Neutral Citation Number: [2022] EWHC 865 (Admin)

Case No: CO/1890/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2022

Before:

MR JUSTICE SWIFT

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BETWEEN

THE QUEEN
on the application of

(1) SSE GENERATION LIMITED
(2) KEADBY GENERATION LIMITED
(3) MEDWAY POWER LIMITED
(4) GRIFFIN WINDFARM LIMITED
(5) SSE RENEWABLES (UK) LIMITED
(6) KEADBY WINDFARM LIMITED
(7) STRATHY WIND FARM LIMITED
Claimants

- and –

COMPETITION AND MARKETS AUTHORITY
Defendant

-and –

(1) THE GAS AND ELECTRICITY MARKETS AUTHORITY
(2) NATIONAL GRID ELECTRICITY SYSTEM OPERATOR LIMITED
(3) CENTRICA PLC
(4) BRITISH GAS TRADING LIMITED
Interested Parties

Kieron Beal QC (instructed by **Addleshaw Goddard LLP**) for the **Claimants**

Rob Williams QC, **Christopher Brown**, **Ewan West** (instructed by the **CMA**)
for the **Defendant**

Kassie Smith QC, **Amy Rogers**, **George Molyneaux** (instructed by **GEMA solicitor**)
for the **First Interested Party**

Hearing dates: 2, 3 and 30 November 2021, and 1 December 2021

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Approved Judgment

MR JUSTICE SWIFT

A. Introduction

1. The challenge in this case is directed to a decision of the Competition and Markets Authority ("the CMA") on the terms to be included in the Connection and Use of System Code to give effect to European Commission Regulation 838/2010. The decision is set out in a document dated 30 March 2021. The provisions in the Connection and Use of System Code apply as between National Grid Electricity System Operator Ltd ("National Grid") and electricity generators such as the Claimants, and set the charges paid by generators to use the national high voltage electricity transmission system.

2. The decision of the CMA was made on an appeal against decisions of the Gas and Electricity Markets Authority ("GEMA") taken on 17 December 2020. The principal appellant before the CMA was SSE Generation Ltd ("SSEGL") which is the primary Claimant in this application for judicial review. All the other Claimants are members of the SSE Group of companies. SSEGL is a producer of electricity. It owns and operates power stations and associated assets. It is the holder of a Generation Licence issued by GEMA under section 6 of the Electricity Act 1989.

(1) National Grid, the Transmission Licence, and the Connection and Use of System Code.

3. National Grid holds a Transmission Licence, also issued by GEMA under section 6 of the Electricity Act 1989. A transmission licence permits the holder to "participate in the transmission of electricity" for the purposes of providing or enabling the supply of electricity to any premises. "Transmission" is defined to mean "transmission by means of a transmission system". A transmission system is one, wholly or mainly, made up of high voltage lines and electrical plant and is used to convey electricity from a generating station to a substation, from one generating station to another, or from one substation to another.

4. Under the terms of its transmission licence, National Grid is required to put in place arrangements for connection to and use of the transmission system and to devise a Balancing and Settlement Code. The reasons for the former need no further explanation. The latter is intended to set out arrangements between National Grid and those who use the transmission system to coordinate and control the flow of electricity over that system. The Balancing and Settlement Code includes arrangements for payments between National Grid and network users.

5. All these arrangements are required to be set out in the Connection and Use of System Code ("the CUSC"). Pursuant to an agreement known as the CUSC Framework Agreement, the CUSC is contractually binding as between National Grid and those (including generators) it is applied to. The CUSC includes details of the charges made by the National Grid for use of the transmission system. The obligation to set such charges is the subject of a separate licence obligation under which National Grid must prepare a statement of the "use of system charging methodology". The methodology must be approved by GEMA and once approved, National Grid is required to apply it. The charges set are paid by generators such as SSEGL. The methodology is at Section 14 of the CUSC. So far as relevant for present purposes, the charging methodology includes arrangements for payment of a Use of System Charge, and charges for

Balancing Services. Licence Condition C5 requires National Grid to "keep the use of system charging methodology at all times under review", and to modify the methodology for the purpose of "better achieving the relevant objectives". Those objectives (also at Condition C5 in the Transmission Licence) include "compliance with Electricity Regulation and any relevant legally binding decisions of the European Commission and/or the Agency". Similar objectives apply to the contents of the Balancing and Settlement Code: see Condition C3(1)(b) and (3) in the Transmission Licence. The reference to the "Electricity Regulation" is to Regulation EU 2019/943 as in force on 31 December 2020; the "Agency" is the European Union Agency for the Co-operation of Energy Regulators, established under Regulation EU 713/2009.

6. Section 8 of the CUSC prescribes the way in which modifications may be made to the Section 14 charging methodology. In summary, the process is started by a proposal from any of the persons identified in Section 14, paragraph 8.16, which includes any person who is party to the CUSC Framework Agreement. The proposal is then evaluated by the CUSC Modification Panel. The Panel may refer the proposals for consideration to a Workgroup. If that happens, the workgroup evaluates both the proposal and any alternatives to the proposal that might be put forward by any party to the CUSC Framework Agreement, and then provides a report to the CUSC Modification Panel. There is then a requirement for consultation on the proposals and any alternatives. Next, the CUSC Modification Panel reports to GEMA. The final decision is taken by GEMA. By paragraph 8.23.7 of the CUSC, GEMA may (subject to exceptions none of which is material in the circumstances of this case): (a) approve the original proposal; or (b) approve one of the alternative proposals; or (c) "if [GEMA] believes that neither the CUSC modification proposal (nor any workgroup alternative CUSC modification) would better facilitate achievement of the Applicable CUSC Objectives then there will be no approval". The relevant objectives are the ones at Condition C5 of the Transmission Licence.

7. The arrangements for modification contained in the CUSC reflect part of Condition C10 of the Transmission Licence. Condition C10 paragraph 7(a) is to the effect that if on consideration of a report from the CUSC Modification Panel, GEMA "… is of the opinion that a modification set out in such report would, as compared with the then existing provisions of the CUSC and any alternative modifications set out in such report, better facilitate achieving the applicable CUSC objectives [GEMA] may direct [National Grid] to make that modification".

(2) European legislation

8. Three European law measures came into effect on 3 March 2011. The first was Directive 2009/72/EC "… concerning common rules for the internal market in electricity…" ("the 2009 Electricity Directive"). The Directive set common rules for the generation, transmission, distribution, and supply of electricity. The Directive required ownership of the high or very high voltage electricity transmission system to be separate from ownership of facilities for generation or supply of electricity. To this end, the Directive included the notion of "transmission system operator", defined as the person responsible for operating and maintaining the transmission system in any given area. The Directive went on to set out various obligations incumbent on transmission system operators. The Directive also made provision for the establishment of national regulatory authorities. GEMA is the national regulatory authority for Great Britain. The Directive provides that the responsibilities of each national regulatory authority

include that for "… approving, in accordance with transparent criteria, transmission … tariffs or their methodologies" (article 37).

9. The second measure was Regulation EC 714/2009 ("the 2009 Regulation"). This was primarily concerned with conditions for access to the electricity transmission network to facilitate cross-border exchange of electricity. However, it also contained provision about the charges that could be made by "network operators" (synonymous with transmission system operators, at least for the purposes of issues considered in this judgment) for access to transmission networks. Article 14(1) provided as follows:

> "1. Charges applied by network operators for access to networks shall be transparent, take into account the need for network security 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 be distance-related."

By article 18, the European Commission was permitted to issue Guidelines on matters within the scope of (inter alia) article 14. Article 18(2) was in the following terms:

> "2. 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 inter-transmission system operator compensation mechanism in national network charges and the provision of appropriate and efficient locational signals, in accordance with the principles set out in Article 14."

By article 19 of the 2009 Regulation, national regulatory authorities were required to "… ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 18".

10. The third of the measures was Commission Regulation 838/2010 ("Regulation 838/2010"). This contains guidelines issued pursuant to the power at article 18 of the 2009 Regulation. Article 2 of the Regulation 838/2010 is as follows:

> "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."

So far as material, Part B of the Annex to Regulation 838/2010 provides:

> "1. Annual average transmission charges paid by the producers in each Member State shall be within the ranges set out in point 3.
>
> 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;
>
> (2) charges paid by producers related to ancillary services;
>
> (3) specific system loss charges paid by producers.
>
> 3. The value of the annual average transmission charges paid by producers shall be within a range of 0 to 0.5 EUR/MWh except those applying in Denmark, Sweden, Finland, Romania Ireland, Great Britain and Northern Ireland.
>
> …
>
> Annual average transmission charges paid by producers in … Great Britain and Northern Ireland shall be within a range of 0 to 2.5 EUR/MWh …"

Paragraph 2(1) is referred to as the "connection exclusion"; paragraph 2(2) as the "ancillary services exclusion".

11. The 2009 Regulation was repealed by Regulation 2019/943 ("the 2019 Regulation") with effect from 1 January 2020. Article 18 of the 2019 Regulation is, for present purposes, the functional equivalent of article 14 of the 2009 Regulation. The Commission's power to issue Guidelines is at article 61 of the 2019 Regulation. At the hearing before me, no one suggested there was any relevant difference between this power and the power previously at article 18 of the 2009 Regulation. The obligation on national regulatory authorities previously at article 19 of the 2009 Regulation is now at article 59(1) of Directive EU/2019/944 "… on common rules for the internal market for electricity …" ("the 2019 Electricity Directive"). The 2019 Electricity Directive came into effect on 1 January 2021 and from that date, as a matter of EU law, replaced the 2009 Electricity Directive.

12. Although both the 2009 Electricity Directive and the 2009 Regulation have been repealed, Regulation 838/2010 has not been repealed. The parties' position is that Regulation 838/2010 remains in force notwithstanding the repeal of the 2009 Regulation, and is to be regarded in the same manner as Guidelines issued under the 2019 Regulation. That reflects the premise implicit both in GEMA's decision of 17 December 2020 and the decision of the CMA of 30 March 2021.

13. The final matter as far as concerns legislation, is the effect of the United Kingdom's departure from the European Union. It is common ground that the 2019 Regulation, Regulation 838/2010 and the 2009 Electricity Directive are all within the notion of retained EU law defined in the European Union (Withdrawal) Act 2018. Each was in force on "IP Completion Day" (defined at section 39 of the European Union

(Withdrawal Agreement) Act 2020). Minor amendments were made to Part B of the Annex to Regulation 838/2010 by the Electricity Network Codes and Guidelines (Markets and Trading) (Amendment) (EU Exit) Regulations 2019. None of these amendments is material for present purposes.

14. The 2019 Electricity Directive is not retained EU law. It came into force only on 1 January 2021. For the purposes of Ground 3 in these proceedings, SSEGL relies on a definition contained in the Electricity Directive 2019 (the definition of "ancillary service" at article 2(48), see below at paragraph 59). However, that definition is incorporated by reference into the 2019 Regulation (see the Regulation at article 2(60)). One wrinkle concerns the fate of the obligation on national regulatory authorities at article 19 of the 2009 Regulation. This now sits, not in the 2019 Regulation, but in article 59 of the 2019 Electricity Directive. It was not incorporated by reference into the 2019 Regulation. However, no party submitted that any significance attaches to this point. Submissions proceeded on the basis that neither the status of the Guidelines in Part B of the Annex to Regulation 838/2010, nor GEMA's obligation to give effect to it, altered on 1 January 2021.

(3) GEMA's decision

(a) The context for the decision on the Use of System Charge (application of the connection exclusion)

15. Grounds 1 and 2 of SSEGL's claim arise from GEMA's decision to modify the way in which the Use of System Charge is calculated. The following sets the context for that decision.

16. The amount that can be charged to meet the cost of building, maintaining, and operating the transmission system is set each year by GEMA. This is the Use of System Charge (in the jargon of the decision, it is referred to as the "TNUoS"). This charge is then split between generators (such as SSEGL) and other users of the transmission system referred to as "demand users" (such as suppliers who buy electricity from generators to sell to end-users). Since 2014 the proportion of the Use of System Charge payable by generators was determined so as to ensure that the charge they paid did not exceed €2.5/MWh, i.e. the limit set in Part B of the Annex to Regulation 838/2010. In practice this meant that around 13% of the Use of System Charge was paid by generators and 87% by demand users.

17. The Use of System Charge paid by generators comprises two parts: "local charges" (intended to reflect matters such as the cost of assets needed to connect the generators equipment – for example a power station – to the transmission network); and "wider locational charges" (intended to recover the cost imposed on the transmission network as result of the connection to the network of the individual generator). Together these are referred to as "locational charges". In addition, there is a Generator (or Generation) Residual Charge (in the jargon, the "TGR") which is intended to meet the difference between the amount recovered as locational charges and the total proportion of the Use of System Charge that is to be paid by generators.

18. One significant matter within this description is the maximum charge (€2.5/MWh) arising by reason of Part B of the Annex to Regulation 838/2010. As mentioned already, this sets the extent to which the Use of System Charge may be levied on generators

such as SSEGL. This provision was added into the CUSC with effect from 22 October 2014, consequent on a modification proposal known as CMP 224, approved by GEMA. In the course of the decision on CMP 224, an issue arose on the meaning and effect of the connection exclusion at paragraph 2(1) of Part B of the Annex to Regulation 838/2010. GEMA recognised that the meaning of this exclusion was open to debate. One option was that it should be understood as meaning only the things referred to in the CUSC as "connection charges", namely charges made for the cost of work and equipment necessary to construct "entry and exit points" to the transmission system. GEMA referred to this as the "narrow construction". The other option (referred to as the "broad interpretation") was that the connection exclusion included both connection charges as defined in the CUSC and local charges for circuits linking generators to the transmission system. When reaching its decision on CMP 224, GEMA reached no settled conclusion on the matter but said it preferred the narrow construction. In its decision on CMP 224, GEMA pointed out that the modification made to the calculation prescribed in the CUSC (at paragraph 14.14.5) included a margin of error provision such that compliance with the requirement in the Annex to Regulation 838/2010 that annual average transmission charges paid by producers would fall within the prescribed range, would be secured regardless of which of the two possible approaches was taken to the meaning of the connection exclusion.

19. The net effect of the decision in CMP 224 was described by the CMA in its subsequent decision on CMP 261, as follows:

> "4.22. The result of the CMP 224 Decision, in terms of charging practices, was that NGET had to:
>
> (a) Forecast transmission output and exchange rates one year ahead;
>
> (b) Calculate what ex ante charges could be levied on Generators, such that the outturn charge in Euros per MWh was expected to be compliant with the Cap (calculated by reference to the narrow interpretation of the Connection Exclusion), where the ex-post calculation would be as follows:
>
> *€ per MWh equals (Total TNUoS Charges levied on generators /transmission output) * (£:€ exchange rate)*
>
> (c) Derive the appropriate G:D split on this basis, including an allowance for forecasting error. NGET explained that 'this limit has been reduced to €2.34/MWh to incorporate a risk margin for forecasting error'".

20. The meaning and effect of the connection exclusion was considered again in CMP 261, a decision of the CMA dated 26 February 2018 on a further proposed modification to the CUSC. CMP 261 (a modification proposal raised by SSEGL) was to the effect that the CUSC should be amended to provide for a mid-year reconciliation of the Use of System Charge to ensure within the course of each charging year, that the charge did not exceed the €2.5/MWh maximum. This would avoid the need for generators to seek

to recover excess payments after the end of each charging year. GEMA considered that the modification to the CUSC proposed by CMP 261 should not be made. GEMA relied on the broad interpretation of the connection exclusion. From this premise it concluded that in the 2015/2016 charging year the maximum charge permitted under Regulation 838/2010 had not been exceeded. From that conclusion, applying the criterion at paragraph 8.23.7 of the CUSC, GEMA concluded that CMP 261 would not better facilitate the achievement of the objectives at Condition 5, paragraph 5 of the Transmission Licence.

21. SSEGL appealed the decision on CMP 261 to the CMA. One of its arguments was that GEMA's reliance on the broad interpretation of the connection exclusion was wrong. That ground of appeal failed. The CMA concluded that, on an ordinary reading of the language in Regulation 838/2010, the reference to assets "required for connection to the system" was not limited to matters within the notion of "connection charges" as defined for the purposes of the CUSC. Rather, the exclusion included anything needed for the purpose of connecting the generator to the system, taking the system as it existed at a time connection was first requested. Further, the CMA concluded that those things needed for connection at the material time continued to fall within the exclusion thereafter; they would not, over time, cease to be part of a means of connection and instead come to be regarded as part of the transmission system itself. In practice the consequence of this conclusion was that a significant part of the "local charges" element of the Use of System Charge could fall within the scope of the connection exclusion. How much would depend on the circumstance of the generator concerned, as at the time it had connected to the transmission system.

22. In August 2017, GEMA had commenced what it described as a Targeted Charging Review. This was part of a wider programme of reform. It considered possible changes to residual charges with a view to reducing "harmful distortion in the current charging framework". The problem arose because the Generation Residual Charge only affected large generators (with capacity greater than 100 MW). It did not affect either small distributed generators, or on-site generation. Further, by 2017 the Generation Residual Charge had turned into a negative charge – i.e., a rebate payable to ensure the Use of System Charge stayed within the €0 – 2.5/MWh range imposed by Regulation 838/2010.

23. In November 2018, and as part of the review, GEMA proposed that the Generation Residual Charge should be set at zero. This proposal was made following the conclusion of the CMA on CMP 261 on the scope of the connection exclusion. On 21 November 2019, GEMA published its decision following the Targeted Charging Review. This included the following on the Generation Residual Charge.

> "**Maintaining compliance with EU regulation 838/2010**
>
> 4.72 One concern raised by some stakeholders was compliance with European Regulation 838/2010 …
>
> This states that "Annual average transmission charges paid by producers in each Member State shall be within the ranges set out …", for which Ireland, Great Britain and Northern Ireland is the range from 0 to 2.50 EUR/MWh. In Great Britain, "producers" are the larger generators – transmission-

connected and larger distribution-connected generators (above 100 MW) but excludes Smaller Distribution Generators (which are currently treated as negative demand for the purposes of transmission charging).

4.73 Maintaining compliance with this "EU cap and floor" has been achieved through a combination of charges and credits for larger generators who are liable for transmission charges. The credits have been paid to generators through the Transmission Generation Residual charge.

4.74 As noted above, stakeholders raised questions around how compliance with the cap and floor will be maintained if the Transmission Generation Residual is set to zero and is not available as a mechanism to achieve compliance. Questions were also raised as to what reconciliation process would exist to ensure payments are correct for all generators.

4.75 There is a wider context around this issue. In May 2018, Ofgem made a decision related to how compliance with the cap and floor is determined through CMP 261, and this decision was appealed to the Competition and Markets Authority (CMA). The CMA upheld Ofgem's decision on CMP 261.

4.76 There is currently a Connection and Use of System Code (CUSC) modification at workgroup stage considering EU Regulation 838/2010 which is likely to be impacted by this decision. The CMP 317 modification was raised in response to CMP 261 and the CMA ruling, which provided some guidance as to how the "connection exclusion" should be correctly interpreted.

4.77 The CMA ruling, confirmed Ofgem's decision on CMP 261 and means that CUSC is not currently aligned with the correct interpretation of which assets should be included in the "connection exclusion" for the purposes of the EU cap and floor. The [Electricity System Operator] which has proposed the modification to ensure CUSC calculate generation charges in accordance with the interpretation of the EU Regulation 838/2010 reflected in CMP 261, has included an adjustment mechanism to ensure compliance in the proposal. The industry code working group will also evaluate whether there might be a need for, and consider the design of, any reconciliation should there be a breach of the lower or upper limit of the charging range. Subject to our final decision on this modification, we expect that this will allow the Transmission Generation Residual to be set to zero, resulting in the correct charges and achieving compliance with the EU Regulation 838/2010. We accept that a negative adjustment

> charge may be required in the future to ensure compliance with the Regulation.
>
> 4.78 We said in the minded-to consultation that the ESO is developing a modification which would implement the correct post-CMP 261 definition of the EU Regulation 838/2010 range, and would allow us to direct that our policy position of no residuals charged to generation is met. Subject to our final decision on this modification, we currently expect that the correct interpretation of the EU Regulation 838/2010 will be in place in the CUSC by April 2021 in order for the Transmission Generation Residual to be set to zero on this date. If that is not the case, we expect the TCR proposal and subsequent modification to implement the TCR decision to include an appropriate adjustment charge to ensure compliance with the CMP 261 interpretation of the regulation.
>
> 4.79 For the avoidance of doubt, we consider that 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 CMP 261. We think that generators should face transmission charges for:
>
> - off-shore local charges
> - on-shore local charges (less those which fall into the "Connection Exclusion"), and
> - wider locational charges.
>
> For compliance with the EU Regulation 838/2010 we expect these annual average transmission charges paid by producers not to exceed €2.5/MWh or fall below €0/MWh. We accept that an "adjustment charge" may be necessary to rectify this."

24. Also on 21 November 2019, GEMA gave directions to National Grid to propose modifications to the CUSC to give effect to the conclusions in the Targeted Charging Review. The material part of the direction for present purposes was at paragraphs 45 – 48:

> "**Terms: Embedded Benefits**
>
> 45. The Proposal(s) must set out proposals to modify the Use of System Charging Methodology, Section 14 CUSC to set the TGR to £0, subject to ensuring ongoing compliance with EU Regulation No 838/2010 (in particular, the requirement that average transmission charges paid by producers in each Member State must be within prescribed ranges – which for Ireland, Great

> Britain and Northern Ireland is 0 to 2.50 EUR/MWh). This should be achieved by charging generators all applicable charges (having factored in the correct interpretation of the connection exclusion as set out in EU Regulation 838/2010) and adjusted if needed to ensure compliance with the 0 to 2.50 EUR/MWh range.
>
> 46. NGESO must work in conjunction with the relevant industry work group(s) in place for CMP 317 (and provide such input as appropriate) to seek to ensure that any impact on that modification proposal by the TCR Decision is addressed in a manner that does not undermine NGESO's ability to comply with its obligations under this Direction. In doing so, the Proposal(s) must set out proposals for an appropriate adjustment charge to ensure compliance with the EU Regulation 838/2010, if NGESO considers it necessary (see paragraphs 4.76 to 4.78 of the TCR Decision).
>
> 47. The Proposal(s) must set out proposals to modify the Use of System Charging Methodology, Section 14 of CUSC regarding the basis on which suppliers balancing services charges are applied. In particular, such charges are to be applied using gross demand measured at the Grid Supply Point, having the effect of removing the Embedded Benefit that balances the offsetting of Suppliers' net demand and in turn, a reduction of liability for balancing services charges. This will remove payments from suppliers to smaller distributed generators for this service.
>
> 48. The Proposal(s) must set out proposals to modify Section 11 (Interpretation and Definitions) of CUSC to introduce and/or adjust any terms and definitions and any other associated provisions as required as a result of the Proposal(s)."

25. Prior to the report on the Targeted Charging Review and GEMA's direction, National Grid had raised CMP 317, a proposal to modify the CUSC consequent on the CMA's decision on CMP 261. CMP 317 proposed that the Generation Residual Charge be calculated after the cost of "assets required for connection" had been calculated and removed from the calculation at paragraph 14.14.5(v) of the CUSC. The proposal included the following by way of explanation[1].

> "Under this CUSC Modification Proposal removal of revenue linked to definition of "assets required for connection" will be added to the calculation of Maximum Allowed Revenue (MAR) under 14.14.15(v). This will align the CUSC to the broader interpretation of these assets in [Regulation 838/2010] in accordance with the Authority's decision. This will lead to

[1] Reproduced at page 12 of the Final CUSC Modification Report on CMP 317/327.

> changes in the manner in which the generator and demand residual charges are calculated. For the avoidance of doubt the Company intends to maintain compliance on an ex-ante basis as today. However, the solution will also need to incorporate an "if-needed" process to adjust charges on an ex-post basis should tariffs set on an ex-ante basis be non-compliant with [Regulation 838/2010] when the actual values are used. This is necessary as the ex-ante approach contains an error margin but forecasting errors, movement in exchange rates and generator output can all affect the outturn compliance. This error margin will need to be applied to both the upper and lower ends of the range."

26. On 29 January 2020 GEMA agreed that CMP 317 should be amalgamated with CMP 327, the modification proposal (also made by National Grid) consequent on the direction above (at paragraph 24), to remove the Generation Residual Charge (by setting it to zero). The combined effect of CMP 317 and 327 was described by National Grid as follows[2]:

> "Therefore, the consolidated situation encompasses the requirements of CMP 317 and CMP 327 and is detailed below:
>
> 1. The proposer's solution will set the transmission generation residual to zero. This will in preference be achieved through the removal of the relevant sections of the CUSC that require the use of a transmission generation residual.
>
> 2. The proposer's solution will establish a definition of Assets required for connection and charges (revenues) associated with these. These will be excluded from the calculation of average generation charge within the CUSC. The proposer considers that a straightforward approach to this is to exclude all local charges and assess compliance with the range against the wider charges within the charging methodology.
>
> 3. The proposer's solution will not establish a target within the range [in Regulation 838/2010], rather it will only adjust charges if required to maintain compliance as per Ofgem's direction that generators should pay all applicable charges.
>
> 4. The proposer's solution will include an ex-ante tariff adjustment that will be applied if the average charge to generators falls outside of the range within [Regulation 838/2010] when tariffs are produced.
>
> 5. The proposer's solution will include an error margin calculated in the same manner as today. The need for an ex-ante tariff adjustment will be assessed against the error margin

[2] Reproduced at page 14 of the Final CUSC Modification Report on CMP 317/327.

> adjusted range to ensure that ex-post adjustments are not necessary.
>
> 6. The proposer's solution will stipulate that an ex-post adjustment to the users' charges must be carried out as soon as possible. In practice this will be carried out as part of generator and demand reconciliation to ensure that correct monies are returned to and billed from parties within the same charging year."

(b) GEMA's decision on the Use of System Charge

27. These proposals to modify the CUSC were considered pursuant to the process in Section 8 of the CUSC. They were considered by the Modification Panel and by the workgroup. The workgroup also considered 83 alternative proposals put forward by parties to the CUSC.

28. GEMA's decision (published on 17 December 2020) was to approve the proposals as made by National Grid. So far as concerns giving effect to the connection exclusion in Regulation 838/2010 the decision was to include the following as a new paragraph (vi) within paragraph 14.14.5 of the CUSC.

> "(vi) For the purpose of compliance with [Regulation 838/2010] in the context of setting limits on the annual charges paid by generation The Company will exclude Charges for Physical Assets Required for Connection when calculating the total amount to be recovered from Generators (GCharge (forecast))."

"Charges for physical assets required for connection" was defined as follows:

> "Connection Charges and charges in respect of an On-shore local circuit, On-shore local substation, Off-shore local circuit and Off-shore local substation."

Strictly speaking, this definition became operative within the CUSC as a result of a different modification proposal, CMP 339 (also approved by GEMA on 17 December 2020). CMP 317 and 327 concerned Section 14 of the CUSC, which contains the charging methodology; CMP 339 concerned Section 11, the interpretation section which lists the defined terms used in the CUSC. However, for present purposes, the fact that this modification to the CUSC arrived via CMP 339 is not a material point.

29. In respect of this part of its decision, GEMA said this:

> "**Our decision**
>
> 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 CMP 317/327.
>
> 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 [i.e., the proposal made by National Grid] would be likely to avoid the imminent risk of a breach of [Regulation 838/2010] that is posed by the status quo, and better facilitate achievement of the [Applicable Charging Objectives] than either the status quo or any of the [workgroup alternative code modifications]. We also consider that approval of the Original Proposal would be consistent with principal, objective and statutory duties.
>
> Accordingly, our decision is to approve the Original Proposal and direct that it be implemented.
>
> Our approval of the Original Proposal is on the express basis that it is a "stop-gap" measure which should avert an imminent risk of breach of [Regulation 838/2020] and allow time for the formulation of a longer-term solution that properly reflects the correct interpretation of the Connection Exclusion. We expect NGESO to bring forward a further CUSC Modification Proposal that will fully give effect to the correct interpretation of the Connection Exclusion."

(c) GEMA's decisions on the Balancing Services Code charge, and the Balancing Services Use of System Charge (the ancillary services exclusion)

30. Ground 3 of SSEGL's challenge concerns a different part of GEMA's decision on modification proposal CMP 317/327. GEMA considered that in part, CMP 317/327 required consideration of "new proposals as regards the treatment of [Balancing Services Code] charges and certain [Balancing Services Use of System Charges] (related to Congestion Management) and whether those charges should be included within the CUSC calculation" (GEMA decision, internal page 7). These proposals concerned paragraph 2(2) in Part B of the Annex to Regulation 838/2010, the paragraph that provides that the annual average transmission charge is to be calculated after exclusion of "charges paid by producers related to ancillary services" – i.e., the ancillary services exclusion.

31. The proposal considered by GEMA arose from the workgroup process (part of the process at Section 8 of the CUSC: see above at paragraph 6).

32. GEMA reached two conclusions. The first was that Balancing Services Code charges fell within the scope of the ancillary services exclusion. The second conclusion concerned the part of the Balancing Services Use of System Charge referred to as

charges for "constraint management services". GEMA described these services as concerning monitoring the amount of electricity on different parts of the transmission system and taking steps to ensure relevant constraints were not exceeded. The example given was that of making payments to generators to reduce output to reduce the load on the transmission system: see "Legal Annex One" to the GEMA decision at paragraph 16. GEMA's conclusion was that these charges also fell within the ancillary services exclusion.

(4) The appeal to the CMA

33. SSEGL appealed GEMA's decision to the CMA. This appeal is provided by the Energy Act 2004: see section 173(1) read together with section 173(2)(a). Section 175 of the 2004 Act sets out the CMA's functions on an appeal:

> "(4) The CMA may allow the appeal only if it is satisfied that the decision appealed against was wrong on one or more of the following grounds—
>
> (a) that GEMA failed properly to have regard to the matters mentioned in subsection (2);
>
> (b) that GEMA failed properly to have regard to —
>
> (i) the purposes for which the relevant condition has effect (in the case of an appeal by virtue of section 173(2)), or
>
> (ii) the purposes of the power to give a direction under section 36 of the Gas Act 1986 or the purposes of Standard Special Condition A11 of licences granted under section 7 of that Act (in the case of an appeal by virtue of section 173(2A));
>
> (c) that GEMA failed to give the appropriate weight to one or more of those matters or purposes;
>
> (d) that the decision was based, wholly or partly, on an error of fact;
>
> (e) that the decision was wrong in law.
>
> (5) Where the CMA does not allow the appeal, it must confirm the decision appealed against.
>
> (6) Where it allows the appeal, it must do one or more of the following—
>
> (a) quash the decision appealed against;
>
> (b) remit the matter to GEMA for reconsideration and determination in accordance with the directions given by the CMA;

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

34. SSEGL pursued six grounds of appeal. The CMA issued its decision on 30 March 2021; the appeal failed on all grounds. The CMA's decision on the appeal runs to almost 230 pages. It is not necessary in this judgment to summarise the CMA's reasons because SSEGL's challenge, as put in this application for judicial review, is to the effect that in four respects the CMA's decision repeats errors of law made by GEMA in its decision. To the extent it is necessary to touch on any aspect of the CMA's reasons that can conveniently be done when addressing the substantive grounds of challenge.

(5) The grounds of challenge in this case

35. SSEGL's grounds of challenge in this application for judicial review are as follows. Ground 1 is that the CMA erred in law in failing to conclude that GEMA had itself erred in law by approving a modification to the CUSC that did not accurately reflect the connection exclusion (i.e., paragraph 2(1) in Part B of the Annex to Regulation 838/2010). Ground 2 challenges the conclusion stated by GEMA in its decision on CMP 317/327 as to the correct meaning of the connection exclusion. Ground 3 is directed to the decision on the scope of the ancillary services exclusion (paragraph 2(2) of Part B of the Annex to Regulation 838/2010). SSEGL contends that the conclusions that the Balancing Services Code charge and the congestion management charge were both within the ancillary services exclusion were wrong.

B. Decision

(1) Ground One. Wrong to approve the modification to the CUSC that does not accurately reflect the connection exclusion in Regulation 838/2010

36. This ground of challenge reflects what was ground 2 of SSEGL's appeal to the CMA.

37. I have set out above both the criterion at paragraph 8.23.7 of the CUSC for approval for a modification proposal, and the part of Condition C10 paragraph 7(a) in the Transmission Licence which is the premise for that provision in the CUSC (see above at paragraphs 6 - 7). Taking these matters in the round, the condition for a decision to modify the charging methodology at Section 14 of the CUSC is whether GEMA considers the proposal before it (or any counter proposal that has emerged from the workgroup process) is better than the status quo in terms of facilitating achievement of the "Applicable CUSC Objectives". The CUSC states the "Applicable CUSC Objectives" to be "as defined in the Transmission Licence". Condition C10 paragraph 1 of the Transmission Licence refers to CUSC objectives. So far as concerns the Use of System Charging Methodology, Condition C10, paragraph 1 points in turn to Condition C5. This provides that the methodology is to "achieve the relevant objectives" These are stated at Condition C5, paragraph 5 as follows:

> "(a) that compliance with the use of system charging methodology facilitates effective competition in the generation

> and supply of electricity and (so far as consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;
>
> (b) that compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and in accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard condition C26 (Requirements of a connect and manage connection);
>
> (c) that, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses;
>
> (d) compliance with the Electricity Regulation and any relevant legally binding decisions of the European Commission and/or the Agency; and
>
> (e) promoting efficiency in the implementation and administration of the system charging methodology."

38. SSEGL's submission rests on objective (d). SSEGL submits that in the circumstances of the present case, GEMA was not permitted to approve modification to the CUSC unless it was satisfied the modification proposed would better facilitate the objective of compliance with the guidelines in Part B of the Annex to Regulation 838/2010. Those guidelines represented a legally binding decision of the Commission. When Regulation 838/2010 was made, GEMA was under a legal obligation to ensure compliance with it, pursuant to article 19 of the 2009 Regulation. That obligation did not change. It survived the repeal of the 2009 Regulation by reason of the effect of article 61 of the 2019 Regulation, if necessary, considered together with article 59 of the 2019 Electricity Directive which simply re-stated what had been originally provided by article 19 of the 2009 Regulation. Overall, SSEGL's submission is that having concluded that National Grid's proposal did not properly give effect to the connection exclusion in Regulation 838/2010, GEMA was bound to reject the proposal. When dismissing the appeal, the CMA fell into the same error. Since this error is an error of law the point is fit for determination by this court on this application for judicial review.

39. The submissions to the contrary made by the CMA and supported by GEMA come to three propositions. The first is free-standing, the second and third are connected. The first proposition is that the key obligation imposed by Part B of the Annex to Regulation 838/2010 is the one stated in the first paragraph, i.e., that the annual average transmission charge must be within the range specified in the third paragraph (i.e., between €0 – 2.5/MWh, "the specified range"). Paragraph 14.14.5 of the CUSC as modified by GEMA in December 2020 met that requirement. The second proposition

is that any divergence between paragraph 14.14.5 and a correct application of the connection exclusion does not matter because there is no requirement on GEMA to ensure compliance with the guidelines in Part B of the Annex to Regulation 838/2010 through the terms of the CUSC. The obligation to secure compliance can be achieved by other means. The third proposition, linked to the second, is that GEMA was satisfied (and was entitled to be satisfied) that paragraph 14.14.5 of the CUSC, as modified, would better achieve the Applicable CUSC Objectives, including the objective of compliance with Regulation 838/2010. The modification made did serve to prevent transmission charges outside the specified range. This was achieved by the adjustment mechanism added to the paragraph in the CUSC. By contrast, the status quo presented a risk of transmission charges in breach of the specified range. Moreover, there was no better alternative available because the terms of the modification mechanism in Section 8 of the CUSC permitted GEMA only to accept or reject proposals put to it, not to devise proposals of its own. In the round (the submission continues), GEMA was plainly acting for a proper purpose, and acted within the terms of the modification provision in the CUSC in taking the decision it did.

40. I prefer SSEGL's submissions. The relevant obligation on National Grid under the terms of the Transmission Licence is that the CUSC be "calculated to facilitate the achievement" of the objective of "compliance with … any relevant legally binding decision of the European Commission". Regulation 838/2010 was such a decision. Both GEMA's decision and the CMA's reasoning proceeded from the premise that National Grid's modification proposal did not properly reflect the connection exclusion. The premise was that National Grid's proposal was over-inclusive to the extent that, depending on the circumstances of a generator's connection to the transmission system, charges might be incorrectly included within the connection exclusion. Thus, notwithstanding the adjustment tariff included to ensure no charge was levied outside the specified range, there remained the possibility that a generator could be required to pay a charge within the specified range but, nevertheless, higher than ought to have been charged taking account of what is stated at paragraph 2 of Part B of the Annex to Regulation 838/2010 as to how the annual average transmission charge is required to be calculated.

41. A significant part of the CMA's reasoning considers the meaning and effect of Part B of the Annex to Regulation 838/2010 – specifically two matters: *first*, whether Part B contains only one obligation (the one at paragraph 1, that the annual average transmission charge be within the specified range), or whether further distinct obligations arise (from what is said at paragraph 2 as to how the annual average transmission charge is required to be calculated); *second*, and alternatively, if more than one obligation arises from Part B of the Annex, whether the paragraph 1 obligation (that the charge be within the specified range) is the "primary obligation". The CMA's conclusion was that the paragraph 1 obligation was not the only obligation arising from Part B of the Annex but that it was the "primary obligation." Relevant parts of the CMA's reasoning are as follows:

> "5.34 We do not agree with GEMA that the obligations imposed by [Regulation 838/2010] 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 [Regulation 838/2010] 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 [Regulation 838/2010]. [Regulation 838/2010] 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 …

5.36 Applying the reasoning of [decision on CMP 261] … the fact that the domestic arrangements do not mirror precisely the calculations required for assessing compliance is not therefore in itself a breach of [Regulation 838/2010]. 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).

…

7.9 We do not accept [SSEGL's] 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 [above] …

In summary:

> (a) [Regulation 838/2010] 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 [Regulation 838/2010] is that annual average transmission charges must fall with the Permitted Range. It does not follow that any error in the domestic calculation necessarily means 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 [Regulation 838/2010]. As set out…above…we reject [SSEGL's] appeal against GEMA's own construction of the Connection Exclusion. On this basis, the impact of relying on the incorrect construction of the Connection Exclusion by implementing the Original Proposal is marginal…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."

42. I do not consider this reasoning can stand. Although the CMA was correct to reject what it saw as GEMA's primary submission, that the only obligation imposed by Part B of the Annex to Regulation 838/2010 was an "obligation of result" to ensure charges remained within the specified range, I do not consider there to be any basis for the conclusion that the paragraph 1 obligation is the "primary obligation" while the obligations arising from paragraph 2 of Part B are in some sense lesser, so that non-compliance with them is not a breach of Regulation 838/2010. Properly construed, Part B of the Annex to Regulation 838/2010 sets requirements both: (a) as to the lower and higher limit of the annual average transmission charge (paragraph 1 read with paragraph 3); and (b) on how the annual average transmission charge is to be calculated (paragraph 2). There is no hierarchy within these obligations. It is the transmission charge, calculated in the manner prescribed in paragraph 2 that is to be subject to the higher and lower limits referred to and then specified in paragraphs 1 and 3, respectively. Generators should pay annual average transmission charges that are both calculated in the prescribed way (requiring proper application of both the connection exclusion and ancillary services exclusion) and fall within the specified range. On the correct construction of Part B, the former is equally important as the latter. While it is true that the latter obligation could exist without the former, under the provisions of Regulation 838/2010, as made, it does not. Failing to give effect to the connection exclusion is as much a breach of Regulation 838/2010 as failing to give effect to the requirement that charges fall within the specified range. For these reasons I do not accept CMA's first proposition.

43. The second element of the CMA's reasoning (and its second proposition in response to Ground 1 in these proceedings) is that since there is no requirement that GEMA secure compliance with Regulation 838/2010 by means of the terms of the CUSC, GEMA committed no error of law by approving a modification proposal that contained an incorrect definition of the connection exclusion. At the level of theory this contention is correct. In theory there would, no doubt, be a range of steps open to GEMA in exercise of its regulatory authority to ensure compliance with requirements arising from Regulation 838/2010. However, in the circumstances in which GEMA came to its decision on CMP 317/327 the contention is wrong. The purpose of GEMA's Direction to National Grid of 21 November 2019 was to bring forward a modification proposal to give proper effect to Regulation 838/2010 within the terms of the CUSC, in accordance with its decision on modification proposal CMP 261. That resulted in CMP 327. Prior to that, the objective of CMP 317 had also been to modify the provisions of the CUSC

to give effect to the connection exclusion. Notwithstanding any other options that may have been available to GEMA to give effect to Regulation 838/2010 (none were mentioned in the proceedings before me), it had decided to use the powers available to it to require modification to the CUSC (through the combination of CMP 317/327 and CMP 339) as the means to meet its obligation to ensure compliance with Regulation 838/2010, and specifically to effect the correct implementation of the connection exclusion. This point is further underlined by what happened after GEMA's decision on CMP 317/327. In its decision, GEMA stated that it "expected" National Grid to make a new proposal, to modify the CUSC further so that it correctly gave effect to the connection exclusion. Thus, notwithstanding the theoretical possibility that GEMA might (whether before its decisions on either CMP 261 or CMP 317/327, or in conjunction with either of those decisions) have exercised some other regulatory power to ensure compliance with the connection exclusion, it has not done so. So far as concerns the evidence before me, there is no suggestion that there was any other route to compliance with Regulation 838/2010 other than through the CUSC. In those circumstances, the CMA's second proposition also fails.

44. The conclusions stated so far are sufficient for SSEGL to succeed on the first ground of challenge. The CMA was wrong to conclude that the paragraph 1 obligation on the specified range was the "primary" obligation arising from Part B of the Annex to Regulation 838/2010, and that compliance with the Regulation could be secured without compliance with the connection exclusion provision; and the CMA was also wrong on the facts, to conclude that, absent modification to the CUSC, effect would be given to the connection exclusion. In the premises, GEMA's decision to approve CMP 317/327, so far as it included in the CUSC the new paragraph 14.14.5(vi) rested on an application of the criterion at paragraph 8.23.7 of the CUSC that was wrong in law. The relevant "Applicable CUSC Objective" was compliance with Regulation 838/2010. GEMA's decision did not secure compliance. In turn, the CMA erred in law when it dismissed SSEGL's appeal on this matter.

45. The position is not rescued by the CMA's third proposition. I accept the factual premises of the proposition. The modification proposal that GEMA approved made things better insofar as the amendment made to the CUSC prevented transmission charges outside the specified range. It was, in that regard, an improvement on the unamended provisions of paragraph 14.14.5 of the CUSC. I also accept that the criterion at paragraph 8.23.7 of the CUSC, for approval of a modification, is whether GEMA is satisfied that what is proposed "would better facilitate achievement of the Applicable CUSC Objectives". In many circumstances that criterion will bring with it a practical margin of judgement for GEMA as expert regulator. This may be particularly significant when assessment of a modification proposal requires a balance to be struck between overlapping or competing practical considerations. But that was not this case. The relevant objective was compliance with a legal standard and in that context a miss is as good as a mile. In the circumstances of this case, it is immaterial that the amendment to the CUSC improved the situation, making for a situation that better complied with Regulation 838/2010. Actual compliance with Regulation 838/2010 was what was required to permit GEMA to approve this aspect of modification proposal CMP 317/327.

46. For all these reasons SSEGL succeeds on Ground 1.

(2) Ground 2. Was GEMA's conclusion on the meaning of the connection exclusion correct?

47. This was Ground 1 of SSEGL's appeal to the CMA.

48. This ground of challenge is directed to the CMA's decision on modification proposal CMP 339. It was this proposal that inserted into Section 11 of the CUSC, the definition of the phrase "Charges for Physical Assets Required for Connection". This is the phrase used in paragraph 14.14.5 (vi) of the CUSC, a provision inserted by modification proposal CMP 317/327, intended to capture the meaning and effect of the connection exclusion.

49. Both in National Grid's original proposal and pursuant to GEMA's decision, the phrase was defined to mean:

> "Connection Charges and charges in respect of an Onshore local circuit, Onshore local substation, Offshore local circuit, Offshore local substation".

During the proceedings under Section 8 of the CUSC leading to the GEMA's decision, SSEGL had contended this definition did not reflect the scope of the connection exclusion. SSEGL had proposed an alternative definition during the workgroup process. Its proposal was that the phrase should be defined to mean:

> "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*." [emphasis added]

SSEGL defined "Shared Assets" to mean:

> "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."

and "Pre-Existing Assets" to mean:

> "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".

50. Thus, SSEGL's proposal was that the following should fall outside the exclusion at paragraph 14.14.5(vi) of the CUSC:

> (a) local assets used by a generator to connect to the transmission system which already existed at the time the generator first connected to the system; and
>
> (b) local assets that either were or could be used by two or more generators for the purposes of connecting to the transmission system.

51. In SSEGL's Statement of Facts and Grounds, Ground 2 is set out under the heading "… the CMA endorsed an erroneous construction of the Connection Exclusion". This heading reflects the substance of the Ground 2 challenge.

52. I do not consider this issue arises as a legitimate ground of challenge in this application for judicial review of GEMA's decision on modification proposal CMP 339 or the CMA's decision on appeal concerning that decision. To the extent that GEMA's decision on CMP 339 modified the CUSC in a way that did not give effect to the connection exclusion in Regulation 838/2010 it is open to the Ground 1 challenge, and a challenge on that ground would succeed in the same manner as the Ground 1 challenge to the decision on modification proposal CMP 317/327. However, Ground 2, directed to the decision on CMP 339 goes further. It is not directed either to the decision taken by GEMA or the decision on appeal by the CMA but only to supplementary reasoning in the GEMA decision which was the subject of consideration by the CMA in its appeal decision.

53. I have already set out the part of GEMA's reasoning in its decision on CMP 317/327 to the effect that the National Grid's proposal did not rest on a correct interpretation of the connection exclusion (see above at paragraph 29). Later in its decision (internal pages 18 and 19) GEMA's reasons included the following:

> "We set out our analysis of the correct interpretation of the Connection Exclusion in Legal Annex Two. In summary we consider that the Connection Exclusion includes all charges paid by generators in respect of Local Assets whether shared/sharable 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. We consider 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 do not fall within the Connection Exclusion.
>
> By way of an illustrative example, suppose that two generators connect to the transmission system in a similar area at different times. For the first generator ("Generator One") to connect, a Local Circuit and Local Substation are installed. Generator One pays Local Circuit and Local Substation [Transmission Network Use of System] Charges in respect of these "Local Assets" based on its Transmission Entry Capacity. As the Local Assets were required to connect Generator One to the NETS as the NETS existed at the time the Generator One wished to connect, those charges fall within the Connection Exclusion.

> A second generator ("Generator Two") subsequently wishes to connect at a location close to Generator One. It may utilise Local Assets used by Generator One which now form part of the NETS, instead of requiring a new Local Substation and/or Local Circuit. As such, the Local Assets in this example were required for Generator One to connect to the NETS, but not for Generator Two to connect to the NETS (since the Local Assets already existed at the time Generator Two wished to connect). Local Charges will be payable by both generators based on their respective Transmission Entry Capacities. Local Charges paid by Generator One will fall within the Exclusion (both before and after the connection of Generator Two), but the Local Charges paid by Generator Two will not (since the Local Charges paid by Generator Two do not relate to assets required to connect Generator Two to the NETS as it existed at the time Generator Two wished to connect).
>
> For the avoidance of doubt, if Generator One and Generator Two 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* Generator One and Generator Two in respect of those Local Assets would fall within Connection Exclusion."

The references in the quotation to NETS are to the National Electricity Transmission System, i.e., the high voltage transmission system. GEMA's views on the correct meaning of the connection exclusion and the reasons for them were then set out in more detail at Legal Annex Two to its decision.

54. One of SSEGL's grounds of appeal to the CMA was that GEMA's construction of the connection exclusion was wrong. In its reasons, the CMA described Ground 1 of the appeal to it as a challenge to "… both GEMA's approval of the Original Proposal [i.e., the National Grid definition] and GEMA's own construction of the Connection Exclusion on the basis that each of them incorrectly construed the Connection Exclusion" (CMA decision at paragraph 6.72). I do not consider that the second part of that ground (the challenge to GEMA's "own construction of the Connection Exclusion") fell within the scope of appeals permitted under section 173 of the Energy Act 2004. The scope of permitted appeals is set by section 173(2). The material part for present purposes is section 173(2)(a) which permits an appeal against "… a decision relating to a document by reference to which provision is made by a condition of gas or electricity licence". The CUSC is such a document. However, the relevant decision on modification proposal CMP 339 had been to modify the CUSC by adding the definition proposed by National Grid. GEMA's further reasoning on what it thought was the correct meaning of the connection exclusion was not a decision within section 173(2)(a) of the Energy Act 2004. It was something said incidentally (in legal jargon, *obiter*). The further reasoning did not affect the content of the CUSC.

55. The point is illustrated by the fact that since the decisions in issue in these proceedings, GEMA has prompted and obtained a further modification proposal from National Grid (CMP 368/369) which, I am told, will seek to modify the CUSC by defining the phrase "Charges for Physical Assets Required for Connection" in the manner GEMA considers

to meet the correct meaning of the connection exclusion (i.e. as explained by it in its further reasoning in the decisions now in issue). The decision on that proposal, when made, will give rise to the substantive point SSEGL raises by Ground 2 in these proceedings.

56. Since this matter was not properly the subject of an appeal to the CMA it ought not to be the subject of a challenge in this application for judicial review. The same conclusion is reached in consideration of the CMA decision. On its own terms, that decision agreed with GEMA's reasoning on what it thought the connection exclusion meant. But that decision resulted in no relevant change to any term in the CUSC. Ground 2 of SSEGL's judicial review claim invites the court, in substance, to state a binding conclusion on the meaning of the connection exclusion in anticipation of GEMA's operative decision on the point to be made in CMP 368/369. That is an invitation I must decline.

57. By way of my own *obiter* comment, I agree with GEMA's reasoning on the scope of the connection exclusion, as far as it goes. So far as it goes because what is meant by the connection exclusion as stated at paragraph 2(1) of Part B of the Annex to Regulation 838/2010 ("charges paid by producers for physical assets required for connection to the system or the upgrade of the connection") will self-evidently depend on the facts of any specific case. Attempts at generic definition are necessary and useful, but only up to a point. The possibility will always remain that any generic definition might need to yield in the face of the circumstances of the case in hand. There is no generic level of charge payable by all generators; what each should pay will depend on that generator's own circumstances. Be that as it may, Ground 2 of SSEGL's challenge fails.

(3) Ground 3. Failure to properly apply the ancillary services exclusion.

58. This ground of challenge is directed to two decisions in GEMA's decision on CMP 317/327 on the application of the ancillary services exclusion at paragraph 2(2) of Part B of the Annex to Regulation 838/2010. The first decision was that charges due under the Balancing and Settlement Code fell within the ancillary services exclusion. The second decision concerned the consequence of a change in the definition of "ancillary service" in the 2019 Regulation. GEMA's decision was that this did not affect whether any part of the Balancing Services Use of System Charge (set out in Section 14 of the CUSC) fell outside the ancillary services exclusion. In its decision, the CMA upheld each of these conclusions.

59. The term ancillary service was defined in the 2009 Electricity Directive as "… a service necessary for the operation of a transmission or distribution system" (article 2(17)). The 2019 Regulation contains a different definition. By article 2 (60) the 2019 Regulation adopted the definition of ancillary service in article 2(48) of the 2019 Electricity Directive:

> "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*." [emphasis added]

"Congestion Management" is not a defined term. However, article 2(4) of the 2019 Regulation defines "congestion":

> "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."

60. In its decision, GEMA declined to use the definition in the 2019 Regulation for the purpose of construing the ancillary services exclusion in Regulation 838/2010. It did not consider the meaning of the exclusion in Regulation 838/2010 could be altered by a definition contained in subsequent legislation, particularly when the 2019 Regulation was silent on its impact on Regulation 838/2010. The CMA took a different approach. It assumed (but did not decide) that the ancillary services exclusion was to be read by reference to the definition in the 2019 Regulation.

61. I consider the CMA approached this matter on a correct basis. I would go further; my conclusion is that the ancillary services exclusion in Regulation 838/2010 should now be interpreted taking account of the definition in the 2019 Regulation. The 2019 Regulation is silent on the matter. However, if the Regulation 838/2010 guidance, issued by the Commission for the purposes of the legal regime that comprised the 2009 Electricity Directive and the 2009 Regulation, does continue to hold good as guidance in a successor regime (one that under EU law comprises the 2019 Electricity Directive and the 2019 Regulation), the proper inference is that it continues to hold good being read subject to definitional changes in the new regime. I accept the position as a matter of the retained EU law provisions under the European Union (Withdrawal) Act 2018 is less clear because the relevant retained EU law comprises the 2009 Electricity Directive and the 2019 Regulation, measures which contain different definitions of "ancillary service". Nevertheless, my conclusion is that for this purpose also the definition in the 2019 Regulation, being the more recent definition, should be taken to be the definition that is operative.

(a) charges under the Balancing and Settlement Code

62. In its decision, GEMA described these charges as follows (internal page 5):

> "The balance of the system can be affected by disparities between the amount of electricity that a generator has agreed to inject into the grid, and the amount that it in fact injects. Similarly, a supplier's customers may import more or less electricity than the suppler had contracted to import. To mitigate against such disparities, the GB market includes a financial settlement process, administered by Elexon in accordance with the [Balancing and Settlement Code], which encourages market participants to be "balance responsible". The costs of administrating this financial settlement process are recovered via [Balancing and Settlement Code] Charges payable by generators and demand."

GEMA noted that the proportion of such charges not referable to the administration of the settlement process was negligible.

63. GEMA's decision is at paragraph 13 of Legal Annex One to its decision:

> "13. Our view is that the transmission system could not reliably be kept in balance without a process to check how much electricity generators and suppliers have injected onto or withdrawn from the system, and to financially incentivise them to minimise variation from the volume that they had forecast. We therefore consider that the provision of a settlement process of the sort administered by Elexon, the costs of which are recovered via [Balance and Settlement Code] Charges, to be related to "a service necessary for the operation of a transmission … system". Consequently, we consider (i) that [Balancing and Settlement Code] Charges fall within the Ancillary Services Exclusion; and (ii) [that Balancing and Settlement Code] Charges should be excluded from the CUSC Calculation."

64. The CMA agreed with this conclusion:

> "8.43 … In our view, the services to which the [Balancing and Settlement Code] charges relate would clearly fall within the scope of 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 (i.e., the main service). As [SSEGL] have… postulated
>
> > "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."
>
> 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" within the definition of an ancillary service, but it is not (on [SSEGL's] construct) the operation of the system itself."

65. SSEGL's submission in these proceedings restates the submissions made at the CMA appeal. SSEGL submits the charges are charges for use of the transmission network because administration of the settlement system is integral to the use of the transmission network.

66. These proceedings for judicial review are not the occasion for merits review either of GEMA's decision or the decision of the CMA. Moreover, this ground of challenge does not concern anything capable of being described as a hard-edged question of law. Although ancillary service is a legally-defined term, the issue on how to classify the charges made under the Balancing and Settlement Code as either ancillary or not is essentially a matter of evaluation. On such a point, a court should think carefully before second-guessing the conclusion reached by a specialist regulator such as GEMA. In

this case it is GEMA's decision rather than the CMA's consideration of it on appeal which is the critical matter. The CMA approached this part of the appeal on the premise it was looking for an error of law – that was the relevant requirement on the CMA under section 175 of the Energy Act 2004.

67. I can see no error in GEMA's assessment on this matter. Its identification of the charges as being charges for "a service necessary for the operation of a transmission system …" was a conclusion it was entitled to reach. For what it may be worth, it is a conclusion I also consider to be correct (for the reasons at paragraphs 62 and 63 above, which are each to the same effect). This part of Ground 3 of SSEGL's challenge therefore fails.

(b) Balancing Services Use of System Charges

68. The matter before GEMA was whether the reformulated definition of ancillary service, specifically excluding a service necessary for congestion management, meant that any part of the Balancing Services Use of System Charges as set out in Section 14 of the CUSC fell outside the ancillary services exclusion. The workgroup proposal referred to GEMA contended that it did, to the extent that the Balancing Services Use of System Charges include charges for constraint management services. GEMA described such services as being essential actions taken by National Grid to keep the transmission systems operating safely (see Legal Annex One at paragraph 18). On that basis, GEMA, applying the definition of ancillary service in the 2009 Electricity Directive, concluded that such charges were for ancillary services.

69. The CMA's decision rested on a different premise, namely that the definition of ancillary service in the 2019 Regulation was the relevant definition. Applying that definition, the CMA noted the definition of "congestion", namely a situation in which network elements cannot accommodate flows arising from requests from "market participants to trade between network areas". Its reasoning then continued as follows:

> "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.
>
> 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 [2009 Regulation]; '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 (i.e., lack of capacity of interconnectors and/or the national transmission systems) and effect (i.e., 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 2019 Regulation], congestion is limited to congestion on interconnectors
>
> …
>
> 8.59 We also note that the definition of ancillary services in the [2019 Electricity Directive] and the [2019 Regulation] distinguishes between (i) services for congestion management (charges for which are expressly excluded from the [ancillary service exclusion]); and (ii) balancing and non-frequency allocation services (charges for which are expressly included). The latter, which are defined via the [2019 Electricity Directive] and the [2019 Regulation], relate to the management of internal constraints within a network area. 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 [National Grid] provides and the settlement services administered by Elexon) and cross-border congestion by the capacity allocation process described in paragraph 8.23 above.
>
> …
>
> 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 that this is made clear by the definition of ancillary services in the [2019 Electricity Directive] and the [2019 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 [Balancing Services Use of System] charges relate to congestion management. They therefore fall within the scope of [ancillary service exclusion], as GEMA concluded."

70. SSEGL's submission in these proceedings is that this is a misconstruction and/or misapplication of the exclusion from the definition of ancillary service of congestion

management services. SSEGL submits "congestion management" does not refer only to management of congestion on interconnectors.

71. I do not accept that submission. I consider the reasoning in the CMA's decision is correct. As with most arguments of statutory instruction there are points that can be made for both sides of the argument. SSEGL places reliance on several linguistic points for example, that in some other provisions in the 2019 Regulation specific reference is made to congestion arising from use of interconnectors (see article 19), and that in other provisions congestion must include reference to congestion within a transmission network. SSEGL also submits that it is not possible to divorce congestion that affects the use of interconnectors from congestion within a network. However, I consider there are two matters within the CMA reasoning that clearly tip the balance in favour of the conclusion it reached. The first is that the notion of congestion charging is defined as congestion arising from requests to trade between network areas. I accept the point made at paragraph 8.56 of the CMA's decision that this is synonymous with a request to trade across an interconnector. The second is the point at paragraph 8.59 of the CMA's decision, the distinction drawn between congestion management services and balancing and non-frequency allocation services. I am satisfied that the CMA's conclusion was correct, and for this reason, the second part of SSEGL's Ground 3 also fails.

C. Disposal

72. For the reasons above SSEGL's challenge succeeds on Ground 1 but fails on Grounds 2 and 3.

D. Postscript. Compliance with Practice Direction 54A

73. The present version of Practice Direction 54A came into effect on 31 May 2021. The prompt for the new version of this Practice Direction was the observations of Lord Burnett CJ at paragraphs 116 to 121 in *R(Dolan) v Secretary of State for Health and Social Care* [2021] 1 WLR 2326. At paragraph 120 Lord Burnett said this:

> "120 … We are concerned that a culture has developed in the context of judicial review proceedings for there to be excessive prolixity and complexity in what are supposed to be concise grounds for judicial review. As often as not, excessively long documents serve to conceal rather than illuminate the essence of the case being advanced. They make the task of the court more difficult rather than easier and they are wasteful of costs. It is for these reasons that skeleton arguments are subject to length constraints and so too, for example the length of printed cases in the Supreme Court."

74. Among other matters, the new version of Practice Direction 54A set page limits for pleadings (see paragraph 4.2(3), 6.2(4) and 9.1(2)), and set out rules concerning the content and length of skeleton arguments (see paragraph 14.1 to 14.4). These requirements have not been met in this case.

75. The Claimants' Statement of Facts and Grounds ran to 99 pages. That pleading was filed before the present version of Practice Direction 54A came into effect. Nevertheless, on any analysis, the 99-page Statement of Facts and Grounds was excessively long. The purpose of a Statement of Facts and Grounds is to provide clear and concise statements of the facts relied on in support of the claim and of the grounds on which the claim is brought. The grounds should explain the claimant's case succinctly by reference to the facts relied on. Even though the present version of Practice Direction 54A was not in force at the material time, the Statement of Facts and Grounds in this case failed, by any standard of appropriate pleading. The CMA's Detailed Grounds of Defence dated 31 August 2021 ran to 48 pages, 8 pages longer than the maximum specified at paragraph 9.1(2) of Practice Direction 54A. The Detailed Grounds were, quite properly, accompanied by Application Notice requesting permission to file Detailed Grounds that exceeded the 40-page page limit. The only reason advanced in support of that application was that the Claimant's Statement of Facts and Grounds had run to 99 pages. That application was made by Mr Williams QC at the outset of the final hearing. I refused the application. The reason advanced was not a sufficient reason to extend the maximum length provided by paragraph 9.1(2) of the Practice Direction. Prolixity cannot be a reason for further prolixity; for this purpose, as for many others, two wrongs do not make a right.

76. The failure to comply with the requirements in Practice Direction 54A on skeleton arguments was even more striking. A 25-page limit is imposed by the Practice Direction. Further, the Practice Direction sets out the purpose of a skeleton argument and the matters to be contained in it are set out at paragraphs 14.1 to 14.2. Paragraph 14.2(1) says this:

> "A skeleton argument must be concise. It should both define and confine the areas of controversy; be set out in numbered paragraphs; be cross-referenced to any relevant document in the bundle; be self-contained and not incorporate by reference material from previous skeleton arguments or pleadings; and should not include extensive quotations from documents or authorities. Documents to be relied on must be identified."

77. The Claimants' Skeleton Argument ran to 25 pages, but at paragraph 2 incorporated by reference the 99-page Statement of Facts and Grounds. At the hearing Mr Beal QC for the Claimants volunteered a new 30 page "Notes for Oral Submissions" document. Overall, therefore, the written submissions ran to 154 pages. The CMA's skeleton argument took a similar course. While the document ran to only 23 pages, at paragraph 5 it too incorporated a document by reference, the 48-page Detailed Grounds of Defence. Only the First Interested Party, GEMA, produced a Skeleton Argument that met the requirements of Practice Direction 54A.

78. The Claimants' and the Defendant's approach to their Skeleton Arguments was entirely wrong. It was in blatant disregard of the requirements in the Practice Direction. This is intolerable. A properly prepared skeleton argument is essential. It is how the court is assisted to identify and determine the issues, consistent with a proportionate use of court time. Quite plainly too, compliance with the requirements set out in the Practice Direction is in the interests of the parties: a single, concise document will be the best

way of putting each party's case. Paragraph 14.4 of Practice Direction 54A states that a skeleton argument that does not comply with the requirements at paragraph 14.1 to 14.3 "may" be returned by the court. Advocates should now expect that this practice will be followed.