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NATIONAL GRID ELECTRICITY SYSTEM

OPERATOR LIMITED

CMP 396

RE-INTRODUCTION OF BSUOS CHARGES ON

INTERCONNECTOR LEAD PARTIES

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28 MARCH 2023

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1. EXECUTIVE SUMMARY

1.1 In our view, the amendment to the Connection and Use of System Code (the "**CUSC**") envisaged by CUSC Modification Proposal 396 ("**CMP396**") would likely be unlawful.

1.2 The above results from the interplay between retained EU law and the law resulting from the European Union (Future Relationship) Act 2020 (the "**FRA**"), which (amongst other things) incorporates the EU and UK Trade and Cooperation Agreement ("**TCA**") into UK domestic law. Specifically:

1.2.1 Absent the FRA/TCA, in our view, CMP396 would likely be unlawful due to the provisions of the Recast Regulation (as defined below) that were retained in England and Scotland.

1.2.2 The FRA/TCA would have resulted in CMP396 becoming lawful under Article 311(5) of the TCA until the conclusion a multi-party agreement relating to the compensation for the costs of hosting cross-border flows of electricity between: (i) transmission system operators participating in the inter-transmission system operator compensation mechanism established by Commission Regulation (EU) No 838/2010; and (ii) United Kingdom transmission system operators (see Article 311(3) of the TCA).

1.2.3 In fact, we understand that such an agreement does exist. Assuming that agreement fulfils the requirements of Article 311(3) of the TCA, the exception in Article 311(5) has ceased to apply. As a result, CMP396 would likely be unlawful due to the provisions of the Recast Regulation.

1.2.4 Further, the European Commission has taken the view that the agreement fulfils the requirements of Article 311(3) of the TCA. As a result, in our view, making the amendments to the CUSC envisaged by CMP396 would risk a legal action against the United Kingdom by the European Union under the terms of the TCA.

2. STRUCTURE OF ADVICE

2.1 As a result of the interrelationship between EU law, retained EU law and the TCA, this advice is structured as follows:

2.1.1 Introduction.

2.1.2 Legal framework.

2.1.3 EU law.

2.1.4 Retained EU law.

2.1.5 EU and UK Trade and Cooperation Agreement.

3. INTRODUCTION

3.1 As the licensed electricity transmission system operator ("**TSO**") in Great Britain ("**GB**"), National Grid Electricity System Operator Limited ("**NGESO**") incurs substantial costs in connection with balancing the transmission system and its day-to-day operation.[1]

3.2 NGESO recovers these costs by levying a charge, known as the Balancing Services Use of System charge ("**BSUoS Charges**"), on users of the transmission system. More specifically BSUoS Charges are:

3.2.1 Currently, levied on GB generators and GB suppliers/transmission-connected demand, in broadly equal parts, and calculated as a variable volumetric charge (£/MWh) based on the amount of energy imported from the network or exported onto the network within each half-hour period on an ex-post basis (i.e. to reflect the actual relevant costs that arose in that period); and

3.2.2 from 1 April 2023, will be levied on GB suppliers and transmission-connected demand, (that is, "**Final Demand**"), and calculated as a flat volumetric charge (£/MWh) on an ex-ante basis (i.e. calculated using forecasts of relevant costs arising in a period) and fixed for a certain period.[2]

3.3 Since 2012 BSUoS Charges have not been levied on cross-border flows of electricity over interconnectors linking the electricity markets of GB and other countries (e.g. France, Netherlands, Republic of Ireland, etc.).[3] However, prior to 2012, BSUoS Charges were also levied on interconnector flows depending on whether those flows were imports (charged as if generation) or exports (charged as if demand). This change was the result of the implementation of CUSC Modification Proposal 202 ("**CMP202**").[4]

3.4 The methodology for calculating BSUoS Charges is set out in Section 14 of the CUSC.

3.5 Representatives of Saltend Power and Waters Wye Associates have raised CMP396, which in essence is a proposal to amend the CUSC such that, if ultimately approved and implemented, it would (re)introduce BSUoS Charges on users of the transmission system exporting electricity from GB to another country through interconnectors.[5]

3.6 Further to the above, we understand that, in practice, the desired outcome is to extend BSUoS Charges on a user's Final Demand (i.e. electricity which a user consumes other than for the purposes of generation or export onto the electricity network[6]) irrespective of whether such demand/consumption occurs at the transmission system's boundary with a Distribution Network Operator ("**DNO**") (i.e. at Grid Supply Points, where a supplier's consumption volume is determined) or at the transmission system's boundary with an interconnector.

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[1] We consider the nature and component parts of BSUoS Charges in greater detail in section 5 of this advice.

[2] See Ofgem's CMP308 decision here, which removed BSUoS Charges from generators such that the charges are levied solely on GB Final Demand. This was implemented at paragraph 14.30.5 of the CUSC, Section 14.

[3] See Ofgem's CMP202 decision here, which removed BSUoS Charges from cross-border flows of electricity over interconnectors.

[4] The proposal, consultation, final modification report and Ofgem decision for CMP202 are available here.

[5] See CMP396 proposal here.

[6] CUSC, Section 11, definition of "Final Demand".

3.7 The workgroup constituted under the CUSC to evaluate CMP396 has instructed CMS to consider whether the CMP396 proposal is compliant with the current legal framework in GB.

4. LEGAL FRAMEWORK

4.1 The relevant legislative framework consists of the following:

4.1.1 Regulation (EU) 2019/943 ("**Recast Regulation**").

4.1.2 The European Union (Withdrawal) Act 2018 ("**Withdrawal Act**"), and The Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020 made pursuant to the Withdrawal Act which amends the Recast Regulation for the purposes of withdrawal.

4.1.3 The European Union (Future Relationship) Act 2020 (the "**FRA**"), which (amongst other things) incorporates the EU and UK Trade and Cooperation Agreement ("**TCA**") into UK domestic law (in the manner explained below).

4.2 It is the relationship between the above that, in our view, provides the answer to the issue upon which we have been asked to opine.

5. EU LAW

Legal framework

5.1 Much of the GB legislative and regulatory framework for interconnectors and network charges is derived from EU legislation, principally Regulation (EC) No 714/2009 ("**Regulation 714**"). However, Regulation 714 has been repealed and recast with effect from 1 January 2020 by the Recast Regulation. As will be seen below, it is necessary to start with considering the Recast Regulation, as it is relevant to the proper construction and interpretation of domestic GB law post-withdrawal from the EU.

5.2 The Recast Regulation requires:

> "*Article 2: The following definitions apply:….*
>
> *'interconnector' means a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States;*"
>
> ….
>
> "*Article 18(1): Charges applied by network operators for access to networks, including charges for connection to the networks, charges for use of networks, and, where applicable, charges for related network reinforcements, shall be cost-reflective, transparent, take into account the need for network security and flexibility and reflect actual costs incurred insofar as they correspond to those of an efficient and structurally comparable network operator and are applied in a non-discriminatory manner. Those charges shall not include unrelated costs supporting unrelated policy objectives.*
>
> *…*
>
> *Art 18(6). There shall be no specific network charge on individual transactions for cross-zonal trading of electricity*". [emphasis added]

5.3 As a result of Article 18 of the Recast Regulation it is clear that EU law prohibits a "*network charge*" being levied on cross zonal trading. In turn, this leads to two questions:

5.3.1 Question 1: Are BSUoS Charges a type of "network access charge"/"network charge" or some other type of supply cost?

5.3.2 Question 2: If BSUoS Charges may be properly construed as a network [access] charge, does the Recast Regulation prohibit the levying of such charges in the manner envisaged by CMP396?

Interpreting EU law

5.4 The starting point for interpreting an EU law is the meaning of the words themselves. However, where the meaning of the words is not clear, the Court will take a purposive (or teleological) approach to interpreting EU law. As Lord Diplock explained in *Henn and Darby v DPP* [1981] AC 850*:*

> "*The European court, in contrast to English courts, applies teleological rather than historical methods to the interpretation of the Treaties and other Community legislation. It seeks to give effect to what it conceives to be the spirit rather than the letter of the Treaties; sometimes, indeed, to an English judge, it may seem to the exclusion of the letter. It views the Communities as living and expanding organisms and the interpretation of the provisions of the Treaties as changing to match their growth.*"[7]

5.5 In adopting this purposive approach to construction and interpretation, the Court will consider the text of the relevant legislation and undertake:

> "*(i) an analysis of the natural meaning of the particular statutory language used; (ii) an analysis of legislative drafting techniques including how the language has changed over time and the inferences which are to be drawn from such changes; (iii) an analysis of the substantive provisions as a whole which will enable the language of the disputed measure to be placed into context and which can also (especially in an EU context) indicate whether a measure is intended to be a measure of full or only partial harmonisation and (iv) an analysis of the recitals as instrumental in identifying the legislative history…*"[8]

5.6 In relation to the recitals referred to in (iv), *Bennion on Statutory Interpretation*, 8th Ed., notes:

> "*English statutes rarely contain statements of their objectives because they are often found not to be reliable guides to the detailed points of interpretation that tend to arise on English statutes. However European Union directives frequently have long preambles setting out the purposes or reasons for the measures and what it is intended to achieve. This point is an indication that the objectives of a measure have a greater normative force under Community law than they would under English law.*"[9]

5.7 In addition, the Court will have regard to the following external materials:

5.7.1 Other language versions: As it must be "*borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.*"[10]

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[7] *Henn and Darby v DPP* [1981] AC 850 at [905B]

[8] *SSE Generation Ltd & Ors, R (On the Application Of) v Competition and Markets Authority* [2022] EWCA Civ 1472 at [85]

[9] *Bennion on Statutory Interpretation*, 8th Ed, at Section 28.2, paragraph 71

[10] *Srl Cilfit v Minister of Health case 283/81*[1982] ECR 3415 at [18]

5.7.2 Travaux préparatoires: The preparatory works for the EU legislation i.e. the documentary evidence of the negotiation, discussions and drafting of the final text.[11]

5.8 It should also be remembered that EU law is an autonomous legal system. No provision of English law may alter the meaning of a provision of EU law. As such, it is not relevant whether English or Scottish law (CUSC or Licence) seeks to describe or proscribe a cost as a network access charge/network charge – what is relevant is whether EU law autonomously considers any GB charge to be so.

Question 1: Are BSUoS Charges a type of "network access charge"/"network charge" or some other type of supply cost?

5.9 The Recast Regulation does not define the terms "*network access charge*" or "*network charge*". However, it does specify at Article 18(1) that "*charges applied by network operators for access to networks,* [include] *charges for connection to the networks, charges for use of networks, and, where applicable, charges for related network reinforcements*" and further provides that such charges must "*reflect actual costs incurred insofar as they correspond to those of an efficient and structurally comparable network operator*".

5.10 The BSUoS Charge would therefore constitute a "*network access charge*" for the purposes of the Recast Regulation if it represents: a (1) connection charge, (2) use of network charge; or (3) reinforcement charge – in each case with the aim of recovering actual corresponding costs.

5.11 We set out the relevant terms of the CUSC and TSO Licence at Appendix 1. In this respect:

5.11.1 It is unlikely that BSUoS Charges represent a connection or reinforcement charge as these are dealt with separately in the GB regulatory framework through other dedicated charges (i.e. electricity connection charges,[12] and, to an extent, Transmission Network Use of System Charges known as "**TNUoS Charges**"[13]).

5.11.2 The issue therefore turns on whether BSUoS Charges should be properly characterised as a "*use of network charge*".

5.12 While the Recast Regulation does not define a "*use of network charge*":

5.12.1 Article 18 requires that "*charges for use of networks, and, where applicable, charges for related network reinforcements, shall be cost-reflective*".

5.12.2 As a result, the natural meaning is charges aimed at recovering (and reflecting) the cost of developing and operating the network system shall be a use of network charge.

5.12.3 Accordingly, BSUoS Charges will be a "*use of network charges*" if they seek to recover the cost of "*developing and operating*" the transmission system.

5.13 In our view, BSUoS Charges are charges that seek to recover the cost of "*developing and operating*" the transmission system. Indeed, the nature and purpose of BSUoS Charges as provided for in the foundational legal and regulatory instruments governing electricity transmission in GB (and creating BSUoS Charges) appears to make clear that the charges are use of network charges.

5.14 As set out in Appendix 1, BSUoS Charges are for the purposes of recovering the costs incurred by the system operator when performing the "*balancing services activity*", which is in turn

[11] *Bennion on Statutory Interpretation*, 8th Ed, at Section 28.2, paragraph 70

[12] Electricity connection charges | National Grid ESO.

[13] Transmission Network Use of System (TNUoS) Charges | National Grid ESO.

specified as being part and parcel of operating the transmission system (stated as including balancing the system), and are accordingly should be defined as a "*use of system charge*".[14]

5.15 Insofar as it is relevant (or admissible), the conclusion that we have reached also reflects practice at EU and GB level:

5.15.1 ACER defines "*use of network charges*" as "*charges due to the costs developing and operating the transmission and the distribution grid and system which are recurring every year*", and ACER uses this definition in the best practice report on transmission tariffs that it prepares under Article 18(9) of the Recast Regulation (which national regulatory authorities must duly take into consideration when fixing or approving tariffs or their methodologies per Article 18(10) – noting, however, that Articles 18(9) and 18(10) are removed from the UK retained law versions but remain relevant to interpretation issues) (the "**Transmission Tariffs Best Practice Report**")".[15]

5.15.2 ACER states in its 2019 (i.e. pre-Brexit) Transmission Tariffs Best Practice Report that in GB "*the costs of system operation are recovered through Balancing Services Use of System charge*".[16]

5.15.3 Likewise, Ofgem confirms in its statutory 2020 Regulatory Authorities Report to the European Commission that BSUoS Charges recover costs associated with "*system operation, including balancing supply*" and are a type of network charge levied in GB.[17]

5.16 In our view, for all of the above reasons, BSUoS Charges are likely "*use of network charges*" (and cognate terms e.g. network [access] charge) within the meaning Article 18 of the Recast Regulation.

Question 2: If BSUoS Charges may be properly construed as a network [access] charge, does the Recast Regulation prohibit the levying of such charges in the manner envisaged by CMP396?

5.17 Proceeding on the basis that BSUoS Charges are likely to constitute "*network charges*" the issue becomes whether the charges envisaged by CMP396 proposal fall within the scope of the prohibitions set out in the Recast Regulation.

5.18 As set out above, the Recast Regulation creates the following prohibition at Article 18(6):

> *"Art 18(6). There shall be no specific network charge on individual transactions for cross-zonal trading of electricity."* [emphasis added]

5.19 The terms "*individual transactions*", and "*cross-zonal trading*" are undefined in the Recast Regulation. Taking each in turn:

5.19.1 Individual transactions: The term "*individual transactions*" is relatively straightforward and in our view would likely be understood in accordance with its ordinary meaning, i.e. separate or distinct transactions. This is supported by the French language version of the Recast Regulation, which refers to "*différentes transactions*", meaning "*distinct*" transactions. We would note, however, that an argument to the effect that CMP396 proposes to levy BSUoS Charges on Final Demand (rather than on a transaction-specific basis) is unlikely to be helpful, because BSUoS Charges are levied on a £/MWh basis.

[14] It is commonly understood that the words "system" and "network" may be used interchangeably.

[15] ACER_electricity_network_tariff_report.pdf (europa.eu).

[16] ACER Practice report on transmission tariff methodologies in Europe.pdf (europa.eu), paragraph 66.

[17] https://www.ofgem.gov.uk/sites/default/files/docs/2020/07/great_britain_and_northern_ireland_regulatory_authorities_reports_2020.pdf, page 21 first paragraph and paragraph 3.1.3.

As such, an individual transaction does (in our view) attract a BSUoS Charge. Whilst we can see arguments to the contrary, we consider them unlikely to succeed.

5.19.1 Cross-zonal trading: While this term is undefined, the Recast Regulation does provide that the similar term "*cross-zonal capacity*" means "*the capability of the interconnected system to accommodate energy transfer between bidding zones*" [emphasis added]. In turn, "*interconnected system*" is defined in the Recast Regulation as meaning "*a number of transmission and distribution systems linked together by means of one or more interconnectors*". Therefore, it appears that "*cross-zonal*" should be read as meaning "*between bidding zones linked by an interconnector*", and accordingly "*cross-zonal trading*" may be read as referring to "*trading between bidding zones linked by an interconnector*".[18]

5.20 In the context of the foregoing, we proceed on the basis that "*cross-zonal trading*" is synonymous with "*cross-border trading over interconnectors*".

5.21 In respect of the scope of the prohibition it may be said:

5.21.1 The words used ("*for*") indicate that they apply to a network charge *specifically* levied on cross-zonal transactions (i.e. a dedicated network charge designed to apply specifically to cross-border transactions); or

5.21.2 alternatively, that the words mean any particular network charge is prohibited so long as *it relates to* a transaction where the electricity will flow across borders.

5.22 The different language versions of the Recast Regulation do not illuminate which of these is the correct interpretation.

5.23 We understand that CMP396 is simply proposing that a user's BSUoS Charges liability is determined by reference to the total amount of electricity taken off the national electricity transmission system (i.e. the user's Final Demand) irrespective of whether such offtake occurs (and is calculated) at Grid Supply Points or interconnection points. Importantly, we understand there is no proposal to levy BSUoS Charges on interconnector licensees themselves (given interconnectors are "transmission" as a matter of law). Assuming this is a correct description of CMP396's intended effect, the proposal would only be contrary to EU law if the second (alternative) interpretation is correct.

5.24 As explained at paragraphs 5.4 to 5.8 above, EU law is interpreted purposively (or teleologically). In practice, this essentially means that EU courts will interpret provisions to give effect to the *aim or spirit* of the legislation, taking into account its context and general objectives (and may also have regard to the recitals, preparatory works, and other language versions).

5.25 The starting point should be that ensure that the Recast Regulation is construed as a whole. In this respect:

5.25.1 Article 1 provides that the Recast Regulation aims to:

(a) "*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*

[18] It is worth highlighting in this respect that the EU energy market is split between "*bidding zones*", which are simply geographical areas that form distinct electricity markets with uniform prices (and where market participants do not have to acquire transmission capacity via capacity allocation mechanisms), such that a country may have multiple bidding zones, or alternatively a bidding zone may span more than one country.

electricity, the setting of harmonised principles on cross-border transmission charges and the allocation of available capacities of interconnections between national transmission systems;" [emphasis added] and

(b) "*facilitate the emergence of a well-functioning and transparent wholesale market, contributing to a high level of security of electricity supply, and provide for mechanisms to harmonise the rules for cross-border exchanges in electricity*."[emphasis added]

5.25.2 Article 49 provides, amongst other things, that:

(a) "*Transmission system operators shall receive compensation for costs incurred as a result of hosting cross-border flows of electricity on their networks*".

(b) "*The compensation referred to in paragraph 1 shall be paid by the operators of national transmission systems from which cross-border flows originate and the systems where those flows end*".

(c) "*The Commission shall adopt delegated acts in accordance with Article 68, supplementing this Regulation, establishing the amounts of compensation payments payable*".

5.26 As a result of the foregoing, when read as a whole, it is apparent that:

5.26.1 The Recast Regulation establishes a compensation mechanism for hosting cross-border flows.

5.26.2 That mechanism will be a harmonised, i.e. single, mechanism.

5.26.3 The mechanism is found in Article 49 that establishes an "*inter-transmission system operator compensation mechanism*".

5.27 In our analysis, the Recast Regulation acknowledges that hosting cross-border flows creates additional costs for TSOs (including from additional constraints/congestion and additional system balancing actions). But, in line with its objective to remove barriers to cross-border trade and provide for a level playing field, the Recast Regulation creates a dedicated scheme to compensate TSOs (and therefore its users) for such additional costs in a harmonised manner. This is the "*inter-transmission system operator compensation mechanism*", also known as the "**ITC**".

5.28 When Article 18(6) is considered in the context of Article 1 and Article 49, in our view, it leads to a construction that the purpose of Article 18(6) is to exclude network charges for flows that subsequently go over interconnectors that will be compensated, separately to the TSO, by the ITC mechanism. Absent Article 18(6) there is a danger that the flows would be subject to two sets of charges.

5.29 In this respect that the above construction is supported by, and consistent with, Article 18(4)(a) provides that network charges shall be set taking into account payments and receipts resulting from the ITC (i.e. to reduce network charges by amounts received under the ITC mechanism).

5.30 The above construction is consistent with the purpose of the Recast Regulation found in the Recitals:

5.30.1 *Recitals (improving cross-border trade)*: Several recitals emphasise that a core aim of the legislation is to remove barriers to cross-border trade and therefore increase the efficiency and competitiveness of the internal energy market.[19]

[19] See for example Recast Regulation (EU version), Recitals (2), (6), and (8).

5.30.2 *Recitals (prices determined by market forces)*: Recital 22 provides that a core market principle is that electricity prices must be determined through the interaction of demand and supply in order to indicate when electricity is needed and thereby provide signals for investment.

5.30.3 *Recitals (network charges/tariffs)*: Further recitals underscore that different tariff (i.e. network charging) structures can impact prices payable for cross-border access, and therefore a degree of tariff harmonisation is required to avoid distortions of trade.[20]

5.30.4 *Recitals (cross-border flow impacts compensated through scheme)*: TSOs are to be compensated for costs arising from hosting cross-border flows by the TSOs from which the flows originate, and that such compensation will be used to reduce national network charges.

5.31 The Recitals require that the Recast Regulation should be read through the prism of aiming to remove (price and non-price) barriers to cross-border trade, whereby electricity prices and flows are determined by the interaction of supply and demand, with the overall aim of improving the efficiency of the cross-border electricity market and provide appropriate investment signals. In this respect:

5.31.1 In its decision to remove BSUoS Charges from interconnector flows in CMP202, Ofgem opined that "*BSUoS charges constitute an additional charge for imports and export of electricity and should therefore not be charged on cross-border flows* [and] *constitutes a potential barrier to cross-border trade, which is not in line with the wider European objective to promote the development of a single European market in electricity*".[21] [emphasis added]

5.31.2 Likewise, the Final Modification Report for CMP202 notes that in "*other European Member States, it is commonly the case that their equivalent of BSUoS is charged almost exclusively to demand; Interconnector Users being liable solely for their energy imbalances in each market*".[22] It further states that "*BSUoS charges create a potential barrier to GB exports. Generation BSUoS charges inherent in the GB market price, plus the demand BSUoS charges levied on the export, can potentially raise the GB price of exporting above that at which it would naturally flow if both markets were aligned*".[23] [emphasis added]

5.32 While BSUoS Charges will no longer be levied on generation from 1 April 2023 (and CMP396 does not propose to levy such charges on imports), the above text also signals that levying such charges on electricity ultimately exporting from GB may artificially increase export prices (therefore implying that a distortion of trade may occur). As such, the Recitals provide further support for our preferred interpretation (above).

5.33 In light of the above analysis, charges of the type envisaged by CMP396 are likely prohibited by Article 18(6) of the Recast Regulation insofar as the charges impose additional costs on cross

[20] Recast Regulation (EU version), Recitals (33) and (37).

[21] CMP202D (nationalgrideso.com), page 3.

[22] Microsoft Word - Final CUSC Modification Report 1.0.doc (nationalgrideso.com), paragraph 4.3.

[23] Microsoft Word - Final CUSC Modification Report 1.0.doc (nationalgrideso.com), paragraph 4.6.

border electricity flows (or at least where they do so in a unilateral, non-harmonised, manner relative to interconnected markets – i.e. outside the ITC mechanism).

6. RETAINED EU LAW

Legal framework

6.1 Prior to withdrawal from the EU, EU law was not automatically part of domestic United Kingdom law. Rather, it was a part of domestic law *via* the European Communities Act 1972 ("**ECA 1972**"), in particular Section 2(1) and (2). As stated by the Supreme Court in *R* (*Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 at [65] [80], the ECA 1972 is "*the 'conduit pipe' by which EU law is introduced into UK domestic law*."

6.2 After withdrawal, the conduit pipe (or 'tap') was turned off as the ECA 1972 was repealed by Section 1 of the European Union (Withdrawal) Act 2018 (the "**Withdrawal Act**"). The repeal took effect on 'exit day' which was 31 January 2020 at 11:00pm GMT.

6.3 The implementation (or transition) period between 31 January 2020 and 31 December 2020 at 11:00pm GMT ("**IP completion day**") preserved the position, but now that has come to an end and the tap is turned off completely.

6.4 After IP completion day, it would have caused considerable uncertainty and disruption to immediately wipe EU law and EU-derived law from domestic law. Instead, a solution was adopted to take a 'snapshot' of EU law at the end of the implementation period and convert it into domestic law. This was achieved under the Withdrawal Act, which set out the architecture for the retention, status and amendment of EU law after withdrawal and created a new category of domestic law – retained EU law.

6.5 As a result, although the United Kingdom ceased to be an EU Member State on 31 January 2020 and EU regulations ceased to apply in GB, a year later, on 31 December 2020:

6.5.1 The Withdrawal Act created a concept of 'retained EU law', by which all EU law would be incorporated into domestic United Kingdom law upon withdrawal.

6.5.2 The Recast Regulation has been incorporated into the domestic statute book as 'retained EU law' and therefore continues to apply in GB.[24]

6.5.3 However, as part of the withdrawal process, the Recast Regulation was amended by The Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020, which require "*Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast) is amended in accordance with Schedule 4*".

Recast Regulation – amendments

6.6 Articles 18(1) and 18(6) of the Recast Regulation remain, word for word, the same and were not amended by The Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020.

6.7 The relevant provisions of the Recast Regulation amended by The Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020 are set in Appendix 2. For our purposes, the key element of the amendments was that the Articles relating to the ITC were removed for the purposes of 'retained EU law'. As a result, GB's participation in the ITC

[24] For completeness, it is worth highlighting that Regulation 714 does not form part of retained EU law because (as explained above) it was repealed and replaced by the Recast Regulation prior to the relevant deadline for incorporating EU regulations into the UK statute book.

mechanism for compensating costs relating to cross border flows would (as a matter of law) no longer be based on directly applicable EU regulation, but would instead need to be effected through a multi-party agreement, as provided for in Commission Regulation 838/2010.[25] Further, Article 18(4)(a) was removed, as it was uncertain at the time whether ITC related payments would be received, such that they would (or would not) need to be taken into account in setting charges for network access.

6.8 The issue that arises is whether the withdrawal process, including amendments to the Recast Regulation, mean that a different construction and interpretation should be given to the Article 18(6) of the Recast Regulation that is now part of GB domestic law. Further, if so, whether this means that the charges envisaged by CMP396 would be lawful as a matter of 'retained EU law'.

Interpretation of retained EU law

6.9 The ultimate arbiter of EU law is the Court of Justice of the European Union ("**CJEU**"), seated in Luxembourg.

6.10 After IP completion day, under Section 6(3) of the Withdrawal Act, retained EU law that was unmodified on or after the IP completion date is to be interpreted in accordance with:

6.10.1 Retained EU case law: Domestic courts are generally bound by retained EU case law when interpreting other categories of retained EU law. For example, CJEU cases about the EU GDPR which pre-date IP completion day will bind a domestic court when interpreting the UK GDPR. However, the Supreme Court and Court of Appeal are not bound by retained EU case law, and can depart from retained EU case law.

6.10.2 Retained general principles of EU law: This is defined as "*the general principles of EU law*" as they had effect before IP completion day and subject to certain exclusions in Schedule 1 of the Withdrawal Act.

6.11 The above scheme was designed to ensure that domestic courts will, as far as possible, approach questions about the meaning of retained EU law in the same way that they approached equivalent questions of EU law before IP completion day. The scheme includes taking an EU law purposive approach to construing retained EU law.

6.12 After IP completion day, under Section 6(6) of the Withdrawal Act, in relation to retained EU law that was modified on or after the IP completion date, it is left to the Courts to decide whether or not to apply the retained EU case law or retained general principles of EU law. It is not prevented from doing so, if doing so is "*consistent with the intention of the modifications*".

Impact of the withdrawal process on the Recast Regulation

6.13 As a result of the foregoing:

6.13.1 The absence of amendment to the meaning or text relating to "*network access charge*"/"*network charge*" in the retained version of the Recast Regulation means that, in our view, BSUoS Charges remain "network access charge"/"network charge" for the purposes of Article 18 of the Recast Regulation that remains part of GB law.

6.13.2 It is, however, necessary to consider whether the removal of the provisions relating to the ITC have altered the proper construction and interpretation of Article 18(6), which previously relied upon the relationship between Article 18(6) and the ITC mechanism.

6.13.3 In our view, it does not. The proper context in which Article 18(6) was drafted was the whole of the Recast Regulation, pre-withdrawal. It would not be proper to reach the

[25] Commission Regulation 838/2010, Annex, Part A, paragraphs 2.2 and 3.

conclusion that amends to the text of other provisions, made after the drafting of Article 18(6) was complete, impacted the proper construction and interpretation of Article 18(6). That would be to place the drafting of Article 18(6) outside its proper context.

6.13.4 In addition, although Article 18(4)(a) has been removed, we do not consider that its removal is sufficient to suggest a different meaning and effect should be given to Article 18(6).

6.13.5 When considered as a whole, it is apparent that the amendments to the Recast Regulation, as part of the withdrawal process, were those related to recognising the United Kingdoms changed status – such that it was uncertain at the time whether UK TSOs would continue to participate in the EU's ITC mechanism. In our view, there is not sufficient textual alternation to suggest that the aim was to change the meaning of other provisions. Rather, the purpose was to implement the UK's withdrawal from the EU (including its institutions and mechanisms which rely on membership to operate) and ensure retained EU law remains operative on a UK-only standalone basis.

6.14 As a result, it is our view, that the (subject to the below), the position in domestic law was the same as that captured in the Recast Regulation – in other words, the charges contemplated would not be lawful.

7. EU AND UK TRADE AND COOPERATION AGREEMENT

7.1 It might be thought that the journey would end at the above point. However, it does not.

Impact of the FRA and TCA on the law

7.2 Following the UK's departure from the European Union, the EU and UK entered into the TCA.

7.3 The TCA has the status of an international treaty, such that it does not automatically become part of domestic law in the United Kingdom. However:

7.3.1 Section 29(1) the FRA provides for the general implementation of provisions of the TCA which are not already implemented into UK law by any other mechanism.

7.3.2 This is achieved by a 'glossing mechanism' which provides "*existing domestic law*" has effect "*with such modifications*[26] *as are required for the purposes of implementing*" the TCA. Therefore, insofar as the provisions of the TCA are not already part of domestic law, the TCA has transposed them automatically onto domestic law; without requiring any further legislation or text amendments to the law.

7.4 As set out in *Lipton v BA City Flyer Limited* [2021] EWCA Civ 454 at [82], when applying Section 29 of the TCA the Court shall:

> "*…determine whether the domestic law is the same as the corresponding provisions of the TCA. If it is then under section 29(1) there is no need to apply the automatic read-across. If there is inconsistency, daylight or a lacuna then the inconsistent or incomplete provision is amended or replaced and the gap is plugged.*"

7.5 As a result, if the TCA contains provisions that are inconsistent with the retained EU law version of the Recast Regulation the law will be amended so as to ensure that TCA provisions have legal effect.

[26] 'Modifications' includes amendment, repeal or revocation (section 37(1)).

TCA and interconnector flows

7.6 Importantly for our analysis, the TCA contains provisions that largely mirror those of the Recast Regulation concerning flows over interconnectors. However, it also seeks to include additional provisions.

7.7 The TCA provides as follows:

> *"Art 311(1): With the aim of ensuring the efficient use of electricity interconnectors and reducing barriers to trade between the Union and the United Kingdom, each Party shall ensure that:*
>
> *...*
>
> *(e) there are no network charges on individual transactions on, and no reserve prices for the use of, electricity interconnectors;"*

7.8 It is worth highlighting at the outset that the TCA prohibition closely tracks the equivalent pre-existing prohibition in the Recast Regulation (i.e. Article 18(6) in the retained law version). The table below shows the two prohibitions side by side for ease of reference:

Recast Regulation – Article 18(6)	**TCA – Article 311(1)(e)**
There shall be no specific network charge on individual transactions for cross-zonal trading of electricity	*each Party shall ensure ... that there are no network charges on individual transactions on ... electricity interconnectors*

7.9 In relation to the proper construction and interpretation of the TCA:

7.9.1 The TCA, like all international treaties, must be interpreted in accordance with the canons of international law.

7.9.2 The general rule for the interpretation of treaties in international law is set out in Article 31 of the Vienna Convention on the Law of Treaties (the "**Vienna Convention**"), which provides that treaties must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and meaning.

7.9.3 Other factors taken into account are: (1) any subsequent agreement between signatories; (2) their subsequent practice; (3) relevant rules of international law; and (4) any special meanings established between signatories to particular terms. Article 32 of the Vienna Convention also allows for supplementary means of interpretation, such as the preparatory work of the treaty and the circumstances of its conclusion, to determine the meaning when the interpretation according to Article 31 is ambiguous/obscure or leads to a manifestly absurd outcome/meaning.

7.9.4 Consistent with the above, the TCA itself provides at Article 4 that the "*provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the* [Vienna Convention]." It is further specified that the TCA does not oblige a party to interpret its meaning in accordance

with its domestic law, and that an interpretation by the courts of one party will not be binding on the other party.

7.10 In relation to the text of the TCA, the table above shows that there are certain lexical differences between the two prohibitions, e.g. (1) the TCA omits the word "*specific*" in relation to network charges, (2) refers to "*electricity interconnectors*" rather than "*cross-zonal trading*", and (3) uses the preposition "*on*" instead of "*for*".

7.11 In respect of whether any of these changes mean that the TCA has amended Article 18(6) of the Recast Regulation for GB law, in our view:

7.11.1 The ordinary meaning of the words used give the same result as the Recast Regulation.

7.11.2 The differences in text are insufficient to suggest on their own that the parties intended a different meaning. Rather, they reflect a clearer use of language to achieve the construction we have already arrived at for the Recast Regulation transposed into a circumstance where the relationship between the GB market and EU market (or Ireland market) means that flows will be on "*interconnectors*".

7.11.3 Further, it may be said that the difference in language between the TCA and Recast Regulation deals more clearly with how the UK deals with charges for use of network.

7.11.4 The relevant context of the TCA is the Recast Regulation and it is apparent that, save for the below, the intention was to enshrine the effect of Article 18(6) into an international law agreement between the EU and UK.

7.12 Indeed, the above is consistent with Article 311(1) of the TCA which states at the outset that the aim of its provisions (including the prohibition at sub-paragraph (e)) is to *ensure* "*the efficient use of electricity interconnectors and reducing barriers to trade between the Union and the United Kingdom*", and this is reflective of the similar aims and objectives of the Recast Regulation.

7.13 Subject to the below, we would therefore consider that Article 311(1)(e) of the TCA likely prohibits the levying of network charges to the same extent as Article 18(6) of the retained law Recast Regulation.

7.14 However, the TCA also (and perhaps even more clearly) links this prohibition on the existence of a dedicated scheme to compensate TSOs for hosting cross-border flows, and makes specific provision for UK TSOs to accede via contractual agreement to the EU ITC mechanism. The relevant provisions of the TCA are as follows:

> *"Art 311(3). Each Party shall take the necessary steps to ensure the conclusion as soon as possible of a multi-party agreement relating to the compensation for the costs of hosting cross-border flows of electricity between:*
>
> *(a) transmission system operators participating in the inter-transmission system operator compensation mechanism established by Commission Regulation (EU) No 838/2010 (45); and*
>
> *(b) United Kingdom transmission system operators.*
>
> *Art 311(4). The multi-party agreement referred to in paragraph 3 shall aim to ensure:*
>
> *(a) that United Kingdom transmission system operators are treated on an equivalent basis to a transmission system operator in a country participating in the inter-transmission system operator compensation mechanism; and*

(b) the treatment of United Kingdom transmission system operators is not more favourable in comparison to that which would apply to a transmission system operator participating in the inter-transmission system operator compensation mechanism.

Art 311(5). Notwithstanding point (e) of paragraph 1, until such time as the multi-party agreement referred to in paragraph 3 has been concluded, a transmission system use fee may be levied on scheduled imports and exports between the Union and the United Kingdom."

7.15 The following points arise:

7.15.1 First, the linkage between the prohibition at Article 311(1)(e) and the ITC mechanism is evident from the exception created by Article 311(5).

7.15.2 Second, this effectively disapplies the prohibition on network charging until the UK and EU TSOs enter into the agreement pursuant to which the GB TSO re-joins the ITC compensation mechanism.

7.16 We are instructed that NGESO has entered into such an agreement with its EU peers (the "**ITC Agreement**"). We are also instructed that this agreement was entered into before the exit from the EU. We have assumed for the purposes of this advice that the agreement entered into by NGESO fulfils the requirements of Article 311(3) of the TCA.

7.17 That assumption is consistent with the position taken by the European Commission. On 15 September 2022, the European Commission issued its Opinion "*Pursuant to point 3.5 of PART A of the Annex of Commission Regulation (EU) 838/2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging on the conclusion of a multi-party agreement relating to the compensation for the costs of hosting cross-border flows of electricity pursuant to Article 311(3) of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part*".[27] In that Opinion, the European Commission:

7.17.1 Considered that the existing ITC Agreement, as signed in 2011 between the ENTSO for Electricity and the parties to the ITC Agreement pursuant to point 3.1 of PART A of the Annex of Regulation 838/2010 and subsequently amended, is a multi-party agreement relating to the compensation for the costs of hosting cross border flows of electricity between the ITC participants and the UK TSOs.

7.17.2 On that basis, it opined that the ITC agreement is relevant for the purposes set out in Article 311(3) of the TCA.

7.17.3 Further, it opined that the existing ITC Agreement respects the requirements of points 3.2 and 3.4 of PART A of the ANNEX to Regulation 838/2010. Therefore, it fulfils the conditions set out in Article 311(4) (a) and (b) of the TCA.

7.18 Although the European Commission Opinion would not be conclusive in law on the issue of whether the ITC Agreement fulfils the requirements of Article 311(3) of the TCA, as that is a matter of international law, for determination under the terms of the TCA, the following are relevant:

[27] The Opinion may be requested from the Commission by accessing this link: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)6624&lang=en.

7.18.1 First, as the European Commission considers that the ITC Agreement does fulfil the requirements of Article 311(3) of the TCA, taking any action to amend the CUSC on the basis that it does not would leave the United Kingdom vulnerable to legal action by the European Union under the terms of the TCA.

7.18.2 Second, if the United Kingdom government shared the opinion of the European Commission, the United Kingdom and European Union could agree, at any time, that the European Union's approach is correct (by way of treaty or exchange of letters), such as to definitively resolve any concern.

7.19 As a result, it would be risky to proceed on the basis that the ITC Agreement does not fulfil the requirements of Article 311(3) of the TCA. It seems very likely that the European Union and the United Kingdom are proceeding in the basis that the ITC Agreement does fulfil the requirements of Article 311(3).

The answer

7.20 As a result, a conclusion is reached that:

7.20.1 As of today, the charges to flows over interconnectors envisaged by CMP396 would likely be unlawful.

7.20.2 That conclusion is premised on the factual assumption, and understanding, that an agreement has been entered into by NGESO fulfils the requirements of Article 311(3) and (4) of the TCA, which assumption is very likely correct.

8. NOTE

9. This note represents our view based on a review of the law. In carrying out that review, you have asked us not to look into the background negotiations of the Recast Regulation and the TCA. Our views of the merits may materially alter if we become aware of further facts and evidence relating to the drafting of the Recast Regulation and the TCA. The existence, construction and interpretation of rights and obligations is highly contextualised, and tribunals and courts can be influenced by the perceived appropriateness of the parties' actions in construing their legal obligations.

10. CONTACT DETAILS

10.1 If you have any queries in relation to the above, please contact Phillip Ashley (Partner) on +44 20 7367 3728 or at phillip.ashley@cms-cmno.com.

CMS Cameron McKenna Nabarro Olswang LLP

28 March 2023

APPENDIX 1

1. ELECTRICITY TRANSMISSION LICENCE & CUSC

1.1 The other element of the legal framework relevant to our analysis in the licence and CUSC. In order to establish the extent to which BUSoS Charges may be caught by the above provisions of the Recast Regulation (as amended) and/or the TCA, it is useful to consider their intended nature and purpose:

1.1.1 NGESO's electricity transmission licence (the "**Licence**"), granted under the Electricity Act 1989, allows it to recover costs associated with the "*balancing services activity*".[28]

1.1.2 The "*balancing services activity*" is defined in the Licence as meaning "*the activity undertaken by the licensee as part of the transmission business including:*

(a) *the co-ordination and direction of the flow of electricity onto and over the national electricity transmission system,*

(b) *the procuring and using of balancing services for the purpose of balancing the national electricity transmission system and for which the licensee is remunerated under Special Condition [4.2] (Balancing Services Activity Revenue Restriction on External Costs) and Special Condition [4.1] (Restriction of System Operator internal revenue) of the licensee's transmission licence*" [emphasis added].[29]

1.1.3 With reference to (a) above, it is worth noting that section 9(2)(a) of the Electricity Act 1989 provides that it is the "*duty of the holder of a licence authorising him to participate in the transmission of electricity to develop and maintain an efficient, co-ordinated and economical system of electricity transmission".* This is also reflected in the definition of "*transmission business*" set out in the Licence, which includes "*the co-ordination and direction of the flow of electricity onto and over the national electricity transmission system including the balancing services activity*".

1.1.4 With reference to (b) above, the Licence at Standard Condition C16 sets out "*the processes and activities the licensee must undertake for the procurement of balancing services, used to assist in co-ordinating and directing the flow of electricity onto and over the national electricity transmission system in an efficient, economic and co-ordinated manner*". [emphasis added]

1.1.5 Further, the Licence at Standard Condition C4(1) requires NGESO to have in place and conform with a "*use of system charging methodology*".

1.1.6 The "*use of system charging methodology*" is defined at Standard Condition C1 as meaning "*the principles on which, and the methods by which, for the purposes of achieving the objectives referred to in paragraph 5 of standard condition C5 (Use of system charging methodology), use of system charges are determined*" [emphasis added].

[28] NGESO Electricity transmission licence, Special Conditions 4.1 and 4.2.

[29] NGESO Electricity transmission licence, Condition C1, definition of "balancing services activity".

1.1.7 In turn, "*use of system charges*" is defined at Standard Condition C1 to mean "*charges made or levied or to be made or levied by the licensee for the provision of transmission network services and/or in relation to any area of the national electricity transmission system operator area in respect of the balancing services activity, in each case as part of the transmission business, to any authorised electricity operator, but shall not include connection charges*" [emphasis added].

1.1.8 The Licence at Standard Condition C5(1) requires NGESO to keep the use of system charging methodology at all times under review, including for the purpose of ensuring that the methodology meets the "*relevant objectives*", which are set out at Standard Condition C5(2) and include "*compliance with the Electricity Regulation*[30] *and any relevant legally binding decisions of the European Commission and/or the Agency*".

1.1.9 Finally, the use of system charging methodology regarding charges relating to the balancing services activity is set out in Section 14 of the CUSC,[31] specifically at Section 2 (The Statement of the Balancing Services Use of System Charging Methodology). More specifically, CUSC Section 14, paragraph 14.29.5 states that BSUoS Charges comprise the following costs: (i) The Total Costs of the Balancing Mechanism; (ii) Total Balancing Services Contract costs; (iii) Payments/Receipts from The Company's incentive schemes; (iv) Internal costs of operating the System; (v) Costs associated with contracting for and developing Balancing Services; (vi) Adjustments; (vii) Costs invoiced to The Company associated with Manifest Errors and Special Provisions; (viii) BETTA implementation costs; and (ix) Financing and administrative costs, as agreed by The Authority, associated with the management of the Covid Support Scheme in 14.30.13 and Exceptional Costs Support Scheme in 14.30.21, and the Further Costs Support Scheme in 14.30.27.

[30] This is defined as meaning the Recast Regulation.

[31] This is stated in the CUSC at Section 14, paragraph 14.1.

APPENDIX 2

Recast Regulation (EU version)	Recast Regulation (retained GB version)
Article 1 (Subject matter and scope)	
Art.1. This Regulation aims to: (a) set the basis for an efficient achievement of the objectives of the Energy Union and in particular the climate and energy framework for 2030 by enabling market signals to be delivered for increased efficiency, higher share of renewable energy sources, security of supply, flexibility, sustainability, decarbonisation and innovation; (b) set fundamental principles for well-functioning, integrated electricity markets, which allow all resource providers and electricity customers non-discriminatory market access, empower consumers, ensure competitiveness on the global market as well as demand response, energy storage and energy efficiency, and facilitate aggregation of distributed demand and supply, and enable market and sectoral integration and market-based remuneration of electricity generated from renewable sources; (c) 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	Art.1. This Regulation aims to: (a) […] (b) set fundamental principles for well-functioning, integrated electricity markets, which allow all resource providers and electricity customers non-discriminatory market access, empower consumers, ensure competitiveness on the global market as well as demand response, energy storage and energy efficiency, and facilitate aggregation of distributed demand and supply, and enable market and sectoral integration and market-based remuneration of electricity generated from renewable sources; (c) set fair rules for cross-border exchanges in electricity. This involves setting the principles on cross-border transmission charges and the allocation of available capacity of interconnections between the transmission systems of Great Britain and the transmission systems of other countries or territories; (d) facilitate the emergence of a well-functioning and transparent wholesale market, contributing to a high level of security of electricity supply [...].[32]

[32] Repealed by Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020/1006 Sch.4 para.1(2) (December 31, 2020: shall come into force on IP completion day).

Words substituted by Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020/1006 Sch.4 para.1(3) (December 31, 2020: shall come into force on IP completion day).

Words repealed by Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020/1006 Sch.4 para.1(4) (December 31, 2020: shall come into force on IP completion day).

transmission charges and the allocation of available capacities of interconnections between national transmission systems; (d) facilitate the emergence of a well-functioning and transparent wholesale market, contributing to a high level of security of electricity supply, and provide for mechanisms to harmonise the rules for cross-border exchanges in electricity.	
Article 2 (Definitions)	
Art.2. The following definitions apply: (1) '*interconnector'* means a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States;	Art.2. In this Regulation- "*interconnector*" means a transmission line which crosses or spans a border between Great Britain and another country or territory, and which connects the national transmission system of Great Britain with the transmission system of that other country or territory;[33]
Article 18 (Charges for access to networks, use of networks and reinforcement)	
Art.18(4). When setting the charges for network access, the following shall be taken into account: (a) payments and receipts resulting from the inter-transmission system operator compensation mechanism; (b) actual payments made and received as well as payments expected for future periods, estimated on the basis of previous periods.	Art.18(4) When setting the charges for network access, the following shall be taken into account: [...][34] (b) actual payments made and received as well as payments expected for future periods, estimated on the basis of previous periods.
Art.18(9). By 5 October 2019 in order to mitigate the risk of market fragmentation ACER shall provide a best practice report on transmission and distribution tariff methodologies while taking account of	[Repealed][35]

[33] Substituted by Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020/1006 Sch.4 para.2 (December 31, 2020: shall come into force on IP completion day)

[34] Repealed by Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020/1006 Sch.4 para.17(3) (December 31, 2020: shall come into force on IP completion day).

[35] Repealed by Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020/1006 Sch.4 para.17(6) (December 31, 2020: shall come into force on IP completion day).

national specificities. That best practice report shall address at least: (a) the ratio of tariffs applied to producers and tariffs applied to final customers; (b) the costs to be recovered by tariffs; (c) time-differentiated network tariffs; (d) locational signals; (e) the relationship between transmission tariffs and distribution tariffs; (f) methods to ensure transparency in the setting and structure of tariffs; (g) groups of network users subject to tariffs including, where applicable, the characteristics of those groups, forms of consumption, and any tariff exemptions; (h) losses in high, medium and low-voltage grids. ACER shall update the best practice report at least once every two years.	
Art.18(10). Regulatory authorities shall duly take the best practice report into consideration when fixing or approving transmission tariffs and distribution tariffs or their methodologies in accordance with Article 59 of Directive (EU) 2019/944.	[Repealed][36]
Article 49 (Inter-transmission system operator compensation mechanism)	
1. Transmission system operators shall receive compensation for costs incurred as a result of hosting cross-border flows of electricity on their networks. 2. The compensation referred to in paragraph 1 shall be paid by the operators of national transmission systems from which cross-border flows originate and the systems where those flows end.	[Repealed][37]

[36] Repealed by Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020/1006 Sch.4 para.17(6) (December 31, 2020: shall come into force on IP completion day).

[37] Repealed by Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020/1006 Sch.4 para.25 (December 31, 2020: shall come into force on IP completion day).

3. Compensation payments shall be made on a regular basis with regard to a given period in the past. Ex-post adjustments of compensation paid shall be made where necessary, to reflect costs actually incurred. The first period for which compensation payments are to be made shall be determined in the guidelines referred to in Article 61.	
4. The Commission shall adopt delegated acts in accordance with Article 68, supplementing this Regulation, establishing the amounts of compensation payments payable.	
5. The magnitude of cross-border flows hosted and the magnitude of cross-border flows designated as originating or ending in national transmission systems shall be determined on the basis of the physical flows of electricity actually measured during a given period.	
6. The costs incurred as a result of hosting cross-border flows shall be established on the basis of the forward-looking long-run average incremental costs, taking into account losses, investment in new infrastructure, and an appropriate proportion of the cost of existing infrastructure, in so far as such infrastructure is used for the transmission of cross-border flows, in particular taking into account the need to guarantee security of supply. When establishing the costs incurred, recognised standard-costing methodologies shall be used. Benefits that a network incurs as a result of hosting cross-border flows shall be taken into account to reduce the compensation received.	
7. For the purpose of the inter-transmission system operator compensation mechanism only, where transmission networks of two or more Member States form part, in whole or in part, of a single control block, the control block as a whole shall be considered as forming part of the transmission network of one of the Member	

States concerned, in order to avoid flows within control blocks being considered as cross-border flows under point (b) of Article 2(2) and giving rise to compensation payments under paragraph 1 of this Article. The regulatory authorities of the Member States concerned may decide which of the Member States concerned shall be that of which the control block as a whole is to be considered to form part.	