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## Further decision in respect of CMP317/327 and CMP339

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On 12 December 2022, the CMA published its updated Decision and Order in relation to the statutory appeal brought in respect of our CMP317/327 and CMP339 decisions. This followed a judgment of the Court of Appeal handed down on 8 November 2022. As a result of the CMA Order, our CMP317/327 decision has been partially quashed, with a specific matter remitted to us for reconsideration and determination. This document sets out our decision on the matter which has been remitted to us.

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We published our decisions on CMP317/327<sup>1</sup> and CMP339<sup>2</sup> on 17 December 2020. The proposals in CMP317/327 and CMP339 were, in broad terms, intended to more closely align the CUSC with Part B of the Annex to Commission Regulation (EU) 838/2010 ("**the Limiting Regulation**"). Part B of the Annex, as it applied in Great Britain ("**GB**") at the time of our decisions on CMP317/327 and CMP339, included the following:

*"1. Annual average transmission charges paid by 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. ...Annual average transmission charges paid by producers in...Great Britain...shall be within a range of 0 to 2,5 EUR/MWh..."*

In this letter, we refer to the exclusion of "*charges paid by producers related to ancillary services*" as "**the Ancillary Services Exclusion**".

Part B of the Annex continues to apply in GB following the end of the post-Brexit transition period, subject to certain drafting amendments.

The proposals in CMP317/327 (i.e. the Original Proposal and various WACM<sup>3</sup>s) set out various options in respect of seven discrete modules. The proposals in CMP339 consisted of options for definitional changes, corresponding to the various options presented in CMP317/327. In our decision on CMP317/327, we addressed each module in turn, and indicated our conclusion in respect of the proposals within each module.

Module 2 concerned whether or not certain Balancing Services Use of System charges ("**BSUoS Charges**") paid by generators should in future be taken into account for the purposes of the calculation prescribed by Part B of the Annex to the Limiting Regulation. We concluded that all BSUoS Charges paid by generators fell within the Ancillary Services Exclusion, and that they therefore should not be taken into account for the purposes of

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<sup>1</sup> [CMP317 & CMP327: Excluding assets required for connection and removing Transmission Generator Residual | Ofgem](#)

<sup>2</sup> [CMP339: Consequential changes for CMP317/327 \(TCR\) | Ofgem](#)

<sup>3</sup> Workgroup alternative code modifications are alternative proposals raised by Workgroup members in the course of developing a code modification proposal.

the calculation. In light of that conclusion, we decided to reject proposals under which any BSUoS Charges paid by generators would be taken into account for the purposes of the calculation.

Our decisions on CMP317/327 and CMP339 were the subject of an appeal to the Competition and Markets Authority ("**the CMA**").<sup>4</sup> The CMA dismissed the appeal, but that decision was challenged by way of judicial review.<sup>5</sup> The decision of the High Court in respect of the judicial review was in turn the subject of an appeal to the Court of Appeal.

In its judgment dated 8 November 2022<sup>6</sup>, the Court of Appeal held that BSUoS Charges paid by generators would not fall within the Ancillary Services Exclusion insofar as they were charges for "*congestion management*". The Court of Appeal also held that:

1. under the law which applied at the time of our decisions in December 2020, "*congestion management*" was not confined to the management of congestion on interconnectors (although the Court expressly refrained from setting out any definition of what *would* constitute "*congestion management*" in the context of GB: see paragraph 103 of the judgment). The Court of Appeal's conclusion in that regard was based on analysis of the definition of "*congestion*" in Article 2(4) of Regulation (EU) 2019/943 ("**the 2019 Regulation**"), in the form that applied in GB until the end of the post-Brexit transition period;
2. however, since the end of the post-Brexit transition period, the 2019 Regulation has applied in GB in a form that is subject to certain amendments, including in respect of the definition of "*congestion*". In its amended form, the 2019 Regulation now provides (and has since 31 December 2020 provided) that "*congestion*' means a situation in which an interconnection linking the Great Britain transmission network with the transmission network of another country or territory cannot accommodate all physical flows resulting from international trade required by market participants, because of a lack of capacity of the interconnectors or the transmission systems concerned". The Court of Appeal held that the amendment of the definition of "*congestion*" appeared to be based on an erroneous assumption about the meaning of the 2019 Regulation, and adverted to the possibility that the Secretary of State might, in future, decide to make further amendments.

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<sup>4</sup> [SSE code modifications appeal - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/sse-code-modifications-appeal)

<sup>5</sup> [SSE Generation Ltd & Ors, R \(On the Application Of\) v Competition And Markets Authority \[2022\] EWHC 865 \(Admin\) \(11 April 2022\) \(bailii.org\)](https://www.bailii.org/uk/ewhc/cases/ewhc-2022-865.html)

<sup>6</sup> [SSE Generation Ltd & Ors, R \(On the Application Of\) v Competition and Markets Authority \[2022\] EWCA Civ 1472 \(08 November 2022\) \(bailii.org\)](https://www.bailii.org/uk/ewca/cases/ewca-2022-1472.html)

Nevertheless, as matters stand, the 2019 Regulation applies in the form that is subject to these post-Brexit amendments.

The Court of Appeal directed the CMA to quash our CMP317/327 decision "*in so far as it purported to exclude charges relating to the costs of Congestion Management (as referred to in this Court's judgment dated 8 November 2022) from the calculation of average annual transmission charges under [the Limiting Regulation]*".

On 12 December 2022, the CMA duly made an order in the following terms ("**the CMA Order**"):

*"[GEMA's] decision dated 17 December 2020 in CMP317/327 is quashed in so far as it purported to exclude charges relating to the costs of congestion management (as referred to in the Court of Appeal Judgment) from the calculation of average annual transmission charges under Regulation 838/2010, and that matter is remitted to [GEMA] for reconsideration and determination."*

The effect of the CMA Order is to quash our decision on Module 2 (only), in respect of which we declined to make certain proposed changes to the CUSC, and to require us to make a fresh decision on that issue. The CMA Order does not undo any of the changes to the CUSC that were made, through our approval of the Original Proposal, in light of our conclusions on other Modules.<sup>7</sup>

### **Our decision<sup>8</sup>**

As explained above, the definition of "*congestion*" which has applied in GB since 31 December 2020 is that which appears in the amended version of the 2019 Regulation, not the definition which applied at the time of our original decisions. Moreover, as from 1 April 2023, no BSUoS Charges are payable by generators in respect of their exports<sup>9</sup>, as a result of our decision to approve CMP308 (*'Removal of BSUoS Charges from Generation'*)<sup>10</sup>, and it therefore follows that the question raised by Module 2 (i.e. whether or not certain BSUoS Charges paid by generators should from now on be taken into account for the purposes of the calculation prescribed by Part B of the Annex to the Limiting Regulation) is now academic. Our decision is therefore that no further action is required in respect of the matter which the CMA remitted to us.

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<sup>7</sup> Although a previous order of the CMA quashed the CMP339 decision insofar as it inserted into the CUSC a definition of "*Charges for Physical Assets Required for Connection*". Our decision to approve CMP391 reintroduced this defined term to the CUSC <https://www.nationalgrideso.com/document/260666/download>

<sup>8</sup> This document is notice of the reasons for this decision as required by section 49A of the Electricity Act 1989.

<sup>9</sup> BSUoS charges are instead levied against 'Final Demand', that consumption which is not required for the purposes of generation

<sup>10</sup> [CMP308: Removal of BSUoS charges from Generation | Ofgem](#)