges (NoA, paragraph 31).

Appellants submitted, had a deleterious effect on regulatory certainty and presented a chilling effect on future investment.[422]

6.65 Thirdly, the Appellants submitted, further or alternatively, that GEMA's approach also infringed its statutory obligation to act with regulatory consistency on the basis that it had approved a proposal which ran counter to certain findings in the TCR Decision.[423] However, following further submissions by GEMA,[424] the Appellants indicated that they were content for the TCR Decision to be treated as rectified.[425] We have taken this to mean that the Appellants no longer pursued their point that the approval of the Original Proposal ran counter to the findings in question in the TCR Decision.

6.66 Fourthly, the Appellants submitted that it had been open to GEMA to adopt a construction of the Connection Exclusion which better reflected the reasoning in the CMA 2018 Decision and which would have been more consistent with the interpretations that GEMA previously had made. However, by approving the Original Proposal GEMA exacerbated the degree of regulatory inconsistency to which Generators had been subjected.[426] Moreover, the Appellants submitted, GEMA clearly hoped that someone else would now put forward yet a further modification proposal and alight upon the 'correct' definition of the Connection Exclusion, to remedy the unlawful definition which GEMA had approved under the Original Proposal.[427]

GEMA's submissions

6.67 GEMA made two points in response to the Appellants' submission that GEMA had sought to advance a 'short run' policy goal of avoiding a breach of the Permitted Range of the ITC Regulation at the expense of the wider structural security for generation, as well as undermining the internal market:[428]

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[422] NoA, paragraph 161 referring to *Tindal 1*, paragraphs 7.2–7.9 and to paragraphs 7.28–7.40.
[423] NoA, paragraphs 162 (referring to paragraph 53) and 163 referring to the TCR Decision, A20, paragraph 4.79, page 124.
[424] Reply, paragraphs 35.4 and 85.4.
[425] Response, paragraph 11. The Appellants nonetheless maintained that GEMA was implying that it had made a drafting error (ibid.). In summary, the Appellants had submitted that the Original Proposal ran counter to the TCR Decision on the basis that the Original Proposal included all Local Charges (onshore and offshore) in the Connection Exclusion, whereas the TCR Decision (at paragraph 4.79, page 124) had stated on its face that Generators should face transmission charges for offshore Local Charges (without any qualification) and onshore Local Charges '(less those which fall into the 'Connection Exclusion')'. The Appellants noted that the qualification in brackets applied only in respect of onshore Local Charges. However, GEMA submitted that the statement at paragraph 4.79 of the TCR Decision should not be construed as a statement that no offshore Local Charges fell within the Connection Exclusion, since when the TCR Decision was read in the context of the CMA 2018 Decision, it was obvious that the qualifying words in brackets were intended to apply both to offshore Local Charges and onshore Local Charges (Reply, paragraph 35.4).
[426] Response, paragraph 24.
[427] Appellants' Skeleton, paragraph 27.
[428] Reply, paragraph 84 referring to NoA, paragraph 156.

(a) The Appellants had offered no coherent explanation as to how GEMA had undermined wider structural security for generation or the internal market. GEMA further submitted that, in any case, the difference in financial terms between the competing interpretations of the Connection Exclusion was relatively small.[429]

(b) In any event, (i) the proper interpretation of the ITC Regulation was a matter of law, not policy; [430] and (ii) compliance with the Permitted Range was a legal obligation, not a mere 'policy goal'. It would not have been properly open to GEMA to pursue non-statutory objectives at the expense of compliance with the Permitted Range.[431]

6.68 GEMA submitted that there was no proper basis for the Appellants' submission that GEMA had been inconsistent in its interpretation of the Connection Exclusion.[432] GEMA provided the following reasons:

(a) The Appellants had described various changes in how the costs associated with transmission infrastructure had been recovered as a matter of domestic GB law/practice, for example changes in whether particular costs were recovered via TNUoS charges as opposed to CUSC Connection Charges.[433] GEMA submitted that that was a matter of domestic classification and did not involve GEMA making any statement about the interpretation of the Connection Exclusion. GEMA further submitted that much of the history that the Appellants had recounted related to the period prior to the entry into force of the ITC Regulation.[434]

(b) GEMA had not expressed any concluded view on the interpretation of the Connection Exclusion in its decision on CMP224.[435]

(c) In the CMP261 Decision, GEMA had stated that there was 'no reasonable justification for treating most, if not all, Local Charges differently from charges that are labelled as connection charges in the context of the connection exclusion'.[436] In the CMP261 Decision, GEMA had also

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[429] Reply, paragraph 84.1 referring to Reply, paragraph 81.
[430] Reply, paragraph 84.2 referring to the CMA 2018 Decision, C20 paragraph 7.33.
[431] Reply, paragraph 84.2.
[432] Reply, paragraph 85 referring to NoA, paragraphs 157-163.
[433] Reply, paragraph 85.1 referring to NoA, paragraphs 158-160.
[434] Reply, paragraph 85.1.
[435] Reply, paragraph 85.2 referring to (i) the CMP224 Decision, A10, (ii) NoA, paragraphs 157 and 26–31 and (iii) the CMA 2018 Decision, C20, paragraphs 7.21–7.31.
[436] Reply, paragraph 85.3 referring to the CMP261 Decision, A53, page 8. GEMA added that the Appellants were incorrect in stating that in the CMP261 appeal GEMA's position had been that 'the Connection Exclusion did not extend to charging for Local Circuits and Local Assets' (NoA, paragraph 157). The diagram to which the Appellants had referred in support of their submission illustrated which assets were the subject of CUSC Connection Charges and which were the subject of TNUoS charges. Therefore, it related to domestic GB practice, and said nothing about the scope of the Connection Exclusion (Reply, paragraph 85.3, footnote 37).

identified that the relevant question was whether an asset was required for a Generator's connection to the system. That position was entirely consistent with the conclusion that GEMA had set out in the (CMP317/327) Decision.[437]

(d) The Appellants' submission based on paragraph 4.79 of the TCR Decision was without merit, since it appeared that the Appellants had misinterpreted what was stated in the TCR Decision.[438]

6.69 GEMA also submitted that the Centrica/BGT intervention[439] showed that GEMA had not failed to respect the principles of legal certainty and/or regulatory consistency.[440]

6.70 GEMA further submitted that, even if it had been inconsistent (which it denied for the reasons given above), that would be irrelevant to the proper interpretation of the Connection Exclusion. That was because the Connection Exclusion could only have one correct meaning, which must be the same throughout the EU and was incapable of being affected by statements of a regulator in a single (former) Member State. GEMA further submitted that even if it had previously adopted an incorrect interpretation of the Connection Exclusion, that would not stop it from adopting the correct interpretation now.[441]

6.71 GEMA submitted that Ground 1 should be dismissed.[442]

Our decision on Ground 1

6.72 Under Ground 1, the Appellants challenged both GEMA's approval of the Original Proposal and GEMA's own construction of the Connection Exclusion, on the basis that each of them incorrectly construed the Connection Exclusion.[443] The Appellants advanced a number of limbs under Ground 1, three of which (sub-grounds 1(a) to (c)) were advanced primarily at the level of principle and two of which (sub-grounds 1(d) and (e)) concerned the consequences of the claimed error.

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[437] Reply, paragraph 85.3.
[438] Reply, paragraph 85.4 referring to NoA, paragraphs 162-163. In summary, the Appellants had submitted that GEMA's approach had infringed its statutory obligation to act with regulatory consistency on the basis that the Original Proposal (approved by GEMA) ran counter to certain findings in the TCR Decision. See paragraph 6.65 (and the footnotes to that paragraph) above in relation to the submissions made by GEMA and the response of the Appellants.
[439] That is the intervention by Centrica plc and British Gas Trading Limited.
[440] GEMA Skeleton, paragraph 19 referring in particular to *Moran*, paragraphs 34–38.
[441] Reply, paragraph 86 and GEMA's Skeleton, paragraph 19 referring to the CMA 2018 Decision, C20, paragraphs 7.32–7.42 and the authorities cited there.
[442] Reply, paragraph 87.
[443] NoA, paragraph 115 and Response, paragraph 22.

6.73 Below we set out our assessment of, and conclusion on, Ground 1 by reference, in particular, to the conclusions we reached in Chapter 5: Preliminary issues.

Principles: the need for an autonomous EU law meaning and the purposive/teleological approach to the construction of the Connection Exclusion (sub-grounds 1(a) and (b))

6.74 The Appellants' arguments under sub-grounds 1(a) and 1(b) relied on two key principles: namely, (a) the need for the Connection Exclusion to be given an autonomous EU law meaning (sub-ground 1(a)); and (b) the requirement that the Connection Exclusion, as a concept of EU law, be given a purposive or teleological construction[444] (sub-ground 1(b)).

6.75 As noted in paragraph 6.4 above, it was apparent from the pleadings that it was common ground that these principles applied in this case.[445] We agree that these principles apply in determining the correct construction of the Connection Exclusion as that definition is set out in EU legislation (the ITC Regulation).[446] The Parties agreed that the issues arising under these sub-grounds were: 'Has the proper construction of the Connection Exclusion been applied by the Decision?'[447] In particular:

(a) Did the Decision fail to give an autonomous EU law meaning to the Connection Exclusion?[448]

(b) Did the Decision fail to consider the proper purpose behind the ITC Regulation in the light of its 'travaux préparatoires'?[449]

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[444] GEMA referred us to the *Monsanto* judgment of the CJEU, as cited in the CMA 2018 Decision. We note the relevant extract from that judgment, which states that:

> The need for the uniform application of Community law and the principle of equality require that the terms of a provision of Community law which … makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, which must take into account the context of that provision and the purpose of the legislation in question (see, to that effect, in particular Case C-287/98 Linster [2000] ECR I-6917, paragraph 43).

Case C-236/01 *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri*, ECLI: EU: C: 2003:431, paragraph 72 cited in the CMA 2018 Decision, C20, paragraph 5.82. Reply, paragraphs 31.2, 54.2 and 66.
[445] We note that although in the pleadings each of the Parties was of the view that these were the correct legal principles, the List of Issues agreed between the Parties made no reference to those principles having been agreed.
[446] See also the endorsement of those principles in the CMA 2018 Decision, C20, paragraphs 5.76, 5.82 and 6.24.
[447] List of Issues, Issue 9.
[448] List of Issues, Issue 9.1.
[449] List of Issues, Issue 9.2.

6.76 It was, however, common ground that the Original Proposal reflected the incorrect construction of the Connection Exclusion.[450] Thus, insofar as the Decision adopted that the Original Proposal GEMA failed to give an autonomous EU law meaning to the Connection Exclusion or to take a teleological approach to its construction. We consider the implications of GEMA's adoption of the Original Proposal for the legality of the Decision at paragraphs 5.136 to 5.151 above, and under Ground 2 (see paragraph 7.9 below).

6.77 As regards GEMA's own construction of the Connection Exclusion, whether or not this construction complies with the principles that EU law concepts must be given an autonomous meaning and a teleological or purposive approach must be adopted turns on our determination of sub-ground 1(c). Under that sub-ground, the Appellants challenged GEMA's own construction of the Connection Exclusion, as well as that adopted under the Original Proposal, on the basis that it was incorrect. As set out at paragraph 6.97 below, we have found under sub-ground 1(c) that the Appellants have not demonstrated that GEMA erred in the interpretation of the Connection Exclusion it set out in, in particular, Legal Annex Two of the Decision.

6.78 The Parties made a number of other points under sub-grounds 1(a) and (b) going beyond the level of principle, which we address elsewhere in this decision. Those submissions included in particular the following points:

(a) The Appellants relied on the 'travaux préparatoires' in support of their construction of the Connection Exclusion. They highlighted references in the 'travaux*'* to Connection Charges relating to a 'one-off' act of connection to the network, and argued that the 'travaux préparatoires' also viewed the process of connection as an initial stage in a process leading to the use of a transmission network by a Generator or Supplier. The subsequent use of an asset for transmitting electricity by multiple users rendered it a transmission asset. A connection asset that, perhaps over time, becomes part of a shared transmission network should be subject to charges for the use of the transmission system, not Connection Charges.[451] These points are addressed in paragraph 6.93 (and its footnotes) in relation to sub-ground 1(c).

(b) The Appellants argued that it was no answer to these sub-grounds for GEMA to refer to its 'expectation' that NGESO would bring forward an appropriate proposal to rectify the position in due course[452] and/or to rely on its own construction of the Connection Exclusion. These points are

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[450] List of Issues, Issue 12. See also Reply, paragraph 51.
[451] NoA, paragraphs 123 and 124; Response, paragraph 18; Appellants' Skeleton, paragraph 21.
[452] NoA, paragraph 121.

addressed at paragraphs 5.136 to 5.151 of the Chapter 5: Preliminary Issues, and paragraph 7.9(c) in relation to Ground 2.

(c) GEMA argued that the adoption of the Original Proposal as a stop-gap measure had been the best of the imperfect options available to GEMA, and this course of action was open to it as a matter of law.[453] This point is addressed in paragraphs 5.34 to 5.40, 5.53 to 5.59, and 5.136 to 5.151 above, and in paragraph 7.12 in relation to Ground 2.

Principles: the construction of the Connection Exclusion (sub-ground 1(c) and elements of sub-ground 1(b))

6.79 We have summarised at paragraphs 6.6 and 6.25 to 6.29 above the core disputes between the Parties under sub-ground 1(c). The crux of the debate was whether it is relevant to consider whether a 'connection asset' has become a 'transmission asset', which should be determined by reference to, in particular, whether that asset is shared or not.

6.80 Both the Appellants and GEMA referred to the CMA 2018 Decision in support of their respective positions on the construction of the Connection Exclusion. We therefore start our analysis by outlining the points of principle we draw from the CMA 2018 Decision. We then set out our view of the correct principled approach to the interpretation of the Connection Exclusion in the light of the core arguments raised by the grounds of appeal before us, followed by our decision on other key points of the Appellants' challenge under sub-ground 1(c).

The CMA 2018 Decision

6.81 The Connection Exclusion is defined as the 'charges paid by producers for physical assets required for connection to the system or the upgrade of the connection'.[454] For the purposes of the application of the ITC Regulation in GB, 'the system' is 'the transmission system of Great Britain'.[455]

6.82 Although the CMA 2018 Decision concerned the application of the Connection Exclusion to Offshore GOS,[456] it made a number of points of principle which are applicable more generally. Those points are as follows:

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[453] Reply, paragraphs 68 and 72.
[454] Point 2 of Part B of the Annex to The ITC Regulation, A43.
[455] Point 2 of Part B of the Annex to The ITC Regulation, A43.
[456] Offshore GOS comprised those assets of an offshore transmission owner which consisted of (a) an offshore substation (the Offshore Local Substation) and (b) subsea cables, which run from the Offshore Local Substation

(a) The Connection Exclusion is an EU law concept with an autonomous meaning. Therefore, it cannot be interpreted by reference to domestic law or domestic charging practice.[457]

(b) Applying the purposive or teleological approach, where EU legislation uses an expression which is not defined, the expression's meaning 'must be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is a part'.[458]

(c) The reference in the Connection Exclusion to 'the system' means the system as it exists at the point that a new Generator wishes to be connected to it.[459]

(d) Any assets that are 'required by that new Generator for connection to that pre-existing system' (such as Offshore GOS) fall within the Connection Exclusion.[460] The CMA 2018 Decision rejected the criticism of GEMA's 'but-for' test, that is whether but-for the asset the Generator would be connected to the system.[461]

(e) Those assets continue to be required by that Generator for connection to the pre-existing system even once the Generator is operational. Therefore, connecting equipment continues after the initial act of connecting to be 'required for connection to the system'.[462] The ambit of 'the transmission system' does not widen immediately upon the act of connecting.[463]

6.83 The CMA noted that there had been some debate among the Parties in that case as to how Offshore GOS would be categorised in the event that, at some future point in time, a radial link were to be built, connecting a second Generator to an offshore local substation built for the purposes of an initial offshore Generator, and whether this was informative of the correct interpretation of the Connection Exclusion. The CMA did not find this debate to be particularly illuminating. In any event the CMA 2018 Decision declined to

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to an onshore substation, from where electricity can be transmitted towards its ultimate users (CMA 2018 Decision, C20, paragraph 3.10).
[457] CMA 2018 Decision, C20, paragraphs 5.82, 5.83 and 6.24.
[458] CMA 2018 Decision, C20, paragraph 5.76(a), citing Case C-568/15 *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV v comtech GmbH*, ECLI:EU:C:2017:154, paragraph 19.
[459] CMA 2018 Decision, C20, paragraph 5.94.
[460] CMA 2018 Decision, C20, paragraph 5.94.
[461] CMA 2018 Decision, C20, paragraphs 5.97, 5.98 and 5.101.
[462] CMA 2018 Decision, C20, paragraph 5.94.
[463] CMA 2018 Decision, C20, paragraph 5.95. The CMA rejected the implication that the ambit of 'the transmission system' widened immediately upon the act of connecting, such that an Offshore GOS fell within it despite, prior to construction, clearly being an asset required for connection to the system.

express a view as to the categorisation of various Offshore GOS assets vis-à-vis that second Generator (or the first Generator) because those were not the facts in 2015/16, which was the charging year with which the decision under appeal was concerned.[464]

6.84 We note that the points of principle relied upon by GEMA, as set out at paragraph 6.41(a) above, correspond to those summarised at paragraph 6.82(a) to (e) above as arising from the CMA 2018 Decision. We note also that GEMA had stated that the CMA did not need to (and did not) provide a comprehensive ruling as to the precise ambit of the Connection Exclusion.[465] We agree. We set out our decision on sub-ground 1(c) directly below.

Our decision on sub-ground 1(c)

6.85 We have been invited to pronounce on the principled construction of the Connection Exclusion. In their agreed List of Issues, the Parties put an open-ended question for us to consider to the following effect: in light of the CMA's previous findings, in the CMA 2018 Decision, on the approach to determining the construction of the Connection Exclusion, 'what is the correct construction of whether charges are "paid by producers for physical assets required for connection to the system or the upgrade of the connection" (ie the Connection Exclusion)?'[466]

6.86 The Appellants have submitted that our answer to this question should 'serve to meet the changing system architecture for the years to come'.[467]

6.87 We note, however, that our statutory powers in determining the present appeal are prescribed by section 175(4) of the EA04. In summary, that section provides that the CMA 'may allow the appeal only if it is satisfied that the decision appealed against was wrong on one or more of the [statutory] grounds'.

6.88 We have therefore proceeded to set out the applicable principles for the correct interpretation of the Connection Exclusion only insofar as they are relevant to the determination of points raised in the present appeal, as advanced against the Original Proposal given effect by the Decision and GEMA's own construction of the Connection Exclusion. We were asked by the Parties to consider the correctness of both of these interpretations of the Connection Exclusion, although it was common ground that the Original

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[464] CMA 2018 Decision, C20, paragraph 5.99.
[465] Decision, A27, page 33, paragraph 3.
[466] List of Issues, Issue 7.
[467] Appellants' Skeleton, paragraph 16; see also Main Hearing, 4 March 2021, Transcript, page 18, lines 11 to 14.

Proposal was based on an incorrect construction of the Connection Exclusion.[468]

6.89 For the avoidance of doubt, we do not (indeed we cannot on the arguments as pleaded and facts presently put before us) attempt to cater for every situation that may arise in the future. Rather, the principles set out below will need to be applied to each situation as it arises on the facts in issue at the particular time, and this analysis will be subject to such developments in the law as are applicable at that time.

6.90 We note that neither of the Parties stated that they disagreed with the findings of the CMA 2018 Decision (see paragraph 6.7 above). Indeed, we were asked to consider the arguments raised by the Parties by reference to the CMA 2018 Decision (see paragraph 6.7 above).

6.91 Having had regard to the CMA 2018 Decision (insofar as it is relevant for present purposes) and the issues raised in the present appeal, we consider that the following principles govern the correct interpretation of the Connection Exclusion:

(a) The Connection Exclusion is enshrined in primary (EU) legislation. It is contained in a definition set out in the ITC Regulation. As outlined above, it was common ground between the Parties that the interpretation of the Connection Exclusion, being a matter of construction of the words in legislation, was a question of law - as to which there was no role for discretion or regulatory judgement (see paragraph 6.4(c) above). We agree.

(b) As was common ground, given that the Connection Exclusion is a term of EU law which uses words that are not further defined in the ITC Regulation, the application of the purposive or teleological approach means that the expression's meaning 'must be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is a part'.[469]

(c) Moreover, the Connection Exclusion is an EU law concept that must be given an autonomous and uniform interpretation throughout the EU, which must take into account the context of that provision and the purpose of the

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[468] List of Issues, Issues 6 and 8.
[469] Case C-568/15 *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV v comtech GmbH*, ECLI:EU:C:2017:154, paragraph 19. See also CMA 2018 Decision, C20, paragraph 5.76(a).

legislation in question.[470] Thus, it cannot be interpreted by reference to domestic law or domestic charging practice.[471] This was also common ground (see paragraph 6.4(a)).

(d) The reference in the Connection Exclusion to 'the system' means the transmission system as it exists at the point that a new Generator wishes to be connected to it.[472] We also note the following:

(i) For the purposes of the application of the ITC Regulation in GB, 'the system' is 'the transmission system of Great Britain'.[473]

(ii) Currently, the entire GB transmission system comprises the NETS. For so long as that remains the case, treating the NETS as 'the system' is correct (see paragraph 2.8).[474]

(iii) In terms of the relevant point in time at which the determination should be made as to which Local Assets are considered 'pre-existing' (that is, part of the NETS), we note that GEMA's initial view was that the date of execution of the contracts between NGESO and the relevant Generator would be a reasonable proxy as to when a Generator wished to connect.[475] This initial view was not specifically challenged in the present appeal and therefore we do not need to decide this point.

(e) When deciding whether or not a charge falls within the Connection Exclusion, it is necessary to ask whether the physical asset to which it relates is 'required for connection' by the Generator in question to 'the

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[470] Case C-236/01 *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri*, ECLI: EU: C: 2003:431, paragraph 72. See also CMA 2018 Decision, C20, paragraphs 5.82 and 6.24.
[471] CMA 2018 Decision, C20, paragraphs 5.82 and 5.83.
[472] CMA 2018 Decision, C20, paragraph 5.94.
[473] Point 2 of Part B of the Annex to The ITC Regulation, A43.
[474] For the avoidance of doubt, although the NETS as a defined term is GB-specific, treating the NETS as 'the system' does not deprive the Connection Exclusion of its autonomous EU law meaning. That is because treating the NETS as 'the system' is no more than a reflection of the fact that the NETS comprises 'the transmission system of Great Britain' for the purposes of the ITC Regulation.
[475] Decision, A27, page 26. GEMA explained that that was the point at which the Generator and NGESO entered into a binding commitment under which NGESO agreed to provide the Generator with a connection. GEMA added that the connection offer (in particular, the Bilateral Connection Agreement) would also set out the Local Assets that would be required to be built or upgraded to facilitate the connection.

system' as it exists at that point.[476] That is the same as asking whether, 'but-for' the asset, the Generator would be connected to the system.[477]

(f) The physical assets which are determined to fall within the Connection Exclusion for a Generator continue to be required by that Generator for connection to the pre-existing system even once the Generator is operational. Put another way, connecting equipment for a Generator continues after the initial act of connecting to be 'required for connection to the system'.[478] For the purposes of a Generator, the ambit of 'the transmission system' does not widen immediately upon the act of connecting that Generator.[479]

6.92 Applying these principles, we conclude that, contrary to the Appellants' case, the fact that an asset is shared or shareable does not preclude it from continuing, after the initial act of connecting, to be 'required for connection to the system'. In our view, that point follows from the above principles, in particular those in paragraph 6.91(e) and (f) above. We agree with GEMA that there is nothing in the ITC Regulation to indicate that an asset being shared or shareable is determinative of the matter.[480]

6.93 The wording of the Connection Exclusion focuses on whether the charges in question are paid for physical assets required for connection to the system or the upgrade of the connection. The definition does not refer to the distinctions drawn by the Appellants between 'connection assets' and 'transmission assets' (which are domestic constructs), or to the issue of whether the asset is shared or shareable. In principle, applying the ordinary meaning of the wording of the Connection Exclusion, by reference to its object and purpose, a charge may still be applied for an asset required for connection even if that asset is to be used by more than one Generator. Moreover, we are not

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[476] CMA 2018 Decision, C20, paragraph 5.94. We note that the Connection Exclusion also covers the charges for the upgrade of the connection in question. We do not address this in this decision as the focus of the present appeal has been on that part of the Connection Exclusion which covers the charges paid by producers for physical assets required for connection to the system. However, in our view, the principled approach to the interpretation of the Connection Exclusion should also be applied, as far as possible, to the situation of the upgrade of the connection in question.
[477] CMA 2018 Decision, C20, paragraphs 5.97, 5.98 and 5.101.
[478] CMA 2018 Decision, C20, paragraph 5.94. At the Main Hearing, the Appellants referred to the CMA 2018 Decision and stated 'we have accepted that we lost on the initial-act-of-connection point' (Main Hearing, 4 March 2021, Transcript, page 25, line 20).
[479] CMA 2018 Decision, C20, paragraph 5.95. Therefore, given that the test in paragraph 6.91(e) must be applied in respect of each Generator in question, it is possible that an asset, at one and the same time, (a) continues to be treated as an asset 'required for connection to the system' in relation to the first Generator which used the asset for the initial act of connection and (b) it constitutes part of the pre-existing system in relation to a second Generator which subsequently uses that asset. In that situation, charges paid by the first Generator in respect of its use of that asset would fall within the Connection Exclusion, whereas charges paid by the second Generator in respect of its use of that asset would fall outside the Connection Exclusion.
[480] Reply, paragraph 77.2.

persuaded that the passages from the 'travaux préparatoires' to which the Appellants have referred[481] provide any further assistance on this point.[482] [483] We therefore reject the Appellants' submission that any sharing of an asset is enough to take any relevant charge out with the scope of the Connection Exclusion.

6.94 Having set out our view of the correct principled approach to the interpretation of the Connection Exclusion, and our view on the Appellants' core argument as to the relevance of whether an asset is shared, we now turn to the remaining key points of the Appellants' challenge under sub-ground 1(c).

6.95 As regards the Original Proposal approved by GEMA, it was common ground between the Parties that the Original Proposal had adopted an incorrect construction of the Connection Exclusion.[484] That was because the Original Proposal incorrectly included all Local Charges on a blanket basis as falling within the Connection Exclusion rather than only those charges for assets required for connection to the NETS.[485] We address the implications of this for the legality of the Decision at paragraphs 5.136 to 5.151 above, and further at paragraph 7.9 in relation to Ground 2.

6.96 We do not accept the Appellants' submissions that the Original Proposal failed to follow the correct approach on the basis that (a) it adopted a definition of Connection Charges which deviated from the definition given in the CUSC and the NGESO Transmission Licence or (b) it applied the CUSC incorrectly.[486] That is because we agree with GEMA that to challenge the Original Proposal on those bases would be tantamount to defining the Connection Exclusion by reference to domestic GB concepts, which in turn

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[481] See the summary provided in paragraphs 6.16 to 6.18 above.
[482] In support of their submissions on this point, the Appellants also made extensive references to the 'travaux préparatoires' (see the summary provided in paragraphs 6.16 to 6.18 above). In summary, the Appellants submitted that the 'travaux préparatoires' viewed the process of connection as an initial stage in a process leading to the use of an asset for transmitting electricity; and on that basis the Appellants submitted that a connection asset which, perhaps over time, became part of a shared transmission network that was used by more than the first connected Generator should thereafter be subject to charges for the use of the transmission system (NoA, paragraphs 123 and 124; Response, paragraph 18; Appellants' Skeleton, paragraph 21). We have considered the passages from the 'travaux préparatoires' to which the Appellants have referred, however in our view those passages neither demonstrate, nor do they lead to the reasonable inference, that the 'travaux préparatoires' support the Appellants' submissions on the 'change of function' point they have advanced.
[483] GEMA had also submitted that the Appellants had not identified (nor had GEMA identified) anything in the 'travaux préparatoires' that supported the Appellants' interpretation (Reply, paragraph 77.3).
[484] List of Issues, Issue 12.
[485] See for example, Decision, A27, page 20; see also NoA, paragraphs 117 and 121. The Appellants also challenged the Original Proposal on the basis that it failed to draw relevant distinctions between the first use of a Local Asset to connect a Generator to the NETS and one or more subsequent network users who would be using an established transmission asset for the purposes of using a pre-existing part of the NETS infrastructure (NoA, paragraph 151 and Appellants' Skeleton, paragraph 25). GEMA accepted that the Original Proposal did not draw such a distinction, but submitted that GEMA expressly did not endorse it as a long-term solution (Reply, paragraph 78).
[486] NoA, paragraph 117.

would constitute a failure to give the Connection Exclusion an autonomous EU law meaning.[487]

6.97 As regards the correctness of GEMA's own construction of the Connection Exclusion, in light of our analysis above, the Appellants have not demonstrated to us that GEMA erred in the interpretation it set out in, in particular, Legal Annex Two of the Decision:

(a) We have addressed the Appellants' core point that any sharing of the assets is sufficient to mean that the charges in respect of those assets do not fall within the scope of the Connection Exclusion at paragraphs 6.92 and 6.93 above.

(b) The Appellants also challenged GEMA's view on the basis that it failed to draw relevant distinctions between the first use of a Local Asset to connect a Generator to the NETS and one or more subsequent network users who would be using an established transmission asset for the purposes of using a pre-existing part of the NETS infrastructure.[488] However, as noted in paragraph 6.49 above, GEMA's view did in fact distinguish between the first and subsequent users.[489]

6.98 As regards the Appellants' view of the correct interpretation of the Connection Exclusion, for the reasons given above, we disagree with the following submissions made by the Appellants:

(a) The Appellants' submission that as a matter of principle and in the light of the factual situation concerning the network architecture of the NETS, only GOS should be treated as 'connection assets' for the purposes of the Connection Exclusion, but no other Local Assets or Local Circuits should be since they form part of the NETS being a system over which electricity is transmitted.[490] It follows from our analysis at paragraphs 6.91 and 6.92 above, that charges for Local Assets are not precluded from falling within the Connection Exclusion. Applying the 'but for' test, such Local Assets may be physical assets which were 'required for' the Generator to connect to 'the system' as it existed at that point. Any charges for such assets, whether characterised as Local or not under the domestic regime, fall within the Connection Exclusion.

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[487] Reply, paragraph 67.
[488] NoA, paragraph 151 and Appellants' Skeleton, paragraph 25.
[489] Reply, paragraphs 78, 59.3 and GEMA's Skeleton, paragraph 14.4.
[490] NoA, paragraphs 115.3 and 142 and Appellants' Skeleton, paragraph 22.

(b) The Appellants' submission that, save for GOS, Local Circuits and local substations can never be assets required for connection, even where a particular Generator is the first entity to use the particular asset, because (i) by their nature they may serve to link more than one local Generator or Demand (load) or both to the broader transmission network; or (ii) they are required for transmitting electricity across the broader network.[491] In our view, neither of these points are determinative of whether a charge is for an asset required for the Generator to connect to the system in order to transmit electricity. All assets in respect of which Local Charges are levied are used for the transmission of electricity, and form part of the NETS. That is not sufficient to mean that such charges can never fall within the Connection Exclusion.

(c) The Appellants' submission that any Local Asset or local circuit which is shared by multiple users (including, but not limited to, meeting the needs of Demand) should be treated as a transmission network asset and not as a connection asset and therefore the charging for the use of those assets should reflect that shared use.[492] In our view, in light of the points made at paragraph 6.91 above, it does not automatically follow from the fact that assets are shared that those assets fall outside the Connection Exclusion.

6.99 We note that in the course of argument the Parties raised various issues or points as to how the Connection Exclusion should be interpreted and applied in a range of factual scenarios. It was not necessary for our decision on the Appellants' grounds of appeal to set out our view of how the Connection Exclusion should or should not be applied in respect of each scenario. We note only that:

(a) The application of the Connection Exclusion in respect of the development of, for example, the offshore meshed network will need to be assessed by reference to the particular facts of each case.[493] In order to address the Appellants' arguments on appeal we did not need to determine, as the Appellants contended,[494] the factual point about the extent to which Local Assets are used or are capable of use by two or more Generators and/or the nature of the network architecture that is likely to develop in the short to medium term. It was clearly common ground that Local Assets could be shared, or are capable of being shared,

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[491] NoA, paragraphs 142 and 144.
[492] NoA, paragraphs 115.3 and 148 and Appellants' Skeleton, paragraphs 17 and 23.
[493] We agree with GEMA that the application of the Connection Exclusion, to determine whether or not charges paid by particular Generators in respect of particular parts of the network fall within the Connection Exclusion, will depend on the particular facts in question in each case (GEMA Skeleton, paragraph 12).
[494] List of Issues, Issue 5.

and that sharing is likely to become more common in the coming years, including through the development of an offshore meshed network.[495] We considered the Appellants' appeal arguments on that basis.[496]

(b) We did not need to reach a concluded view on the meaning of the term 'GOS', contrary to the Appellants' position.[497] That concept, as variously described, was relied upon by the Appellants in support of their general propositions that: (i) save for GOS, no Local Assets should be treated as connection assets as they were used for the purposes of transmitting electricity across the system, not for connection; and (ii) any sharing of an asset was sufficient to render the asset outside the scope of the Connection Exclusion. We have rejected these arguments for the reasons given above.

(c) The Parties agreed that assets that were part of the MITS did not fall within the scope of the Connection Exclusion.[498] Their reasons for this view differed, however. The MITS is a concept specific to the GB system. As set out at paragraphs 6.34 and 6.48 above, the Appellants contended that charges for the MITS did not fall within the Connection Exclusion because they were shared assets; and GEMA contended that once assets were part of the MITS, that is, the core network, the nature of the charges applied changed.[499] The ITC Regulation does not rule out the possibility that assets required by individual Generators for connection to the system could become assets deployed in the system for different purposes. If the function of assets, initially required by any such Generators for connection to the system, did change in this way, the charges applied for such assets may no longer fall within the Connection Exclusion, depending on the particular facts arising. Whether any such change would be sufficient to render such charges out with the Connection Exclusion, would need to be assessed by reference to (a) the principles set out at paragraph 6.91 above, and (b) our finding that the fact that an asset is shared is insufficient to render any charges out with the Connection Exclusion (see paragraph 6.92). Relevant factors may include the degree of interconnectedness between assets, and possibly

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[495] GEMA's Skeleton, paragraph 12.
[496] As explained above, we have concluded that the Appellants' proposition that any sharing of an asset is sufficient to change its function from that of connection to that of transmission such that charges for that asset fall outside the Connection Exclusion is too simplistic (Main Hearing, 4 March 2021, Transcript, page 51, lines 11 to 13 and page 53, lines 6 to 7). As we have noted in paragraph 6.92 above, the fact that an asset is shared or shareable does not preclude it from falling within the Connection Exclusion.
[497] List of Issues, Issue 8.
[498] The Appellants stated 'We agree with GEMA that nothing in the MITS is required for connection' (Main Hearing, 4 March 2021, Transcript, page 22, lines 8 to 9).
[499] Main Hearing, 4 March 2021, Transcript, page 100, lines 2 to 7 and see also page 99, lines 10 to 17.

also between Generators, suppliers and other users. However, these matters are complex and call for highly specialist technical expertise and the exercise of judgement by reference to the particular facts of the case.[500]

GEMA's favoured construction failed to comply with the principles of proportionality and non-discrimination (sub-ground 1(d))

6.100 The Appellants' case under sub-ground 1(d) was summarised as being that, by adopting the Original Proposal, GEMA imposed disproportionate costs on, and operated in a discriminatory manner, against GB Generators.[501] The Original Proposal adopted a construction of the Connection Exclusion which GEMA accepted was over-inclusive, and which therefore:

(a) resulted in disproportionately high charges being levied on GB Generators, since at least a proportion of the relevant Local Charges raised under the CUSC are excluded from the scope of the adjustment mechanism; and

(b) resulted in discrimination against GB Generators because (i) non-GB EU or NI Generators and interconnectors were able to benefit from an EU compliant definition of the Connection Exclusion in their jurisdictions, and (ii) Suppliers had unduly benefitted from the higher charges imposed on Generators.[502]

6.101 In considering this sub-ground, it is helpful to begin by identifying two matters that are now accepted as being common ground between the Parties.

6.102 First, as outlined in paragraph 6.95 above, as regards the Original Proposal, it was common ground between the Appellants and GEMA that the construction of the Connection Exclusion in the Original Proposal was wrong and that it was over-inclusive.[503] It assumed that all Local Charges fell within it and that only Wider Locational Charges were taken into account in the CUSC Calculation. This was wrong since not all Local Charges relate to assets

[500] In our view, the Appellants' proposition that any sharing of an asset is sufficient to change its function from that of connection to that of transmission such that charges for that asset fall outside the Connection Exclusion is too simplistic (Main Hearing, 4 March 2021, Transcript, page 51, lines 11 to 13 and page 53, lines 6 to 7). As we have noted in paragraph 6.92 above, the fact that an asset is shared or shareable does not preclude it from falling within the Connection Exclusion.
[501] NoA, paragraph 115.4.
[502] Appellants' Skeleton, paragraph 26.
[503] Appellants' Skeleton, paragraph 26 and GEMA Reply, paragraph 63.

required to connect the Generator paying the charge to NETS as it existed at the time when the Generator wished to connect.

6.103 Second, it was common ground that the financial difference between the Original Proposal and the Appellants' favoured approach was around £3 million for the charging year 2021/22.[504] GEMA told us that the total TNUoS charges projected to be paid in 2021/22 by (i) Generators is £813 million, and (ii) suppliers/demand was £2,596.5 million.[505] The financial impact on GB Generators was therefore on its face 'de minimis' (see also our analysis of Ground 4).

6.104 We note that the Appellants disagreed that the impact of the Decision should be assessed on a short-term basis because it dismissed the relevance of GEMA's expectation that a new proposal would be in place for the charging year 2022/23. We disagree with the Appellants' argument that this expectation is not relevant (see paragraphs 5.145 to 5.148 above). Consequently, we agree that in assessing the impact of adopting the Original Proposal, its likely impact during 2021/22 is the relevant basis for the assessment.

6.105 Against this background, we note first GEMA's argument that invocation of the principles of proportionality and discrimination cannot be used to construe the Connection Exclusion in a way which has no support in the words of the ITC Regulation itself.[506]

6.106 As we have set out above, the interpretation of the ITC Regulation and the construction of the Connection Exclusion are questions of law (see paragraph 6.91(a) above).

6.107 In circumstances where GEMA set out in the Decision its own interpretation of the Connection Exclusion in a manner that has not been shown to be wrong, we do not see how any breach of the principles of equal treatment and non-discrimination could arise. We did not understand the Appellants to challenge GEMA's own construction of the Connection Exclusion on this basis (if it lost on sub-ground 1(c)). This sub-ground of challenge was therefore focused on the Original Proposal.[507]

6.108 Focusing on the adoption of the Original Proposal, we do not in any event consider the Appellants to have established any breach of those principles.

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[504] Reply, paragraph 81.
[505] Reply, paragraph 81 which referred us to Draft TNUoS Tariffs for 2021/22, A73 page 5 and Reply, paragraph 83 in which GEMA also referred us to Draft TNUoS Tariffs for 2021/22, A73, pages 5 to 6.
[506] Reply, paragraph 80.
[507] See, for example, Appellants' Skeleton, paragraph 26, Response, paragraph 12, and List of Issues, Issue 9.4.

6.109 The Appellants have not produced sufficient evidence to demonstrate how the Original Proposal resulted in disproportionate and discriminatory charges being levied on GB Generators. The differential between the approach taken in the Original Proposal and the Appellants' favoured approach is accepted to be around £3 million as against total TNUoS Charges of £813 million. As we have noted, a differential of less than 0.4% is on its face 'de minimis'. The differential between the Appellants' favoured approach and GEMA's interpretation of the Connection Exclusion is even less. As we have rejected the Appellants' case on sub-ground 1(c), it is this comparison which is relevant. However, on either comparison, the differential is 'de minimis'.

6.110 In the light of those matters, any allegation of disproportionality would require very detailed evidence to support a case that, by itself, such disproportionality demonstrated the unlawfulness of GEMA's interpretation of the Connection Exclusion. The Appellants have failed to do so.

6.111 In so far as the allegation of breach of the principle of inequality/discrimination is concerned, it is clearly linked to the allegation of breach of the principle of proportionality. If, as we have found, there has been no breach of the principle of proportionality, it is very difficult to see how the challenged approach can have any significant consequence. A 'de minimis' difference is intrinsically very unlikely to have any effect.

6.112 In any event:

(a) As GEMA has pointed out, the fact that the upper end of the Permitted Range is higher in GB than in EU Member States (except Ireland) is an inherent feature of the ITC Regulation, both as enacted by the Commission and as retained domestically following the end of the Transition Period;[508]

(b) The comparison with interconnectors is not valid for the purposes of applying the principle of equal treatment. Interconnectors are not in the same position as Generators in GB for the reasons GEMA explains, namely that they will have to pay charges in the Member State from which electricity is imported, which such Generators do not have to pay.[509]

6.113 Generators in GB and interconnectors are not therefore in a relevantly comparable position and are not required to be treated in the same manner. Neither are Generators in a relevantly comparable position to Suppliers. It is Generators who decide where new generating facilities are to be located and

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[508] Reply, paragraph 82.1.
[509] Reply, paragraph 82.2.

who can influence the cost of connecting a new Generator to the NETS. Suppliers have no input into that process or control over it.

6.114 Further, and in any event, as GEMA has pointed out, it is incorrect to suggest that Generators pay a disproportionately higher share of transmission costs associated with Local Circuits and local substations.[510] Demand is forecast to pay over three times as much as Generators in TNUoS charges in 2021/22.[511] The Appellants have not explained how any issue of disproportionality arises in those circumstances.

GEMA failed to comply with principles of legal certainty and regulatory consistency (sub-ground 1(e))

6.115 As the Appellants' put it in their skeleton argument, their complaint under this sub-ground was that 'GEMA's construction of the Connection Exclusion has been a moveable feast'.[512] It was the Appellants' view, in particular, that:

(a) GEMA, by the contested Decision, had sought to advance a 'short run' policy goal of avoiding a breach of the statutory range at the expense of the wider structural security for generation, as well as undermining the internal market;[513] and

(b) There was a breach of legal and regulatory certainty, caused by GEMA's repeated re-definitions of the Connection Exclusion, each time there was an impending breach of the Permitted Range set by the ITC Regulation in GB.[514]

6.116 GEMA's core point in response was that the proper interpretation of the ITC Regulation was a matter of law, not policy and that compliance with the Permitted Range was a legal obligation, not a policy goal; it would not have been properly open to GEMA to pursue non-statutory objectives at the expense of seeking compliance with the Permitted Range.[515] The obligation to comply with the Permitted Range, which GEMA was seeking to comply with, was a measure introduced in order to bring greater coherence (but not full harmonisation) to the internal market for electricity transmission.

6.117 To the extent that GEMA had previously adopted an unlawful interpretation of the ITC Regulation and construction of the Connection Exclusion, that would not justify its continuation once it apprehended that it was unlawful, or was

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[510] NoA, paragraph 155.
[511] Reply, paragraph 83.
[512] Appellants' Skeleton, paragraph 27.
[513] NoA, paragraph 156.
[514] NoA, paragraph 157.
[515] Reply, paragraph 84.2.

found to be unlawful. The principle of legal certainty does not extend to the maintenance of an approach to interpretation which is acknowledged or found to be unlawful. Neither can a proper interpretation of the ITC Regulation and the Connection Exclusion be subrogated to being a matter of policy, where there is any scope for discretion or regulatory judgement. As we discuss below in paragraph 7.14 under Ground 2, GEMA's adoption of the Original Proposal, as a stop-gap measure, was not defended on this basis.

6.118 The Original Proposal was adopted as it was closer to the correct interpretation of the Connection Exclusion (as foreshadowed in CMP261, and the outcome of the appeal to the CMA of the CMP261 Decision) than the status quo. It is not a breach of the principle of legal certainty to adopt a construction which is better, in terms of compliance with the legal obligations imposed by the ITC Regulation, than that previously applied or articulated by the regulator.

6.119 In any event, in so far as the Appellants contend that GEMA had undermined the wider structural security for generation, as well as undermining the internal market by pursing a 'short run' policy goal, [516] we agree with GEMA that the Appellants have not offered a coherent explanation as to how this was the case. In that regard, we refer again to the small differential between the Original Proposal and the Appellants' favoured approach and the even smaller differential between that approach and GEMA's interpretation of the Connection Exclusion. It is very difficult to see how structural security for generation can reasonably be said to be undermined by such a 'de minimis' differential.

6.120 In so far as regulatory certainty is concerned, the Appellants were of the view that previous GEMA decisions (CMP224, CMP261 and the Decision) had breached that principle by allegedly repeatedly redefining the treatment of the Connection Exclusion each time there was an impending breach of the ITC Regulation in GB.[517] In support of their argument, the Appellants submitted a historical analysis of GEMA's treatment of Local Charges as being part of the TNUoS charges (not as connection charges outside of TNUoS).[518] [519]

6.121 As regards the historic iterations of the interpretation of the Connection Exclusion that were submitted by the Appellants, we note that this appeal is concerned only with the Decision. If we conclude, as we have done, that GEMA's own interpretation of the Connection Exclusion has not been shown

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[516] NoA, paragraph 156.
[517] NoA, paragraphs 115.5 and 157.
[518] NoA, paragraph 160.
[519] NoA, paragraphs 158 to 159.

to be wrong (see sub-ground 1(c)) and that a lawful approach has been taken in respect of adopting the Original Proposal on a 'stop-gap' basis as it is better than the status quo (Ground 2), we do not need to consider how connection assets have been treated in previous decisions. Ultimately, the principle of regulatory certainty cannot require a regulator to apply an incorrect interpretation of the Connection Exclusion, or to leave an imperfect solution in place where a better option is available (even if imperfect) on a short-term basis.

6.122 In any event, the Appellants' submission under this sub-ground essentially boils down to its argument that:

> The only motivating factor which appeared to cause the successive changes of position was a fear of imminent breach of the statutory limits. It was open to GEMA to adopt a construction of the Connection Exclusion which better reflected the CMA's reasoning and which was more consistent with the previous interpretations. But by approving the Original Proposal it exacerbated the degree of regulatory inconsistency which Generators have been subjected to.[520]

6.123 The Appellants' case under this sub-ground therefore also rests on the proposition that GEMA could have adopted a different construction of the Connection Exclusion to that inherent in the Original Proposal. We disagree with that submission because:

(a) None of the proposals put forward in the FMR reflected GEMA's view as to the correct construction of the Connection Exclusion. We have rejected the Appellants' appeal insofar as they submitted that GEMA's view as to the correct construction of the Connection Exclusion was wrong.

(b) The Original Proposal was 'closer to' the reasoning of the CMA in the CMA 2018 Decision when compared with the status quo. The approval of the Original Proposal did not therefore exacerbate any regulatory inconsistency. It improved the degree of consistency between GEMA's interpretation of the Connection Exclusion, the CMA 2018 Decision, and the implementation of the Connection Exclusion under the CUSC.

(c) It was not open to GEMA, in the time available, to adopt a proposal that reflected its interpretation of the Connection Exclusion (see paragraphs 5.112 to 5.122 in the Preliminary Issues chapter above).

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[520] Response, paragraph 24.

6.124 In those circumstances, the principle of regulatory certainty could not apply so as to require GEMA to adopt a different approach. The Decision did not therefore fail to respect the principles of legal certainty or regulatory certainty.[521]

Our conclusion on Ground 1

6.125 In this chapter, we have considered the issues raised under each of the sub-grounds identified by the Appellants in their NoA as part of our determination on Ground 1. We address below under Ground 2 (which cross-refers to Chapter 5: Preliminary issues), the issues raised under this Ground and Ground 2 in respect of whether it was open as a matter of law to GEMA to approve the Original Proposal at all.[522]

6.126 For the reasons given in this chapter, and to the extent relevant, in our Preliminary Issues Chapter and in Chapter 7 on Ground 2, we dismiss Ground 1 of the appeal. In reaching this overall determination, we have considered each of the sub-grounds relied upon by the Appellants and concluded that none of the issues raised by the Appellants render the Decision unlawful or otherwise wrong.

7. Ground 2: the Decision is vitiated by breaches of public law principles

7.1 In this section we consider in more detail Ground 2 of the Appellants' NoA, namely that The Decision is vitiated by breaches of public law principles. We note that many of our conclusions on the preliminary issues we have identified are relevant to our decision on this ground. Consequently, this chapter should be read together with Chapter 5.

7.2 It was common ground that the Original Proposal had adopted an incorrect construction of the Connection Exclusion.[523] It was against this background that the Parties agreed that the following issues arose in respect of Ground 2:

(a) Is it an error of law that the correct construction of the Connection Exclusion has not been applied by the Decision?

(b) What is the effect in law of the Decision?

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[521] This was the agreed issue to be determined under this sub-ground, see List of Issues, Issue 9.5.
[522] Issues List, Issues 10-11. These issues overlap with the issues the Parties agreed under the heading of Ground 2 (Issues 12-14).
[523] See, in particular, paragraph 5.3 of Chapter 5 (Preliminary Issues) of this decision. In respect of Grounds 1(a) and (b), see paragraph 6.76 of Chapter 6 of this decision.

(c) What options were available to GEMA when asked to approve the Original Proposal or any of the WACMs as part of the Decision?

(d) If the Decision proceeds on the basis of a legally erroneous construction, is that justifiable by GEMA as an exercise of its regulatory judgment with which the CMA Panel should be slow to interfere?[524]

7.3 In addressing the issues disputed by the Parties, we have structured this section as follows:

(a) First, we summarise the key points contained in the submissions made by the Parties, with reference to those submissions already summarised in the Preliminary Issues section of this decision (Chapter 5); and

(b) Second, we assess this Ground.

The Appellants' submissions

7.4 Under Ground 2, the Appellants submitted that the Decision was vitiated by breaches of public law principles. The Appellants' core argument was that as the Original Proposal does not apply the correct interpretation of the Connection Exclusion, the effect of the Decision was to give effect to legal modifications to the CUSC which proceeded on an error of law. The Decision was accordingly vitiated by an error of law, come what may.[525] This core point was advanced in a number of ways,[526] as outlined below.

7.5 The key points advanced by the Appellants in support of this submission are summarised in paragraph 5.131 of this decision. In respect of Ground 2, the Appellants' key points were as follows.

(a) The Decision was internally inconsistent and/or procedurally flawed. GEMA had consciously adopted a construction of the ITC Regulation which it knew was incorrect. It did so to avoid a breach of the ITC Regulation in pursuit of the short-term expedient of avoiding an impending breach of the limits set by that Regulation. The Decision was accordingly vitiated by, in public law terms, being motivated by an improper purpose of avoiding a breach of the ITC Regulation at all costs. The correct

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[524] List of Issues, Issues 10 and 12 to 14.
[525] Response, paragraph 2-3, 13, 25; Appellants' Skeleton, paragraphs 3, 14, 28-29 and 31. The Appellants referred us to *Everything Everywhere Ltd v. Competition Commission* [2013] EWCA Civ 154, per Moses LJ at [24]
[526] We note that the Parties often advanced points under the heading of Ground 1 which were also relevant to and/or overlapped with Ground 2. We have addressed all relevant points in this Chapter and/or in the preceding chapters as indicated.

definition should have been applied alongside other appropriate adjustments. Giving the correct construction of the Connection Exclusion would still have permitted the adjustment mechanism now found in CUSC condition 14.14.5. to be applied.[527]

(b) It was illogical and procedurally improper for GEMA to approve a proposal they knew was wrong in law as a 'stopgap' measure when there were other ways of avoiding the breach of the statutory range which would work (for example, WACM14, WACM72 or WACM79).[528]

(c) Approving a CUSC modification that GEMA had accepted wrongly construed EU law was not a lawful discharge of GEMA's statutory power because (i) it is an improper purpose for GEMA to seek to use its statutory powers to achieve a result which is not contemplated by the statutory provisions themselves and/or (ii) the use of unlawful means to achieve a desired outcome is improper.[529]

(d) GEMA's argument that it had no option but to approve the Original Proposal as the lesser of two evils, was contrary to EU and domestic rule of law principles. GEMA had to comply with mandatory rules of law and could not waive compliance with those rules as part of a balancing exercise in the evaluation of competing ACOs.[530]

(e) The Decision was based on a misdirection of law and/or improperly fettered its discretion because GEMA did not need to select the lesser of two evils in circumstances where there were other options available to GEMA (for example, the power to send back a proposal).[531] Further detail on the Appellants' submissions regarding alternative options that were open to GEMA are in paragraphs 5.100, 5.101 and 5.105 of this decision.

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[527] NoA, paragraph 164. The Appellants submitted that the impending breach only arose because of the adjustment mechanism that GEMA had initially chosen to put in place (the TGR), combined with its direction to set the TGR to zero.
[528] NoA, paragraph 165. In Appellants' Skeleton, paragraph 24, the Appellants also submitted that either WACM72 or WACM79 would substantially capture the definition of connection set out in the CMA 2018 Decision (see Appellants' Skeleton, paragraph 24). The Appellants further submitted, at the Main Hearing, that only WACM79 contained a 'correct autonomous interpretation… consistent with the ITC regulation' (Main Hearing, 4 March 2021, Transcript, page 33, lines 7–11).
[529] NoA, paragraph 166. The Appellants referred us to the following authorities in support of their submission in NoA paragraphs 166 and 169: *R (Palestine Solidarity Campaign Ltd) v. Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16, [2020] 1 WLR 1774, SC per Lord Wilson at [20] – [22]; *Laker Airways Ltd v. Department of Trade* [1977] QB 643, CA per Lord Denning MR at pp 705 -706 and 708; and *R (Goodman) v. London Borough of Lewisham* [2003] EWCA Civ 140, [2003] Env LR 28, [C15].
[530] NoA, paragraphs 166-170.
[531] NoA, paragraph 171; Response, paragraphs 4 and 26-27; Appellants' Skeleton, paragraph 32. The Appellants referred us to *R v. Gaming Board of Great Britain exp Kingsley (No 2)* [1996] C.O.D. 241, per Jowitt J.

7.6 Further, in response to GEMA's defence of the appeal, see directly below, the Appellants submitted that the Decision was not justifiable by GEMA as an exercise of its regulatory judgment, which might otherwise vindicate an error of law. GEMA's public law decisions have to proceed on the basis of a correct construction of the applicable law, or they will be vitiated in public law terms. There is no 'margin of discretion' afforded to GEMA in relation to its construction of the law. The Appellants submitted that the CMA should not be slow to interfere.[532] [533] The Appellants also submitted that GEMA's expectation that a new proposal would be in place within a year was irrelevant.[534]

GEMA's submissions

7.7 GEMA disagreed that the Decision was unlawful because GEMA had concluded that the Original Proposal was based on an erroneous interpretation of the Connection Exclusion, but nonetheless approved it.[535] Set out below is a summary of the key points that GEMA submitted in support of its position.

(a) The ITC Regulation only imposes an obligation of result.[536] Illegality would only arise if there were a breach of the Permitted Range (see further paragraphs 5.31 to 5.32). [537]

(b) The nature and effect of the Decision was to approve a change of wording of the CUSC, it did not approve or endorse the Original Proposal.[538]

(c) There is nothing unlawful about approving the implementation of a proposal that brings the CUSC Calculation closer to the correct interpretation, and substantially reduces the risk that it will fail to deliver the result required by the ITC Regulation (see further paragraph 5.96 of

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[532] Appellants' Skeleton, paragraph 33.] The Appellants referred us to the following authorities: *E.ON plc v GEMA* Case CC02/07 [C17], at [5.11]; *R(Goodman) v. London Borough of Lewisham* [2003] EWCA Vic 140, [2003] Ev LR 644, CA at [8], per Buxton LJ. The Appellants also relied on *Goodman* at paragraph 169 of the NoA.
[533] Response, paragraphs 27-28. See also Response, paragraphs 5 to 8 inclusive, paragraph 13 and Appellants' Skeleton, paragraphs 2, 28 and 29 in which the Appellants referred us to the following authorities: *Everything Everywhere Ltd v. Competition Commission (supra)* per Moses LJ at [15], [16] and [39]; *R v. Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23, at p 32 per Lord Mustill; *R v. Central Arbitration Committee ex p. BTP Tioxide Ltd* [1981] ICR 843, at p. 855 – 856; *R (Gillan v. Commission of the Police of the Metropolis* [2004] EWCA Civ 1067, [2005] QB 388, CA at [30]; *Hutchinson 3G Ltd v. Ofcom* [2008] CAT 11 at [44]; *British Telecommunications plc v. Ofcom* Case 1180/3/3/11, 9 February 2012, at [1.26] – [1.33].
[534] Response, paragraph 27; see also paragraph 5.134 of this decision.
[535] Reply, paragraph 88.
[536] Reply, paragraphs 89.1 and 90.6; GEMA's Skeleton, paragraph 23.
[537] Reply, paragraph 26.2, 89.1; GEMA's Skeleton, paragraphs 6, 23 and 26. GEMA, Main Hearing, Ms Smith QC, Transcript page 93, lines 12-18.
[538] GEMA's Skeleton, paragraphs 4-5.

this decision).[539] Neither the status quo nor any of the modification proposals were based on the correct interpretation of the Connection Exclusion.[540]

(d) The options available to GEMA in respect of CMP317 were (i) to approve the implementation of the Original Proposal or any one WACM; (ii) to reject both the Original Proposal and all of the WACMs, and thereby leave the status quo in place; or (iii) to direct that the modification report be revised and resubmitted, with the status quo remaining in place in the meantime (see further paragraph 5.102 of this decision).[541] GEMA further submitted that the Appellants were wrong to suggest that there were other, alternative options available to GEMA (see further paragraph 5.103 of this decision).[542]

(e) The evaluation of which of a series of imperfect options is best is not a hard-edged question of law. It is a matter of regulatory judgement, with which an appellate tribunal should be slow to interfere. GEMA submitted that there was no error in its decision to approve the Original Proposal as a stop-gap measure[543] in circumstances where: (i) the risk of a breach of the Permitted Range under the status quo was high and may have occurred in the current charging year;[544] (ii) under either the Original Proposal or WACM7, the risk of a breach was low in 2021/22.[545] It was therefore preferable to approve the implementation of either the Original Proposal or WACM7, rather than leaving the status quo in place which would have had the effect of requiring the modification report to be revised and resubmitted (ie the send-back option).[546] GEMA had also made clear its expectation that a new measure should be in place within a year. [547]

(f) GEMA disagreed with the Appellants' submission that it had 'unlawfully fettered its discretion' by failing to consider the possibility of exercising its send-back powers.[548] GEMA submitted that it had considered whether to

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[539] GEMA's Skeleton, paragraph 24.
[540] Reply, paragraph 89.2.
[541] Reply, paragraph 38.5 and 89.3; GEMA's Skeleton, paragraph 25.
[542] GEMA's Skeleton, paragraph 25.
[543] GEMA's Skeleton, paragraph 26.
[544] GEMA's Skeleton, paragraph 26.1; Reply, paragraph 89.4 and *Self*, paragraph 94.
[545] GEMA's Skeleton, paragraph 26.2; Reply, paragraph 89.5 and *Self,* paragraph 91. GEMA noted that the Appellants did not dispute that the Original Proposal's approach to the Connection Exclusion does not in and of itself give rise to a significant risk of breach of the Permitted Range in the short term.
[546] GEMA's Skeleton, paragraph 26.300 See also Reply, paragraph 89.8 in which GEMA stated that it had considered the send back option and cited page 20 of the CMP317/327 Decision and *Self,* paragraph 90.5.
[547] Reply, paragraph 89.6.
[548] Reply, paragraph 90.10, citing NoA, paragraph 171.

use these powers and had decided not to do so for the reasons stated in the Decision.[549] See also paragraph 5.125 of this decision).

(g) It was not internally inconsistent for GEMA to decide that the Original Proposal was based on an incorrect interpretation of the Connection Exclusion, but was better than the other imperfect options available. There was nothing improper in seeking to secure compliance with the ITC Regulation, taking into account the fact that none of the options available to GEMA would have applied the correct interpretation of the Connection Exclusion. There was no procedural impropriety, and none was identified.[550] The other options, WACM14, WACM72 and WACM79, relied upon by the Appellants, were also based on the wrong interpretation of the Connection Exclusion.[551]

(h) GEMA did not contend that the interpretation of the Connection Exclusion was a matter of discretion.[552] See also paragraph 5.10 of this decision.

Our decision on Ground 2

7.8 Below we set out our assessment of, and conclusion on, Ground 2 by reference, in particular, to the conclusions we reached in Chapter 5: Preliminary issues.

7.9 We do not accept the Appellants' core argument that any error in the CUSC Calculation amounts to a legal error rendering the Decision unlawful come what may. We have explained the reasons for this conclusion in paragraphs 5.34 to 5.40 and 5.53 to 5.60 of this decision. In summary:

(a) The ITC Regulation is not a full harmonisation measure. Much flexibility is left to each Member State, and GB, now the UK has left the EU, to determine its own domestic charging arrangements. The primary, relevant, obligation imposed by the ITC Regulation is that annual average transmission charges must fall within the Permitted Range. It does not follow that any error in the domestic charging calculation necessarily means that there has been a breach of EU law.

(b) Applying this conclusion to the domestic CUSC arrangements, it does not automatically follow that any departure from the correct definitions in the CUSC Calculation will result in a breach of the ITC Regulation. As set out in our analysis of sub-ground 1(c) above (see paragraph 6.97 of this

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[549] Reply, paragraph 90.10, referring to Reply, paragraph 89.8.
[550] Reply, paragraphs 90.1-90.3 and 90.6-90.7
[551] Reply, paragraph 90.5; GEMA Skeleton, paragraphs 13 and 14.5.
[552] Reply, paragraph 90.8.

decision), we reject the Appellants' appeal against GEMA's own construction of the Connection Exclusion. On this basis, the impact of relying upon the incorrect construction of the Connection Exclusion by implementing the Original Proposal is marginal (see paragraphs 5.58(b) of this decision). We do not therefore consider that the admitted error in the implementation of the Connection Exclusion through the Original Proposal renders the Decision automatically unlawful.

(c) We do not accept GEMA's argument that the legal effect of the Decision was to approve a change of wording to the CUSC, which did not involve approving the Original Proposal. However, at the same time, we agree with GEMA that it is relevant to consider the reasons it gave for reaching the Decision, including: (i) its reasoning as to what the correct construction of the Connection Exclusion is, and its analysis of the impact of adopting the Original Proposal over applying the correct construction; and (ii) its expectation that a new modification proposal would be implemented in time for the 2022/23 charging year (see paragraphs 5.136 to 5.151 of this decision).[553]

(d) GEMA did not proceed on the basis of a misdirection of law and/or otherwise fetter its discretion in proceeding on the basis that there were no alternative options available to it that should have been preferred to the course it took. In paragraphs 5.106 to 5.110 of this decision, we considered each of the alternatives identified by the Appellants. The Appellants' arguments did not demonstrate that a new proposal, based on the correct construction of the Connection Exclusion, could realistically be implemented in time for the 2021/22 charging year because:

(i) It did not appear to us that the send-back procedure was available for the reasons set out in paragraph 5.107 of this decision. Even if the send-back procedure had been available, we concluded that it was not a realistic option for a revised proposal to be prepared and put in place in time for the 2021/22 charging year (see paragraphs 5.113 to 5.122 of this decision). This was supported by evidence provided to us by NGESO on the timetable for implementing a proposal (see paragraphs 5.125 to 5.126 of this decision);

(ii) The same timing issue arises for all of the other options identified by the Appellants including, for example, the ability of GEMA to direct NGESO (see paragraphs 5.113 to 5.122 of this decision); and

[553] The Appellants failed to demonstrate that this expectation was wrong because the process was unlikely to be completed in time (see further, paragraphs 5.123 to 5.128.

(iii) Given the large number of proposals that GEMA received, it seems unrealistic to us that GEMA could have identified the deficiencies, triggered a send-back or otherwise directed or proposed its own solution and had that solution in place in time for the 2021/22 charging year.

(e) Thus, if GEMA had proceeded in one of the ways advocated by the Appellants, this would have likely led to the status quo remaining in place during the 2021/22 charging year, under which there was a serious and imminent risk of breach of the lower end of the Permitted Range (see further paragraphs 5.121 and 5.122 of this decision).[554] The Appellants did not satisfy us that, as a matter of public law, the Decision was vitiated automatically by the fact it implemented an incorrect construction of the Connection Exclusion, having regard to the reasons given by GEMA for adopting this course (see paragraph 5.151 of this decision).

7.10 In respect of Ground 1(c), and as set out at paragraph 6.97 of this decision, we have also rejected the Appellants' appeal insofar as it challenges GEMA's own construction of the Connection Exclusion.

7.11 In light of the above, we also do not agree with the Appellants' submissions to the effect that the Decision was internally inconsistent, procedurally flawed, motivated by an improper purpose, illogical, and/or involved waiving compliance with EU or public law rules in favour of the balancing exercise of competing ACOs under the CUSC regime.

7.12 It was not improper for GEMA to take a decision that attempted to reduce the risk of non-compliance with the ITC Regulation, in circumstances where there was no perfect solution before it, and there was a risk of an immediate and

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[554] We have not been provided with any evidence that GEMA was wrong to consider there to be a serious and imminent risk of a breach of the lower limit of the Permitted Range in 2021/22 under the status quo. We set out GEMA's reasoning for why a breach of the lower limit of the permitted range was likely in 2021/22 in Chapter 4 at paragraphs 4.58–4.71. In paragraph 6.97, we conclude that the Appellants have not demonstrated to us that GEMA erred in the interpretation of the Connection Exclusion. In the Main Hearing, the Appellants submitted that the adoption of the Original Proposal would not reduce the risk of a breach of the Permitted Range as compared to the status quo: if their interpretation of the ASE was correct, then the Original Proposal would almost certainly breach the top of the range in 2021/22 by around £200 million. The Appellants stated: 'This is because the error margin in the calculation leaves headroom of around £90 million but the original fails to take account of congestion management and BSC costs which, together, are expected to be worth about £290 million. So, with a headroom of £90 million and missing costs of £290 million, that takes you £200 million over the top of the range.' Main Hearing, 4 March 2021, Transcript, page 33, lines 12–25. We provide our reasons in Chapter 7 below for our decision to dismiss Ground 3, which therefore sets aside the Appellants' submission that a further £280.9 million of BSC and BSUoS charges should be included within transmission charges for the purpose of setting charges within the Permitted Range. See *Tindal 1*, paragraph 7.17 (BSUoS costs - £247 million (Corrected from £255.2 million following clarifications in The Appellants' 10 March 2021 Letter and in an email dated 18 March 2021)) and paragraph 7.12 (BSC costs - £33.9m)..

significant breach under the status quo.[555] GEMA followed the procedures applicable under NGESO's licence conditions and the CUSC, which includes the requirement that it select options that facilitate compliance with EU law. It was not open to GEMA to simply impose a new proposal, without complying with the procedures (potentially utilising the urgency procedure) applicable under the CUSC. GEMA did not therefore cede primacy to the CUSC (as the Appellants contended) and/or act in a manner which was incompatible with its powers. It exercised its powers in a manner intended to help fulfil its obligations under the ITC Regulation.

7.13 We also do not agree with the Appellants' allegation that GEMA's Decision failed to provide reasoning supporting its decision not to exercise the send-back option. GEMA's Decision did provide such reasoning at, for example, page 20.[556]

7.14 The Parties agreed that it was not open to GEMA to defend construction of the Connection Exclusion upon which the Original Proposal was based as justifiable on the basis of falling within GEMA's regulatory discretion.[557] We have not granted GEMA any such discretion. GEMA also contended that we should be slow to interfere with its regulatory judgment that implementing the Original Proposal was the best option available among a range of imperfect options. We have not proceeded on that basis. As set out in paragraph 5.12 of this decision, the statutory test for an appeal is contained in section 175(4) of the EA04. Based on the facts of this case, the Appellants have not satisfied us that GEMA was wrong in either law or fact, nor that it failed to properly have regard, or give appropriate weight to its duties under EA89. Properly applying the legal test, we do not accept that the Decision was wrong in the manner alleged by the Appellants under Ground 2.

7.15 Thus, Ground 2 is dismissed.

7.16 We also make an additional observation about what relief, if any, it would have been appropriate to grant had we allowed the appeal on this ground alone. In such a circumstance, we would have been minded to issue directions that would ensure a CUSC modification containing GEMA's

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[555] We have considered each of the authorities relied upon by the Appellants in this regard. However, they are distinguishable. This is not a case in which the authority had exercised their power in a way which thwarts or runs counter to the policy and objects of the Act or other obligation. Rather, the decision taken in this case was designed to fulfil, to the extent possible, the object of both the relevant aspects of the CUSC and the ITC Regulation by seeking to ensure the Permitted Range was respected. The Decision was designed to better facilitate compliance.

[556] At page 20, paragraph three of the Decision, A27,which states that GEMA considered that approving a proposal that secured compliance, or reduced the risk of non-compliance, would represent an improvement on the status quo. GEMA concluded that 'Approval of such an option would be preferable to allowing the status quo to remain (whether by rejecting all proposals or exercising our send back powers)'.

[557] See paragraph 5.17 above.

definition of the Connection Exclusion be raised within a timetable that ensures the revised formulation is operative for the 2022/23 charging year. In other words, we would issue directions that would achieve the same result as the actions that are currently in train as a result of the Decision. If we had first quashed the Decision, this would have left in place a more erroneous definition of the Connection Exclusion than that contained in the Original Proposal, and significantly increased the risk of a serious breach of the ITC Regulation, without any advance on what is currently happening to address the incorrect definition. We do not consider that this could be a correct or reasonable result. We would not have, therefore, granted the relief sought by the Appellants in any event.

8. Ground 3: Error of law in relation to the construction of the Ancillary Services Exclusion

Introduction

8.1 In this section we address Ground 3 of the Appellants' NoA, namely that GEMA erred in law in its construction of the Ancillary Services Exclusion (**ASE**) and its corresponding treatment of (i) the relevant BSUoS charges; and (ii) the relevant BSC charges.[558] It was wrong, the Appellants said, to treat those charges as falling within the ASE and accordingly not limited by the Permitted Range for the average annual transmission charges Generators pay.

Sub-ground 3(a): the treatment of the Relevant BSUoS charges

The Appellants' submissions

8.2 The Appellants' case was that GEMA's approach to the treatment of the relevant BSUoS charges[559] was wrong in law. It should not have evaluated proposals involving the inclusion of those charges within the CUSC Calculation by reference to the ACOs. It should have given effect to the autonomous EU law definition of 'ancillary services'[560] and treated the

[558] NoA, paragraphs 172.
[559] By which term the Appellants confirmed they meant BSUoS constraint charges that are borne by Generators: Main Hearing, 4 March 2021, Transcript, page 61 lines 6 to 10.
[560] NoA, paragraph 174.

charges as falling outside the ASE and limited by the Permitted Range for transmission charges.

8.3 The Appellants' essential submission was that in 2019 the Recast Electricity Directive (the **Recast Electricity Directive**)[561] and the Recast Electricity Regulation (the **Recast Electricity Regulation**)[562] had clarified the definitions of 'ancillary services' and 'congestion.' The latter was the parent legislation to the ITC Regulation in which the ASE appears (but in which no specific definition of 'ancillary services' is included). The ITC Regulation and the Recast Electricity Regulation must be read together and the meanings of 'ancillary services' in each must align.[563] GEMA, however, had erred in law by applying the definition of ancillary services adopted in the Electricity Regulation (from 2009).[564]

8.4 The definition adopted in the Electricity Regulation[565] was that, ''ancillary service' means a service necessary for the operation of a transmission or distribution system.' The relevant (and correct) definitions from the Recast Electricity Directive and the Recast Electricity Regulation were, however, the Appellants submitted:[566]

> 'ancillary service' means a service necessary for the operation of a transmission or distribution system, including balancing and non- frequency ancillary services, but not including congestion management;[567]
>
> 'congestion' means a situation in which all requests from market participants to trade between network areas cannot be accommodated because they would significantly affect the physical flows on network elements which cannot accommodate those flows;[568]

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[561] Directive (EU) 2019/944 of the European Parliament and of the Council on common rules for the internal market for electricity and amending Directive 2012/27/EU.
[562] Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast).
[563] Main Hearing, 4 March 2021, Transcript page 59 lines 19 to 22.
[564] NoA, paragraphs 175 and 178-190. Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ [2009] L 211/15, 14.8.2009 as amended, and that has now been repealed and consolidated by the Recast Electricity Regulation. A correlation table in Annex III of the latter shows how the provisions of the Recast Electricity Regulation correspond to the provisions of the Electricity Regulation.
[565] Adopting that in Article 2(17) of Directive 2009/72/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (**the Electricity Directive)**.
[566] NoA, paragraphs 180 and 181.
[567] Article 2(60) Recast Electricity Regulation which adopts this definition of 'ancillary services' set out in Article 2(48) of the Recast Electricity Directive.
[568] Article 2(4) Recast Electricity Regulation.

8.5 Properly applying those definitions from 2019, the relevant BSUoS charges were for services relating to 'congestion management' that accordingly fell outside the definition of 'ancillary services' and of the ASE. The Appellants contended that this was:

> …. unsurprising, since congestion management is an integral part of the functioning of a transmission system, so that the provision of transmission system services will incorporate the steps taken to deal with congestion or constraints at different locations on the network. In contrast, ancillary services ….. constitute services which are necessary for the operation of the transmission system, but do not constitute the very provision of the transmission system itself. Otherwise, there would be no principal service to which an identifiable other service could conceivably be ancillary. GEMA's construction of the expression "necessary for the operation of the transmission system" would see the exclusion swallow the rule, as even the provision of transmission services themselves would, on its case, be necessary for the operation of the transmission system.[569]

8.6 Alternatively, the Appellants said, even if congestion management is an ancillary service, the EU legislature had chosen not to include it in the ASE.[570]

8.7 GEMA had, however, made an error of law by treating the elements of BSUoS charges relating to congestion management as being within the ASE.[571] It had unlawfully failed to give effect to the proper definition of ancillary services and, in doing so, it had given the ITC Regulation a definition which is ultra vires that found in the parent Recast Electricity Regulation.[572] [573]

8.8 In support of these principal submissions, the Appellants relied on a number of points:

(a) They referred to general principles of interpretation of EU law. They said that if a term is undefined in legislation, that leaves room for the EU legislature to clarify its definition in later provisions.[574] They also said EU legislation should be construed in context and, for a given regime,

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[569] Appellants' Skeleton, paragraph 34, which also referred to the more detailed way in which the Appellants set out these arguments in NoA, paragraphs 173 – 195, Response, paragraphs 29 - 37.
[570] Appellants' Skeleton, paragraph 35.
[571] NoA, paragraph 188.
[572] The Appellants by analogy referred to *R v, Secretary of State for Social Security ex p Joint Counsel for the Welfare of Immigrants* [1997] 1 WLR 275, CA per Waite LJ at p. 293.
[573] NoA, paragraph 195.
[574] NoA, paragraph 176.

holistically.[575] The ITC Regulation and the Recast Electricity Regulation should therefore be read sympathetically with one another from the coming into effect of the latter on 1 January 2020.[576]

(b) If not so read, the ITC Regulation would have one meaning between 2009 and the end of 2019 and another afterwards, and/or would be ultra vires the parent legislation under which it was now treated as having been made.[577]

(c) The Recast Electricity Regulation had not expressly amended the ITC Regulation because the EU legislature saw no inconsistency between the two and accordingly there had been no need to do so. The impact assessment the Commission carried out prior to the adoption of the Recast Electricity Regulation had specifically considered fully harmonising the approach to charges for ancillary services and given careful consideration to their treatment.[578] The matter had therefore been properly assessed, such that the resulting position was deliberate and intended. Had the legislature regarded the two pieces of legislation as inconsistent, it would have been obliged either to amend the ITC Regulation or to make it clear that the Recast Electricity Regulation was adopting a different definition from that to be applied to the ITC Regulation.[579]

(d) Properly read, the wider scheme of the Recast Electricity Regulation makes clear that charges for the costs associated with network congestion management are part of the annual average transmission charges paid by Generators and not charges for ancillary services.[580] A number of its provisions regulate ancillary services and proceed on the basis that such services do not encompass congestion management. They indicate that congestion charges were therefore regarded as part of the core transmission charges.[581]

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[575] NoA, paragraph 189 and Appellants' Skeleton, paragraph 36. See Case C-491/01 *R v Secretary of State for Health ex p British American Tobacco* [2002] ECR I-11453, the CJEU at [203], Case C-357/13 *Drukarnia Multipress* [2015] EU:C:2015:253, CJEU at [20]-[21], Joined Cases C-403/08 and 429/08 Football Association Premier League Ltd v. QC Leisure Ltd [2011] ECR I-9083, CJEU at [187]-[188]; and the opinion of Advocate General Sharpston in Case C-693/18 Criminal proceedings against X and CLCV e.a. [2020] EU:C:2020:323, at [99].
[576] NoA, paragraph 190.
[577] NoA, paragraph 190 and Appellants' Skeleton, paragraph 37.]
[578] NoA, paragraphs 185 and 186. The Appellants referred us to Commission staff IA (part 4 of 5) on common rules for the internal market in electricity (recast) dated 30 November 2016, A41, and specifically to paragraphs 4.3.2, 4.3.3, 4.3.5 and 4.3.6.
[579] NoA, paragraphs 178 and 187.
[580] NoA, paragraph 179.
[581] NoA, paragraphs 180.1, 180.2 and 181 - 184. The Appellants referred to the separate definitions of ancillary services and congestion referred to in Article 2 of the Recast Electricity Regulation, the requirements relating to

(e) The UK legislature has chosen to retain the ITC Regulation with no separate treatment of the ASE and without providing for any distinct definition thereof. It has likewise chosen to retain the Recast Electricity Regulation, together with the definition of 'ancillary services' that it adopted, while making amendments to bring the new definition of 'ancillary services' into the framework of UK law. In circumstances where the UK has committed to maintaining regulatory alignment with the EU in the electricity market, the UK legislature had positively endorsed the updated definitions provided in the EU framework by the Recast Electricity Regulation. [582]

8.9 The Appellants also submitted that, in its Reply, GEMA had sought to defend Ground 3(a) by reference to changes to parts of domestic law made by the Amendment Regulations.[583] However, these did not apply at the time of the Decision[584] (and could only be applied from 31 December 2020) and the Decision contained no such reasoning. The Appellants said that the changes did not preclude a finding that GEMA's reasoning was wrong in law at the time the Decision was made. A decision maker who gives one set of reasons for a decision cannot, when challenged, produce another.[585]

8.10 In fact, the Appellants further said, the amendment made to the definition of 'congestion' by the Amendment Regulations, which made some modest changes to the Recast Electricity Regulation for the purposes of its retention in domestic law after the UK left the EU, did not help GEMA on this point anyway.[586] The Appellants relied on these reasons:

(a) The relevant terms continue to be defined in the EU legislation (which had the meanings contended in paragraphs 8.5 to 8.8 above). The purpose of the Amendment Regulations was only to remove references to provisions which would make no sense once the UK left the EU. It was not the intention to establish a new approach to the application of the Recast Electricity Regulation.[587]

(b) Both the Amendment Regulations and the Recast Electricity Regulation refer to 'congestion' as a concept capable of application to (domestic)

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network access charges in Article 18, and the provisions relating specifically to ancillary services in Articles 20(3) and 59(1).

[582] NoA, paragraphs 191 and 194.

[583] The Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020 SI 2020 No 1006 (**Amendment Regulations**).

[584] Or, to the extent relevant, the CMP339 Decision.

[585] Response, paragraph 29. The Appellants referred us to *R (Bancoult No 2) v. Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498, [2008] QB 365, CA per Sedley LJ at [70].

[586] NoA, paragraph 97 and Response, paragraph 30.

[587] Response, paragraph 31.

transmission systems and interconnectors. Where the focus is solely on congestion in interconnectors, and it is intended to restrict the scope of the concept thereto, specific wording or express limiting words are used.[588]

(c) GEMA's Reply[589] ignored that the amended definition of 'congestion' in domestic law encompasses congestion on (domestic) transmission systems, as well as on interconnection.[590]

(d) The relevant BSUoS charges that GB Generators pay do represent charges to pay for measures which deal with capacity constraints in the transmission system which have an impact on flows with interconnectors.[591]

GEMA's submissions

8.11 GEMA's reply was that all BSUoS charges fell within the ASE. It said its decision on their treatment was not wrong and Ground 3(a) should be dismissed.

8.12 GEMA said the ASE should be interpreted by reference to the definition of ancillary services adopted in the Electricity Regulation, not that in the Recast Electricity Regulation, and the relevant BSUoS charges fell within that earlier definition.[592] That was its 'primary case.'[593]

8.13 Even if that primary case was not right, however, GEMA's treatment of the charges was only wrong, and the Appellants' challenge to the Decision[594] could only succeed, if (i) the definition of ancillary services adopted in the Recast Electricity Regulation applied and (ii) the charges related to services for 'congestion management' as that term is used in that definition. They did not, however, relate to such services.[595] (We refer to this as GEMA's 'secondary case' – as GEMA itself appeared to.[596])

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[588] Response, paragraphs 33 – 35 and 37. The Appellants referred to the definition of 'structural congestion' in the Amendment Regulations, to Article 16 of the Recast Electricity Regulation, which they said treats capacity and congestion management as distinct, rather than related solely to managing congestion on interconnectors, and to Article 19(2) of that regulation which they said makes express provision for measures aimed at combatting 'interconnector congestion.'
[589] The Appellants referred us to Reply, paragraph 101.
[590] Response, paragraph 32.
[591] Response, paragraph 36.]
[592] Reply, paragraphs 103 and 104 and GEMA's Skeleton, paragraph 30.
[593] Main Hearing, 4 March 2021, page 124, lines 5–15.
[594] And, to the extent relevant, the CMP339 Decision.
[595] GEMA's Skeleton, paragraphs 29 and 31.
[596] Main Hearing, 4 March 2021, Transcript page 124, lines 17–24.

8.14 The correct approach, GEMA submitted (under either definition and under both its primary and secondary cases), is to apply the statutory words: ancillary services are those, '… necessary for the operation of a transmission or distribution system.' Services that fall within that formulation are ancillary and charges for them within the ASE (unless, where the Recast Electricity Regulation applies, they are for 'congestion management').[597] The main or core services to which they are ancillary are those relating to the construction, maintenance and provision of the transmission system. [598]

8.15 The relevant BSUoS charges fell within that definition[599] because they are for balancing and constraint management services essential to the GB transmission system's safe operation.[600] Those services do not relate to 'congestion management' (and thus cannot fall outside the definition of ancillary services even if the definition adopted in the Recast Electricity Regulation from 2019 applied). That concept is concerned with the lack of capacity for electricity flows between transmission network areas (eg on interconnectors) not congestion within a transmission system (like GB's).[601] It, ….. clearly relates to cross-border congestion….'[602] whereas the relevant BSUoS charges do not.

8.16 GEMA relied on a number of supporting points to advance those submissions.

8.17 As to its primary case - that the ASE should be construed by reference to the Electricity Regulation, rather than the Recast Electricity Regulation - GEMA gave the following reasons:

(a) The ITC Regulation was made in 2010 pursuant to the Electricity Regulation (from 2009). Its drafter, when using the term 'ancillary services,' would not have had in mind a definition that would be adopted nine years later in the Recast Electricity Regulation.[603]

(b) The Electricity Regulation did not say that expressions used in any subordinate legislation (like the ITC Regulation) must have the same meaning as in later versions of the parent legislation. Nor did the Recast Electricity Regulation, or the accompanying Recast Electricity Directive, refer to the ITC Regulation or say that subordinate legislation must use

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[597] See, for example, Main Hearing, 4 March 2021, Transcript page 131 lines 2–12.
[598] See, for example, Main Hearing, 4 March 2021, Transcript page 131 lines 12-15 and Main Hearing, 5 March 2021, Transcript page 15 lines 11–13.
[599] As services '… necessary for the operation of a transmission or distribution system……'
[600] Reply, paragraph 101.1 and Main Hearing, 5 March 2021, Transcript page 15, lines 22–24.
[601] Reply, paragraph 102 and GEMA's Skeleton, paragraph 31.
[602] Main Hearing, 5 March 2021, Transcript page 18, lines 23–24.
[603] Reply, paragraph 103.1.

expressions in the same way as in the Recast Electricity Regulation.[604] There was also no indication in the 'travaux préparatoires'[605] that this legislation was intended to alter the ITC Regulation's effect.[606] The Appellants were wrong to suggest that the ITC Regulation would be ultra vires unless it was treated as referring to ancillary services in the same way as the Recast Electricity Regulation.[607]

(c) The Recast Electricity Regulation adopted a definition of ancillary services explicitly excluding 'congestion management' because that Regulation (i) uses 'congestion management' to refer to the process by which capacity constraints between network areas ('bidding zones') - for example, between GB and EU Member States[608] - are to be addressed; and (ii) makes detailed provision about how that process ('capacity allocation') is to be carried out.[609] It therefore made sense to clarify that services in respect of 'congestion management' (ie 'capacity allocation') are separate from the more generic category of 'ancillary services.'[610]

(d) None of the authorities on which the Appellants sought to rely (see paragraph 8.8 above) assisted their case. None related to a situation where it was held that earlier legislation should be construed in light of terms defined in later legislation. They all related to different scenarios.[611]

8.18 In support of its submissions on the correct approach to the application of the definition of ancillary services (from either Regulation),[612] GEMA said:

> We look first to the fact that ancillary services has a specific definition in the regulation …. what you need to do is not just look at the word "ancillary" but actually look at the definition in the regulation. The definition in the regulation is that ancillary services are necessary for the operation of the transmission system. …. there are two elements ... There is a necessity and what is it necessary for? It is necessary for the operation of the transmission system. So we say all services that are necessary

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[604] Reply, paragraphs 103. 2 and 103.6.
[605] From which GEMA said the Appellants quoted selectively about proposals the European Commission did not adopt.
[606] Reply, paragraphs 103.2-103.4.
[607] Reply, paragraph 103.6.
[608] Reply, paragraph 102.
[609] As to which, see paragraph 8.23.
[610] Reply, paragraph 103.5.
[611] Reply, paragraph 103.7 and GEMA's Skeleton, paragraph 30.3.
[612] And under its primary and secondary cases.

for the operation of the transmission system fall within the ancillary-services exclusion.[613]

8.19 GEMA placed emphasis on the word 'operation'[614] within the definition and said those services necessary for such operation are, '…. to be distinguished from services, or charges for services, which are necessary for the construction and maintenance or the provision of the transmission system.'[615] It said, '…. we say that the charges for the construction and maintenance of the system are core and charges for the services necessary to operate the system are ancillary as defined.'[616]

8.20 GEMA submitted that, on that basis, the services to which BSUoS charges relate are ancillary services. They relate to the costs incurred by NGESO taking steps to ensure that the amounts of electricity being injected into and withdrawn from the GB grid are in balance, and that the amounts of electricity transported across that grid are within operational limits. Those steps include, for example, paying particular generators to reduce or increase their output.[617]

8.21 GEMA described those steps as, '…. essential to the safe operation of the GB transmission system….'[618] It said, 'The transmission system could not operate safely without the balancing and constraint management services funded by the relevant BSUoS charges…'[619]

8.22 Contrary to the Appellants' submissions, such an approach, GEMA contended, would not, '… see the exclusion swallow the whole.' The ASE presupposes the existence of a transmission system, and charges in respect of the building and maintenance of that system would not fall within the ASE. The services funded by the relevant BSUoS charges, however, would do so as they are, 'necessary for the operation [as opposed to the construction and maintenance] of [the GB] transmission…system.'[620]

8.23 As to its secondary case,[621] GEMA made the following points:

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[613] Main Hearing, 4 March 2021, Transcript page 131 lines 2–12.
[614] Main Hearing, 4 March 2021, Transcript page 91 lines 18–21.
[615] Main Hearing, 4 March 2021, Transcript page 131 lines 12–14 and Main Hearing, 5 March 2021, Transcript page 15 lines 4–9.
[616] Main Hearing, 5 March 2021, Transcript page 15 lines 11 to 13.
[617] Reply, paragraph 93.
[618] Reply, paragraph 101.1.
[619] Main Hearing, 5 March 2021, Transcript page 15, lines 22 to 24.
[620] GEMA's Skeleton, paragraphs 34.1.
[621] That the Appellants' challenge to the Decision could only succeed, if (i) the definition of ancillary services from the Recast Electricity Regulation applied and (ii) the relevant BSUoS charges related to 'congestion management' as that term is used in that definition, and that they do not do so.

(a) The Appellants are wrong to seek to interpret the ITC Regulation by reference to the Recast Electricity Regulation but, even if that was relevant, their case was hopeless.[622] The services to which the relevant BSUoS charges relate are necessary for the operation of the transmission system (as described in paragraphs 8.18 to 8.21 above), so the charges could only fall within the ASE if they relate to services for 'congestion management.' They do not do so. [623]

(b) 'Congestion management' is not defined in the Recast Electricity Regulation,[624] but it should be construed in accordance with the definition of 'congestion' which is in that Regulation:[625]

> "congestion" means a situation in which all requests from market participants to trade between network areas cannot be accommodated because they would significantly affect the physical flows on network elements which cannot accommodate those flows;[626]

(c) That definition is concerned with the lack of capacity for electricity flows between transmission network areas or 'bidding zones' – defined in Article 2(65) of the Recast Electricity Regulation as, '…the largest geographical area within which market participants are able to exchange energy without capacity allocation.'[627] GEMA described this lack of capacity as 'cross-border congestion.'[628] It is addressed by a process of 'capacity allocation,' in which available capacity on connections between network areas is allocated to the highest bidder. That is provided for by Article 16 of the Recast Electricity Regulation.[629] GB, however, is a single bidding zone and the process of capacity allocation does not apply within it. 'Congestion management' does not therefore refer to services for managing congestion within a bidding zone or network area (like GB)[630]

(d) The definition of ancillary services distinguishes (i) those services for congestion management (charges for which are expressly excluded from the ASE); from (ii) balancing and non-frequency allocation services

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[622] Reply, paragraph 101.
[623] GEMA's Skeleton, paragraphs 29 and 31.
[624] Or the Electricity Regulation.
[625] Reply, paragraphs 99.2, 100 and 101.2.
[626] Article 2(4).
[627] eg on interconnectors.
[628]Main Hearing, 5 March 2021, Transcript page 18, lines 23-24.
[629] Headed, 'General principles of capacity allocation and congestion management.' GEMA said the strong linkage between these concepts is also seen in Commission Regulation (EU) 2015/1222 to which the Recast Electricity Regulation repeatedly refers.
[630] Reply, paragraphs 101.3 and 102, and GEMA's Skeleton, paragraph 31.

(charges for which are expressly included). The latter, which are defined in Articles 2(45) and 2(49) of the Recast Electricity Directive, '… relate to actions taken by a TSO internally, on a domestic transmission system.'[631]

(e) The constraints within a transmission system (internal constraints) and those relating to cross-border congestion are managed differently and the services relating to them are charged for separately. The latter are managed by the capacity allocation process described in sub-paragraph (c) above, which is not funded from BSUoS charges.[632] The former are managed by way of separate services and charges. In GB, those are the balancing services NGESO provides, and the BSUoS charges relate to them.

(f) The Electricity Regulation, the Recast Electricity Regulation and the amendments made thereto in domestic law by the Amendment Regulations have always dealt with 'congestion' in a similar way or to similar effect. They have at different times referred to congestion on interconnections[633] and between network areas.[634] That, however, just reflects the way in which the flows between transmission systems have changed in practice over time.[635] They have, nonetheless, always been concerned with constraints on cross-border flows, and the position, with regard to the definitions of congestion and ancillary services, has remained the same in effect from 2009. The amendments made in 2019 do not substantively change that:

> …the structure, the purpose, the definitions in the European Legislation show that the definition of the ancillary services exclusion has always remained, although not exactly the same as regards its wording, the same as regards its ambit and its application.[636]

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[631] Main Hearing, 5 March 2021, Transcript page 17, lines 11-12.
[632] Reply, paragraph 94 and *Self,* paragraph 44.
[633] In the Electricity Regulation and the Amendment Regulations.
[634] In the Recast Electricity Regulation.
[635] The current definition in domestic law, for example, in the Amendment Regulations, refers to congestion on interconnections because the UK no longer an EU Member State and GB is a single network area and bidding zone.
[636] Main Hearing, 5 March 2021, Transcript page 20, lines 12–15. More generally, Main Hearing, 5 March 2021, Transcript page 19, line 2 to page 20, line 15. Reply, paragraphs 101.3 and 102, and GEMA's Skeleton, paragraphs 31, 32 and 34.2.

(g) The position is accordingly to the same effect whether the definitions of ancillary services and congestion adopted in the Recast Electricity Regulation or the Amendment Regulations were to be applied.[637]

(h) The Appellants' case also ignored a key point about the definition of 'congestion' as it applies in GB since 31 December 2020 (under the Amendment Regulations). In particular, the final words of the definition indicate that lack of capacity on a domestic transmission system may give rise to *'*congestion*'*, ie *'*a situation in which an interconnection…cannot accommodate all physical flows*'*. The lack of capacity on the domestic transmission system does not, however, in itself constitute *'*congestion*'* within the meaning of the term. [638] In other words, it is cause, not effect.

(i) The Appellants' arguments about GEMA's reliance on the definition of congestion following the Amendment Regulations were misconceived. Those Regulations were made on 15 September 2020, well before the Decision. The Decision makes changes to the CUSC that come into force in April 2021, when the Amendment Regulations will apply. The amendments made by the Regulations do not in any event contradict the Decision and the case law referred to by the Appellants was not relevant.[639]

Sub-ground 3(b): the treatment of the relevant BSC charges

The Appellants' submissions

8.24 The Appellants also said GEMA had erred in treating the relevant BSC charges as falling within the scope of the ASE. They relied on the following in support:

(a) The relevant question was whether the BSC charges relate to services necessary for the operation of the transmission system. The same approach should be taken in that regard as described in the quote in paragraph 8.5 above.[640]

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[637] Reply, paragraphs 101 and 102 and GEMA's Skeleton, paragraphs 31 and 32.
[638] Reply, paragraphs 98, 99.1 to 99.3 and 100, and GEMA's Skeleton, paragraph 34.4.
[639] GEMA's Skeleton, paragraph 33. See *R v Westminster City Council ex p Ermakov* [1996] 2 All ER 302 [**C25**] and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] EWCA Civ 498, [2008] QB 365 [**C27**]
[640] The Appellants said of the BSC charges, specifically, Main Hearing, 4 March 2021, page 63, lines 5 to 10: 'We would agree that there has to be a core service for something to be ancillary to it. We would see it as the core service that we are looking at here is the production of electricity and the provision of it via suppliers to customers for consumption. In respect of that, the services which BSC charges cover for the settlement system. The settlement system is an essential part of that core system.' The Appellants also said, Main Hearing, 5 March

(b) The BSC charges are for the costs of funding Elexon, which discharges administrative functions in the operation of the BSC. That is the Code which governs (i) arrangements under which generators can bid to increase or decrease the amount of electricity they put into the transmission system and (ii) consequent settlement (payment) processes. Elexon is the body NGESO set up, under its licence, to administer the BSC.[641]

(c) Elexon's 'main service …. is in energy balancing and the administration of transmission flows, which is a primary activity of the operation of the transmission system (not an ancillary one).'[642] The settlement system under the BSC, '…settles the energy produced by generators and consumed by customers. It is an essential part of that core function, not ancillary to it.'[643] Administration of the settlement system is 'an integral part of the transmission service' and, thus, the BSC charges were, '… not paid for a distinct service which supports the transmission service and so is ancillary to it.'[644]

(d) In its P396 Decision,[645] GEMA had determined that the BSC charges were network access charges.[646] Article 18(1) of the Recast Electricity Regulation addresses the issue of network access charges by referring to charges for (i) connection to the networks; (ii) use of networks, and (iii) related network reinforcements. Those are all transmission charges. The BSC charges for Elexon are not charges within (i) or (iii), so GEMA must necessarily have accepted that they were charges for the use of the transmission network (ie transmission charges) within (ii).[647] In the Decision, therefore, GEMA treated them inconsistently and wrongly by not treating them as such.[648]

2021, page 11 line 24 to page 12 line 3: 'The main service here is the operation of the transmission system. Ancillary services are typically understood to cover provision of services that are necessary for the operation of the system but are not the operation of the system itself. Here Elexon's charges are for the operation of the system.'

[641] NoA, paragraph 196.
[642] NoA, paragraph 202.
[643] Main Hearing, 4 March 2021, page 63, lines 10 to 12.
[644] Response, paragraph 38.
[645] NoA, paragraph 200. The P396 Decision is GEMA's decision *P396, Revised treatment of BSC Charges for Lead Parties of Interconnector BM units dated 6 March 2020*. This was a decision in which GEMA considered whether the BSC charges were network access charges which interconnectors could not be required to pay.
[646] NoA, paragraph 199.
[647] NoA, paragraph 199 and Response, paragraph 38.
[648] NoA, paragraph 200.

GEMA's submissions

8.25 GEMA made the following submissions in defence of the Appellants' claims:

(a) It agreed the relevant question was whether the BSC charges relate to services necessary for the operation of the transmission system. Even if the definition of ancillary services adopted in the 2019 Regulation were relevant, this would not affect the argument on Ground 3(b).[649] It, too, said the same approach should be taken to that question as set out above (see paragraphs 8.18 and 8.19 above).[650]

(b) The BSC charges relate to the administration of the settlement process by which generators and suppliers are compensated/charged for the actual volumes of electricity that they inject/withdraw from the system, as opposed to the volumes they had agreed.[651] The settlement process is designed to create a financial incentive for generators and suppliers to be 'balance responsible'.[652]

(c) The transmission system could not reliably be kept in balance, and thus operate safely, without a settlement process of the sort that is funded through the BSC charges.[653] The services to which the relevant BSC charges relate are accordingly 'necessary for the operation of [the GB] transmission system' and fall within the ASE.[654] GEMA's conclusion on that point was right.[655]

(d) The Decision[656] was consistent with its P396 decision. The P396 decision did not refer to 'transmission charges' or 'charges for transmission.' It concerned whether particular parties should be liable for BSC charges. GEMA concluded that the charges were 'network access charges' because they relate to non-optional services that a person accessing the network cannot decline to use. The Decision is in line with that finding.

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[649] Reply, paragraph 109.1.
[650] GEMA's Skeleton Argument, paragraph 37 and Main Hearing, 4 March 2021, page 91, lines 13 – 15. GEMA said, 'We say that for BSC charges, for the reasons set out in our evidence, they are necessary for the operation of the system and that is the end of the matter.' Also, Main Hearing, 5 March 2021, page 14, line 16 to page 15, line 9.
[651] GEMA referred us to Reply, paragraph 22 and *Self,* paragraphs 45 to 56.
[652] Reply, paragraph 108.
[653] Reply, paragraph 109.2, referring to pages 29 to 30 of the CMP317/327 Decision [A27] and Main Hearing, 5 March 2021, page 15, lines 22 to 25.
[654] Reply, paragraphs 109.1 to 109.3. GEMA also submitted (Reply, paragraphs 110.1 and 110.3) that the Appellants interpretation of the word 'ancillary' appeared to mean 'optional' or 'unimportant' and ignored the statutory definition ('a service necessary') and any question of whether a service is 'administrative' is irrelevant to whether it falls within the statutory definition.
[655] Reply, 109.3.
[656] And, to the extent relevant, the CMP339 Decision.

GEMA did not consider in P396 whether the charges were within the ASE for the purposes of the ITC Regulation.[657]

Our decision on Ground 3

8.26 Below we set out our assessment of and conclusion on Ground 3.[658]

Statutory construction

8.27 Ground 3 appears to raise a prior issue of statutory construction on which the Parties have taken different positions.[659] [660]

8.28 The starting-point is the ITC Regulation which itself contains no definition of ancillary service. The term is defined in Article 2(17) of the Electricity Directive and adopted in Article 2(1) of the Electricity Regulation (both from 2009):

> 'ancillary service' means a service necessary for the operation of a transmission or distribution system;

8.29 The position for which the Appellants contended is that the term 'ancillary service' in the ITC Regulation was now to be read in the light of the definition in Article 2(48) of the Recast Electricity Directive and adopted by Article 2(60) of the Recast Electricity Regulation (from 2019):

> 'ancillary service' means a service necessary for the operation of a transmission or distribution system, including balancing and non-frequency ancillary services, but not including congestion management;[661]

8.30 The Appellants contended that that approach may be regarded conceptually as aligning the parent and subordinate legislation by either (a) treating a later definition as clarification of the meaning that a term in earlier legislation has always borne or (b) reading and applying an earlier definition in the light of

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[657] Reply 110.2, GEMA's Skeleton, paragraph 38 and Main Hearing, 4 March 2021, page 134, lines 16 to 24.
[658] Which applies to the Decision and, to the extent relevant, the CMP339 Decision.
[659] This goes to Issue 15 on the List of Issues: Does the contested Decision adopt an erroneous construction of the Ancillary Services Exclusion? In particular: (15.1) Was GEMA right to treat the relevant BSUoS charges (relating to "congestion management") as falling within the scope of the Ancillary Service Exclusion? [Ground 3(a)]; (15.2) Was GEMA right to treat the relevant BSC charges (for funding Elexon) as falling within the scope of the Ancillary Services Exclusion? [Ground 3(b)]
[660] It also goes to Issues 16 and 17 on the List of Issues: (16) Can GEMA rely upon changes made to the applicable provisions of the Electricity Regulation as retained EU law by the Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020 (the Amendment Regulations 2020"), SI 2020 No 1006 in circumstances where these changes came into force after the date of the contested Decision? (17) If GEMA can rely on the Amendment Regulations 2020, what is effect of the changes that have been made and what impact does this have on the Parties' rival contentions?
[661] See, for example, NoA, paragraphs 180 and 181.

later legislation.[662] However, there is no direct authority to support either approach. The only authorities to which the Appellants could point concerning a harmonised reading of EU legislation did not deal with the precise situation here.

8.31 Equally, the position for which GEMA contended in its primary case also lacked for direct authority. It required the term 'ancillary service' in the ITC Regulation (from 2010) to be read in the light of legislation (the Electricity Directive and the Electricity Regulation, both from 2009) that has subsequently been repealed and replaced by other legislation (the Recast Electricity Directive and the Recast Electricity Regulation, both from 2019), which provides a definition which is arguably different. Alternatively, the definition in the Recast Electricity Directive (and the Recast Electricity Regulation) is again to be read as being a clarification of a meaning that the term 'ancillary service' has always borne.[663]

8.32 There is then a further complication in that the Recast Electricity Regulation was amended with effect from 1 January 2021[664] to take account of the consequences of the UK leaving the EU. However, those amendments were not in force at the time that the Decision was taken.

8.33 The question of which approach is to be preferred is not easy to resolve, especially when at the Main Hearing both Parties conceded that they could not point to any authority that was directly on point.[665] There are, however, two important points to make.

8.34 First, there is no need to resolve the question of statutory construction if it relates only to the reasoning and not to the correctness of the decision. The question for us is whether GEMA made an error of law and whether its decision on the relevant BSUoS and BSC charges was wrong. The Appeal is against that decision, not the reasons for it. It is therefore not enough to identify an error in the reasoning. The Appeal can only succeed if the error in the reasoning means the decision cannot stand as a result. If we conclude that the decision can be supported on a basis other than that on which GEMA relied, the Appellants will not have shown that the original decision is wrong and the appeal will fail.[666]

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[662] See, for example, Main Hearing, 4 March 2021, Transcript page 59, lines 3 and 19 to 22.
[663] See, for example, Reply, paragraphs 101-103 and GEMA's Skeleton, paragraphs 30 and 34.2.
[664] By the Amendment Regulations.
[665] Main Hearing, 4 March 2021, Transcript page 60 lines 4 to 7 and page 125, lines 10 to 11.
[666] Applying the approach set out by Moses LJ in *Everything Everywhere v Competition Commission* [2013] ECWA Civ 154.

8.35 Second, the issue of statutory construction need only be resolved conclusively if it is necessary for the determination of the appeal. If we can dismiss this Ground on the hypothesis that the Appellants' approach is correct, we do not need to determine the correctness of that approach.

8.36 We therefore proceed on the hypothesis that the Appellants were correct and that in applying the ITC Regulation and for the purposes of the ASE we are required to adopt the definition contained in the Recast Electricity Directive and the Recast Electricity Regulation. That is, that an ancillary service is one 'necessary for the operation of a transmission or distribution system, including balancing and non-frequency ancillary services, but not including congestion management.'

8.37 In this regard, we also note that the opening words of that definition are unchanged from 2009. An ancillary service must be 'necessary for the operation of a transmission or distribution system.' If that part of the definition cannot be met, then the following words introduced in 2019 are of no application in any event.

'Necessary for the operation of a transmission or distribution system'

8.38 We note that neither party referred in their pleadings to a comprehensive accepted industry-wide definition of an ancillary service that is said to settle the matter. There is clearly some disagreement about the precise scope of the term.[667] That might be thought surprising: one of the reasons why a term may not be explicitly defined (or more explicitly defined) in legislation is because it bears a normal meaning which is so widely understood that it does not require any further clarification.

8.39 In circumstances where there is not such a widely accepted industry wide definition, it is relevant to consider the ordinary meaning of the word 'ancillary.' In normal usage, it means providing support to a main purpose. The Parties submitted two ways in which this meaning might be applied to interpreting the current statutory definition:

(a) A distinction is to be drawn between the operation of a transmission or distribution system itself and the services necessary for its operation; or

(b) The operation of a transmission or distribution system is to be distinguished from the provision, construction and maintenance of the

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[667] Notwithstanding that the Appellants referred at the Main Hearing to a report that NGESO publishes which includes a range of ancillary services which it procures (Main Hearing, 4 March 2021, Transcript page 65, lines 2 to 22) and to their definition in the CUSC (Main Hearing, 4 March 2021, Transcript page 65, lines 23 to 25).

system, and ancillary services are all those necessary for the operation of the system.

8.40 The former approach (a) was put forward by the Appellants,[668] and the latter approach (b) was essentially that advanced by GEMA.[669] On that latter basis, GEMA drew the distinction between TNUoS charges (ie for construction and maintenance and thus, provision, of the system) and BSUoS and BSC charges (ie for its operation). It was said that the BSUoS and BSC charges are necessary for the operation of the transmission system because without the balancing and congestion management services funded by them the system could not operate safely.

8.41 Approach (a), by contrast, would require identification of the services necessary for the operation of the system as opposed to the operation of the system itself (which might for convenience be labelled the 'core' or 'main' service). On this approach, the dividing line between what is 'main' and what is 'ancillary' may not always be capable of easy demarcation and identification. In general terms, the 'main' service will comprise the physical system, the conveyance of electricity, and aspects inherent to that, while the ancillary services will be those necessary for the system as a whole to work but which are not the system and its operation itself.

8.42 The Appellants' position was that both the BSUoS and BSC charges relate to services that are part of the 'main service'. Thus, the service provided in return for the BSC charges, for example, is 'one of transmission…not…some lesser, ancillary service.'[670] Here, the Appellants were drawing a distinction along the lines of approach (a) set out in paragraph 8.39 above, categorising the BSC charges as being part of the 'main' service.

8.43 We cannot agree with that conclusion. In our view, the services to which the BSC charges relate would clearly fall within the scope of an ancillary service, as GEMA concluded. They relate to a (financial) settlement system without which the transmission system could not be kept in balance. However, the settlement system is not part of the transmission system itself (ie the main service). As the Appellants themselves have postulated:

> The main service here is the operation of the transmission system. Ancillary services are typically understood to cover

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[668] See, for example, Appellants' Skeleton, paragraph 34, and Main Hearing, 5 March 2021, Transcript page 11, lines 22–25 and page 12, lines 1–3.
[669] See, for example, Main Hearing, 4 March 2021, Transcript page 131, lines 1–15 and Main Hearing, 5 March 2021, Transcript page 15, lines 1–18.
[670] NoA, paragraph 200. See also NoA, paragraph 202, Response, paragraph 38, and Main Hearing, 4 March 2021, Transcript page 63, lines 10–12.

provision of services that are necessary for the operation of the system but are not the operation of the system itself.[671]

8.44 Nonetheless, the settlement system is a critical element in the operation of the transmission system because it is the means by which it is kept in balance. It is therefore 'necessary' and within the definition of an ancillary service, but it is not (on the Appellants' construct) the operation of the system itself.

8.45 We also consider that, on the Appellants' approach, the services to which the relevant BSUoS charges relate are not part of the 'main' service. Such services are not the operation of the system itself, but rather are services that are necessary for the operation of that system. They are services that comprise, '…. steps that NGESO takes to keep the grid as a whole in balance, and also as regards the steps that it takes to ensure that the operational limits applicable to particular pieces of equipment are not exceeded…,' which services, '…. are essential to the safe operation of the GB transmission system….'[672] 'The transmission system could not operate safely without the balancing and constraint management services funded by the relevant BSUoS charges…'[673]

8.46 Applying the Appellants' approach, we thus consider that both the BSUoS and BSC charges, not being part of the 'main' service, are nonetheless necessary for the operation of the transmission system and are therefore ancillary services. However, the alternative approach (b) (in 8.39(b) above) also leads to the same conclusion. If ancillary services are taken to be all services required for the operation of the system (as opposed to its construction or maintenance and thus its provision) then the services to which both the BSUoS and BSC charges relate would necessarily fall within that definition. They clearly relate to the operation of the system, not its construction or maintenance.

8.47 Thus, on either approach we consider that both BSUoS and BSC charges would fall for consideration as charges relating to 'services necessary for the operation' of the transmission system.[674] It does not make any difference whether the relevant definition is that in the Electricity Directive (and the Electricity Regulation) or the Recast Electricity Directive (and the Recast

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[671] See Main Hearing, 5 March 2021, Transcript page 11, line 24, to page 12, line 2.
[672] Reply, paragraph 101.1.
[673] Main Hearing, 5 March 2021, Transcript page 15, lines 22–24
[674] This finding goes to the resolution, for the purposes of this appeal, of Issue 15 on the List of Issues: Does the contested Decision adopt an erroneous construction of the Ancillary Services Exclusion? In particular: (15.1) Was GEMA right to treat the relevant BSUoS charges (relating to "congestion management") as falling within the scope of the Ancillary Service Exclusion? [Ground 3(a)]; (15.2) Was GEMA right to treat the relevant BSC charges (for funding Elexon) as falling within the scope of the Ancillary Services Exclusion? [Ground 3(b)]

Electricity Regulation), in so far as there may be any difference between them.

8.48 For completeness, we deal with two other issues. First, the Appellants suggested that an approach cannot be taken to the definition of an ancillary service whereby the ancillary service swallows the main service. We do not think that is the case regardless of whether approach (a) or approach (b) in paragraph 8.39 above is adopted. In both cases, there is a clear distinction between a 'main' service and an ancillary service. Indeed, it seems to us that the Appellants approach to the relevant services with which this Appeal is concerned may have the effect of the main service swallowing the ancillary services.

8.49 Second, the Appellants submitted that, by taking the view, in the P396 Decision, that the relevant BSC charges were network access charges, GEMA recognised that they were charges for transmission.[675]

8.50 We do not accept that proposition. In the P396 Decision, GEMA was considering the nature of the charges, whether they were network access charges, and who should be liable for them. GEMA determined that payment of the relevant BSC charges was not optional for use of the transmission system and thus that they were network access charges. GEMA did not proceed to consider whether the related services were ancillary services because it did not need to do so. However, the services do not relate to the operation of the system itself. They are nonetheless necessary for its operation, relating as they do to the settlement of charges for balancing the system. Thus they are ancillary services as GEMA concluded in the Decision.

Congestion management

8.51 If, as we conclude, the services to which both the BSUoS and BSC charges relate are services necessary for the operation of the system, they will only fall outside the scope of the ASE if they relate to congestion management. This consideration arises only if (a) the relevant definition of an ancillary service is that contained in the Recast Electricity Directive (and the Electricity Regulation) or (b) the definition in the Electricity Directive (and the Electricity Regulation) applies but is taken to exclude from its scope services relating to congestion management within a network area.

8.52 There is no contention that the BSC charges relate to congestion management, however broadly construed. Accordingly, on the basis of the

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[675] NoA, paragraphs 198-200 and Response, paragraph 38.

analysis set out above they will fall within the scope of the ASE, and GEMA did not err in concluding that they do.

8.53 In so far as the BSUoS charges are concerned, the starting-point is the definition of 'congestion' in Article 2(4) of the Recast Electricity Regulation:

> "congestion" means a situation in which all requests from market participants to trade between network areas cannot be accommodated because they would significantly affect the physical flows on network elements which cannot accommodate those flows;

8.54 Although 'congestion management' is not defined, it cannot sensibly be interpreted as being anything other than the management of 'congestion' within the terms of that definition in Article 2(4). A relevant service will therefore be one which is directed to managing congestion arising from a situation involving trade between 'network areas'.

8.55 As GEMA pointed out, the reference to network areas reflects changes in the European electricity market between 2009 and 2019 during which some network areas comprised more than one Member State and could exchange electricity without the need for capacity allocation. [676]

8.56 It thus seems to us that the definition of congestion is an updating of essentially the same concept as contained within the definition of congestion in Article 2(2)(c) of the Electricity Regulation (from 2009):

> "congestion" means a situation in which an interconnection linking national transmission networks cannot accommodate all physical flows resulting from international trade requested by market participants, because of a lack of capacity of the interconnectors and/or the national transmission systems concerned;

8.57 The words 'because of' are important. The definition draws a distinction between cause (ie lack of capacity of interconnectors and/or the national transmission systems) and effect (ie the inability of the interconnector to accommodate all physical flows). It is the effect which constitutes 'congestion' not the cause. Therefore, even applying the definition in the Recast Electricity Regulation, congestion is limited to congestion on interconnectors.

8.58 It therefore appears that the EU legislation has taken a consistent approach that congestion applies to a cross-border situation which is managed by a

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[676] Main Hearing, 5 March 2021, Transcript page 19, lines 2 to 25 and page 20, lines 1–16.

process of capacity allocation. It does not refer to purely internal constraints within a network area, even if those internal constraints may have the consequence that there is congestion and a need for capacity allocation at the boundary between, formerly, two interconnectors and, since 2019, two network areas.

8.59 We also note that the definition of ancillary services in the Recast Electricity Directive and the Recast Electricity Regulation distinguishes between (i) services for congestion management (charges for which are expressly excluded from the ASE); and (ii) balancing and non-frequency allocation services (charges for which are expressly included). The latter, which are defined via the Recast Electricity Directive and the Recast Electricity Regulation, relate to the management of internal constraints within a network area.[677] Such internal constraints and those relating to cross-border congestion are managed differently in practice: internal constraints by way of separate services and charges (in GB, by the balancing services NGESO provides and the settlement services administered by Elexon) and cross-border congestion by the capacity allocation process described in paragraph 8.23 above.

8.60 The interpretation in paragraph 8.58 is also consistent with the amendments made to the Recast Electricity Regulation by the Amendment Regulations to deal with the consequences of the UK's withdrawal from the EU. The reinstatement of language relating to interconnection reflects the reality that the UK is no longer part of an EU single market. In so far as that amendment did not come into force until after the Decision, the relevant legislation[678] was enacted well before the Decision was taken. In any event, it did not have any practical impact because it does not change the inherent meaning of congestion but merely reflects the changed situation of the UK being outside the EU.

8.61 We therefore consider that the concept of congestion, and hence congestion management and related charges, is, in the definition of ancillary services, concerned with the issue of capacity allocation across interconnectors, not with congestion management internal to a single network area. We also agree

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[677] Articles 2(45) of the Recast Electricity Directive says, '"balancing" means balancing as defined in point (10) of Article 2 of Regulation (EU) 2019/943' (the Recast Electricity Regulation). Article 2(10) of the Recast Electricity Regulation defines it as, '… all actions and processes, in all timelines, through which transmission system operators ensure, in an ongoing manner, maintenance of the system frequency within a predefined stability range and compliance with the amount of reserves needed with respect to the required quality.' Article 2(49) of Recast Electricity Directive says '"non-frequency ancillary service" means a service used by a transmission system operator or distribution system operator for steady state voltage control, fast reactive current injections, inertia for local grid stability, short-circuit current, black start capability and island operation capability.'

[678] The Amendment Regulations.

that this is made clear by the definition of ancillary services in the Recast Electricity Directive and the Recast Electricity Regulation (in specifying that balancing and non-frequency services are within the definition, but not congestion management).

8.62 On this basis, we do not consider that the relevant BSUoS charges relate to congestion management. They therefore fall within the scope of the ASE, as GEMA concluded.[679]

Our decision on Ground 3

8.63 For the reasons set out above, we find that GEMA did not make an error of law and its decision in respect of the relevant BSUoS and BSC charges was not wrong. Ground 3 is dismissed.

9. Ground 4: fundamental errors of appraisal

Introduction

9.1 In this section, we address Ground 4 of the NoA, which alleges that GEMA made fundamental errors of appraisal which led to it overstating the consumer benefit and understating the Generator detriment, including the detriment to the long-term generation of renewable energy, arising from the Decision.[680]

The Appellants' submissions

9.2 The Appellants submitted that in reaching the Decision, GEMA took into account conclusions derived from an Impact Assessment conducted as part of the TCR Significant Code Review procedure [681] and that GEMA's analysis suffered from a number of flaws identified in Tindal 1.[682] The Appellants submitted that this resulted in GEMA, in the Decision, significantly overstating the consumer benefit and understating the Generator detriment, including the

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[679] This finding resolves, for the purposes of this appeal, Issue 15 on the List of Issues: Does the contested Decision adopt an erroneous construction of the Ancillary Services Exclusion? In particular: (15.1) Was GEMA right to treat the relevant BSUoS charges (relating to "congestion management") as falling within the scope of the Ancillary Service Exclusion? [Ground 3(a)]; (15.2) Was GEMA right to treat the relevant BSC charges (for funding Elexon) as falling within the scope of the Ancillary Services Exclusion? [Ground 3(b)] We find that GEMA was right in both respects. Having made this finding on the bases set out, Issues 16 – 18 on the List of Issues fall away and it is not necessary to address them for the purposes of disposing of this appeal.
[680] NoA, paragraph 7.4.
[681] NoA, paragraph 203.
[682] NoA, paragraph 204.

detriment to the long-term generation of renewable energy.[683] The Appellants submitted that this would result in a less economically efficient electricity system and therefore a more expensive system, whose cost would ultimately be borne by customers over the long term.[684]

Impact on consumers

9.3 The Appellants submitted that GEMA had materially overstated the perceived consumer benefit, since its reference in the Decision to a benefit of £300 million per year was based on the total suite of measures contemplated under the TCR Decision and not simply the changes effected by the Decision. The Appellants submitted that the Net Present Value of the estimated annual, 'levelized' consumer benefit was around £33 million per year, but that was reflective of large distributional transfers from Generators to consumers and was also subject to caveats about the high degree of TNUoS tariff volatility.[685] The Appellants submitted that such volatility would arise if (as GEMA had indicated it was considering to do) GEMA were to reduce the value of locational tariffs and therefore obviate the need to use a £ negative adjustment factor to ensure compliance with the ITC Regulation in the long-term. The Appellants also submitted that a large amount of the perceived consumer benefit was attributable to GEMA's treatment of embedded benefits.[686]

9.4 In response to GEMA's Reply, the Appellants submitted that there was no indication in the Decision that the value of consumer benefits attributed to the Decision would be less than £300 million.[687] The Appellants added that Mr Self's evidence (produced for this appeal) could not substitute replacement reasons for the Decision[688] and that the absence of any value for one side of the relevant equation rendered GEMA's cost-benefit analysis flawed.[689]

Impact on Generators

9.5 The Appellants submitted that the estimated impact on Generators arising from the Decision would be additional costs in the order of £648.3 million in

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[683] NoA, paragraph 203.
[684] NoA, paragraph 204.8.
[685] NoA, paragraph 204.4.
[686] NoA, paragraph 227.
[687] Response, paragraph 41.
[688] Response, paragraph 41.The Appellants cited *R v. Westminster City Council ex p Ermakov* [1996] 2 All ER 302, CA per Hutchison LJ at pp. 315-316.
[689] Response, paragraph 41.

the charging year 2021/22 alone, a figure which would increase to over £1 billion per year beyond the charging year 2025/26.[690]

9.6 The Appellants submitted that GEMA's analysis of the relative impact of the Decision on Generators and consumers suffered from flaws, the impact of which was set out in the evidence of Mr Tindal, as follows:[691]

(a) Decision 1: The application of the incorrect definition of the Connection Exclusion. The Appellants submitted that the figures in the Decision showed this would cost Generators an additional £3 million in 2021/22, a figure which was expected to rise significantly in future years following the development of a shared offshore grid.[692]

(b) Decision 2: The exclusion of BSUoS constraint costs from the calculation of cost for the purposes of compliance with the ITC Regulation. The Appellants submitted that this would cost Generators an additional £247.0 million in 2021/22, a figure which was assumed to increase with inflation over the next few years.[693]

(c) Decision 3: The exclusion of BSC costs from compliance with the ITC Regulation. The Appellants submitted that this was expected to amount to £33.9 million in charging year 2021/22 and rise with inflation in future years.[694]

(d) Decision 4: The decision to set no target within the range set out in the ITC Regulation. The Appellants submitted that this decision would, as a result of the Wider Locational Charges being the only Generator charges considered for compliance with the ITC Regulation permitted range, result in producing tariffs which are at the upper limit of the range.[695] It would

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[690] *Tindal 1,* paragraph 7.11.The Appellants corrected the figure of £639 million that it provided in NoA paragraph 204.1 of £656.5 million in Tindall 1 to £648.3 million at page 8 of the Appellants' letter to CMA dated 10 March 2021 providing clarification information following the Main Hearing and responding to the CMA's 9 March 2021 request for information (**The Appellants' 10 March 2021 Letter**).
[691] NoA, paragraph 204
[692] *Tindal 1*, paragraphs 7.14 - 7.16.
[693] *Tindal 1*, paragraph 7.17. The Appellants corrected the overall detriment reported in *Tindal 1,* paragraph 7.11 from £656.5 million 1 to £648.3 million at page 8 of the Appellants' letter to CMA dated 10 March 2021 providing clarification information following the Main Hearing and responding to the CMA's 9 March 2021 request for information. This adjustment was attributed wholly to the calculation of congestion management or BSUoS constraint costs. We have accordingly adjusted the detriment figure reported in *Tindal 1,* paragraph 7.17 in relation to 'Decision 2' to take this into account. (**The Appellants' 10 March 2021 Letter**). In an email dated 18 March 2021 the Appellants confirm that there were no adjustments to the estimated detriments in relation to Decisions 1, 3 and 4 necessary following this correction to the overall figure.
[694] *Tindal 1*, paragraph 7.21.
[695] *Tindal 1*, paragraph 7.24

therefore lead to total charges collected from all Generators increasing by £364.4 million in charging year 2021/22.[696]

(e) Decision 5: The CMP317/327 Workgroup considered several WACMs which included a 'Transitional Adjustment Tariff'. The Appellants submitted that this could have smoothed the impact of the large increases in Generator charges compared with the Baseline [status quo] (ie the £648.5 million calculated by the Appellants), and that NGESO had calculated a total transmission Generator impact of this phasing of £280.9 million in 2021/22[697] (we have presented this for completeness, but the decision not to include phasing is not part of Ground 4, and is considered separately under Ground 6, and therefore is not considered further in this section).

9.7 The Appellants submitted that Generators would not be able to recoup all or most of these costs from their customers or from consumers. Generators were locked into Contracts for Differences (**CfD**s) and could not now change their investment decisions.[698] The Appellants submitted that the regulatory uncertainty arising from GEMA's conduct gave rise to economic and commercial risks which would have a chilling effect on investment in renewable generation and ultimately translate into higher prices for consumers.[699]

Other issues raised

9.8 The Appellants submitted that the impact assessment in respect of the Decision failed to take into account the impact of increasing the cost of capital and increasing the risk margins that Generators would be likely to face following the Decision, and that over time this would remove the perceived consumer surplus entirely. The impact assessment also failed to take into account the negative effects arising from the detrimental impact on the competitive position of GB Generators compared with their EU counterparts.[700]

9.9 The Appellants submitted that GEMA's own modelling showed that the impact of the Decision on total system value overall was either zero, or detrimental.[701] The Appellants also submitted that the Decision did not follow

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[696] *Tindal 1*, paragraph 7.23-7.24.
[697] *Tindal 1*, paragraph 7.25-27.
[698] NoA, paragraph 204.2.
[699] NoA, paragraph 204.3.
[700] NoA, paragraph 204.6-204.7.
[701] NoA, paragraph 204.5.

the correct principles of cost reflectivity, so no perceived benefit would arise from locational pricing.[702]

9.10 The Appellants submitted that the significant detriment occasioned to Generators would not therefore be subject to any countervailing systemic benefit to consumers in the long run.[703]

9.11 In response to GEMA's Reply, the Appellants explained that their assessment of the effect of the Decision was not seeking to compare the factual position post-modification with the baseline [status quo] position pre-modification, but to compare that position with the counterfactual in which GEMA had applied what the Appellants considered to be the correct approach to each of the various matters raised as distinct grounds of appeal.[704]

9.12 The Appellants further submitted that reductions in the costs charged to Generators for transmission would be passed on to consumers through, for example, the Capacity Market and CfD regimes, and would lead to better outcomes for the consumer in the long run through the increased competitivity of GB generation compared with non-GB rivals.[705]

9.13 In response to GEMA's submission that the factual errors it committed were immaterial, the Appellants submitted that the impact of the Decision would be experienced beyond the charging year 2021/22, and that GEMA could not simply assume that all errors would be corrected in the coming year.[706] The Appellants further submitted that GEMA had projected the consumer benefit over a much longer period, and described the additional costs which would be imposed on suppliers as 'significant', even though the additional charges would represent only about 1% of the total costs paid by suppliers.[707]

GEMA's submissions

9.14 GEMA submitted that, contrary to the Appellants' submissions, it did not make any errors of fact regarding the impacts of the Decision on consumers and/or Generators.[708] Furthermore, GEMA submitted that any error of fact would only provide a basis for appeal if it were material to the decision under challenge

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[702] NoA, paragraph 204.6.
[703] NoA, paragraph 204.8.
[704] Response, paragraph 39.
[705] Response, paragraph 39.
[706] Response, paragraph 40.
[707] Response, paragraph 40.
[708] Reply, paragraph 112.

and the Appellants had failed to demonstrate the materiality of any alleged error of fact.[709]

Impact on consumers

9.15 GEMA submitted that there would be an impact on consumers from the other consumer benefits associated with the TCR Decision, and that the consumer benefits of the Decision would be significantly less than the £300 million per annum benefits of the TCR Decision, but significantly greater than zero.[710]

9.16 GEMA submitted that the Decision was very clear that the consumer benefits of £300 million per year was GEMA's estimate of the consumer benefit of implementing the Directions to give effect to the TCR Decision, not just the Decision in isolation.[711] GEMA submitted that it was reasonable for GEMA not to seek to disaggregate the consumer benefits associated with the Decision.[712] The Appellants' attempts to play down the consumer benefits of the Decision were misplaced.[713]

9.17 GEMA submitted that the Appellants' reasoning was flawed, but even if as stated in the Appellants' submissions the annual, levelized consumer benefit was only £33 million per year, this would still be a material consumer benefit.[714] GEMA submitted that, not only did the Appellants base their estimate on the bottom end of GEMA's forecast, they also ignored the consumer benefits expected in 2021/22 and 2022/23.[715] GEMA claimed that adjusting the estimate to capture these two years alone would increase the consumer benefits to £87 million.[716]

Impact on Generators

9.18 GEMA submitted that it was misleading for the Appellants to characterise the 'Decisions 1-4' set out above as causing increased generation costs or a loss of £648.3 million.[717] Of the four 'Decisions' set out by the Appellants, GEMA submitted that only 'Decision 1' reflected a change from the status quo (ie to implement the Connection Exclusion in setting Generator TNUoS charges).[718] GEMA submitted that in relation to 'Decision 1' (the decision to approve the

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[709] Reply, paragraph 113.
[710] Reply, paragraph 120
[711] Reply, paragraph 120; see also GEMA's Skeleton, paragraph 39.
[712] Reply, paragraph 120.
[713] Reply, paragraph 121.
[714] The Appellants' references to £33 million are referred to at paragraph 9.3 above.
[715] *Self*, paragraph 108.2 –108.3 and Reply, paragraph 121.2; see also GEMA's Skeleton, paragraph 40.
[716] Reply, paragraph 121.2.3.
[717] Reply, paragraph 116. Corrected by the Appellants in the Appellants' 10 March 2021 Letter, page 8.
[718] Reply, paragraph 116.2.

Original Proposal, rather than WACM7)[719] the Appellants had acknowledged that the £3 million difference that would arise in 2021/22 was 'relatively small'[720]. GEMA added that the increase in the difference between the impact of the Original Proposal and WACM7 that Mr Tindal had projected from 2024/25 onwards was not relevant given GEMA's indication that a further CUSC modification proposal should be brought forward to replace the Original Proposal from 2022/23 onwards.[721]

9.19 According to GEMA, the remaining £648.3 million 'loss' in 2021/22 attributed by the Appellants to 'Decisions 2-4' did not involve changes from the status quo or reflect a cost increase or loss at all.[722] GEMA submitted that these purported losses were based on the Appellants' quantification of the potential reduction in Generator costs that would have resulted from certain WACMs,[723] that is, the alternative proposals that GEMA had rejected.

9.20 GEMA concluded that for the above reasons 'Decisions 1-4' did not result in any material increase in Generator charges in 2021/22 and that the Appellants' real complaint was that GEMA had failed to deliver Generators a windfall.[724]

9.21 With regard to the extent to which these changes were foreseeable, GEMA submitted that its plans to amend the CUSC Calculation to implement a more accurate interpretation of the Connection Exclusion, described as 'Decision 1' by the Appellants, had been known for some time (specifically, that since at least 2014 Generators had known there was doubt as to whether the CUSC Calculation was correct as regards the Connection Exclusion).[725] GEMA provided several examples of events that had taken place since 2014, including the CMA decision in 2018, which should, in its view, have led any reasonably prudent Generator to take into account the possibility that the CUSC Calculation would at some point be revised.[726]

9.22 With regard to 'Decisions 2-4', GEMA submitted that it had never suggested that (i) any part of BSUoS charges and/or BSC charges should be taken into account in the CUSC Calculation, and/or (ii) the CUSC Calculation should target the bottom of the Permitted Range - as such, no sensible Generator would have conducted its business on the footing that GEMA would have

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[719] Reply, paragraph 115.1.
[720] Reply, paragraph 116.3.1
[721] Reply, paragraph 116.3.
[722] Reply, paragraph 116.1 and 116.2.
[723] Reply, paragraph 116.2.
[724] Reply, paragraphs 116.2 and 117.
[725] Reply, paragraph 118.1.
[726] Reply, paragraph 118.1.

approved such changes.[727] GEMA submitted that in the light of these points and the Appellants' acceptance that that the setting of the TGR to zero was foreseeable, there was no proper basis for the allegation that the Decision had inflicted vast costs on Generators that they could not have reasonably anticipated.[728]

9.23 Consequently, GEMA submitted that the allegation that the Decision would give rise to regulatory uncertainty, increase the cost of capital and/or deter investment fell away.[729]

9.24 Furthermore and in any event, GEMA submitted that Ground 4 fell to be assessed on the footing that the Appellants had failed on Grounds 1, 2 and/or 3 of this appeal, as in those circumstances, it would be irrelevant that applying a different, incorrect, interpretation of the ITC Regulation would have led to a more financially advantageous outcome for Generators.[730]

Other issues raised

9.25 With regard to the Appellants' submission that 'Ofgem's own modelling' showed that the impact of its decision on the total system value overall would be zero or detrimental, GEMA submitted that it had projected in the TCR Decision and accompanying impact assessment that the reforms in question would result in additional 'system costs' of between zero and £0.3 billion in the period to 2040.[731] GEMA added that 'system costs' represented the cost of running the system and did not take account of the benefit to consumers of any reduction in their bills. GEMA projected that the same reforms would reduce consumer bills by £3.3 billion–£4.1 billion over the same period.[732]

9.26 With regard to the Appellants' suggestion that the impact assessment failed to take into account the impact of increasing the cost of capital, GEMA submitted that this was incorrect and referred to paragraphs 4.56 to 4.59 in the TCR Decision (which did account for the impact on the cost of capital).[733]

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[727] Reply, paragraph 118.2.
[728] Reply, paragraph 118.3; see also GEMA's Skeleton, paragraph 41
[729] Reply, paragraph 118.3.
[730] Reply, paragraph 119.
[731] Reply, paragraph 122.
[732] Reply, paragraph 122.1.
[733] Reply, paragraph 123.

Interveners' submissions

9.27 Centrica/BGT supported GEMA's position on this ground and submitted that, as a matter of law, GEMA was obliged to adopt the correct interpretation of the ITC Regulation, irrespective of arguments based on regulatory consistency and predictability.[734]

9.28 Furthermore, Centrica/BGT submitted that GEMA's decision was predictable.[735] Centrica/BGT also submitted that GEMA's decision, and its impact, were foreseeable,[736] and that Centrica foresaw and acted on the basis that the decision would be made.[737] Specifically, Centrica/BGT submitted that this applied to GEMA's approval of the Original Proposal, as well as GEMA's approach to the ancillary services exclusion for which it had never suggested a different approach.[738]

Our decision on Ground 4

Introduction

9.29 Below we set out our assessment of, and conclusion on Ground 4.[739]

9.30 GEMA did not carry out a separate impact assessment for the Decision and instead relied on the assessment it had carried out in the context of the TCR and which it had taken into account in its Significant Code Review Decision.[740] The Decision stated that the impact assessment for the TCR Decision had factored in setting the TGR to zero and showed 'significant' consumer benefits associated with the changes that would be implemented through CMP317/327. It also found that the distributional impact on affected Generators, who would pay higher charges as a result of the Decision, to be 'acceptable'.[741]

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[734] Centrica/BGT NoI, paragraph 3.4.
[735] Centrica/BGT NoI, paragraph 3.5.
[736] *Moran,* paragraph 13.
[737] *Manning*, paragraph 15 and 17.
[738] *Moran,* paragraphs 22-26.
[739] As part of our assessment, we have considered the List of Issues, Issues 4 and 19:
a) The Parties disagreed on material factual issues regarding (i) the anticipated level of consumer benefit to be derived from the Decision, and (ii) the anticipated level of the cost burden imposed on Generators as a result of the Decision (Issues 4.1 and 4.2); and
b) Was GEMA's appraisal of the respective costs and benefits likely to be experienced in the light of the application of the Decision flawed by fundamental errors of appraisal? (Issue 19)
[740] Decision, A27, at page 27, paragraph 1.
[741] Decision, A27, page 27.

9.31 The Appellants' challenge under Ground 4 is not that GEMA had failed to carry out a separate quantitative impact assessment of CMP317/327, but that GEMA made errors in the analysis that it did.

9.32 The Appellants submitted that GEMA's analysis of the relative impact of the Decision on Generators and consumers suffered from the following 'flaws':[742]

(a) Flaw 1: Understated Generator detriment;

(b) Flaw 2: Generators had locked into investment planning on the basis that they would not incur additional costs;

(c) Flaw 3: Regulatory uncertainty and chilling of investment;

(d) Flaw 4: Overstated consumer benefits;

(e) Flaw 5: System value;

(f) Flaw 6: Increased cost of capital, and lack of cost reflectivity; and

(g) Flaw 7: Negative effects on the competitive position of GB Generators.

9.33 All of these 'flaws' other than Flaw 4 (consumer benefits), if they have impacts at all, would be impacts on Generators. We consider each of these alleged flaws below, first consumer benefits, then Generator detriment, then other impacts on Generators.

Our assessment of GEMA's assessment of consumer benefits

9.34 We agree that in reaching the Decision, GEMA took into account the £300 million consumer benefit which it attributed to the TCR Decision. We note that GEMA referred to the impact assessment carried out in respect of the TCR Decision having factored in setting the TGR to zero.[743] In the Decision, it said that the TCR Decision showed 'significant' consumer benefits associated with the changes that would be implemented through the Decision.[744] However, GEMA did not quantify the proportion of those benefits which would be attributed to the Decision, or to the decision to approve the Original Proposal, rather than other WACMs.

9.35 In this appeal the Appellants accept that some proportion of the £300 million total benefit identified in the TCR Impact Assessment can be attributed to the

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[742] NoA, paragraph 204.
[743] TCR Decision, A20, Figure 7 and TCR IA, A80, page 17
[744] Decision, A27, page 27.

Decision. The Appellants accepted that the Net Present Value of the estimated annual, levelized consumer benefit from the Decision was positive (around £33 million) in GEMA's impact assessment, but was also subject to caveats about the high degree of volatility.[745]

9.36 In response, GEMA submitted that had the Appellants not made certain adjustments in their calculation (with which GEMA disagreed), the annual consumer benefits would have been £87 million, not £33 million.[746] The Appellants submitted that GEMA could not substitute 'replacement' reasons for the Decision in this way.[747]

9.37 We consider, notwithstanding the difference between the Parties as to the quantum of the consumer benefits in issue, even if one were to take the Appellants' calculation of benefits amounting to around £33 million per year, that this would still reflect benefits which cannot reasonably be described as insignificant. Moreover, we note that the reference to 'significant' consumer benefits was to benefits 'associated with' (not exclusively by reference to) the changes that would be implemented through CMP317/327 and we agree with GEMA that this should be read as reflecting the wider package of changes (including CMP317/327) required to give effect to the TCR Decision.

9.38 The Appellants have thus highlighted, correctly, that the consumer benefits attributable to the Decision are significantly less than the total benefit from the TCR Decision.[748] However, the Appellants have not demonstrated that GEMA needed to do a more detailed impact assessment of the consumer benefits specific to the Decision, or that GEMA was wrong to attribute the benefits as being part of a wider package in the way that it did. GEMA's assessment in support of the Decision was to highlight that the Decision would implement a number of the changes required to give effect to the TCR Decision, and therefore that it would deliver consumer benefits. The Appellants' analysis disputes the size of these benefits, but not whether they exist at all.

9.39 In summary, we find that the Appellants have not shown that GEMA was wrong to use the evidence from the impact assessment of consumer benefits associated with the TCR Decision as part of the assessment that it did in support of the Decision. We conclude therefore that GEMA did not make

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[745] NoA, paragraph 204.4.
[746] Reply, paragraph 121.2.3, referring to *Self*, paragraph 108.3.
[747] Response, paragraph 41, *citing R v. Westminster City Council ex p Ermakov* [1996] 2 All ER 302, CA per Hutchison LJ at pp. 315-316.
[748] This is noted at Reply, paragraph 120.

errors of appraisal, as submitted by the Appellants, in its assessment of the consumer benefits in the Decision.

Our assessment of GEMA's assessment of Generator detriment

9.40 The Appellants submitted that the Decision would lead to additional costs for Generators in the order of £648.3 million in 2021/22 alone, a figure which would rise to over £1 billion per year beyond 2025/26.[749] The Appellants explained that this figure resulted from 'Decisions 1-4' and was calculated by comparing the position Generators find themselves in compared with the counterfactual in which GEMA had applied what the Appellants considered to be the correct approach to each of the various matters raised as distinct grounds of appeal.[750]

9.41 As described in paragraph 9.6 above, the Appellants' calculation of costs breaks down into:

(a) the application of the incorrect definition of the Connection Exclusion (£3 million in 2021/22); [751]

(b) the exclusion of BSUoS constraint costs (£247 million in 2021/22);[752]

(c) the exclusion of BSC costs (£33.9 million in charging year 2021/22) which the Appellants assume is inflated for future years;[753] and

(d) the decision to set no target within the range set out in the ITC Regulation. The Appellants submitted that this decision would, in effect, result in producing tariffs at the upper limit of the range with costs for Generators increasing by £364.4 million in year 2021/22.

9.42 This aspect of the Appellants' case is that GEMA made fundamental errors of appraisal that resulted in the Decision significantly understating the Generator detriment.[754]

9.43 We have considered the description above of the sources of the £648.3 million calculated by the Appellants as additional costs for Generators. For the

[749] *Tindal 1,* paragraph 7.11 and corrected by the Appellants in the Appellants' 10 March 2021 Letter, page 8.
[750] Response, paragraph 39.
[751] *Tindal 1*, paragraphs 7.14–7.16.
[752] *Tindal 1*, paragraph 7.17. Corrected from £255.2 million following clarifications in the Appellants' 10 March 2021 Letter and in an email dated 18 March 2021 due to error in the indexing applied to these costs.
[753] *Tindal 1*, paragraph 7.21 and 7.22.. Adjusted from £255.2 million following clarification in the Appellants' 10 March 2021 Letter and in an email dated 18 March 2021.
[754] NoA, paragraph 203.

reasons given below, our view is that GEMA was not wrong in not including them in its assessment. In particular:

(a) In its assessment, GEMA took into account the difference between the status quo and the Original Proposal. Therefore, save as regards Decision 1 which we address in paragraph 9.45 below, none of the £648.3 million stated by the Appellants was included in the assessment.

(b) GEMA would only have assessed the effects of Decisions 2 and 3 if it had changed the status quo as regards the treatment of Ancillary Services (BSUoS constraint costs and BSC costs). It would have been wrong for GEMA to have assessed the effect of adopting the Decision by reference to changes that were not being made.

(c) GEMA was not, in the Decision, setting a target for zero charging, and therefore was correct not to measure the impact of setting such a target.

9.44 Based on paragraph 9.43 above, we find that GEMA did not make an error in respect of the increased costs for Generator detriment. Given that GEMA was not assessing the Decision against the counterfactual put forward by the Appellants, but instead was assessing it against the Original Proposal, GEMA's assessment was not against an alternative which would have resulted in these increases in costs for Generators. It cannot have been wrong not to include them in any assessment of the costs or benefits of the Decision.

9.45 In respect of the definition of the Connection Exclusion, the effect of adopting the Original Proposal rather than the alternative proposals favoured by the Appellants (around £3 million higher cost to Generators in the 2021/22 charging year as a result of the decision to define the Connection Exclusion by reference to the assets required for connection) is agreed by both Parties to be small. On the basis that this effect on Generators is small, then GEMA did not significantly understate the Generator detriment, as alleged by the Appellants, because of this effect.[755]

9.46 To the extent that this effect increases in the future, this is not directly relevant to the current decision, since GEMA has said that the definition of the Connection Exclusion is expected to change before the expected increase in Generators' costs in 2024/25.[756]

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[755] *Tindal 1*, paragraph 17.4. states that 'this value is relatively small'.
[756] See Chapter 5: Preliminary Issues, paragraphs 5.123–5.128 and 5.147

9.47 In our view, therefore, the Appellants have not demonstrated that GEMA was wrong on the basis of a failure to consider effects of the Decision that could have resulted in a material increase in costs being incurred by Generators.

Other impacts on Generators

9.48 The Appellants also raised other points that were not reflected in the impact assessment for the Decision, none of which are, in our view, sufficiently material to show that GEMA was wrong in the Decision (these are listed in paragraph 9.32). In any event, we do not agree that GEMA was wrong in its assessment. We have dealt with understated Generator detriment (Flaw 1) and overstated consumer benefits (Flaw 4) above. We address the other flaws in our analysis below.

9.49 In respect of planning for investment and regulatory certainty ('Flaws 2 and 3'), and the effect on the cost of capital (part of 'Flaw 6'), GEMA pointed to a range of evidence which, in our view, showed that its decisions were foreseeable[757] such that they did not create regulatory uncertainty and associated future costs which should have been incorporated into the impact assessment of the Decision. [758] We note also that Centrica, in its intervention, submitted that it did foresee the Decision and acted on the basis that the Decision would be made.[759] This illustrates that the effect of the choice of a definition of the Connection Exclusion consistent with the Decision was foreseeable, at least by another large Generator.[760]

9.50 On the basis of the evidence referred to above, our view is that the Decision did not create regulatory uncertainty, with associated implications, because GEMA's decisions were foreseeable (subject to the Connection Exclusion addressed above). The changes implemented through the Decision either do not lead to a material increase in costs for Generators relative to the status quo, or, in the case of the implementation of the decision to set the TGR to zero, were to give effect to decisions which had been clearly signalled in the TCR Decision and were therefore foreseeable.

9.51 In respect of system value ('Flaw 5'), the Appellants submitted that Ofgem's own modelling showed that the impact of the Decision on total system value overall was either zero, or detrimental.[761] GEMA submitted that it had due

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[757] Reply, paragraph 118.1.
[758] Reply, paragraph 118.3.
[759] Centrica/BGT NoI, paragraph 3.13, referring to *Manning*, paras 15 and 17.
[760] Although it is agreed that the definition of the Connection Exclusion in the Decision is incorrect, it is also agreed that the impact of a change to the correct definition from the Decision has an immaterial financial effect on Generators, at least in the short term.
[761] NoA, paragraph 204.5.

regard to this outcome in the Decision but concluded that any such costs would be outweighed by the forecast benefits to consumers.[762]

9.52 We have reviewed the relevant section of the TCR Decision[763] and the ITC Regulation Impact Assessment[764] which in our view show that GEMA did consider these outcomes in its assessment. Since the Appellants have not explained on what basis GEMA's consideration of these factors was wrong, we have not considered this point further.

9.53 In 'Flaw 6', the Appellants claimed that the Decision did not follow the correct principles of cost reflectivity so no perceived benefit would arise from locational pricing.[765] The Appellants' submission and the role of cost reflectivity are addressed under Ground 5. In short, our view is that in making its decision to accept the Original Proposal GEMA was not wrong in its assessment of the proposal against ACO (b): cost reflectivity.

9.54 Finally, in 'Flaw 7', the Appellants submitted that GEMA had failed to take into account the negative effects arising from the detrimental impact on the competitive position of GB Generators compared with their EU counterparts.[766] We address this under Ground 5. In summary, our view is that in making its decision to accept the Original Proposal GEMA was also not wrong in its assessment of the proposal against ACO (a): facilitating competition.

Our conclusion on Ground 4

9.55 For the reasons given above, Ground 4 is dismissed.

[762] Reply, paragraph 122.1.
[763] TCR Decision, A20, page 143.
[764] ITC Regulation Impact Assessment, A30, page 20.
[765] NoA, paragraph 204.6.
[766] NoA, paragraph 204.6–204.7.

10. Ground 5: Failure to have proper regard or give due weight to the statutory and CUSC objectives when setting a target towards zero charging for Generators

Introduction

10.1 In this section we address Ground 5 of the NoA, namely that GEMA failed '…to have proper regard or give due weight to the statutory and CUSC objectives when setting a target towards zero charging for Generators.'

The Appellants' submissions

10.2 The Appellants submitted that the Decision[767] fails to have proper regard or give appropriate weight to the desirability of reducing annual average transmission charges paid by GB Generators (the TNUoS charges) to as close to zero as possible.[768] They contended that GEMA failed to have due regard to relevant statutory objectives and the ACOs when declining to set such a target. They also submitted that the statutory cap deriving from the ITC Regulation of €2.50/MWh should not be treated as a target for transmission charging but should be the maximum within the Permitted Range.[769]

Reopening of the TCR Decision by the 'back door'

10.3 An issue that arose in the Parties' pleadings was whether the Appellants' case on Ground 5 amounted to a collateral attack on the TCR Decision and that setting a zero target for the relevant transmission charges would amount to reintroducing a Transmission Generation Residual charge (**TGR**) by the 'back door'.[770] The Appellants denied this. They submitted that a zero target did not require the reintroduction of any TGR component. Some form of adjustment to Generators' charges was always going to be necessary for so long as the statutory cap existed.

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[767] Decision, A27 and, to the extent relevant, the CMP 339 Decision, A25.
[768] We note that, in their pleadings, the Appellants referred to this in various ways including as a target that tends towards zero, to charges as close to zero as possible, to charges at or approaching € 0.00 MWh and to targeting zero. For ease of reference, we generally refer to a 'zero target' – by which we mean the target the Appellants referred to in their pleadings.
[769] NoA, paragraph 205. The Appellants added that in order to prevent the statutory cap *de facto* becoming the prevailing rate, GEMA should have found that a target should be set for transmission charging to bring the level down over time, with an aim of achieving zero annual average transmission charges paid by Generators in GB (Ibid.).
[770] See Reply, paragraphs 10.5 and 127, and further below. This goes to part of the List of Issues: Issue 21 (Did the TCR Decision reach a concluded and definitive view on this issue?) and issue 22 (If so, are the Appellants precluded from challenging that part of the CMP 317/327 Decision which declined to set such a target?).

10.4 The Appellants also submitted that, in any event, in considering the Final Modification Report (**FMR**) GEMA considered WACMs proposing 'targeting zero' and reached a formal conclusion on the matter (by rejecting them).[771] The rejection of those WACMs was a separate decision by a public body producing legal effects. Applying Lord Bingham's principles in *Johnson v Gore Wood (No 1)*,[772] they were not precluded from challenging GEMA's conclusions on this discrete issue.[773]

Desirability of a zero target deriving from EU (and UK) legislation and policy considerations

10.5 The Appellants' case as far the relevant EU legislation and GEMA's principal objective, and policy considerations,[774] were concerned was that GEMA failed to take properly into account: (i) that the ITC Regulation did not present any obstacle to setting a zero target; (ii) that not doing so would set a de facto target of €2.50 MWh; (iii) the adverse impact of not doing so on the competitive position of GB Generators, compared to those in most Member States which set generator charges at or close to zero; (iv) the higher costs to consumers that would result from not setting such a target; (v) the added difficulty and expense not setting a target would impose on building low carbon generation plant in GB; (vi) that setting a zero target would increase regulatory certainty, reducing pricing for risk and enabling Generators to bid for CfDs) and for Capacity more economically;[775] and (vii) the effect of not setting a zero target on cross-border trade and the undermining of the internal market within the EU.[776]

10.6 As to the latter of those points, the Appellants submitted that GEMA failed to take into account the effect on cross border trade that not setting a zero target would have in terms of Article 8(7) of the Electricity Regulation[777]. Neither did it consider the effect, in terms of undermining the internal market, set out in

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[771] Response, paragraphs 42 – 44.
[772] [2002] AC 1.
[773] Appellants' Skeleton, paragraphs 46 - 48.
[774] NoA, paragraphs 205 – 210. We note that paragraph 205 referred to objectives identified by UK legislatures and to matters relating to the interests of consumers but did not refer in terms to GEMA's principal objective in section 3A EA89. The same paragraph also referred to 'policy statements.'
[775] It would also, the Appellants contended, facilitate the building of flexible dispatchable generation in GB. That is, generation which can be turned on or off quickly, or rapidly increase or decrease output. NoA, paragraph 210.2.
[776] NoA, paragraphs 207 and 210 in particular.
[777] Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ [2009] L 211/15, 14.8.2009 as amended, and that has now been repealed and consolidated by the Recast Electricity Regulation. A correlation table in Annex III shows how the provisions of the Recast Electricity Regulation correspond to the provisions of Regulation (EC) No 714/2009.

Recital (10) of the ITC Regulation.[778] [779] [780] The Appellants said targeting zero would have had the benefit of better seeking to achieve the aims pursued by the ITC Regulation. The statutory cap on Generators' charges was always going to represent a 'benefit' to Generators, but the rationale for it was that improved competitivity of Generators would lead to efficiency gains for the benefit of consumers.[781]

The Applicable CUSC Objectives (ACOs)

10.7 The Appellants submitted that the Decision's failure to set a target was flawed by reference to the achievement of the ACOs by which it was to be assessed.[782]

ACO (a): facilitating competition

10.8 The Appellants' case was that the Decision was flawed by reference to the achievement of ACO (a) - facilitating competition - because not setting a zero target meant it would be cheaper for developers to build generation in interconnected countries and import electricity into GB over interconnectors. That would distort competition between them and GB Generators and have a detrimental impact on cross-border trade.[783] [784]

10.9 The Decision, however, focused exclusively on competition between generators within GB: (i) Transmission Connected Generation[785] and Large Distributed Generation (**Large DG**),[786] on the one hand; and (ii) Small Distributed Generation (**Small DG**),[787] on the other.[788] In so doing, there were

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[778] Commission Regulation (EU) No 838/2010 of 23 September 2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging OJ (2010) L250/5 24.9.2010.
[779] NoA, paragraph 207.
[780] The Appellants also noted advantages of setting a target identified in the CMP 317/327 FMR, including that targeting average Generator transmission charges of zero would: (i) achieve comparability with other transmission markets across the EU and more consistent treatment with Embedded Generators (NoA, paragraph 210.3); and (ii) reduce the risk of a breach of the €2.50/MWh upper limit set by the ITC Regulation, but with a lower risk of charges falling beneath the €0.00/MWh floor set thereby (NoA, paragraph 210.4). They said targeting zero commanded support from most Workgroup members, but the Decision failed to reflect this.
[781] Appellants' Skeleton, paragraphs 44 and 45.
[782] NoA, paragraph 211.
[783] NoA, paragraph 211.
[784] In Appellants' Skeleton, paragraph 9, they noted that the purpose of the ITC Regulation was to facilitate cross-border competition, and that it has succeeded in that ambition, but not to GB Generators' advantage. Since 2014, the majority (87.8%) of electricity transferred by interconnector has been imported into GB. In the period from 2014 to 2018, between 6.74% and 7.85% of GB Demand was met by imports of electricity across interconnectors.
[785] Generation or Generators that are connected directly to the electricity transmission system.
[786] Large Distributed Generation or Generators - the large Generation or Generators connected (above 100 MW) connected to the distribution network.
[787] Small Distributed Generation or Generators - the small generation or generators (less than 100 MW) connected to the electricity distribution network.
[788] NoA, paragraph 212.

inconsistencies in GEMA's rationale and it took into account legally irrelevant factors. [789] It also failed to take into account that there were competitive distortions in favour of some small generators ('Behind the Meter Generation' or **BTMG**),[790] and which could have been addressed by other means.[791]

10.10 In submissions at the Main Hearing, on 4 March 2021, the Appellants also said that GEMA's failure to set a zero target worsened, rather than improved, competitive distortions between the GB Generators who pay TNUoS charges[792] and those generators who do not.[793] It means the former pay additional costs.[794]

ACO (b): cost reflectivity

10.11 The Appellants' case on ACO (b) - cost reflectivity - was that it was still entirely possible to set relative locational charging for Generators within a regime where total, average charges to Generators tend to zero (since Generators located close to sources of Demand would pay lower/negative transmission charges than those located further away). GEMA's assessment of the extent to which the Original Proposal and the WACMs respect the principle of cost reflectivity was flawed. It failed to recognise that the relative price signal to Generators is the same irrespective of where in the range the target is set for annual average transmission charges. GEMA appeared, the Appellants submitted, to claim that TNUoS locational tariffs were cost reflective in absolute terms.[795]

10.12 The Appellants also noted that TNUoS locational Demand charges had historically averaged to roughly zero for Demand. GEMA had accepted that this was 'perfectly fine' from a cost reflectivity point of view. They said it was not clear why GEMA considered that it is appropriate for Demand charges to average zero, but not Generators'. [796]

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[789] NoA, paragraph 213. The Appellants submitted that, if GEMA has concluded (as they say page 25 of the Contested Decision suggests it has) that Large DG should not fall within the scope of the ITC Regulation, then a policy objective of achieving parity of treatment between Large DG and Small DG is a legally irrelevant factor for GEMA to have taken into account.
[790] Also known as onsite generation, this is generation located on an electricity customers' premises.
[791] NoA, paragraphs 211-215.
[792] Transmission Connected Generators and Large DG.
[793] Small DG.
[794] Main Hearing, 4 March 2021, Transcript, page 15, lines 3 to 25, page 16, line 1, and page 72, lines 4 to 17.
[795] NoA, paragraph 216 and Appellants' Skeleton, paragraph 45.
[796] Response, paragraph 45.

ACO (d): compliance with EU legislation

10.13 In relation to ACO (d), and specifically compliance with the ITC Regulation, the Appellants summitted that a zero target would minimise the risk of non-compliance in a more effective way than the error margin GEMA adopted. It would also avoid the regulatory uncertainty engendered by a series of ad hoc adjustments to the definitions of the Connection Exclusion and now the ASE by GEMA and NGESO to deal with an impending breach of the Permitted Range.[797]

Other ACOs

10.14 As for ACO (c) and (e),[798] the Appellants submitted that, for the reasons set out in Chapter 9 of this document, GEMA had overstated consumer savings and understated Generator detriment.[799]

GEMA's submissions

The Appellants' arguments represent a collateral attack on the TCR Decision

10.15 GEMA's primary defence was that the Appellants' arguments amounted to a collateral attack on the TCR Decision. It submitted that setting a zero target would re-introduce the competitive distortion between Generators who pay TNUoS charges and those generators who do not, which GEMA decided to remove in the TCR Decision (by setting the TGR to zero).[800] The Appellants could have, but did not, seek judicial review of the TCR Decision and/or the CUSC Direction at the relevant time. It was, GEMA submitted, impermissible to advance a public law challenge to a decision which (as here) simply gives effect to an earlier, unchallenged, decision.[801] GEMA submitted that the appeal should be dismissed for that reason alone.[802] [803]

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[797] NoA, paragraph 217.
[798] ACO (c) is that, 'so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses;' ACO (e) is 'promoting efficiency in the implementation and administration of the system charging methodology.'
[799] NoA, paragraph 218.
[800] Reply, paragraph 127.2 and 127.3
[801] GEMA's Skeleton, paragraph 43.1 and the case law there referred to: 'See, e.g., *R (Nash) v Barnet London Borough Council* [2013] EWCA Civ 1004, [2013] PTSR 1457, §§42, 57-75 [**C29**]; *R (Peters) v Haringey London Borough Council* [2018] EWHC 192 (Admin), [2018] PTSR 1359, §§151-156 [**C30**]; *R (Christchurch Borough Council) v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 2126 (Admin), [2019] PTSR 598, §§60-63 [**C31**].'
[802] Reply, paragraphs 10.5 and 127.
[803] GEMA also noted that, in the absence of any such judicial review, other industry participants are likely to have organised their businesses on the footing that the TCR Decision and the CUSC Direction were lawful and would be given effect. Reply, paragraph 127.5 and GEMA's Skeleton, paragraph 43.

10.16 GEMA further submitted that the Appellants' arguments in favour of the 'back-door reintroduction' of the TGR and/or the partial postponement of its removal were in any event without merit. They demonstrated no error (still less any material error) in the Decision.[804] [805]

Desirability of a zero target deriving from EU (and UK) legislation and policy considerations

10.17 In its Reply, GEMA submitted that 'No target is needed to secure compliance with the ITC Regulation.'[806] It said the regulation does not impose any obligation to target the bottom of the Permitted Range and that it is notable that the UK government did not introduce any such obligation when recently amending the ITC Regulation.[807]

10.18 GEMA also said the Appellants were also wrong to say that the Decision set a de facto target for annual average transmission charges of €2.50 MWh.[808] It was an adjustment only to be applied if those charges were forecast to fall outside the Permitted Range.[809] GEMA further said that setting a target for average charges would not significantly reduce Generators' pricing risk.[810] [811]

The ACOs

ACO (a): facilitating competition

10.19 GEMA submitted that the Appellants did not demonstrate any error (let alone any material error) in its conclusion that not setting a zero target would better facilitate achievement of ACO (a).[812] It said:

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[804] Reply, paragraph 10.5.
[805] Or, to the extent relevant, the CMP 339 Decision, A25.
[806] Reply, paragraph 140.2.
[807] GEMA's Skeleton, paragraph 44.
[808] Reply, paragraph 129.3.
[809] Reply, paragraph 129.1. GEMA noted that whether unadjusted 'annual average transmission charges' consistently remain above €2.50.MWh in future years will depend primarily on the choices Generators make. If they choose to locate new generating capacity closer to centres of demand, this would have the effect of decreasing 'annual average transmission charges,' potentially to below €2.50.MWh. Reply, paragraph 129.2.
[810] Reply, paragraph 130.2. This was because (i) the charges that any individual Generator would face could be either above or below the target; and (ii) it is an individual Generator's own charges, not average charges, which are relevant to the pricing risk faced by the Generator in question, as explained in *Self*, paragraph 117.2. GEMA also noted what it said was an inconsistency in the Appellants' case on this point.
[811] And that there was no basis for the Appellants' unexplained assertion (NoA, paragraph 210.2) that fixing a target would facilitate the building of more flexible dispatchable generation (generation which can be turned on or off quickly, or rapidly increase or decrease output): Reply, paragraph 130.3. GEMA also noted that there is in any event no reasonably foreseeable threat to security of electricity supply in GB: Reply, paragraph 130.3. making reference to *Self*, paragraph 117.3.
[812] Reply, paragraph 137.

(a) The object of removing the TGR was to address a distortion of competition between Generators who pay TNUoS charges (Transmission-Connected Generators and Large DG) and those generators who do not (Small DG). A zero target for annual average transmission charges would in effect reintroduce the TGR by the back door, perpetuating the same distortion.[813]

(b) If and insofar as distortions in favour of BTMG exist, that is not a reason why other distortions of competition should be perpetuated or created.[814]

(c) The Appellants offered no specific evidence of the alleged detriment to cross-border competition without a zero target or the extent to which such a target would improve competition. They likewise offered no analysis of why the alleged benefits to cross-border competition of a zero target would outweigh the harms to competition between Generators who pay TNUoS charges and those generators who do not, which the Appellants did not appear to challenge.[815]

(d) GEMA had taken the effect on cross-border competition of not setting a zero target into account. The Decision letter expressly states that it took into account the issues raised in the modification report and consultation, including on cross-border competition. Paragraph 119 of Mr Self's witness statement confirms this.[816]

(e) The effects on cross-border competition would in any event be minimal. A zero target would have limited, if any, impact on the competitiveness of existing power stations[817] and the level of TNUoS charges was unlikely in practice to influence whether operators open or close plants in GB or elsewhere.[818] The ITC Regulation expressly envisaged annual average transmission charges paid by GB Generators being higher than in most

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[813] Reply, paragraphs 127 and 132 and GEMA's Skeleton, paragraph 46.1.
[814] Reply, paragraph 136 and *Self*, paragraph 121.
[815] Reply, paragraph 133.
[816] GEMA's Skeleton, paragraph 46.4.
[817] Reply, paragraph 134.1. That was because (i) the competitiveness or otherwise of a power station depended on the lowest price at which its operator was willing to sell electricity that it generated; (ii) an economically rational operator of an existing power station would generate and sell electricity, provided it could obtain a price which exceeded the marginal cost of doing so; (iii) TNUoS charges were a fixed cost levied on the basis of a Generator's capacity, not the amount of electricity it actually generated; and (iv) the level of TNUoS charges therefore did not affect the marginal costs of generating and selling electricity.
[818] Reply, paragraph 134.2. In practice, any generator considering where to locate a plant intended to serve the GB market was highly likely to situate it in GB, since (i) overseas generators could not bid for Capacity Market contracts or CfDs, which underpinned most major investment in new generating facilities; and (ii) the scope to serve the GB market from power stations located elsewhere was necessarily constrained by limited interconnector capacity.

Member States. This reflected that it was unlikely to give rise to significant distortions in competition.[819]

ACO (b): cost reflectivity

10.20 With regard to ACO (b), GEMA submitted that the Decision did not proceed on the basis that Wider Locational Charges were cost reflective in absolute terms. Such charges were set to send relative pricing signals to reflect the costs to the network of Generators locating in different regions.[820]

10.21 GEMA said setting a zero target for average Generator charges would distort the relative cost reflectivity of charges because:

(a) Such a target would operate as a flat-rate adjustment giving those Generators who pay TNUoS charges[821] a lower £/kWh than generators located in the same place but who are not liable for those charges.[822] [823]

(b) It would also distort the ratio of charges faced by individual Generators located in different places.[824]

(c) It would require adjustments to charges beyond those necessary to comply with the Permitted Range.[825]

ACO (d): compliance with EU legislation

10.22 On ACO (d), GEMA said the Appellants had provided no coherent explanation for their assertion that a zero target would better facilitate compliance with the ITC Regulation.[826] It said no target was needed to secure compliance and setting a zero target would give no leeway for errors since it targets one limit of the Permitted Range. [827] [828] It also said there was no proper basis for the Appellants' allegation of inconsistency.[829]

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[819] Reply, paragraph 134.3.
[820] Reply, paragraph 139.1.
[821] Transmission Connected Generators and Large DG.
[822] Small DG.
[823] Reply, paragraph 139.2.
[824] Reply, paragraph 139.3.
[825] Reply, paragraph 139.4.
[826] Reply, paragraph 140.1.
[827] Reply, paragraph 140.2.
[828] With regard to the Appellants' submissions that GEMA acted in a way not conducive to regulatory certainty for the purposes of ACO (d), GEMA referred to its submissions on Ground 1 (in Reply, paragraph 85). In relation to ACOs (c) and (e), it referred to its submissions on Ground 4 (in Reply, paragraphs 112 - 115).
[829] Reply, paragraph 85.

Other ACOs

10.23 As for ACO (c) and (e),[830] GEMA submitted that the Appellants' arguments were wrong for the reasons it submitted in reply to Ground 4.[831]

Our decision on Ground 5

Our approach to the assessment of Ground 5

10.24 GEMA made the Decision[832] in the context of the TCR Decision in which it set the TGR to zero. GEMA issued the CUSC Direction to give effect to the TCR Decision subject to ensuring ongoing compliance with the ITC Regulation. In response, NGESO made the Original Proposal and the CUSC Modifications Panel made 83 WACMs, some of which contained proposals to set a zero target for the relevant transmission charges.[833]

10.25 In making the Decision GEMA was required to consider if proposals would ensure compliance with relevant EU legislation, better facilitate achievement of the ACOs (compared to the status quo and other options) and further its principal objective and meet its statutory duties. We note that the Decision records that it considered these matters in that order.[834]

10.26 The relevant statutory provisions and the ACOs were accordingly those in:

(a) the relevant EU legislation, including in the Electricity Regulation and the ITC Regulation made thereunder;

(b) the ACOs defined in paragraph 5 of SLC C5 of NGESO's Transmission Licence; and

(c) GEMA's principal objective in section 3A EA89.

10.27 The Electricity Regulation, which has now been repealed and recast,[835] but under which the ITC Regulation was made, aimed at '… setting fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal market ….' (Article 1(a)). It required that network codes be '…

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[830] ACO (c) is that, 'so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses;' ACO (e) is 'promoting efficiency in the implementation and administration of the system charging methodology.'
[831] Reply, paragraphs 112-125.
[832] And, to the extent relevant, the CMP 339 Decision, A25
[833] And some of which contained other targets.
[834] Decision, A27, pages 9-10.
[835] By the Recast Electricity Regulation. See Chapter 3. The Recast Electricity Regulation describes its aims in similar terms in Article 1(c). It says that Regulation aims to, ' … set fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal market for electricity ……'

developed for cross-border network issues and market integration issues…' (Article 8(7)). Recital 10 of the ITC Regulation reflects that in setting transmission charges, 'Variations in charges faced by producers of electricity for access to the transmission system should not undermine the internal market. For this reason average charges for access to the network in Member States should be kept within a range which helps to ensure that the benefits of harmonisation are realised.'

10.28 The ACOs, which are described more fully in Chapter 3 of this document, are (a) facilitating competition; (b) cost-reflectivity; (c) taking account of developments in transmission licensees' transmission businesses; (d) compliance with relevant EU laws; and (e) promoting efficiency in the implementation and administration of the system charging methodology.

10.29 Under section 3A EA89, GEMA's principal objective in carrying out its functions, as also described in Chapter 3, is '… to protect the interests of existing and future consumers in relation to electricity conveyed by distribution systems or transmission systems.' Section 3A (1B) requires GEMA to carry out its functions, '… in the manner … [it] …considers is best calculated to further the principal objective, wherever appropriate by promoting effective competition between [specified] persons.'

10.30 The question for us to determine is whether the Decision[836] was wrong because, on the bases submitted by the Appellants, GEMA failed properly to have regard to, or failed to give the appropriate weight to, the matters to which it must have regard (referred to in paragraph 10.26 above).[837] [838] The decision involved GEMA making a multi-factorial assessment, weighing up different factors and necessarily exercising some elements of regulatory judgment. It is not our role to substitute our judgment for GEMA's simply on the basis we would have taken a different view if we were it in relation to the relevant objectives.[839] It may be that we reach a different view from GEMA on a particular point, but that it cannot be said that GEMA's decision is wrong on that basis. For example, GEMA may have taken a view as to the weight to be attributed to a particular factor which differs from ours, but which we do not consider inappropriate in the circumstances.[840]

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[836] Or, to the extent relevant, the CMP 339 Decision, A25.
[837] See E.ON UK Plc v GEMA (CC02/07), at paragraph 5.12.
[838] This goes to Issue 20 in the List of Issues: Did GEMA fail to have due regard to the statutory and CUSC Objectives when declining to set a target for transmission charging for Generators to tend towards zero?
[839] E.ON UK Plc v GEMA (CC02/07), at paragraph 5.11.
[840] E.ON UK Plc v GEMA (CC02/07), at paragraph 5.12.

Our assessment of Ground 5

10.31 In the following paragraphs we set out our assessment of whether the Decision[841] was wrong on the bases described in the preceding paragraph. Our assessment is structured as follows:

(a) First, we assess whether the Appellants' challenge to the Decision on this ground is a collateral challenge to GEMA's TCR Decision that is made out of time and must therefore fail.[842]

(b) Second, we consider whether GEMA gave appropriate consideration to the desirability of setting a target tending towards zero deriving from relevant EU (and UK) legislation and policy considerations.[843]

(c) Third, we assess whether GEMA failed to have proper regard or give appropriate weight to relevant factors when assessing the setting of a zero target against the ACOs.

(d) Fourth, we consider whether GEMA had appropriate regard to its principal objective when making its decision not to set a target tending towards zero.

Is GEMA correct to assert that the Appellant's arguments in relation to this ground are a collateral attack on the TCR Decision and that therefore the appeal should be rejected on this ground?

10.32 The points GEMA made in support of its primary defence - that the Appellants' arguments amounted to an impermissible attack on the TCR Decision[844] and a re-introduction of the TGR by the 'back door' - raise two principal issues:

(a) whether, and to what extent, the Appellants' challenge to the Decision engages the same or similar substantive issues to those GEMA determined in the TCR Decision; and

(b) whether the Appellants' challenge to the Decision is an out of time collateral attack on the TCR Decision and must fail on that ground.

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[841] Or, to the extent relevant, the CMP 339 Decision, A25.
[842] This goes to issue 21 (Did the TCR Decision reach a concluded and definitive view on this issue?) and Issue 22 (If so, are the Appellants precluded from challenging that part of the CMP 317/327 Decision which declined to set such a target?) on the List of Issues.
[843] This and the assessments referred to in the following two sub-paragraphs go to Issue 20 in the List of Issues: Did GEMA fail to have due regard to the statutory and CUSC Objectives when declining to set a target for transmission charging for Generators to tend towards zero?
[844] Reply, paragraphs 10.5 and 127.

10.33 Our assessment is that the Appellants' challenge does raise overlapping issues with those GEMA determined in the TCR Decision. Those are relevant in the assessment of the Decision GEMA made, and in particular whether it had due regard to and placed appropriate weight on relevant factors, as set out below. However, that does not mean that the Appellants' challenge is a collateral attack on the TCR Decision made out of time and which is impermissible. For the reasons in paragraph 10.36 below, that it is a challenge the Appellant was able to make and which we must determine.

10.34 As to the first of the two issues in paragraph 10.32(a) above, the intention of the TCR Decision and the associated CUSC Direction was to set the TGR to zero whilst achieving compliance with the ITC Regulation. The TCR Decision made plain that should be achieved by '… charging generators all applicable charges (having factored in the correct interpretation of the connection exclusion as set out in 838/2010), and adjusted if needed to ensure compliance with the 0-2.50 EUR/MWh range'.[845] In other words, that an adjustment to Generator charges may be needed, but only if and to the extent required to ensure compliance with the Permitted Range in the ITC Regulation. Otherwise, Generators would pay 'all applicable charges'.

10.35 Setting a zero target would have meant there would be a much larger negative adjustment to those charges beyond that required to ensure compliance with the Permitted Range. It would have largely offset the increase in Generator TNUoS charges that would result from setting the TGR to zero and meant Generators were not paying all applicable charges (subject only to the necessary adjustment).[846] Setting such a zero target would, accordingly, have been inconsistent with a stated aim of the TCR Decision: there is a substantive overlap between the two.

10.36 However, while the issues determined in the TCR Decision and those raised in the Appellants' present challenge overlap in a relevant way, we do not agree with GEMA that Ground 5 is an out of time collateral attack on the TCR Decision which '…should be dismissed for that reason alone'.[847] GEMA's letter setting out the Decision shows that it considered proposals to set a target (zero or otherwise) for the relevant transmission charges. It assessed those proposals against relevant statutory objectives and the ACOs and

[845] TCR Decision, A20, page 103.
[846] See GEMA 17 February 2021 letter, C34, and Teach-in and Clarification Hearing, 11 February 2021, Transcript, pages 67 and 68.
[847] Reply, paragraph 127.

decided not to adopt them.[848] It is this decision the Appellants appealed against. They are entitled to do so.[849]

Did GEMA give appropriate consideration to the desirability of setting a target tending towards zero deriving from relevant EU (and UK) legislation and policy considerations?

10.37 Having carefully considered the Parties' submissions in this regard,[850] our assessment is that the ITC Regulation sets a Permitted Range within which GB Generator transmission charges must fall. It does not set (though neither does it preclude the setting of) a target for these charges and the setting of a target is not required in order to achieve compliance with the range. GEMA was not wrong to set charges within the Permitted Range as far as the EU legislation was concerned and, in not setting a target towards zero, it did not fail to have proper regard or give appropriate weight to the objectives of that legislation. For reasons we set out here and later in this decision,[851] we also do not consider that it failed to have proper regard to other matters (including policy considerations) relevant to its principal objective.

10.38 As we note above in paragraph 10.27, the Electricity Regulation, under which the ITC Regulation was made, aimed to set fair rules for cross-border exchanges in electricity, to enhance competition in the internal market,[852] and required that network codes be developed for cross-border network issues and market integration issues.[853] Recital 10 of the ITC Regulation reflects that, in setting transmission charges, variations should not undermine the internal market. It expressly records that, '…. For this reason average charges for access to the network in Member States should be kept within a range which helps to ensure that the benefits of harmonisation are realised.' Those are objectives which, amongst other things, seek to benefit the interests of consumers by promoting effective competition.[854]

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[848] Decision, A27, pages 16-17.

[849] This finding determines issue 21 (Did the TCR Decision reach a concluded and definitive view on this issue?) and Issue 22 (If so, are the Appellants precluded from challenging that part of the CMP 317/327 Decision which declined to set such a target?) on the Parties' agreed List of Issues. As to the former, as set out in paragraphs 10.34 and 10.35, we find that the TCR Decision concluded that the TGR should be set to zero. A target for transmission charging for Generators to tend towards zero would have been inconsistent with this. However, as to the latter, even if the TCR Decision had reached a view on this issue, GEMA considered proposals involving the setting of a zero target. The Appellants are not precluded from challenging that part of the Decision which declined to set such a target.

[850] NoA, paragraphs 205-210, Reply, paragraphs 129, 130 and 140.2 and *Self* paragraphs 117.2 and 117.3.

[851] See below in relation to ACO (a) – facilitating competition – and GEMA's principal objective in particular.

[852] As does Article 1(c) of the Recast Electricity Regulation.

[853] Articles 1(a) and 8(7).

[854] We note that, in that regard, Recital 1 of the Electricity Directive said: 'The internal market in electricity, which has been progressively implemented since 1999, aims to deliver real choice for all consumers in the Community, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve

10.39 In pursuit of the cross-border competition, internal market and harmonisation objectives described, the ITC Regulation required the setting of GB Generators' transmission charges within the Permitted Range. That range is bigger for GB Generators than for generators in EU Member States and, as the Appellants submitted, the ERGEG Guidelines note that most Member States set generators' transmission charges at or close to zero. However, in setting that range for GB Generators, the ITC Regulation must necessarily be understood as accepting that charges within it are consistent with the objectives of the legislation.

10.40 In the Decision GEMA explicitly considered whether setting a target (zero or otherwise) for Generator TNUoS charges was necessary to achieve compliance with the Permitted Range. It was not wrong to conclude that 'the introduction of a target is not necessary for the purpose of complying with the Direction' [which required compliance with the Permitted Range].[855] It did not set such a target.[856] In not doing so, GEMA had proper regard to the objectives of the ITC Regulation and the purposes they serve, including the interests of consumers.

Did GEMA fail to have proper regard or give appropriate weight to relevant factors when assessing the setting of a zero target against the ACOs?

ACO (a): facilitation of competition

10.41 In the Decision GEMA said:

> We have considered the issues raised by the modification proposals and the FMR dated 13 August 2020, including taking into account the responses to the Workgroup Consultation and Code Administrator Consultation. We have also considered and taken into account the votes of the Workgroup and the CUSC Panel on CMP317/327 [which included a view that a target toward the bottom of the Permitted Range would better facilitate cross border competition].[857]

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efficiency gains, competitive prices and higher standards of service, and to contribute to security of supply and sustainability.'

[855] Decision, A27, page 16.

[856] Nor did it necessarily set a de facto target for Generators' annual average transmission charges of €2.50 MWh. An adjustment would only be applied to such charges if and to the extent they exceed that amount. If not, because, for example, Generators choose to locate new generating capacity closer to sources of demand and face lower locational charges, no adjustment would be applied.

[857] Decision, A27, page 10.

10.42 GEMA also said it, '…. Consider[s] that the introduction of a target below €2.50 would be negative against ACO a) (facilitating competition).' Such a target, '…. would effectively undermine and potentially even negate the impact of setting the TGR to £0, since it would result in some generators benefitting from a negative adjustment to their charges, beyond what is necessary to achieve compliance with the Limiting Regulation.' [858] GEMA therefore considered, '…. that the option without a target would better facilitate ACO a) than the options involving targets.' [859]

10.43 The Appellants' case was that the Decision was flawed by reference to the achievement of ACO (a) because GEMA took account only of competition between GB generators of different types and sizes (and did so in a flawed way), not effects on cross-border competition.[860] GEMA's defence was that it had also taken the latter effects into account and they would be minimal.[861]

10.44 Our assessment is that it was not inappropriate for GEMA to consider the impact on competition between different types and sizes of generator as part of the Decision in the way that it did. The fact some of these generators may or not be covered by the ITC Regulation does not change this. Our further assessment is that GEMA did have regard to the impact of proposals it considered on cross-border competition. That regard was limited but not such that we should treat it or the weight GEMA placed on the point as inappropriate, or the decision not to set a zero target as wrong. There are three reasons for our assessment.

10.45 First, as we have already noted, the intention of the TCR Decision in setting the TGR to zero was to remove a competitive distortion GEMA had identified between those Generators who pay TNUoS charges[862] and those generators[863] who do not. The modification proposal CMP 317/327 - in line with the CUSC Direction - was intended to give effect to the TCR Decision (whilst achieving compliance with the ITC regulation).[864] This was not contested by the Appellants. It was not therefore inappropriate for GEMA to have a focus on competition between sizes and types of generators and to reach the conclusions it did.

10.46 We note that the Appellants contended that this focus did not take into account that some Small DG (BTMG) were already favoured by a competitive

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[858] Decision, A27, page 17.
[859] Decision, A27, page 17.
[860] NoA, paragraphs 211-215.
[861] Reply, paragraphs 134.1-134.3.
[862] Transmission Connected Generators and Large DG.
[863] Small DG.
[864] Reply, paragraph 127.2.

distortion (notably with regard to how they were treated with regard to BSUoS charges).[865] However, that contention does not demonstrate that the distortion, identified by GEMA through the TCR process, between those Generators who pay TNUoS charges and those generators who do not, was given undue weight in the Decision.

10.47 We take into account that BTMG is only a subset of Small DG.[866] The Decision (and the TCR Decision), however, takes into account a distortion between all Small DG (rather than just BTMG) and Generators who pay TNUoS charges. The Appellants did not provide any evidence on the scale of the alleged distortion in favour of BTMG or the extent to which not setting a zero target would exacerbate it.

10.48 Second, GEMA did, albeit to a limited extent, consider cross-border competition in making its decision on whether or not to set a zero target.

10.49 In support of its submission that it did consider the cross-border aspect of competition, GEMA relied on the paragraph on page 10 of its Decision letter as quoted above. [867] GEMA also relied on the evidence of Mr Self in paragraph 119 of his witness statement:

> As I said in the decision letter itself (see page 10),[52] I took into account the issues raised in the modification report and consultation, which included points about cross-border competition. I also considered potential cross-border competition issues more generally in the context of the TCR Decision.

10.50 The paragraph of the Decision letter to which GEMA refers is very general in nature and is not included in the part of the Decision letter where GEMA considers whether or not to set a target (this is on pages 16 and 17 of the letter). While the impact that a target towards the bottom of the Permitted Range would have on cross border competition was an issue raised in the FMR,[868] there was very little explicit consideration of whether or not setting a zero target would better meet ACO (a). That part of the Decision letter does, however, indicate a degree of consideration of the point (which, in light of the following in particular, was sufficient).

10.51 We also note that, as set out in paragraph 10.40 above, in its assessment of whether to set a zero target GEMA did take into account compliance with the ITC Regulation. As we note in paragraphs 10.38 and 10.39, the ITC

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[865] NoA, paragraph 214.
[866] *Self*, paragraph 70.
[867] Decision, A27, page 10.
[868] FMR, A23, paragraphs 3.1.15-3.1.16.

Regulation necessarily acknowledges that the setting of charges within the Permitted Range is consistent with the enhancement of cross-border competition in the internal market.

10.52 Third, there are credible grounds to consider that TNUoS charges, and the setting of a target for them (zero or otherwise) within the Permitted Range, would have a limited impact on cross-border competition. They are as follows.

10.53 It is common ground between the Parties that TNUoS charges are fixed costs and therefore primarily influence Generators' investment and location decisions.[869] The Appellants' contention was that higher TNUoS charges in GB compared to most EU Member States could lead to generators choosing to invest in those Member States instead. They have not, however, provided evidence demonstrating that this is more than a theoretical concern.

10.54 Moreover, as we describe in paragraphs 10.38 and 10.39 above, the objective of the ITC Regulation is to facilitate cross border trade in electricity by bringing about a degree of harmonisation in the level of generator transmission charges between Member States. For these purposes, it specifies a range within which the charges should fall, rather than a target. That indicates that charges anywhere within that range are consistent with the development of cross-border competition.

10.55 GEMA has also pointed to constraints on the extent to which generators located in the Member States can bid into the GB electricity market. Namely that:

(a) overseas generators cannot bid for Capacity Market contracts or CfDs, which underpin most major investment in new generating facilities; and

(b) the scope to serve the GB market from power stations located elsewhere is necessarily constrained by limited interconnector capacity.[870]

10.56 These points are not disputed by the Appellants, although they have noted that it is possible that at some point in the future it may be possible for overseas generators to bid into the capacity mechanism[871] and they maintain that setting TNUoS charges at the top of the range could lead to more generation capacity locating outside GB.[872] In our assessment, these limits on the ability of overseas generators to bid into the GB electricity market will in practice necessarily limit the influence of TNUoS charges on operators'

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[869] See Teach-in Slides. slide 7. Teach-in and Clarification Hearing, 11 February 2021, Transcript, pages 14-15.
[870] Reply, paragraph 134.2.
[871] Teach-in and Clarification Hearing, 11 February 2021, Transcript, page 14.
[872] Main Hearing, 4 March 2021, Transcript, page 74, lines 1–3.

decisions about whether to locate generation plants in GB as opposed to EU Member States.

10.57 For these reasons, GEMA was not wrong to conclude that the Original Proposal would better facilitate the achievement of ACO (a) than proposals that included the setting of a zero target (or the status quo). It did not fail to have proper regard to, or to place appropriate weight on, relevant considerations relating to competition as the Appellants contended.

ACO (b): cost reflectivity

10.58 The Appellants' case was that GEMA could have set relative locational charging for Generators while targeting average transmission charges at zero. GEMA's approach appeared to treat TNUoS locational tariffs as cost-reflective in absolute terms and it failed to recognise that relative price signals are the same whatever target is set within the Permitted Range.[873] GEMA, for its part, said Wider Locational Charges were set to send relative pricing signals, and a zero target would distort the relative cost reflectivity of charges for the reasons described in paragraphs 10.20 and 10.21 above.[874]

10.59 There are, therefore, two issues for us to consider. Namely, whether the Decision was wrong because:

(a) GEMA proceeded on the basis that Generator charges should be cost reflective in absolute terms and thus GEMA failed to have proper regard to or place appropriate weight on relevant considerations relating to cost-reflectivity; and/or

(b) GEMA was otherwise wrong to regard the Original Proposal as better facilitating the achievement of the ACOs because there was a superior approach it should have taken in relation to cost-reflectivity and, on that basis, it failed to have proper regard to or place appropriate weight on relevant considerations.

10.60 As to the first of those issues, in the Decision GEMA stated:

> We consider that generators should face the full extent of their cost-reflective locational charges, subject to compliance with the Limiting Regulation. If a target was set within the Permitted Range, the scope to send price signals to generators would be

[873] NoA, paragraph 216 and Appellants' Skeleton, paragraph 45.
[874] Reply, paragraphs 139.1-139.4.

> unnecessarily constrained, undermining the principle of cost-reflectivity.[875]

10.61 In the TCR Decision and the CUSC Direction (and repeated in the Decision), meanwhile, GEMA stated (as we have already noted) that compliance with the ITC Regulation:

> … should be achieved by charging generators all applicable charges (having factored in the correct interpretation of the connection exclusion as set out in EU Regulation 838/2010), and adjusted if needed to ensure compliance with the 0 to 2.50 EUR/MWh range.[876]

10.62 In the Main Hearing, GEMA clarified why requiring that Generators 'pay all applicable charges' was consistent with its contention that that the Decision did not proceed on the basis that Generator charges should be cost reflective in absolute terms.[877] GEMA explained that:

> …. [local and wider location] transmission charges are modelled charges that are designed to send relative signals to reflect the different costs of you locating in different parts of the network. So transmission charges are relative charges.[878]

10.63 We understand from this that Generator TNUoS charges are not intended to recover the absolute value of the costs of the specific assets used by Generators. Instead, they are intended to signal the relative cost impact of Generators on the transmission system depending on their location. This difference between the concept of absolute cost recovery and relative locational signals is apparent in the calculation of wider locational charges. They are calculated in relation to the zone in which a Generator operates rather than in relation to the specific assets that it uses.[879]

10.64 We would consider TNUoS charges to be cost reflective in absolute terms if they resulted in the recovery of the full costs of the specific assets that are used by individual Generators. However, they do not do that.

10.65 Taking those points into account, our assessment is that the local and wider elements of the Generator TNUoS charges represent relative locational cost signals. Requiring Generators to pay 'all applicable' charges (subject to an adjustment to ensure compliance with the ITC regulation) or 'face the full

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[875] Decision, A27, page 17.
[876] Decision, A27, page 16.
[877] Reply, paragraph 139.1.
[878] Main Hearing, 4 March 2021, Transcript, page 143, lines 6-9.
[879] *Self*, paragraph 33.

extent of their cost-reflective locational charges' was not therefore to proceed on the basis that Generator TNUoS charges should be cost reflective in absolute terms.

10.66 On that basis, our judgment is that, in its assessment against ACO (b), GEMA did not wrongly proceed on the basis of an assessment of the absolute, rather than relative, cost reflectivity of the various proposals. It did not on that footing fail to have proper regard to or place appropriate weight on considerations relating to cost-reflectivity.

10.67 As to the second issue, GEMA recorded in the Decision that:

> If a target was set within the Permitted Range, the scope to send price signals to generators would be unnecessarily constrained, undermining the principle of cost-reflectivity. As such, we consider that the option without a target would better facilitate ACO b) than the options involving targets.[880]

10.68 In its Reply, it argued that the application of a large flat rate adjustment, such as that which would be necessitated for 2021/22 if a zero target were set, would distort the relative pricing signals inherent in the local and wider locational elements of TNUoS charges. It would do so because it would distort the ratio of charges faced by individual Generators located in different places.[881]

10.69 This is mathematically true: local and wider locational TNUoS charges are £/kW tariffs that are applied to a Generator depending on the area in which they are located. Applying a flat rate adjustment to these would alter the ratio of £/kW charges faced by individual Generators located in different locations and the larger the adjustment the greater the distortion. However, we do not find this logic compelling. It is not clear to us why, when a Generator is making a decision over where to locate a generation plant (the very decision that locational pricing signals are seeking to influence), the ratio of TNUoS charges in one location compared with another is more important than the £/kW difference in the level of TNUoS charges between locations. If anything, we would consider that, when making locational investment decisions, the £/kW difference in TNUoS charges at different locations would be more relevant.

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[880] Decision, A27, page 17.

[881] We note that GEMA also contended (Reply, paragraph 139.2) that the flat-rate adjustment required by a zero target would distort the relative cost reflectivity of charges between Generators who pay TNUoS charges (transmission-connected Generators and Large DG) and those generators who do not (Small DG). The distortion between sizes and types of generator is something we have considered in connection with ACO (a). It does not appear to us a point to which GEMA gave undue weight in the context of ACO (b).

10.70 Nonetheless, while we are not convinced by GEMA's logic, we do not consider that this is a basis for us to determine that it was wrong not to set a zero target because it failed to have proper regard or give appropriate weight to relevant considerations on cost-reflectivity.

10.71 We take into account that the Appellants submitted in this regard that, 'It is still entirely possible to set relative locational charging for Generators within a regime where total, average charges to Generators as a class tend to €0.00/MWh.'[882] Indeed, both the Original Proposal and setting a zero target would lead to the same relative £/kW difference between charges for Generators located in different locations.[883] At best, therefore, the Appellants' case on this point is that a zero target will have the same level of cost reflectivity as the Original Proposal.

10.72 Accordingly, even on the Appellants' case, we do not consider that GEMA failed to have proper regard or give appropriate weight to a superior approach that it could (and should) have taken in relation to cost-reflectivity. It adopted an approach that can be expected to secure at least the same level of cost-reflectivity as would be achieved by the zero target advocated by the Appellants. GEMA's decision that the Original Proposal would better facilitate the achievement of the ACOs was, therefore, not wrong on this account. It made an overall assessment that we do not consider was inappropriate because it failed to have proper regard, or to give the appropriate weight, to matters to which it must have regard.

ACO (d): compliance with the ITC Regulation and other EU legislation

10.73 In the Decision, GEMA recorded that, 'We consider that the inclusion of an error margin within the CUSC Calculation provides sufficient protection against the risk of a breach of the Limiting Regulation, and that the options are therefore neutral in relation to ACO d).'[884]

10.74 The Appellants' contention was that a zero target would minimise the risk of non-compliance with the ITC Regulation in a more effective way than the Original Proposal and avoid regulatory uncertainty.[885] GEMA said the Appellants provided no coherent explanation for the assertion about

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[882] NoA, paragraph 216.
[883] In line with what we say in paragraphs 10.61–10.66 above, wider locational TNUoS charges are £/kW tariffs that are applied to a Generator depending on the area in which they are located. Applying a flat rate adjustment – as is proposed by both the Original Proposal and would apply under a zero target - to these would not alter the difference in the £/kW charges to be applied to Generators in different locations.
[884] Decision, A27, page 17.
[885] NoA, paragraph 217.

compliance with the ITC Regulation.[886] It said no target was needed to secure compliance, that setting a zero target would give no leeway for errors since it targets one limit of the Permitted Range,[887] and that there was no proper basis for the Appellants' allegation of inconsistency.[888]

10.75 As we discuss in paragraph 10.51 above, in the Decision GEMA explicitly considered whether setting a target (zero or otherwise) for Generator TNUoS charges was necessary to achieve compliance with the Permitted Range. It concluded that it was not.[889] It was not wrong to do so.

10.76 Furthermore, the Original Proposal would only require a downward adjustment to Generator TNUoS charges if they are forecast to exceed the upper limit of the Permitted Range. When calculating the size of the required adjustment, the Original Proposal requires that an error margin, allowing for forecasting error,[890] is incorporated.[891] So, as is the case for 2021/22 TNUoS charges, where Generator transmission charges are forecast to exceed the upper limit, this error margin has the effect of reducing the targeted level of average forecast Generator transmission charges below that limit. In contrast, a target of €0/MWh would specifically target one extreme of the Permitted Range.

10.77 Our assessment, therefore, is that GEMA did not err in this regard. A breach of the lower limit of the Permitted Range is, in legal terms, the same as a breach of the upper limit. Specifically targeting the lower limit (as would be the case under a zero target) would not minimise the risk of non-compliance to any greater extent than the Original Proposal (which contained a mechanism to mitigate that risk). GEMA's decision that the Original Proposal would better facilitate the achievement of the ACOs was, accordingly, not wrong on this account.

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[886] Reply, paragraph 140.1.
[887] Reply, paragraph 140.2.
[888] Reply, paragraph 85. The Parties' submissions in that connection are considered in the context of Ground 1(e).
[889] Decision, A27, page 16.
[890] In exchange rates and generation output.
[891] *Self*, paragraph 115.

ACOs (c) and (e)[892]

10.78 GEMA's conclusions set out in the Decision were that, 'We also consider each of the options to be neutral in relation to ACOs c) and e).'[893]

10.79 The Appellants' case in respect of these ACOs was that setting a target would have remedied GEMA's failings in overstating consumer savings and understating Generator detriment from the Decision.[894] GEMA's defence was that the Appellants' arguments were wrong for the reasons it submitted in reply to Ground 4.[895]

10.80 We have set out our assessment of the Parties' submissions and the Decision in connection with Ground 4 in Chapter 9 of this document. For the reasons set out there, we find that GEMA did not make the errors of appraisal that the Appellants contended. On that basis, the premises of the Appellants' challenge here are not made out, and we have no grounds to conclude that GEMA's assessment in respect of these ACOs was wrong as far as setting a zero target was concerned.

Did GEMA have appropriate regard to its principal objective when making its decision not to set a target tending towards zero?

10.81 On pages 16 and 17 of its Decision GEMA said:

> …. the introduction of a target would effectively amount to a (self-imposed) lowering of the upper end of the Permitted Range. Based on the predicted level of charges over the coming years, it would result in a significant reduction of transmission charges payable by generators. Such charges would require to be 'picked up' by consumers.

10.82 The assessment in respect of its principal objective and statutory duties that GEMA set out in the Decision was:

> **Principal objective and statutory duties**
>
> We consider that the approval of the Original Proposal is consistent with our statutory duties, including our principal

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[892] ACO (c) is that that, 'so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses;' ACO (d) is 'promoting efficiency in the implementation and administration of the system charging methodology.'
[893] Decision, A27, page 17.
[894] NoA, paragraph 218.
[895] Reply, paragraphs 112-125.

objective to protect the interests of existing and future consumers and our other statutory duties. In rejecting proposals which would unnecessarily increase the level of adjustment required to bring annual average transmission charges within the Permitted Range, we are protecting the interests of consumers who would otherwise require to meet the resultant costs of the increase in residual charges payable by demand.[896]

10.83 In our view, GEMA's assessment in this regard was consistent with its assessment of proposals in light of relevant EU legislation and the ACOs (as set out above and which, for the reasons stated, we do not judge to have been wrong). Those are objectives which, amongst other things, seek to benefit the interests of consumers by promoting effective competition.[897] In addition, in Chapter 9 we set out that we do not consider that GEMA made a fundamental error of appraisal, including with regard to its assessment of the consumer benefits of accepting the Original Proposal. On those bases, we also find that GEMA's assessment in relation to its principal objective and statutory duties, and related policy considerations, was not wrong as far as the setting of a zero target[898] for average annual transmission charges was concerned.

Our conclusion on Ground 5

10.84 For the reasons set out above, Ground 5 is dismissed.[899]

11. Ground 6: Failure to provide for the phased introduction of the new provisions

Introduction

11.1 In this chapter we address Ground 6 of the NoA. Namely, that the Decision[900] fails to have proper regard or to give appropriate weight to the desirability of staggering the introduction of the new measures through phasing.[901]

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[896] Decision, A27, page 24.
[897] Including specifically ACO (a), in respect of which, for the reasons set out in paragraphs 10.41 to 10.57 above, we judge that GEMA's assessments on whether the Original Proposal better facilitated competition were not wrong.
[898] Or, rather, not setting such a target.
[899] This finding determines Issue 20 on the List of Issues: Did GEMA fail to have due regard to the statutory and CUSC Objectives when declining to set a target for transmission charging for Generators to tend towards zero? For the reasons set out, we find that GEMA did not so fail.
[900] And, to the extent relevant, the CMP 339 Decision.
[901] NoA, paragraph 219.

The Appellants' submissions

11.2 The Appellants' case was that the effect of the Decision was to cause a large, year-on-year step-change increase in the total TNUoS charges paid by Generators from 1 April 2021. The charges would, the Appellants said, more than double from £375 million to £774 million for 2021/22 and increase the following year before falling back again from April 2023. GEMA's decision not to phase in those changes was wrong, the Appellants said, because it did not properly consider the ACOs or its statutory duties.[902]

11.3 The Appellants submitted that, if the more disruptive impact of the significant change to the charging structure had been introduced over the course of two years, it would have been less detrimental to Generators. They could then have adjusted their conduct in the Capacity Market and in their bids for CfDs.[903] The Appellants noted that the Workgroup for CMP317/327 had proposed a phased implementation in the form of a Transition Tariff for two years or, alternatively, implementation over three years.[904]

11.4 The Appellants contended that in deciding to implement the changes to transmission charges with immediate effect from 1 April 2021, GEMA had relied solely on its conclusion to that effect for the purposes of its TCR Decision (which had set the TGR to £zero).[905] They further submitted that the Decision was, in fact, inconsistent with GEMA's approach in the TCR Decision.

11.5 In the TCR Decision, GEMA had phased the TCR implementation, so that changes to TGR charges would occur in 2021, and those to distribution residual charges in 2022. The Appellants noted that, in the TCR Decision, GEMA said:

> We agree that regulation (to the extent practicable) should be predictable …. we have been clear that our network charging framework should evolve over time as the system changes. … Delivering good long-term outcomes for consumers is best achieved by allowing efficient price signals to drive behavioural response so that the system works well, and ensuring residual charges do not create harmful distortions to these signals and are fair.[906]

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[902] NoA, paragraph 227 and Main Hearing, 4 March 2021, page 14, lines 10 to 19.
[903] NoA, paragraph 219.
[904] NoA, paragraph 220 and 221; and FMR paragraphs 9.2.4 and 9.2.5.
[905] NoA, paragraph 222.
[906] NoA, paragraph 223.

11.6 The Appellants said the changes to TNUoS charges resulting from the Decision were not predictable. Generators could not reasonably have predicted that GEMA's change to the construction of the Connection Exclusion would be inconsistent with the ITC Regulation. Nor could they have predicted GEMA's approach to the ASE, which they said was a wholly new point resulting from changes to the relevant EU legislation.[907]

11.7 The changes to the charges were also, the Appellants contended, contrary to Generators' reasonable expectation that GEMA would avoid harmful and unnecessary volatility in TNUoS charges. After the large increases described above, the charges would fall back from April 2023 once further proposals currently under consideration in a separate regulatory review (the **AFLC SCR**)[908] take effect.

11.8 In addition, the Appellants also submitted that GEMA was incorrect to find that immediate implementation of the Original Proposal better meets the ACOs (a) to (e).

(a) As to ACO (a), **facilitating competition**, the Appellants said that while setting the TGR to zero in a shorter time-frame removes the disparities between large and small generators more quickly, it would do so only at the significant cost of imposing a far higher short-term burden on Transmission Connected Generators. The Appellants further submitted that GEMA gave no indication that it took into account in its assessment the need to balance the removal of a disbenefit from Small DG against the imposition of a significant change in the level of transmission charges on Transmission Connected Generators, with no sufficient warning.[909]

(b) As to ACO (b), **cost-reflectivity**, the Appellants submitted that, in light of the further proposals currently under consideration in the AFLC SCR, the Decision would impose costs on Generators without any benefit in terms of cost-reflectivity. That burden could have been alleviated by a phased introduction of the changes. Generators also had a reasonable expectation that GEMA would be concerned with preserving relative price signals, and so would not be motivated to maximise the total annual average transmission charges collected from generation (which is what the contested Decision achieved).[910]

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[907] NoA, paragraph 226.
[908] The Electricity Network Access and Forward-Looking Charging Significant Code Review, launched by Ofgem in December 2018. NoA, paragraph 227.
[909] NoA, paragraph 228
[910] NoA, paragraph 229.

(c) As regards ACO (c), **taking account of the developments in transmission licensees' transmission businesses**, the Appellants said that setting the TGR at zero could be achieved from April 2021, but that did not mean that the necessary adjustments to the CUSC had to impose unforeseen and significant cost burdens on Generators with immediate effect. The Appellants submitted that the changes to the CUSC included the adoption of a new adjustment mechanism under Condition 14.14.5, which could have been used to avoid a breach of the upper or lower ranges of the ITC Regulation in the meantime.[911]

(d) As to ACO (d), **compliance with the ITC Regulation and EU legislation more generally**, the Appellants contended that compliance with the ITC Regulation could have been secured using the new adjustment mechanism, without triggering the excessive detriment to Generators over the next two-year period.[912]

(e) On ACO (e), **promoting efficiency in the implementation and administration of the system charging methodology**, the Appellants said that allowing an appropriate implementation period would ameliorate a large share of the 'generator shock' which would be experienced in the two-year period from 1 April 2021. Reducing the detrimental impact of the implementation of the changes would promote overall economic efficiency in the implementation and administration of the TNUoS charging regime.[913]

11.9 In its response to GEMA's reply, the Appellants supplemented the contentions above. They accepted that the setting of the TGR to £zero was foreseeable, but submitted that it was not foreseeable, not least because it was wrong in law, that the costs taken into consideration in assessing Generator charges would now include all Local Charges, whereas previously they did not include any such charges, and that all Local Assets would be excluded from the assessment of compliance with the ITC Regulation (and therefore the adjustment mechanism). The Appellants submitted that this change exposed Generators to a substantially higher level of costs, and such a fundamental shift in GEMA's approach was not foreseeable and was damaging for regulatory certainty.[914]

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[911] NoA, paragraph 230.
[912] NoA, paragraph 231.
[913] NoA, paragraph 232.
[914] Response, paragraph 47.

GEMA's submissions

11.10 GEMA's case in defence contained two main arguments. First, like Ground 5, Ground 6 amounted to a collateral attack on the TCR Decision that was made out of time and was impermissible. Second, the argument that the Decision[915] imposed a large and unforeseeable increase in costs for Generators was without merit.

11.11 As to the first of those arguments, GEMA said[916] that it had decided in the TCR Decision that the reduction of the TGR to £zero was to be implemented in full from 1 April 2021, without phasing. It had directed NGESO to forward a CUSC proposal which did so with effect from that date. The Appellants had not sought judicial review of the TCR Decision and/or the CUSC Direction and they could not, GEMA submitted, now use this appeal to mount an out-of-time attack on its earlier decision.[917]

11.12 As to the second argument, GEMA further submitted that if, notwithstanding the first argument, we decided to consider the substance of Ground 6, it should be borne in mind that the challenge is to a multi-factorial evaluation by a specialist regulator. An appellate tribunal should be slow to interfere with such an evaluation.[918]

11.13 GEMA made three main points in support of the second argument: (i) the effects of the Decision were foreseeable; (ii) those effects were not material; and (iii) it had proper regard to the ACOs in evaluating proposals.

11.14 On the first point – foreseeability – GEMA said it had expressed its intention to set the TGR to £zero in its 'minded-to' consultation before the TCR Decision, and then by the TCR Decision itself, which also had indicated that this change was to be effected without phasing. GEMA submitted that the setting of the TGR to £zero from April 2021 had, therefore, been well-signalled to all industry participants.[919] The Appellants expressly accepted this.[920]

11.15 GEMA also submitted that any reasonably prudent Generator would, since at least 2014,[921] have taken into account the possibility that the CUSC

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[915] And to the extent relevant, the Decisions.
[916] Reply, paragraphs 143 and 144.
[917] Reply, paragraphs 144.1 and 144.2.
[918] Reply, paragraph 145.
[919] Reply, paragraph146.1.
[920] GEMA's Skeleton, paragraph 49.1, referring to Response, paragraph 47.
[921] When in the CMP224 Decision GEMA identified that there were competing interpretations of the Connection Exclusion – Reply, paragraph 118.1.

Calculation would at some point be revised to reflect a broader view of the Connection Exclusion. Further, Generators had known since:

(a) 26 February 2018 (the date of the CMA 2018 Decision) that the CUSC Calculation is based on an erroneous interpretation of the Connection Exclusion;

(b) 4 May 2018 that GEMA would be considering changes to the CUSC Calculation alongside the TCR (that being the date GEMA issued an open letter, in light of the CMA 2018 Decision, saying so);[922] and

(c) 21 November 2019, the date of the TCR Decision, that such a change was to be made with effect from 2021.[923]

11.16 On the second point, about immateriality, GEMA contended that the impact on Generators' costs was minimal. The main change in those costs was the result of the TCR Decision to set the TGR to £zero from 1 April 2021, not the Decision.[924]

11.17 The Decision itself, GEMA said, would only[925] impose additional costs on Generators of (a maximum of) £3 million, which figure it said the Appellants acknowledged.[926] That is the difference in effect in 2021/22 between the interpretation of the Connection Exclusion used in the Decision and the interpretation of that exclusion endorsed by the Appellants.[927] 2021/22 is the only charging year when GEMA envisaged the CUSC modifications made under the Decision being in force. It is immaterial in this context that they did not perfectly reflect the correct interpretation of the Connection Exclusion.[928]

11.18 The other elements of the Decision (ie no change to the CUSC Calculation in respect of BSUoS Charges and/or BSC charges, and no introduction of any target within the Permitted Range), GEMA submitted, involved no change to the status quo. GEMA had not at any stage suggested that it was minded to change that position in any of those respects.[929]

11.19 For these reasons, GEMA said, Generators have had ample time to adjust their behaviour and strategies in preparation for the implementation of the

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[922] GEMA open letter, A78.
[923] Reply, paragraph 118.1.2 – 118.1.5; and paragraph 146.2.
[924] Main Hearing, 4 March 2021, page 89, lines 2– 9.
[925] By excluding all Local Charges from the CUSC Calculation under the Connection Exclusion.
[926] Reply, paragraphs 115.1 and 116.3.1, referring to *Graham I*, paragraph 7.14, and GEMA's Skeleton, paragraph 49.1.
[927] In WACM 7 (and WACM 72).
[928] Reply, paragraph 146.2 and GEMA's Skeleton, paragraph 49.1.
[929] Reply, paragraph 146.3.

changes brought about by the Decision, and there was no error in GEMA's decision not to phase the introduction of those changes.[930] GEMA also submitted that the Appellants' position on phasing was inconsistent, as they themselves had supported two alternative proposals (WACM 72 and WACM 79) which did not include phasing even though, while giving a benefit to Generators, they would have increased the charges paid by suppliers.[931]

11.20 As to the third point, about the ACOs, GEMA submitted that it evaluated the proposals in relation to phasing by reference to the relevant objectives.

11.21 As regards ACO (a),[932] GEMA said phasing would delay the removal of distortions in competition between larger and smaller generators. The Appellants accepted this. Their position was also incorrectly predicated on the contention that the Decision would impose vast additional costs on Generators with no sufficient warning.[933]

11.22 Regarding ACO (b),[934] and the need to send effective locational pricing signals, GEMA submitted it would have been inappropriate to make the Decision on the basis that it could be partially offset by the adoption of proposals currently under consideration in the AFLC SCR. No decisions have been made on those proposals and GEMA has publicly indicated that it is not currently convinced of the case for change in the relevant area. For the same reasons, GEMA submitted that the Appellants' contention that immediate implementation of the Decision will lead to 'tariff volatility' was unsound.[935]

11.23 GEMA said it had taken the view that the Original Proposal would better meet the cost-reflectivity objective for the reasons set out in relation to Ground 5.[936] It described as without foundation the Appellants' assertion that it was motivated to maximise the total annual transmission charges collected from generation.[937]

11.24 On ACO (c),[938] GEMA again noted that the Appellants' arguments were incorrectly predicated on the assertion that the Decision imposed 'unforeseen and significant' cost burdens on Generators.[939]

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[930] Reply, paragraph 147.
[931] Reply, paragraph 148.2.
[932] Facilitating competition.
[933] Reply, paragraph 150.
[934] Cost reflectivity.
[935] Reply, paragraph 151.1.
[936] Reply, paragraph 151.2.
[937] Reply, paragraph 151.3 and *Self 1* paragraph 131
[938] Taking account of the developments in transmission licensees' transmission businesses.
[939] Reply, paragraph 152.1.

11.25 GEMA submitted that, as regards ACO (d),[940] a phased implementation would postpone the taking of steps to bring the CUSC Calculation more closely into line with the calculation envisaged by the ITC Regulation. That would increase the risk of non-compliance.[941]

11.26 GEMA contended as to ACO (e)[942] that, even if the Appellants' claim that the Decision would impose large and unforeseen burdens on Generators was correct (which it said it is not), that had nothing to do with this objective.[943]

Interveners' submissions

11.27 Centrica/BGT[944] made intervening submissions. They said that the Appellants had not correctly characterised the situation, and that industry participants could and should have expected the Decision.[945] Indeed, Centrica/BGT submitted that industry should have treated GEMA's acceptance of the Original Proposal as not only foreseeable, but as a likely possibility.[946]

11.28 In particular, Centrica/BGT submitted that: (i) the Original Proposal reflected GEMA's TCR Decision by not seeking to target a specific value within the Permitted Range for Generator charges; (ii) insofar as the ASE is concerned, it was consistent with the status quo; and (iii) not including any 'phased implementation' was consistent with GEMA's reasoning up to and in the TCR Decision.[947] They stated that Centrica had adopted assumptions consistent with the Decision from November 2017 and that, even before that, Centrica had understood that it needed to take account of a range of possible future scenarios.[948]

Our decision on Ground 6

Our approach to assessment

11.29 The Appellants' challenge under this Ground, in essence, is that, in not phasing the introduction of the relevant measures, the Decision was wrong because GEMA failed to have proper regard and give due weight to its statutory objectives, including good regulatory practice, and the ACOs. Those

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[940] Compliance with the ITC Regulation and other EU legislation.
[941] Reply, paragraph 152.2.
[942] Promoting efficiency in the implementation and administration of the system charging methodology.
[943] Reply, paragraph 153.
[944] Who are part of the same corporate group.
[945] Centrica/BGT NoI, paragraph 3.5.
[946] Centrica/BGT NoI, paragraph 3.16.
[947] Centrica/BGT NoI paragraph 3.15.3 -3.15.5; *Moran*, paragraphs 24–27.
[948] Centrica/BGT NoI paragraph 3.16.

matters require GEMA to act in a predictable way. Large step changes to Generators' charges required appropriate notice and a reasonable timeframe, by phasing-in their introduction.

11.30 We have considered whether the Decision[949] was wrong as far as phasing was concerned because GEMA failed properly to have regard to, or failed to give the appropriate weight to, the matters to which it must have regard.

Our assessment

11.31 The Decision combined two separate proposals:[950] the first (CMP317) concerned the identification and exclusion of assets required for connection when setting TNUoS charges; the second (CMP327) concerned removing the Generator Residual from TNUoS charges in accordance with GEMA's TCR Decision to set the TGR to £zero.

11.32 We considered first GEMA's submission that Ground 6 amounted to an impermissible collateral attack on the TCR Decision.[951] We then considered whether the changes made under the Decision were foreseeable, and then whether their scale was such that they should have been phased in. We also assessed whether GEMA had proper regard to the ACOs and its statutory duties.[952]

Collateral attack

11.33 As it did in relation to Ground 5, GEMA contended that the Appellants' challenge under Ground 6 was a collateral attack on the TCR Decision. It was made out of time and should fail on that basis.

11.34 For similar reasons to those under Ground 5, in Chapter 10 of this document, we cannot agree with GEMA's submission. GEMA's letter setting out the Decision shows that it considered proposals involving phased implementation. It assessed them and decided not to adopt them.[953] It is this decision the

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[949] And to the extent relevant, the CMP 339 Decision.
[950] In addition to the consequential changes in the CMP 339 Decision.
[951] This goes to Issues 24 and 25 on the List of Issues: (24) Did the TCR Decision reach a concluded and definitive view on when the implementing measures to give effect to the TCR Decision had to commence? (25) If so, is SSE precluded from challenging that part of the contested Decision which declined to permit a phased introduction for the measures?
[952] Each of which latter three considerations go to Issue 23 on the List of Issues: (23) Was GEMA wrong to have rejected a phased introduction for the contested Decision?
[953] Decision, A27, pages 14-16.

Appellants appealed against and, as in relation to Ground 5, they are entitled to do so.[954]

Foreseeability[955]

11.35 In our assessment, it was clear from GEMA's TCR Decision that the TGR would be set to £zero from 1 April 2021. The Appellants have accepted this – they say in their Response at paragraph 47 that:

> …. the main thrust of GEMA's reply is that the setting of TGR to £zero was foreseeable. It is accepted that this is the case.

11.36 CMP 317, meanwhile, was raised in May 2019 specifically for the purpose of modifying the identification and exclusion of assets required for connection when setting the TNUoS charges paid by Generators.[956] The Appellants would therefore also have been on notice, at least from that date, that changes as regards this aspect of TNUoS charges were going to be made in the near future.

11.37 We take into account that Centrica/ BGT stated in their intervention that Centrica had adopted assumptions consistent with the Decision from November 2017, and that even before that Centrica had understood that it needed to take account of a range of possible future scenarios.[957] The Appellants were similarly in a position to prepare for the changes arising from the TCR Decision, the CUSC Direction and CMP317.

The need for phasing-in

11.38 The Appellants have submitted that the Decision, approving the Original Proposal from April 2021, will result in a large and short-term step-change increase in Generators' TNUoS charges for two years (2021/22 and 2022/23), before falling back down again from April 2023 onwards.[958] In deciding whether GEMA was required to introduce any change phased in over a reasonable timeframe, it is necessary to consider the extent of the financial impact of the Decision on the Appellants (and other Generators).

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[954] This resolves Issues 24 and 25 on the List of Issues for the purposes of this appeal: (24) Did the TCR Decision reach a concluded and definitive view on when the implementing measures to give effect to the TCR Decision had to commence? (25) If so, is SSE precluded from challenging that part of the contested Decision which declined to permit a phased introduction for the measures? Our finding is that, in any event, the Appellants are not precluded from challenging the Decision under Ground 6.
[955] The following findings go to Issue 23 on the List of Issues: (23) Was GEMA wrong to have rejected a phased introduction for the contested Decision? They are part of our finding that GEMA was not wrong.
[956] Decision, A27, at page 6.
[957] Paragraph 11.28 above.
[958] NoA, paragraph 227.

11.39 In that regard, we note that a substantial element of the change in TNUoS charges was caused by the TCR Decision to set the TGR to £zero. An impact assessment thereon was carried out as part of the TCR, and GEMA decided at that time to introduce this change from 1 April 2021 without a phasing-in period.

11.40 We also note that GEMA's treatment of the relevant BSUoS and BSC charges as falling within the ASE was not a change to the status quo. Moreover, as we find under Ground 3, GEMA was not wrong to treat them as within that exclusion.

11.41 Accordingly, the questions of foreseeability and the quantum of the effect of the changes caused by the Decision, and which fall properly for our consideration under Ground 6, relate (only) to the changes concerning the Connection Exclusion. That is, in respect of the identification and exclusion of assets required for connection when setting TNUoS charges.

11.42 The Appellants' evidence as regards the 'Incorrect definition of assets required for connection to improperly exclude all local circuits and substations, rather than GOS assets which are not shared' was that '…. in early years, this value is relatively small…...'[959]. The Parties in fact agree that there would be an estimated increase of around £3 million in the TNUoS charges paid by Generators in the charging year 2021/22 as a result of the Decision compared to the position were the Appellants' construction of the Connection Exclusion adopted.

11.43 That £3 million figure is less than 0.4% of total TNUoS charges paid by Generators.[960] Moreover, GEMA has stated that the Decision is only a 'stop gap' measure and will be replaced after the 2021/22 charging year.[961] In other words, that the Decision was only likely to have a non-material impact over the sort of period in which phasing might otherwise have been appropriate.

11.44 In light of those points, we cannot agree with the Appellants that the Decision caused an unexpected large and short-term step-change increase in Generators' TNUoS charges. Nor that the change needed to be phased in, rather than introduced from a single date. We agree with the Appellants' submission at the Main Hearing that 'Phasing is only an issue with options that cause a year-on-year step-change.'[962] An increase in TNUoS charges of

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[959] *Tindal 1* at 7.14.
[960] *Tindal 1* at 7.14; Reply, paragraph 116.3.1
[961] Decision, A27, page 10. See also above in Chapter 5, paragraphs 5.136–5.151, Chapter 6 at paragraph 6.104 and Chapter 7 at paragraph 7.9(c).
[962] Main Hearing, 4 March 2021, page 14, lines 17–19.

around £3 million in 2021/22, over what they would have been if the Appellants' preferred definition of the Connection Exclusion were adopted, does not amount to such a change. It was, in effect, a non-material short-term increase.[963]

Applicable CUSC Objectives (ACOs) and statutory duties

11.45 It follows from the conclusion immediately above that GEMA did not fail to have proper regard to the ACOs or its statutory duties on the basis that approving the Original Proposal would introduce a step-change in Generators' charges. The Decision[964] was not wrong on that footing.

11.46 We have considered whether GEMA failed to have proper regard and give appropriate weight to the ACOs and its statutory duties in light of the point that, for the reasons we have set out, the Original Proposal would introduce well-signalled changes that would have a limited short-term impact (before being replaced by further modification of the CUSC). We conclude that the Decision[965] was not wrong on that basis either.[966]

11.47 With regard to ACO (a) GEMA assessed that phased implementation would 'prolong the period over which larger generators benefit from (all or part of) the negative TGR whilst smaller generators do not'. Not phasing would expedite the removal of this competitive distortion and thus better facilitate ACO (a).[967] We set out under Ground 5 why GEMA was not wrong in its approach to competitive distortion under this ACO. In that light, we similarly decide that its assessment in respect of phasing was not wrong.

11.48 In relation to ACO (b), we also explain under Ground 5 why we do not consider that GEMA took cost-reflectivity into account in an inappropriate way nor erred in its Decision as far as the targeting of charges was concerned. As to phasing, its assessment was that it would 'prolong the period in which cost-reflective price signals sent to larger generators are dampened'.[968] Given our assessment under Ground 5, it follows that we also do not think this assessment as to phasing can be impugned as wrong. We agree with GEMA that it was not wrong in not taking account of undecided proposals made in

[963] This finding goes to the resolution of Issue 23 on the List of Issues: (23) Was GEMA wrong to have rejected a phased introduction for the contested Decision? It is part of our finding that GEMA was not wrong.
[964] And, to the extent relevant, the CMP 339 Decision.
[965] And, to the extent relevant, the CMP 339 Decision.
[966] This finding also goes to the resolution of Issue 23 on the List of Issues. We find that GEMA was not wrong.
[967] Decision, A27, page 15.
[968] Decision, A27, page 15.

the AFLC SCR. We note that it had expressed some doubt about those proposals.

11.49 On ACO (c), GEMA's assessment was that phasing would affect NGESO's ability to comply with the direction it was under to implement relevant changes in April 2021. That direction was a development in NGESO's transmission business, so not phasing would better meet this ACO.[969] We find that GEMA was not wrong to take that view.

11.50 GEMA similarly noted that, for the purposes of ACO (d), phased implementation would postpone steps to bring the CUSC Calculation more closely into line with the ITC Regulation. Not phasing would accordingly be likely to reduce the risk of non-compliance and better facilitate achievement of this ACO.[970] Again, we do not consider that assessment to have been wrong.

11.51 Finally, on ACO (e) GEMA took into account that phasing would require greater complexity in the implementation and administration of the system charging methodology under the CUSC.[971] That, too, was not an inappropriate assessment for it to make.

11.52 As to GEMA's principal objective, we set out under Ground 5 why we consider that its assessment of proposals in relation to its principal objective and statutory duties was not wrong as far as targeting transmission charges was concerned. We make the same finding, for similar reasons, as far as phasing was concerned.

Our conclusion on Ground 6

11.53 For the reasons given above, Ground 6 is dismissed.

12. Relief

12.1 Since we have dismissed the appeal Grounds 1 to 6, no relief is required.[972]

13. Order

13.1 By way of an Order published on the CMA's website on 30 March 2021, the appeal is dismissed and GEMA's decisions dated 17 December 2020

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[969] Decision, A27, page 15.
[970] Decision, A27, page 15.
[971] Decision, A27, page 15.
[972] List of Issues, C5, Issue 26.

approving Connection and Use of System Code proposals CMP317/327 and CMP339 are confirmed with effect from the date of that Order.