



Making a positive difference
for energy consumers

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Dear Mr Rooke,

Determination in relation to notice of second income adjusting event from Gwynt y Môr OFTO plc

1. On 30 June 2016,¹ the Authority² received a notice (the "**Notice**") from Gwynt y Môr OFTO plc (the "**Licensee**") in respect of two events, which the Licensee considers to be income adjusting events ("**IAEs**") pursuant to Amended Standard Condition E12-J3 (Restriction of Transmission Revenue: Allowed Pass-through Items) of its Licence (the "**Condition**"). The Authority published its determination of the first event on 23 May 2017 ("**Gwynt y Môr SSEC1 Determination**").³ On 8 September 2017, the Authority determined that the second event set out in the Notice constituted an IAE under sub-paragraph 15(c) of the Condition for the reasons given in that determination letter. Following challenge by way of Judicial Review, the Authority's determination on the second event was quashed by the Court and remitted back to Ofgem for reconsideration (the "**Judgment**").⁴

¹ The complete notice was received on this date.

² References to the "Authority", "Ofgem", "we" and "our" are used interchangeably in this document. The Authority refers to GEMA, the Gas and Electricity Markets Authority. The Office of Gas and Electricity Markets (Ofgem) supports GEMA in the discharge of its functions.

³ Available at: <https://www.ofgem.gov.uk/publications-and-updates/gwynt-y-mor-ofto-plc-determination-under-paragraph-23-amended-standard-condition-e12-j3>.

⁴ R. (on the application of Gwynt-y-Môr Offshore Wind Farm Ltd) v Gas and Electricity Markets Authority [2019] EWHC 654 (Admin) (the "**Judgment**").

2. The Authority has considered the claim afresh and has determined that the second event set out in the Notice does not constitute an IAE for the reasons given in this letter. In this letter, we also describe the details of the second event set out in the Notice, provide a summary of the IAE provisions, and explain the process we have followed to reach the Authority's determination, including consideration of the consultation responses received from the Licensee and Gwynt y Môr Offshore Wind Farm Limited⁵ (the "**Developer**").

Background

3. The Licensee is the holder of an offshore electricity transmission licence, granted on 11 February 2015 under section 6(1)(b) of the Electricity Act 1989 (the "**Licence**"). The Licensee provided the Notice to the Authority pursuant to paragraph 14 of the Condition, in respect of an increase in costs and/or expenses incurred by the Licensee that it considers was caused by an IAE.
4. Pursuant to paragraph 16 of the Condition, the Notice gave particulars of:
 - a) the events to which the Notice relates and why the Licensee considers those events to each be an IAE;
 - b) the amount of any change in costs and/or expenses that can be demonstrated by the Licensee to have been caused by each event and how the amount of these costs and/or expenses has been calculated;
 - c) the amount of any allowed revenue adjustment proposed as a consequence of each event and how this allowed revenue adjustment has been calculated; and
 - d) any other analysis or information that the Licensee considers sufficient to enable the Authority and the relevant parties to assess fully each event to which the Notice relates.
5. The second event in the Notice relates to a cable failure on the subsea cable of Export Circuit 2 ("**SSEC2**") on 25 September 2015 (the "**Cable Failure**"). The Licensee's independent technical report (the "**Technical Report**")⁶ indicates that the fault occurred on one of the power cores of SSEC2 as a result of damage to the sheath of the fibre optic cable ("**FOC**") and that the damage was likely sustained either during manufacture of the FOC, during storage prior to installation, or during laying up, prior to the transfer of the transmission assets to the Licensee. In summary, the Licensee considers that the Cable

⁵ Majority ultimate owner RWE Innogy GmbH.

⁶ EDIF ERA, *Investigation of Gwynt y Mor SSEC2 Cable Failure*, Final Report, September 2016.

Failure has arisen due to faults in SSEC2 caused by manufacturing defects or poor operating practice in laying and/or storing the cable.

6. Because of the Cable Failure, extensive repair work was necessary to the transmission assets. The Notice relates to the costs and expenses of the repair works and related costs required by the Licensee in the financial year 1 April 2015 to 31 March 2016 (the "**Relevant Financial Year**") in relation to the Cable Failure.
7. The Licensee considers that the Cable Failure is an IAE pursuant to sub-paragraph 15(a), alternatively sub-paragraph 15(c), of the Condition. The Licensee considers that the Cable Failure constitutes force majeure under the System Operator Transmission Owner Code ("**STC**"), pursuant to sub-paragraph 15(a) of the Condition. The Licensee also considers that the Cable Failure and the consequential costs were not reasonably foreseeable at tender due diligence or at financial close when the revenue calculations were fixed.
8. The Notice provisionally specified that there had been an overall change to the costs and expenses of the Licensee for the Relevant Financial Year of £14.2 million because of the Cable Failure.
9. Pursuant to paragraph 17 of the Condition, on 14 June 2019 the Authority requested that the supporting evidence provided by the Licensee in the Notice be supplemented with additional information to enable the Authority to assess whether an IAE had occurred in respect of the Cable Failure and the amount of any change in costs and/or expenses caused by the Cable Failure. The Licensee responded to this request on 18 July 2019. The Licensee also sent Ofgem a letter dated 2 May 2019 clarifying certain matters raised in the Judgment. The Licensee additionally provided further information on:
 - a. 28 November 2019 following our request of 30 September 2019; and
 - b. 9 March 2020 following our request of 7 February 2020.
10. We have also considered the additional information relating to the Cable Failure provided by the Licensee prior to September 2017 and in the judicial review proceedings that led to the Judgment.

Publication of the Notice and consultation

11. Paragraph 19 of the Condition requires the Authority to publish the Notice, excluding any confidential information, following its receipt. Paragraph 21 requires that the Authority consult with the Licensee and such other persons as it considers desirable before making its determination.

12. The Licensee considered that the details of the Cable Failure and certain commercial arrangements should be kept confidential because it might seriously prejudice its ability to recover incurred costs from other parties, and that this could affect the size of the claims.
13. Under paragraph 20 of the Condition, we have the discretion to determine the confidentiality of information in the Notice by balancing the need for disclosure to enable relevant parties fully to assess the Cable Failure, against the risk of seriously prejudicially affecting the interests of a person to which it relates. In the specific circumstances of the Cable Failure, the Authority agreed that the publication of certain information about it and related commercial arrangements might seriously prejudice the interests of the Licensee in respect of its commercial discussions and therefore redacted that information. The Authority has published the redacted Notice alongside this determination.
14. In accordance with paragraph 21 of the Condition, the Authority has consulted with the Licensee in relation to this determination. The Authority has also consulted with the Developer as it was responsible for the construction of the transmission assets. We have also discussed certain aspects of limb (a) of the Condition with the national electricity transmission system operator and counterparty to the STC, National Grid Electricity System Operator Limited ("**NGESO**"), in order to understand its interpretation of the STC. More generally, we have met with five offshore transmission owners ("**OFTOs**"), three generators, two lead insurers and commissioned independent insurance advice, to better understand the occurrence of subsea cable failures and the response of the OFTO insurance market. Finally, we have also commissioned independent technical advice on good industry practice issues.
15. Based on the facts and circumstances of this Cable Failure, the Authority does not consider it desirable to consult with any other party before making its determination. This is on the basis that the fact-specific nature of the claim limited the likelihood that any other party would have any additional information in this case that might be relevant to our decision on whether an IAE had occurred and, if so, the proposed level of adjustment.

Income Adjusting Event

16. Paragraph 15 of the Condition defines what constitutes an IAE, as follows:

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

- a) an event or circumstance constituting force majeure under the STC;*
- b) an event or circumstance resulting from an amendment to the STC not allowed for when allowed transmission owner revenues of the Licensee were determined for the relevant year t ; and*

c) *an event or circumstance other than listed above which, in the opinion of the Authority, is an income adjusting event and is approved by it as such in accordance with paragraph 21 of this licence condition,*

where the event or circumstance has, for relevant year t, increased or decreased costs and/or expenses by more than £1,000,000 (the "STC threshold amount").

17. As noted in paragraph 7 above, the Licensee claims that the Cable Failure is an IAE pursuant to sub-paragraph 15(a) ("**Limb (a)**") of the Condition, alternatively sub-paragraph 15(c) of the Condition ("**Limb (c)**").

18. Under Limb (a), the Authority must consider whether there has been a force majeure event as construed under the terms of the STC. The STC defines the relationship between NGESO, and onshore and offshore transmission owners. The STC procedures ("**STCPs**") set out the roles, responsibilities, obligations and rights of each party in further detail.

19. Under Limb (c), the Authority may approve any other event or circumstance not covered by sub-paragraphs 15(a) and (b) which, in the opinion of the Authority, is an IAE. The Condition does not expressly set out any particular qualifying criteria for determining whether an event constitutes an IAE under this limb. In our determination on an IAE claim from Blue Transmission London Array Limited dated 27 October 2016⁷ (the "**BTLAL Determination**"), we set out our approach for assessing claims under Limb (c) (see, in particular, pp. 4-6 of the BTLAL Determination).

Limb (a) of the Condition

20. In assessing whether an event or circumstance is an IAE under Limb (a), we must consider whether there has been an event or circumstance constituting force majeure under the STC.

21. 'Force majeure' under the STC is defined in Section J, paragraph 3, as follows (emphasis added):

in relation to any Party, any event or circumstance which is beyond the reasonable control of such Party and which results in or causes the failure of that Party to perform any of its obligations under the Code including act of God, strike, lockout or other industrial disturbance, act of the public enemy, war declared or undeclared, threat of war, terrorist act, blockade, revolution, riot, insurrection, civil commotion, public demonstration, sabotage, act of vandalism, lightning, fire, storm, flood, earthquake, accumulation of snow or ice, lack of water arising from weather or environmental problems, explosion, fault or failure of Plant and Apparatus (which could not have been prevented by Good Industry Practice), governmental restraint, Act of Parliament, other legislation, bye law and Directive (not being any order, regulation or direction under sections 32, 33, 34 and 35 of the Act) provided that lack of funds or performance or non-performance by an Other Code Party shall not be interpreted as a cause beyond the reasonable control of that Party and provided, for the avoidance of doubt, that weather conditions that are reasonably to be expected at the location

⁷ Available at: https://www.ofgem.gov.uk/system/files/docs/2016/10/btlal_iae_determination_final.pdf.

of the event or circumstance are also excluded as not being beyond the reasonable control of that Party

22. Therefore, in order for there to be force majeure under the STC, there must be an event or circumstance which both: (1) results in or causes the failure of that party to perform any of its obligations under the STC; and (2) is beyond the reasonable control of the party, as defined in accordance with the non-exhaustive list of examples provided.

Determination of whether the Cable Failure constitutes an IAE under Limb (a)

23. The Authority has determined that the Cable Failure does not constitute an event or circumstance that is an IAE pursuant to Limb (a) of the Condition, because there has been no failure to perform any of its obligations under the STC and therefore there cannot have been force majeure under the STC.

24. The Licensee has raised two main arguments against this approach.

- a. First, the Licensee argues that there is no requirement for a failure to perform obligations under the STC in these circumstances where the force majeure definition is being cross-referred to in Limb (a) of the licence.
- b. Second, alternatively, the Licensee argues that there has been a failure to perform obligations, under paragraph 2.1 of Part One of Section C, or otherwise paragraph 2.2 of Part One of Section C of the STC.

25. Each argument is considered in turn. The particular arguments have been raised through our interactions with the Licensee in relation to both this IAE claim and the Gwynt y Môr SSEC1 Determination.

Whether there is a requirement of a failure to perform any obligations under the STC

26. The Licensee argues that, even though the Licence cross-refers to "*force majeure under the STC*", this should be construed instead as a cross-reference only to part of the definition of force majeure under the STC, with the express requirement of a "*failure to perform any of its obligations under the Code*" removed.

27. The Licensee considers that the question of whether the Cable Failure resulted in the Licensee failing to perform an obligation under the STC is not significant in the case of an IAE. The Licensee considers that the reference in the force majeure definition to a failure to perform an obligation is present solely because the function of the force majeure definition within the STC is to give relief from a failure to perform an obligation under the STC. In contrast, when this definition of force majeure is cross-referenced in the context of an IAE, it is not being used for such purposes and so the Licensee considers that

element of the definition is therefore irrelevant and so can be ignored. Furthermore, the Licensee considers that its approach is consistent with Ofgem's interpretation of a similar reference to force majeure under the BSC and CUSC in relation to National Grid Electricity Transmission plc's (the entity formerly carrying out the activities of NGENSO) request for an IAE under its licence in relation to the Moyle Interconnector outage (the "**Moyle Interconnector Determination**").⁸

28. We have considered whether, on a proper construction of the Licence as currently drafted, Limb (a) simply cross-refers to the existing concept of force majeure under the STC, or whether it incorporates and amends the definition of force majeure under the STC. We consider that the proper construction is that it cross-refers to the STC.

29. That this is the correct construction is apparent first and foremost as a matter of language. The wording used in Limb (a) is the obvious way to cross-refer to the existing concept of force majeure under the STC.

30. If the licence draftsman had wanted to refer only to the indicative list of events said to be beyond a Licensee's reasonable control, but not refer to other parts of the force majeure definition, then this approach could and would have been taken. For example, in paragraph 9 of Amended Standard Condition E12-J4 (*Restriction of Transmission Revenue: Annual Revenue Adjustments*), a licensee's reported system incentive performance can be adjusted to the extent that there was an 'exceptional event'. 'Exceptional event' is defined in Amended Standard Condition E12-J1 (*Restriction of Transmission Revenue: Definitions*) as follows (emphasis added):

"exceptional event" means an Event or circumstance that is beyond the reasonable control of the licensee and which results in or causes a Transmission Service Reduction and includes (without limitation) an act of God, an act of the public enemy, war declared or undeclared, threat of war, terrorist act, blockade, revolution, riot, insurrection, civil commotion, public demonstration, sabotage, act of vandalism, fire (not related to weather), governmental restraint, Act of Parliament, other legislation, bye law or directive (not being any order, regulation or direction under section 32, 33, 34 and 35 of the Act) or decision of a Court of competent authority or the European Commission or any other body having jurisdiction over the activities of the licensee provided that lack of funds shall not be interpreted as a cause beyond the reasonable control of the licensee. For the avoidance of doubt, weather conditions which are reasonably expected to occur at the location of the event or circumstances are not considered to be beyond the reasonable control of the licensee.

31. In this example, the licence draftsman intended to use the indicative list of examples for force majeure from the STC (with minor amendments), but did not intend to import the requirement of a failure to perform obligations under the STC, replacing it instead with a

⁸ Available at: <https://www.ofgem.gov.uk/publications-and-updates/electricity-system-operator-incentives-2011-13-income-adjusting-events-determination>.

requirement for a Transmission Service Reduction. The draftsman did so by copying out the definition of force majeure from the STC into the licence and making express amendments to it. This is a strikingly different approach to that adopted in Limb (a), in the same part of the licence, which simply cross-refers to the pre-existing concept of “*force majeure under the STC*” and requires it to be satisfied.

32. Further, we consider that usual use of the term ‘*force majeure*’ is a reference to a situation where there would otherwise be a failure to perform, or to perform compliantly, some relevant obligation (such as any of the obligations under the STC). The orthodox legal definition of the term ‘*force majeure*’ is “*a contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused from performance of the contract, in whole or in part, or is entitled to suspend performance or to claim an extension of time for performance, upon the happening of a specified event or events beyond his control*”.⁹ Relatedly, the position in law is that a force majeure provision will usually be inapplicable where alternative methods of performance still exist (i.e. where it is still possible to perform obligations under the contract). It is in this orthodox sense that the phrase “*force majeure*” is used in the STC, referring to a failure to perform any obligation under the STC itself (or under a TO Construction Agreement as set out in Schedule 9 to the STC – see section G paragraph 8.1 of the STC). A reference to ‘*force majeure*’ under the STC therefore incorporates a requirement of a failure to perform obligations under the STC.
33. Finally, the Licensee relied on a legal doctrine (the “*Hamilton/Thomas* approach”¹⁰), which applies where there is wholesale adoption of the clauses from one contract into another. On this approach, a proper construction treats any term that was inconsistent as falling to be disregarded, or reads in only so much of the incorporated document as is not inconsistent. However, we consider that this argument does not assist the Licensee. Limb (a) does not involve the wholesale incorporation of a set of clauses, but is a specific cross-reference to a definition under the STC. Moreover, there is nothing inconsistent with a licence provision that requires both that the costs incurred by the event are not *de minimis* (i.e. the threshold amount specified in paragraph 15 of the Condition) and that requires there to be a failure to perform obligations under the STC.
34. To the contrary, the approach of cross-referring to force majeure as it operates under the STC has a clear rationale. Force majeure under the STC is a tightly-defined category (including due to the requirement that relevant events cause a failure to perform any obligations under the STC). In drafting Limb (a), the draftsman had recourse to this tightly-drawn existing category, as part of the exercise of identifying those serious events worthy of the exceptional remedy of losses being passed on from a licensee to a developer

⁹ *Chitty on Contracts*, 33rd ed, section 15-152.

¹⁰ Lewison, *The Interpretation of Contracts*, 6th ed, chapter 3 section 10(d), referring to *Thomas (TW) & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1 (HL) and *Hamilton & Co v Mackie & Sons* (1889) 5 TLR 677 (CA).

and to consumers. On the Licensee's suggested approach, this tightly-defined category would be substantially expanded. In relation to the present circumstances, rather than referring to a relevant fault or failure of plant or apparatus that also causes a failure to comply with an STC obligations, the Licensee considers that Limb (a) should apply to any relevant fault or failure of plant or apparatus causing loss that is not *de minimis*. This approach would refer to a much broader category of events than are identified as relevant under the STC. As confirmed with NGENSO, reductions in service through fault or failure of plant or apparatus are a regular occurrence in the usual course of operating a transmission system, but (due to the requirement that the failure also leads to a failure to perform obligations) would only very rarely constitute force majeure under the STC.

35. Finally, we do not consider our approach to be inconsistent with the Moyle Interconnector Determination, as the Licensee asserts. In that determination, Ofgem did not indicate that the failure of a party to perform any of its obligations under the relevant code is irrelevant, nor did the determination contain any consideration of the specific force majeure provision. Ofgem made brief statements that the relevant event could "possibly" or "arguably" constitute force majeure under the CUSC or BSC but, as Ofgem was not required to determine whether an event of force majeure has occurred under the BSC and CUSC, it did not need to carry out analysis on the facts or determine this point.

36. In light of the above, the STC and the Condition should be interpreted consistently. The situation should not arise where an event constitutes force majeure under the STC, but not under Limb (a) (and vice versa). There is, accordingly, a requirement of a failure to perform an obligation under the STC.

Whether there has been a failure to perform an obligation under the STC

37. In the alternative, the Licensee identified two provisions that it said it was unable to perform under the STC.

38. First, the Licensee pointed to paragraph 2.1.1 of Part One of Section C of the STC. That paragraph defines "Transmission Services", and is contingent on other provisions of the STC to determine the extent of the obligation to provide Transmission Services.

39. Paragraph 2.1 of Part One of Section C of the STC provides (emphasis added):

2.1 In accordance with the provisions of this Code, each Transmission Owner shall provide services to NGENSO [the National Grid Electricity System Operator] consisting of:

2.1.1 making available those parts of its Transmission System which are intended for the purposes of conveying, or affecting the flow of, electricity, so that such parts are capable of doing so and are fit for those purposes;

2.1.2 a means of enabling NGET to direct the configuration of those parts of that Transmission Owner's Transmission System made available to it and, consistent with such means, giving effect to any such direction from time to time; and

2.1.3 a means of enabling NGET to obtain information in relation to that Transmission Owner's Transmission System which information is needed by NGET to enable it to co-ordinate and direct the flow of electricity onto and over the National Electricity Transmission System and, consistent with such means, providing such information to NGET,

*(together here referred to as "**Transmission Services**").*

40. Paragraph 4.1 of Part One of Section C of the STC defines the obligation on the Transmission Owner to provide Transmission Services:

4.1 Each Transmission Owner shall provide Transmission Services to NGENO, pursuant to paragraph 2, in accordance with its Services Capability Specification (including to any Normal Capability Limits) except, and only to the extent that:

4.1.1 the provision of such Transmission Services is reduced due to an Outage in accordance with Section C, Part Two;

*4.1.2 its Transmission Services are not, other than by reason of an Outage, physically capable of being provided or are not capable, for immediate safety reasons or pursuant to environmental obligations, of being provided in accordance with the Services Capability Specification (referred to as a "**Services Reduction**"); or*

4.1.3 the Transmission Owner has notified NGENO of technical limits applying in excess of Normal Capability Limits pursuant to paragraph 4.14.

41. Paragraph 4.1 therefore provides that there is no obligation on the Transmission Owner under the STC to provide Transmission Services where there is a Services Reduction or where the provision of such Transmission Services is reduced due to an Outage (each as respectively defined by the STC).

42. The Cable Failure constituted a Services Reduction. As the obligation under paragraph 2.1.1 read with paragraph 4.1.2 does not require Transmission Services to be provided where there is a Services Reduction, we do not consider that there has been a failure to perform the obligation under paragraph 2.1.1 read with paragraph 4.1.

43. Again, if the Licensee's argument were correct, then every single Services Reduction caused by a relevant fault or failure of plant or apparatus would constitute a breach of the Licensee's obligations under the STC and would invoke the force majeure provision under the STC. Unsurprisingly, that is not how the STC responds to this commonplace occurrence; rather, there is no failure to perform any obligations under the STC in such a circumstance, and the *force majeure* provision is not (and need not be) engaged.

44. Second, the Licensee suggested that, upon the Cable Failure, it failed to maintain its Transmission System, and is therefore in breach of its obligation under the STC. The Licensee pointed to paragraph 2.2 of Part One of Section C, which provides (emphasis added):

Each Transmission Owner agrees with NGET¹¹ to provide Transmission Services and to plan, develop, operate and maintain its Transmission System in accordance with its Transmission Licence and this Code, subject to any Transmission Derogations from time to time.

45. However, this provision merely cross-refers to the other obligations in the Licence and the STC, which provide more specific duties. The Licensee is unable to point to any of these to identify its breach. There is, therefore, no freestanding obligation that has been breached.

46. In any event, we understand that the Licensee reacted to the Cable Failure by repairing, replacing and maintaining its assets. The Licensee would therefore not be in breach of its obligations under the STC to maintain the Transmission System, nor any other STC obligation.

47. In summary, force majeure under the Licence requires a failure by the Licensee to perform any of its obligations under the STC. The Licensee has not identified an obligation that it has in fact failed to perform under the STC as a result of the Cable Failure; therefore, the Cable Failure does not satisfy the definition of force majeure under the STC.

Fault or failures caused by non-adherence to Good Industry Practice are not force majeure events

48. While the above is dispositive of the Licensee's claim under Limb (a), we have also considered whether the Cable Failure was beyond the reasonable control of the Licensee for the purposes of Limb (a) of the Condition.

49. Where the Cable Failure constitutes a fault or failure in plant or apparatus, it also must be beyond the reasonable control of the Licensee for the purposes of the STC definition of force majeure. The force majeure definition expressly provides that a fault or failure of plant or apparatus is an example of an event or circumstance beyond the Licensee's control if it "could not have been prevented by Good Industry Practice".

50. 'Good Industry Practice' under the STC is defined in Section J, paragraph 3, as follows:

¹¹ Now known as NGESO, the National Grid Electricity System Operator.

in relation to any undertaking and any circumstances, the exercise of that degree of skill, diligence and prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances.

51. The Technical Report provided by the Licensee described the Cable Failure as follows:¹²

Edif ERA has been informed that the FOCs in all of the Gwynt y Mor export cables had been incorrectly earthed at installation in that they were earthed at the off-shore platform but been not [sic] earthed in the transition bays between the submarine and land cable sections of the export circuit. ...

The cause of any damage to the sheath of the FOC is unknown. It is, however, possible that the damage was sustained during manufacture of the FOC, during storage prior to laying up, or during laying up. ...

The most likely sequence of events which led to the fault can be summarised as follows:

- *Puncture of the semi-conducting sheath of the optical fibre,*
- *Ingress of seawater under sheath of FOC,*
- *Corrosion of the aluminium wire armour of the fibre optic due to seawater and a standing voltage on the aluminium armour,*
- *Corrosion breaks continuity of the aluminium armour wires,*
- *Standing voltage on the armour leads to excessive current through the semi-conducting sheaths of the fibre optic cable and the power cores,*
- *High localised current density eroded lead sheath and degraded the XLPE insulation,*
- *The degradation of the XLPE reached a stage where it could not withstand the operating voltage and the insulation failed.*

52. The Technical Report considered two scenarios for the pattern of degradation to the FOC sheath: first, that there may have been two points of damage to the FOC sheath that allowed water ingress and hence corrosion; or second, that there was one break in the armour.¹³ The Technical Report stated that the cause of damage to the sheath of the FOC is unknown but that this could have been sustained during manufacture, storage or laying up. They noted that had this damage occurred at a time when the FOC was stored on a drum, an impact could have equally affected two or more adjacent turns, and that this would potentially account for the multiple sites of corrosion initiation.¹⁴ However, although the Technical Report states that "*this scenario is considered more likely*", it adds that no direct evidence of a puncture in the sheath was found, because the sheath was

¹² Technical Report, pages 52-55.

¹³ Technical Report, page 53.

¹⁴ Technical Report, page 54.

destroyed by the failure event.¹⁵ The Technical Report notes that although “*the earthing of the FOCs in the export cables appears to have been variable and possibly uncertain, no evidence has been found that links the earthing arrangement with the initiation of the fault*”¹⁶. The Technical Report concludes that “*Of the possible scenarios for damage that initiated the failure the most likely is considered to be damage that punctured the FOC sheath during manufacture of the FOC or assembly of the Export cable. The next most likely is considered to be excessive tension during installation*”.¹⁷

53. There is no suggestion that the fault or failure was caused by the Licensee’s failure to follow Good Industry Practice. However, the proper construction of the force majeure provision is not concerned solely with the Good Industry Practice of the Licensee:

- a) the Licensee is deemed, for the purposes of the STC, to have been the party that carried out the development works by paragraph 6.3, Section G of the STC¹⁸. This means that any relevant failure by the Developer to follow Good Industry Practice in carrying out the development works is to be deemed to be attributable to the Licensee; and
- b) the STC definition of force majeure expressly excludes “*performance or non-performance by an Other Code Party*” from being a cause beyond the reasonable control of the applicant Party (i.e. even if that other party’s performance or non-performance had nothing to do with the applicant Party). “Other Code Party” is defined broadly as including “*other than NGESO, a party (including its officers, employees or agents) to or under [as the context admits or requires, any of the CUSC, CUSC Framework Agreement, Grid Code, BSC, BSC Framework Agreement and any agreement entered into pursuant to any of these]*”, and therefore includes the Developer (being a party to the CUSC).

54. Therefore, in determining whether or not an event was preventable by Good Industry Practice for the purposes of the STC definition of force majeure, we consider that the failure to abide by Good Industry Practice by the Developer is also relevant. We note that there is also a clear policy rationale for such an approach. In circumstances where a developer fails to follow Good Industry Practice, the relevant OFTO should generally rely on any direct legal remedies in respect of the breach, rather than seek protection under Limb (a) of the Condition.

¹⁵ Technical Report, page 54.

¹⁶ Technical Report, page 53.

¹⁷ Technical Report, pages 62-63.

¹⁸ We note that paragraph 6.3, Section G of the STC applies to the Licensee because that provision applies to generator-build projects, which include Gwynt y Môr. See the CA046 Modification which introduced paragraph 6.3 in section G of the STC: <http://www2.nationalgrid.com/UK/Industry-information/Electricity-codes/STC/Modifications/Concluded-STC/>

55. As noted above in paragraph 52, the most likely cause of the damage that initiated the failure is considered to be the damage that punctured the FOC sheath during manufacture of the FOC or assembly of the export cable. The next most likely is considered to be excessive tension during installation of SSEC2. However, the Developer procured the manufacture of the cable, was responsible for overseeing assembly of SSEC2,¹⁹ and was ultimately responsible for installation of SSEC2. We therefore have considered: (i) whether there was a failure by the Developer to follow Good Industry Practice; and, if so (ii) if Good Industry Practice had been followed, whether the Cable Failure could have been prevented.

56. On 2 December 2019, the Authority engaged independent expert technical advisers from DNV GL Netherlands B.V. ("**DNV-GL**") to consider whether the failure of SSEC2 was preventable by Good Industry Practice (as defined in the STC) by the Developer. Following preliminary advice from DNV-GL, on 7 February 2020 we requested further information from the Licensee and the Developer (as the Authority was not aware whether the Licensee would have retained the necessary information) relating to the design, manufacture and installation of the export cables. In particular, we requested:

- a) the detailed SSEC2 design, and the design, type and special tests, proposed by the manufacturer, including in relation to the FOC and integration of the FOC in the power cable; the documents in which this detailed design is reviewed (e.g. meeting minutes, or third party report checking the design); and, the documented agreement of final design; and
- b) the detailed installation and cable handling design, and the design, type and special tests, proposed by the installer, including in relation to the FOC and integration of the FOC in the power cable; the documents in which this installation design is reviewed (e.g. meeting minutes, or third party report checking the design); and, the documented agreement of final design.

57. The Developer responded to Ofgem on 6 March 2020 confirming that the Licensee was now responsible for the information requested. The Licensee responded to the request on 9 March 2020. On 16 March 2020, we provided DNV-GL with the information obtained.

58. DNV-GL provided a report dated 3 June 2020 in response to our questions²⁰ (the "**DNV – GL Report**") which concluded that the Cable Failure could, more likely than not, have

¹⁹ DNV-GL Response to questions related to the Gwynt y Môr offshore windfarm submarine power cable, 9 April 2020 (the "**DNV-GL Report**"), page 14.

²⁰ DNV-GL Response to questions related to the Gwynt y Môr offshore windfarm submarine power cable, 9 April 2020.

been prevented by the Developer through Good Industry Practice (paragraph 2.2.3 of the DNV-GL Report). A summary of the advice leading to that conclusion is set out below.

59. DNV-GL explained that it considered the process of setting and verifying project requirements, design requirements, and component requirements to be Good Industry Practice. From the information provided, certain relevant technical requirements as to the FOC integration in the SSEC2 were not specified or queried by the Developer, and relevant verification and testing in relation to the integration of the FOC in SSEC2 were apparently not undertaken, as would constitute Good Industry Practice. In summary, DNV-GL advised that:

- a. Requirements in the technical specifications dedicated to the FOC and the integration of the FOC in the power cable were absent. The Developer should have set explicit requirements on the FOC, and its integration, functionality and performance. Such requirements should have, in particular, included the topic of corrosion in the FOC.
- b. A design review phase, in which the Developer verified the offered cable design against the project requirements, did not take place. Such a design review process should have discussed the FOC sheath integrity after integration of the FOC in the power cable. The risks related to this integration should have been identified and quality control measures and risk mitigation decided.
- c. Tests on the FOC and FOC integration should have been defined and should have also led to a consideration of FOC corrosion. The verification of the integrity of the cable's corrosion barrier is difficult after assembly of the submarine cable and this should have led to a focus on ensuring the integrity of that barrier during the manufacturing and installation phases.
- d. Before manufacturing starts, there should have been agreement between the Developer and the manufacturer in the management of non-conformities and repairs. This should include the method of reporting, repair procedures, and verification of the cable and FOC performance after the repair.

60. DNV-GL note that these are elements which would have at least addressed multiple risks in connection with the cable and FOC design and performance during the pre-manufacturing and pre-testing period. DNV-GL confirm that, with a focus on integration in the power cable, a FOC can be successfully integrated in offshore export cables. DNV-GL advise that if the relevant FOC integration design testing had been carried out, this could have prevented the Cable Failure.

61. In particular, DNV-GL consider that the issue of corrosion should have been handled by type tests or special tests. Further, the integrity of the corrosion barrier which was chosen

here – a semi-conductive one – should have been verified during manufacturing: the issue called for special attention as it is a design feature the integrity of which cannot be verified by later measurement. This should, in accordance with Good Industry Practice, have formed part of the design review phase, and should have led to actions and agreements on verifications during the manufacturing stage, as well as led to actions and agreements on ensuring the FOC sheath integrity was maintained throughout all cable handling and installation processes (i.e. detailed actions specified to ensure FOC sheath integrity and damage is prevented to the extent possible).

62. Against the background of the failure to adopt Good Industry Practice in relation to the product specification, design review and manufacturing/installation matters set out above, the most likely cause of the fault that led to the Cable Failure is that damage occurred on the protective layers of the cable during the manufacture of the FOC or assembly of the cable (see Technical Report, summarised at paragraph 51 above). Testing the integrity of the corrosion barrier in accordance with Good Industry Practice would have increased the probability of identifying such damage to SSEC2 allowing the Developer to detect the fault and direct the relevant repairs such that the Cable Failure would not have occurred.

63. DNV-GL advise that, in consequence of all the above matters, the Cable Failure could more likely than not have been prevented by the Developer using Good Industry Practice. Following a critical review by the Authority of the DNV-GL Report and with due recognition of DNV-GL's expertise in this area, the Authority is satisfied that it can accept the conclusions of the DNV-GL Report. The Developer was responsible for procuring and overseeing the manufacture and installation of SSEC2. It has not been demonstrated that all relevant steps in accordance with Good Industry Practice were taken at the time of specification, design review, manufacture and installation, yet those steps would have been material to the prevention of the Cable Failure. Therefore, the Authority is not satisfied from the evidence available, with the burden resting on the Licensee, that the Cable Failure was not preventable by Good Industry Practice on the part of the Developer.

Other arguments raised by the Licensee

64. The Licensee notes that the Authority has accepted that the Cable Failure was beyond the reasonable control of the Licensee for the purposes of an exceptional event under Amended Standard Condition E12-J1 (the "**EE Condition**").²¹ However, we do not consider there to be any inconsistency between that determination and the present determination. The definition of an exceptional event in the "EE Condition" is similar to, but importantly different from, the definition of force majeure under the STC. Moreover,

²¹ Available at: <https://www.ofgem.gov.uk/publications-and-updates/gwynt-y-m-r-of-to-plc-direction-under-paragraph-10-amended-standard-condition-e12-j4-1>.

the Condition and the EE Condition are pursuing different aims. The EE Condition forms part of a performance mechanism in an OFTO licence which aims to incentivise licensees to properly maintain the transmission assets over the 20-year (or more) revenue period, and thus assesses whether licensees themselves have acted appropriately. On these particular facts, the Authority's determination under the EE Condition focused on whether the Licensee itself ought reasonably to have taken additional steps to discover the cable defect. In contrast, the IAE Condition allows adjustments to the allowed revenue for costs incurred by an OFTO for certain events or circumstances that were not and could not have been predicted at licence grant. Given these different purposes, it is unsurprising that construction of the EE Condition could extend to events not covered by the definition of force majeure under the STC for the purposes of the Condition.

Limb (c) of the Condition

65. In assessing whether an event or circumstance is an IAE under Limb (c), we have considered, consistent with the BTLAL Determination, whether it is appropriate for the Licensee to manage the risk of the event. To determine this, we have considered the extent to which the Licensee was, or should have been, in a position to foresee the event or circumstances and the level of control it had to mitigate the impact of such event.

66. We considered the following factors:

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

67. As noted in the BTLAL Determination, we consider that such an approach is consistent with the overarching design of the OFTO regime and with the Authority's statutory duties, in particular its principal objective to protect the interests of existing and future consumers in relation to electricity conveyed by transmission systems.²² For example, we

²² Section 3A of the Electricity Act 1989.

do not consider it to be in the interests of consumers²³ to pass through those costs arising from a type of damage that was (or should have been) foreseeable to a bidder/OFTO, solely because the precise damage of that type that occurred was not foreseeable. We therefore consider it appropriate to adopt a narrower, rather than a broader, construction of Limb (c) in this regard. Such an approach also seeks to ensure that bidders are properly incentivised to conduct due diligence in respect of the assets, to put in place appropriate commercial arrangements prior to asset transfer and to pursue any relevant third parties who may be liable (such as developers, manufacturers, installers, and insurers). The OFTO regime facilitates commercial transactions for large-scale infrastructure investment. We consider that the OFTO is responsible for managing its investment including adopting what it considers are suitable risk management measures.

Determination of whether the Cable Failure constitutes an IAE under Limb (c)

68. The Authority has determined that the Cable Failure does not constitute an event or circumstance that is an IAE pursuant to Limb (c).²⁴ The detailed reasons for this determination are as follows:

Whether the Licensee knew of the event or circumstance before it arose or ought to have known of it

69. In relation to the Cable Failure, the independent Technical Report provided by the Licensee found that one of the FOCs was “*either severely degraded or entirely missing over the length of the 9 metre section examined*”, apart from a 1.1 metre length of FOC towards the centre, and a 1.0 metre length at the offshore end. The likely cause of damage to the sheath of the FOC is referred to in paragraph 51 above.

70. We understand that the due diligence undertaken and the systems and processes put in place by the Developer to monitor the transmission assets had not identified the specific fault. On the facts, the Authority does not consider that the Licensee could reasonably have known about the specific fault that arose in relation to the Cable Failure. This is consistent with our determination in relation to the Cable Failure under the EE Condition.

Whether the risk of damage of that type was reasonably foreseeable

71. The Authority considers that risks arising from defects in the construction of the transmission assets are reasonably foreseeable risks associated with operating the assets over the 20-year revenue period. We consider that a failure of the cable arising from the

²³ Whilst we recognise that the charging regime will in part or whole allocate costs for IAEs to offshore wind farm developers, we refer to consumers bearing these costs in the sense that all costs passed through into network charges are ultimately borne by consumers through their energy payments. This same language is used in paragraph 1 of the Condition: “*costs that can be passed through to consumers*”.

²⁴ For the avoidance of doubt, the Authority also does not consider that the Event constitutes an IAE under subparagraph 15(b) of the Condition.

actions or inactions of parties involved in undertaking the manufacture or installation of the transmission assets, i.e. a latent defect, is a type of risk that is reasonably foreseeable to a licensee and should be within its contemplation when it submits tenders under the generator build regime, regardless of how such defect may materialise.

72. The Licensee states that the best available information on cable risks at the time of its bid for the Licence was provided by CIGRE.²⁵ The Licensee notes that, on the basis of certain assumptions, an average of one failure every 101 years per cable would apply in the Licensee's case.²⁶ We note that the Licensee considered that, subject to its assumptions being correct, this information indicated a low probability rate of internal cable failure per cable. We consider that it was the Licensee's choice to base its risk management strategy on the conclusions of this data.

73. The Licensee has suggested that Ofgem, in its published material at the time, supported its assumption that the relevant cable risk required to be addressed by OFTOs was external damage/interferences to the cable rather than internal cable failures. The Licensee has not produced any evidence of such a statement. In any event, such a position is (and would have been) inconsistent with the intent of the OFTO regime. For example, the invitation to tender document for the Licence made clear that the risk of a 'major failure event' required to be addressed by OFTOs includes internal cable failures.²⁷ We have also noted indications in the bid submitted by the Licensee that, whilst it may have considered the risk of an internal cable failure to be a low risk, it was one that it identified and contemplated in formulating its bid.²⁸ The Licensee addressed its approach to repair costs arising due to a major failure event including any internal cable failures. It follows that the Licensee contemplated the risk of internal cable failures at the time and such failures were a type of risk that was foreseeable.

Whether there are exceptional factors in the relevant case that mean that the event or circumstance, or its consequences, should not be treated as being reasonably foreseeable, whether in whole or part

74. The Licensee considers that the occurrence of two internal cable failures for the one OFTO within the seven-month period following asset transfer was "exceptional" and "not reasonably foreseeable by the Licensee".²⁹ However, in accordance with our reasoning on foreseeability addressed in paragraphs 71 to 73 above, we consider that the fact that

²⁵ CIGRE Technical Brochure 379, Update of Service Experience of HV Underground and Submarine Cable Systems, April 2009.

²⁶ Gwynt y Môr OFTO Letter of 17 January 2017.

²⁷ In the 'Invitation to Tender Document for the Second Transitional Tender Round: Gwynt y Môr Project' questions 4A and 8A ask the bidder how they would cover the financial consequences of a Major Failure Event. Major Failure Event means "failures that result in long repair times for a single item of equipment (for example cable or transformer), a fault, design or installation fault or other events (for example fire) that results in long repair times;".

²⁸ [redacted]

²⁹ Gwynt y Môr OFTO letter of 9 June 2017.

there were two independent cable failures (each a foreseeable type of event) does not mean that the latter failure should be treated as unforeseeable.

75. The Licensee further relies on the approach to foreseeability adopted in the Moyle Interconnector Determination³⁰ to support its position that the Cable Failure was “exceptional”. On the facts of the Moyle Interconnector Determination, there was an outage in relation to the Moyle Interconnector, in circumstances where there had recently been unplanned outages on both Moyle and IFA interconnectors. The Authority determined that this particular outage had an exceptional factor, given that it lasted eight months rather than the two-month duration that was determined to be foreseeable. Accordingly, the Authority disallowed the IAE in respect of the foreseeable outage for the first two months, but it allowed the IAE in respect of the exceptional latter six months.

76. On the present facts, the Cable Failure suffered by the Licensee arose from a foreseeable type of event, namely a latent defect in the transmission assets. The independent Technical Report identified that the Cable Failure “presented many similarities” to the failure that was the subject of the Gwynt y Môr SSEC1 Determination (the “**SSEC1 Failure**”). It is possible that the root cause of the two failures was the same. However, the fact of the SSEC1 Failure occurring did not increase the chances of the Cable Failure occurring; they were independent failures. Unlike the situation in the Moyle Interconnector Determination where the scale of the consequence of the event was unforeseeable, we do not consider that the scale of the Cable Failure, or its consequences, is exceptional.

77. In summary, we do not consider that there are exceptional factors relating to the Cable Failure that mean that it or its consequences should not be treated, either in whole or in part, as being reasonably foreseeable.

The ability of the Licensee to manage the risk or impact by putting in place and pursuing risk management arrangements such as insurance, commercial recourse against third parties and/or operating practices

78. Similar to any other transaction involving a purchase of assets, a licensee should enter into such transactions with the awareness that it is assuming any risks arising from damage or defects that it has not been able to discover through its due diligence. The OFTO regime was not designed to insulate licensees from all such risks.³¹ Even if a licensee believes, having conducted a reasonable level of due diligence, that the construction of the assets had been undertaken properly and to the level of reasonable skill and care expected, we do not generally consider it appropriate for a licensee to be

³⁰ Above in footnote 8.

³¹ The framework for the offshore regime also reflects this through the STC which deems the OFTO, for the purpose of the STC, to have been the party that developed the transmission assets from the point of asset transfer (paragraph 6.3 of Section G) – see paragraph 53 above.

able to pass on the risks arising from defective work in the construction of the assets to consumers.

79. We expect licensees to pursue third parties for remedies in respect of their negligent or substandard work and to put in place other commercial arrangements and risk management practices to ensure they can bear the consequences of such risks in the event there may not be any such recourse. We also expect licensees to put in place appropriate insurance arrangements to manage risks and satisfy themselves that the insurance cover is suitable for their needs.

80. On consideration of the evidence, and with careful regard to the matters disclosed to, and analysed by, the Court in the judicial review proceedings, we do not agree with the Licensee that it could not have managed the risk of the Cable Failure by putting in place risk management arrangements such as insurance cover and/or commercial recourse against third parties. Below we address such arrangements in the Licensee's case.

Insurance

81. One aspect of the fourth factor in the BTLAL Determination is the ability of a licensee to protect itself through insurance. The Licensee's lead insurer, acting on behalf of the pool of insurers, has refused to cover the costs of the Cable Failure. We understand that the Licensee took out an insurance policy that it initially believed would cover the costs of repair arising as a result of such a cable failure (under its 'Offshore Assets Operating Package' All Risks insurance policy with a LEG2³² exclusion), underwritten by a pool of insurers. The Licensee has indicated that, rather than being the only option available to it, it had considered a strategy to manage operational risk by procuring this policy together with other arrangements³³:

We had previously received advice at bid stage that the LEG 2 exclusion would only exclude the costs of replacements for the defective assets, but that it would cover the costs of undertaking the repairs themselves including vessel costs. Given that the OFTO had spare cable and joints as part of the asset transfer it was logical and beyond any reasonable criticism that we should take insurance cover with a LEG2 exclusion as GYM did not need insurance to cover the costs of the defective parts themselves. This approach was not only logical, but it reduced the TRS bid to the benefit of consumers.

³² London Engineering Group 2. A LEG2 exclusion, excludes the 'consequences' of a defect. The London Engineering Group Model "Consequences" Defects Wording for the LEG2/96 exclusion held by the Licensee is as follows:

"The Insurer(s) shall not be liable for: All costs rendered necessary by defects of material workmanship design plan or specification and should damage occur to any portion of the Insured Property containing any of the said defects the cost of the replacement or rectification which is hereby excluded is that cost which would have been incurred if replacement or rectification of the Insured Property had been put in hand immediately prior to the said damage. [...]"

³³ Letter to Ofgem of 24 February 2017.

This was a commercial decision the Licensee made at its own risk, and our understanding is that 'Operational All Risks' insurance cover at LEG3³⁴ level, which provides a greater degree of cover, was available in the market at the time the Licensee bid for the Licence.³⁵

82. Insurance advisers, JLT Speciality Ltd ("**JLT**"), in their OFTO Cable Insurance Status Report August 2017 (the "**JLT Report**") further advised that "*LEG 3 policy coverage will always be available in the market for new cable installations, with price proving the main economic decision that insured[s] need to make*".³⁶ There is no dispute that, had it been in place at the time of the Cable Failure, insurance cover with LEG3 exclusion would have covered the relevant costs subject to any deductible in accordance with the policy terms.

83. The effect of the various LEG exclusion clauses is summarised in a presentation by the Licensee's brokers, Willis Towers Watson ("**Willis**") in February 2017:

The cover provided for internal faults is addressed primarily by way of the defects exclusions which, depending on the level of cover afforded, writes back an element of cover.

The cover written back from the exclusion is referred to as a LEG clause. The London Engineering Group (LEG) is an informal association of engineering underwriters which has drafted various clauses to address the extent of defects cover which may be provided. These fall into three categories:

LEG1 – "full exclusion"

LEG2 – "consequences design cover". The policy would exclude the cost which would have been incurred if replacement or rectification of the insured property had been put in place immediately prior to the damage (e.g. would exclude the cost of replacing/rectifying the faulty parts but would cover the consequential losses).

LEG3 – "full defects design cover". The policy would exclude the cost incurred to improve the original material workmanship, design plan or specification (e.g. would cover also the replacement of the faulty part but not the costs of rectifying/improving the original design/workmanship).

...

As might be expected, the broader the cover selected the greater the premium rate applied.

84. We note the Licensee's argument that the Willis advised the Licensee at the time it bid for the assets in the tender exercise that they "*anticipate that most insurers will not be*

³⁴ London Engineering Group 3. A LEG3 exclusion, excludes the 'improvement consequences' of a defect. The London Engineering Group Model "Improvement Consequences" Defects Wording for the LEG3/96 exclusion is as follows: "*The Insurer(s) shall not be liable for: All costs rendered necessary by defects of material workmanship design plan or specification and should damage occur to any portion of the Insured Property containing any of the said defects the cost of replacement or rectification which is hereby excluded is that cost incurred to improve the original material workmanship design plan or specification.[...]*".

³⁵ In outline summary, an insurance policy with a LEG2 exclusion will not provide cover for the costs required to remedy the faulty part, whereas such costs are covered under a policy with a LEG3 exclusion (which excludes only costs to improve the original part).

³⁶ JLT Report, page 3.

prepared to give LEG3 and recommend that the cover agreed with LEG2 as minimum requirement".³⁷ The Licensee has confirmed that Willis' advice was based on its understanding of the market feedback at that time and, as Willis was not aware of any issues with the subsea export cables prior to the SSEC1 Failure in March 2015, that advice was not related to any known cable failures on the assets.³⁸ Further, the Licensee has stated that it considered that its "risk management structure, which included a comprehensive insurance program", was "robust and efficient" when queried about the consideration it gave to the risk of cable failure.³⁹

85. However, the JLT Report advises that historically:⁴⁰

[different OFTOs have] decided on a diverse level of insurances, from LEG 2/3 cover and from deductible options to only pick up the large losses (e.g. in excess of GBP 500,000) for a cost saving approach. The insurances procured for all OFTOs have been varied despite LEG3 cover always being available at commencement of new installations and inception of these project insurance contracts.

It further notes that (emphasis added):⁴¹

LEG3 should always have been recommended and quoted to the insured. It is not clear if it was quoted but not taken up due to the pricing level. ... In the same sense that LEG3 is always available albeit with a potential sub limit and increases to premium levels coupled with an insured taking action and steps to pursue parties responsible for any defective materials handed over to them i.e. the cable supplied by the manufacturer and subsequently installation contractor at completion.

86. The Licensee further notes that, in any event, Ofgem was made aware of its insurance arrangement as part of the tender process and did not raise any concerns.⁴² However, Ofgem's evaluation of a licensee's bid does not then indicate that the IAE mechanism would cover any events that are ultimately not covered by the proposed insurance arrangements.

The availability of LEG3 insurance for the Cable Failure in light of the SSEC1 Failure

87. Finally, the Licensee has argued that its ability "to manage the risk of subsequent cable failures including the [Cable Failure] was impaired by the [SSEC1 Failure] in March 2015, which limited the levels of coverage that insurers would have been and subsequently were prepared to offer".⁴³ In particular, the Licensee considers that "had the Licensee had LEG3 cover in place at the time of the SSEC1 failure, the Licensee's insurers would have reduced

³⁷ [redacted]

³⁸ Gwynt y Môr OFTO letter of 9 March 2020.

³⁹ Gwynt y Môr OFTO letter of 24 February 2017.

⁴⁰ JLT Report, page 3.

⁴¹ JLT Report, pages 6-7.

⁴² Gwynt y Môr OFTO letter of 24 February 2017.

⁴³ Gwynt y Môr OFTO letter of 9 June 2017.

*the level of insurance cover prior to the occurrence of the SSEC2 cable failure” and that, at that stage, the Licensee “would have had no option but to accept such an exclusion”.*⁴⁴

88. The Licensee references the experience of two OFTOs, Thanet OFTO Limited (“**Thanet OFTO**”) and Greater Gabbard OFTO Plc (“**Gabbard OFTO**”), that had exclusions placed on their insurance following the occurrence of FOC issues, and we are aware of a third through confidential discussions (the “**Third OFTO**”). The Licensee has also referenced a fourth example, where insurance cover was reduced following insurers being informed that certain sections of the subsea cables in the offshore transmission system of the Licensee and Thanet OFTO had not been buried to the requisite depth. We discuss below the details of each of these experiences of insurer behaviour, in particular the timings and circumstances including for the Cable Failure, to assess whether it is more likely than not that an exclusion would have been imposed on the insurance cover of the Licensee’s subsea cables following the SSEC1 Failure and prior to the Cable Failure, had the insurer been liable to pay out for such failures (under a hypothetical LEG3 insurance policy).

The Cable Failure

89. On the present facts, the SSEC1 Failure occurred on 2 March 2015; the technical laboratory examination of the cable for that fault occurred on 2 September 2015; the Licensee was advised that the insurer would not cover the cost of repair for the SSEC1 Failure on 24 September 2015; and the Cable Failure occurred on 25 September 2015 – 23 days after the technical examination of the SSEC1 Failure.

90. We understand that cable claims represented 40.3 percent of offshore insurance claims and 83.2 percent of offshore claim costs (as at July 2017⁴⁵), which may support the general premise that insurers would wish to introduce exclusions or sub-limits to an Operational All Risks policy where they perceive there is a high risk of a further claim. Further, the Licensee submits that *“in 2015 the inclusion of an FOC within an undersea power cable was considered a relatively new product”* and that an *“insurer will be more sensitive when dealing with events or risks relating to relatively new products, because they do not have the benefit [of] a long history of evidence to support statistical risk analysis”*.⁴⁶

91. We note that whilst the integration of a FOC into a subsea power cable may have been *“relatively new”* at the time of development, generally *“the topic of fibre optic integration*

⁴⁴ Gwynt y Môr OFTO letter of 9 June 2017 and [redacted] witness statement dated 10 October 2018 filed in the judicial review proceedings of R. (on the application of Gwynt-y-Môr Offshore Wind Farm Ltd) v Gas and Electricity Markets Authority [2019] EWHC 654 (Admin).

⁴⁵ Presentation by Codan Forsikring A/S at the Advanced Submarine Power Cable and Interconnection Forum in Berlin 13-15 June 2017; confirmed in discussions with Codan Forsikring A/S on 4 July 2017. We note that the Presentation was describing the trend in cable failures occurring over the previous two years.

⁴⁶ Gwynt y Môr OFTO letter of 18 May 2020.

[...] was not something new to the power cable sector⁴⁷: from 2003, a Dutch pre-standard existed to ensure the correct integration of FOCs into power cables, as did a telecommunication standard from 2000 detailing tests for submarine optical fibre cables.⁴⁸ There was, therefore, some relevant history to FOC integration. But even if insurers would be particularly sensitive to these circumstances (i.e. if it were considered a “relatively new product”, prompting insurers to have a particular interest in reducing the level of insurance cover after the occurrence of the SSEC1 Failure), the relevant question is whether any such amendment to the insurance cover could and would have been implemented before the Cable Failure.

92. In general, JLT advised – in line with the contractual position in which insurers are placed⁴⁹ – that ultimately it “*may be the case that the incumbent insurers who have suffered losses and paid a claim on a cable loss will be unwilling to continue providing LEG 3 cover post loss at a comparative pricing level to expiry. This would likely only be restricted at renewal where insurers may look to increase premium to maintain LEG 3 cover and/or invoke sub limits*”.⁵⁰

Example 1: Thanet OFTO

93. The Thanet OFTO had an exclusion placed on its insurance policy following a cable failure on its export cable 1, which occurred on 23 February 2015. This cable failure is the subject of a determination by the Authority of 23 May 2017 (the “**Thanet IAE Determination**”).⁵¹ The chronology of events for the Thanet OFTO is as follows: the cable failure occurred on 23 February 2015; technical examination of the damaged cable occurred on 21 September 2015, shortly after which a preliminary technical analysis was shared with the insurers indicating surface anomalies on a different part of the cable;⁵² the Thanet OFTO’s insurer proposed a LEG1 defects exclusion on the entire export cable on 25 September 2015;⁵³ negotiations between the insurer, the Thanet OFTO’s broker and the Thanet OFTO took place between 25 September and 13 October 2015;⁵⁴ and Thanet OFTO was informed by its insurance broker on 13 October 2015 that a LEG1 defects exclusion was imposed on the cable and back-dated to 1 October 2015.⁵⁵ The

⁴⁷ DNV-GL Report, page 6.

⁴⁸ DNV-GL Report, page 6.

⁴⁹ Apart from a situation in which extraordinary factors can be said to alter the nature of the risk, and absent specific contractual terms permitting a change, insurers are not entitled to alter the terms of cover during the agreed policy period (*Kausar v Eagle Star Insurance Co Ltd [2000] 1 Lloyd’s Rep IR 154*).

⁵⁰ JLT Report, page 8.

⁵¹ Available at: <https://www.ofgem.gov.uk/publications-and-updates/thanet-ofto-limited-determination-under-paragraph-23-amended-standard-condition-e12-j3>.

⁵² EA Technology, *Thanet Export Cable: Forensic investigation Report*, 12 August 2016.

⁵³ Email from Codan to Willis of 25 September 2015.

⁵⁴ Email from Willis to Thanet OFTO of 28 September 2015; Emails between Willis and Thanet OFTO of 30 September 2015; Emails between Thanet OFTO and Willis of 30 September and 1 October 2015.

⁵⁵ Emails between Willis and Thanet OFTO of 13 October 2015.

Thanet OFTO's insurance broker confirmed to Thanet OFTO that the insurer took such action as the insurer considered that significant issues affected the whole asset.⁵⁶

94. In this example of the Thanet OFTO, the exclusion was negotiated by the insurer to downgrade the existing LEG3 exclusion policy, within term, under threat of cancellation of the policy if the exclusion was not accepted. This was implemented within a period of 22 days from the independent technical laboratory examination of export cable 1 and the initial analysis raising wider concerns about the cable. In the case of the Licensee, the Cable Failure occurred 23 days from the technical laboratory examination on SSEC1, a theoretical margin of one day compared to the Thanet example.

95. The Licensee submits that the:

*events experienced by the Thanet OFTO provide a valid and instructive comparator as to the likely actions of hypothetical LEG3 insurers of the Gwynt y Mor cables following the SSEC1 Failure. The actions of the Thanet insurer, in placing an exclusion on the policy in less than 23 days, provides the clearest evidence as to the actions of hypothetical LEG3 insurer(s) of the Gwynt y Mor cables.*⁵⁷

In particular, the Licensee states that the "hypothetical LEG3 insurer of the Gwynt y Mor cables would likely have viewed the adjustment of cover as more urgent than did the Thanet OFTO's insurer".⁵⁸

96. We recognise that the Thanet OFTO and the Licensee did share a common insurer (Codan A/S ("**Codan**"); in respect of 4.33% of the Licensee's cover), which supports an argument that this insurer may have acted consistently between the two OFTOs in comparable situations. While the Licensee's pool of insurers did not in fact downgrade the level of insurance until the Licensee's policy renewal in 2016, we agree with the Licensee that this is not instructive as to how the pool of insurers would have responded under insurance with a LEG3 exclusion. This is because the pool of insurers did not consider they were liable for the cost of the repair of the Licensee's SSEC1 Failure under the actual insurance with a LEG2 exclusion.

97. However, we understand that there were case specific factors in relation to the Thanet OFTO that could have influenced why and how quickly the insurer for Thanet OFTO acted, which distinguish that case from JLT's general advice above and which are also not present in relation to the Cable Failure:

- a. There was a related pre-existing issue on Thanet export cable 1; Thanet OFTO first suffered a cable failure on export cable 1 in November 2011.⁵⁹ There was a strong

⁵⁶ Email from Willis to Thanet of 1 October 2015.

⁵⁷ Gwynt y Môr OFTO letter of 18 May 2020.

⁵⁸ Gwynt y Môr OFTO letter of 18 May 2020.

⁵⁹ Preliminary internal report of Balfour Beatty, 1 September 2015 (**Balfour Beatty Preliminary Report**).

similarity and link between the 2015 fault and the earlier problems on the same cable in 2011. This indicated a high risk, as at the time of the 2015 fault, of there being further repeat failures. In contrast, in respect of the Licensee, prior to the Cable Failure there had been two FOC 'hot spots' (a different type of issue) in export cable 3 (both identified prior to asset transfer), and the SSEC1 Failure (the technical report for which had not identified an endemic problem with the assets).

- b. There appeared to be a wide array of issues with the Thanet OFTO cables. Other issues were detected on parts of the cable not under technical examination and understood not to be related to the 2015 cable fault at Thanet OFTO, including 56 surface anomalies across the available recovered cable length of 174 metres. A separate investigation was undertaken by the Thanet OFTO parent into the prevalence of FOC surface features in August 2015, the preliminary report of which became available to the insurer shortly after the independent technical examination, and it was the findings of that report which we understand were relevant to the introduction of the insurance exclusion as evidenced by:⁶⁰
- i. an email dated 28 September 2015 from Willis to Lynn Gladwell of Balfour Beatty (shareholders of both the Thanet OFTO and the Licensee) concerning the Thanet insurance, referring to a "*wider array of known issues that could potentially cause damage to the cable in the future*";
 - ii. an email dated 1 October 2015 from Willis setting out Codan's view that "*what we see is significant issues apparently affecting the whole asset*"; and
 - iii. an email from Codan to Willis dated 25 September 2015 stating that "*[t]his information brings about a material change in circumstances from Codan's perspective. We now have a wider array of known issues that could potentially cause damage to the cable in future*".

The Licensee, in contrast, submits that:

...the surface anomalies were not the focus of concern following the examination of the Thanet cable on 21 September 2015. At the examination, the interaction between the FOC copper tube and the PE sheath of the power core was apparent to all present given the level of corrosion to those parts. It was this interaction that was identified by [redacted] in their Thanet Export Cable Report as the "significant discovery" of their initial investigation (p. 3). The surface anomalies, on the other hand, were evenly spread across two sections of FOC i.e. both the faulted and non-faulted sections. It was only four days after the examination, at which the insurer's loss adjuster was present, and issuance of a preliminary report that the insurer sought to impose an exclusion (on 25 September 2015). The common cause of failure modes between the GYM SSEC1 and Thanet cables would

⁶⁰ Email [redacted] to Lloyd Warwick of 21 September 2015.

*have been a far more significant warning sign for insurers than the wider anomalies on the Thanet cable.*⁶¹

However, we consider that the contemporaneous email correspondence outlined above illustrates that Codan's desire to impose an exclusion was influenced by the wider issues with the cable that had been identified, and it was not only the common cause of failure modes that precipitated the Codan's action.

- c. Thanet OFTO had a Cable Indemnity Agreement with the developer Vattenfall [redacted].⁶² Thanet OFTO's broker informed the Thanet OFTO that the insurer "*believe[s] that BB Cap should not be adversely affected by [the introduction of a LEG1 defects exclusion on the entire export cable], as their Cable Indemnity Agreement with Vattenfall [redacted].*"⁶³ This is relevant to Thanet OFTO's willingness to accept an exclusion, even without an express contractual right for the insurer to impose it. We consider that such a willingness would have facilitated the agreement of a contract endorsement, and the speed with which it was agreed, between the Thanet OFTO and its insurer. This is a further distinguishing factor from the circumstances of the Cable Failure.
- d. A further difference between the GyM OFTO and the Thanet OFTO is that the GyM OFTO's actual LEG2 insurance policy was underwritten by a pool, rather than a sole insurer. If there had likewise been a pool of insurers for the hypothetical LEG3 insurance policy, we expect that the negotiation of an exclusion across the policy would likely take longer. The Licensee disputes this.⁶⁴ The likely effect on timing of negotiating with multiple insurers was explored in detail in the judicial review proceedings, with a conclusion in the Judgment that "*the fact that negotiating and reaching agreement with many different insurers will take more time than with one alone seems to me to be self-evident; but in any event Ofgem had before it a submission from Willis from which increased delay was to be inferred.*"⁶⁵ The Court in the Judgment further noted that "*it is evident from the ... Willis report ... that the process of negotiation with multiple insurers was likely to be more cumbersome and time-consuming.*"⁶⁶ We note that even in the case of a pool of insurers, one insurer may act independently to negotiate an endorsement outside of the renewal of the policy – as seen in the Gabbard OFTO's case (discussed below). We accept therefore, as found in the Judgment, that implementation of an exclusion by a single insurer, as in the case of Thanet OFTO, would likely be quicker than each member of a pool of

⁶¹ Gwynt y Môr OFTO letter of 18 May 2020.

⁶² Thanet OFTO, *Root Cause Event Narrative*, January 2016.

⁶³ Email from Willis to Balfour Beatty of 28 September 2015.

⁶⁴ Gwynt y Môr OFTO letter of 18 May 2020.

⁶⁵ Judgment, paragraph 107.

⁶⁶ Judgment, paragraph 129.

insurers negotiating and implementing exclusions against their underwriting of the policy.

98. The failure mechanisms for the Thanet OFTO and the Licensee share similarities – an electro-chemical interaction between the fibre metallic sheath and power core sheath, ultimately leading to failure of the power core. The Licensee states that the relevant risk is exacerbated in the case of the Licensee due to SSEC2 having twice the amount of fibre optic sheath that is at risk of electro-chemical interaction, and the presence of a spare, dormant and unmonitored FOC. Even if these factors would in fact have caused particular additional concern to an insurer, we are not persuaded that such factors would materially increase the ability of an insurer to negotiate, and the speed with which it could negotiate, an exclusion mid-term on the contractual policy. In light of the distinguishing features listed at paragraph 97 above, we therefore do not consider that these factors provide a basis for concluding that an exclusion on the level of insurance cover would be able to be imposed as quickly as, or faster than, the example of Thanet OFTO.

Example 2: Gabbard OFTO

99. The Gabbard OFTO had an exclusion placed on its insurance policy following the complete loss of fibres on one of its transmission cables, and the deterioration of fibres on another transmission cable.⁶⁷ We understand the chronology of events for the Gabbard OFTO was as follows: the complete loss of fibres was detected in mid-February 2016;⁶⁸ a call between Gabbard OFTO, the Gabbard OFTO's insurance broker, and two insurers from the insurance pool took place on 24 March 2016;⁶⁹ further information regarding the fibre issues and exclusion negotiations took place between 24 March and 2 April 2016⁷⁰ and Edif ERA's report to insurers was issued on 6 April 2016. On 22 April 2016, an insurance endorsement was agreed between the Gabbard OFTO and one of the members of the insurance pool relating to 12% of the total risk.⁷¹ That final agreed endorsement excluded cover for a subsea cable power-core failure caused as a result of FOC and power-core interaction in the export cable that had experienced a loss of all fibres, and also excluded cover for FOC repairs to both export cables experiencing FOC issues.⁷²

100. Gabbard OFTO therefore had a partial exclusion negotiated against its insurance policy 16 days after the date its insurers received confirmation from external technical advisers that they had seen a number of cable failures "*due to an interaction between the FOC and power cores*", and advising that the fibre failures on the Gabbard OFTO cable "*should*

⁶⁷ Email from [redacted] to Gabbard OFTO of 15 April 2016.

⁶⁸ Gwynt y Môr OFTO letter of 18 July 2019.

⁶⁹ Note from Conference Call of 24 March 2016.

⁷⁰ Letter from Edif ERA to [redacted] of 6 April 2016; Emails between Ark and [redacted] of 15 April 2016; Letter from Gwynt y Môr OFTO of 18 July 2019.

⁷¹ Email from [redacted] to Gabbard OFTO Board of 22 April 2016.

⁷² Email from [redacted] to Gabbard OFTO Board of 22 April 2016.

be treated as potentially being an indicator that a power core failure is likely to occur".⁷³ We understand that this advice was provided following a request for advice from the Gabbard OFTO lead insurer on learning about the deterioration of fibres in the FOCs of two of Gabbard OFTO's transmission cables. The exclusion was placed without any technical examination of the cables to determine the root cause of the breakdown of the fibres.

101. However, there are also case-specific factors applicable to this example. The exclusion was imposed by only one non-lead member of the pool of insurers. We understand that there were other reasons that may have prompted this insurer for Gabbard OFTO to react in this way and within this timeframe; this may have been partly due to a claim that Gabbard OFTO had been aware of the FOC issues since asset transfer from the developer in November 2013, and the related non-disclosure of these issues to the insurer pool.⁷⁴ We note that the remainder of the insurance pool made no movement to introduce exclusions for the remaining term of that policy.

Example 3: Third OFTO

102. The Third OFTO had FOC issues similar to the Gabbard OFTO in February 2017. It submitted an insurance claim four days after the fibre failure (notifying its insurers of the FOC issues) and the insurers contractually imposed a DE3⁷⁵ exclusion related to the submarine cable effective on the policy from the Long-Term Agreement insurance renewal date of 1 April 2017.⁷⁶

103. In this example, as distinguishable from the Cable Failure, the exclusion was imposed at the annual renewal date of the insurance policy, in the circumstances of a specific contractual right to impose such an exclusion. Further, we note that the Third OFTO example is not contemporaneous to the Cable Failure: that failure occurred two years after the SSEC1 Failure and a year and a half after the Cable Failure.

Example 4: Reduction in insurance cover due to cable burial depth issue

104. In support of the Licensee's assertion that hypothetical LEG3 insurance would have been downgraded within 23 days, the Licensee further submits that in [redacted].⁷⁷ The Licensee notes the limitations of this example, but considers that it is generally indicative as to how quickly insurers will act where they perceive a change in risk to subsea cables. We agree that insurers will likely exercise a contractual right of restriction of cover where

⁷³ Letter from Edif ERA to [redacted] of 6 April 2016.

⁷⁴ Email from [redacted] (Gabbard OFTO) of 15 April 2016.

⁷⁵ There are two established sets of London Market insurance exclusion wordings: the London Engineering Group Defects Clauses ("**LEG**") and the London Market Defects Exclusions ("**DE**"). We understand that DE3 provides similar cover to LEG2.

⁷⁶ Third OFTO Letter to Ofgem of 28 June 2019.

⁷⁷ Gwynt y Môr OFTO letter of 18 May 2020.

they perceive an increased risk of claim in respect of insured subsea cables. However, as the Licensee indicates, we consider this example is materially different, because it concerns events prior to the policy review date of 15 October 2019 at which insurers had an express contractual right to amend or restrict cover. That is not reflective of the circumstances we are considering pertaining to the Cable Failure in September 2015.

Opinions of the Licensee's current insurers

105. The Licensee has also obtained, by emails in May 2020, the views of the current insurers of the Gwynt y Môr cables, [redacted] regarding the potential actions of LEG3 insurers following the SSEC1 Failure. In summary:

[redacted]

The Licensee submits that all of these responses support the proposition that it is more likely than not that LEG3 insurers would have implemented an exclusion on the hypothetical LEG3 policy within 23 days following the examination of SSEC1.⁷⁸

106. We consider that (assuming for the purposes of argument that these informally-expressed views also represent the insurers' corporate position as it was in September 2015), whilst these particular insurers have indicated that they would have intended to act quickly to limit their risk liability, this desire to impose an exclusion does not mean that an exclusion would be imposed immediately from the time of that decision. Crucially, the views of these current insurers do not indicate the timeframe in which, nor the mechanism by which, such an exclusion would be imposed. In fact, as highlighted by [redacted] response, a negotiation with the policy holder would likely follow. [redacted] confirmed that it would first seek to amend the terms by negotiation. [redacted] response outlined that only if negotiation was unsuccessful might the underwriter "*consider cancelling the coverage in line with the cancellation provisions of the policy [30 days]*".⁷⁹ This does not resolve an analysis of the timeframe within which such actions would be concluded, let alone the premise that any exclusion, following negotiation, would be imposed within 23 days. We further note that, even if the insurer considered cancelling coverage on contractual notice, that would be effective in accordance with the timeframe specified under the insurance policy; if it were a minimum 30 days' notice, then, in the hypothetical scenario, the Cable Failure would have occurred before the policy was effectively cancelled.

Conclusion on hypothetical insurance coverage

⁷⁸ Gwynt y Môr OFTO letter of 18 May 2020.

⁷⁹ Email from [redacted] to Gwynt y Môr OFTO of 7 May 2020.

107. Having considered the evidence, the Licensee's representations, and the above four examples, we do not consider that it is more likely than not that, even if the Licensee had taken out LEG3 insurance cover that extended to the Cable Failure, an exclusion would have been imposed on the insurance cover of the Licensee's subsea cables following the SSEC1 Failure and before the Cable Failure. The Licensee could have managed the impact of the event by taking out insurance with a LEG3 exclusion, but chose – at its own risk – not to do so.

108. As a further argument, the Licensee claims that had it "*attempted to upgrade its coverage to include a LEG3 exclusion, following the SSEC1 failure, this would not have been accepted by the insurers*".⁸⁰ Whether it was reasonable to seek to increase the level of insurance cover between two cable failures is different to whether such insurance was capable of being obtained in advance. It is the latter that is relevant: the Licensee could have made the commercial decision at the outset to take out insurance cover with a LEG3 exclusion, and it chose not to do so.⁸¹

Other risk management arrangements

109. Under the fourth factor in the BTLAL Determination (see paragraph 66(d) above), insurance is not the only relevant risk management arrangement to be considered by the Authority. We have also considered the ability of the Licensee to manage the risk or impact by putting in place and pursuing other risk management arrangements such as commercial recourse against third parties and/or operating practices.

110. The Licensee recovered part of the costs incurred through commercial arrangements. [redacted].⁸² It was therefore able to seek commercial recourse to this extent.

111. The Sale and Purchase Agreement dated 11 February 2015 between the Licensee and Developer (the "**SPA**") contained an indemnity for the reinstatement of assets destroyed or damaged prior to completion. The Licensee claimed under this indemnity, but that claim was rejected by the Commercial Court.⁸³ The Court held that the Cable Failure was not covered by the indemnity clause. Further, in an analysis of the negotiations leading to the indemnity (in assessment of the Developer's alternative claim for rectification), the Court was satisfied that this drafting of the clause reflected the parties' common intention

⁸⁰ Gwynt y Môr OFTO letter of 9 June 2017.

⁸¹ As to the former question, JLT advised that although incumbent insurers who have paid a claim on a cable loss will be unwilling to continue providing LEG 3 cover post loss at a comparative pricing level to expiry, "*this is not to say that following a cable failure that the OFTO would not be able to obtain full LEG 3 insurance cover*"; by analogy, we are not convinced that the Licensee would therefore have been unable to obtain LEG 3 insurance cover for the first time following the SSEC1 Cable Failure. We nevertheless acknowledge that, in practice, the Licensee would not likely have had time to put such a policy in place. The Licensee was informed by its loss adjuster at a meeting on 24 September 2015, only the day before the SSEC2 Cable Failure, that it would not be covered for the SSEC1 Failure. Prior to that, the Licensee believed its insurance would cover the cost of the repair for the SSEC1 Failure, including on the basis that the insurer had made an interim payment towards the repair (subject to return on request).

⁸² Emails from Balfour Beatty to Ofgem of 9 and 11 October 2017.

⁸³ *Gwynt y Môr OFTO Plc v Gwynt y Môr Offshore Wind Farm Limited & ors* [2020] EWHC 850 (Comm).

as to the allocation of risk in the SPA, in particular that the indemnity would cover only damage to assets that occurred in the period between exchange and completion.⁸⁴ The Licensee has therefore been unable to obtain commercial recourse against the Developer in respect of the Cable Failure.

112. However, this was a matter of common intention as to the allocation of risk in the SPA (as the Commercial Court found), and we consider that the inability to pursue commercial recourse against the Developer only strengthened the need for the Licensee to ensure that it had full insurance protection in respect of those risks not covered through the commercial arrangements; the responsibility was on the Licensee to do so.

113. In conclusion, on the fourth BTLAL factor, the Authority considers that the Licensee was in a position to manage the risk by putting in place and pursuing relevant risk management arrangements.

Conclusion

114. In summary, we do not consider that the risk of the Cable Failure was unforeseeable or exceptional, and we consider that the Licensee was in a position to manage the risk of the Cable Failure (irrespective of whether it in fact took all such steps). Accordingly, we find that the Cable Failure does not constitute an IAE under Limb (c) of the Condition.

115. This letter constitutes the Authority's determination in relation to the Notice for the purposes of paragraph 23 of the Condition.

Yours sincerely,

Cathryn Scott

Interim Executive Director, Systems and Networks

**For and on behalf of the
Gas and Electricity Markets**

⁸⁴ Ibid, in particular at paragraphs 78 to 120.