CUSC Modification Proposal Form

CMP392: Transparency and legal certainty as to the calculation of TNUoS in conformance with the Limiting Regulation

Overview: As identified in the Authority's direction to the Panel regarding CMP391 it is relevant to identify whether (or not) particular charges fall within the Connection Exclusion taking into consideration the Judgment.

Modification process & timetable

1. **Proposal Form** — 27 May 2022
2. **Workgroup Consultation** — TBC
3. **Workgroup Report** — TBC
4. **Code Administrator Consultation** — TBC
5. **Draft Final Modification Report** — TBC
6. **Final Modification Report** — TBC
7. **Implementation** — TBC

Status summary: The Proposer has raised a modification and is seeking a decision from the Panel on the governance route to be taken.

This modification is expected to have an impact on the ESO and also Generator Users liable for TNUoS, with consequential effect on Supplier Users.

Proposer's recommendation of governance route	Urgent with Standard Governance modification with assessment by a Workgroup	
Who can I talk to about the change?	**Proposer:** Garth Graham Garth.Graham@sse.com	**Code Administrator Contact:** Paul Mullen Paul.j.mullen@nationalgrideso,com

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What is the issue?

With the Authority's decision on 20th May 2022 to reject CMP368 and CMP369[1] there is a lack of detail; beyond the words of the Limiting Regulation (as transposed into UK law[2]); which is relevant to identifying whether (or not) particular charges fall within the Connection Exclusion.

In the Authority's CMP368 decision[3] it was identified that:

> "*In light of this, we consider that the Connection Exclusion is unlikely to be capable of be[ing a] prescriptive definition within the CUSC, without some provision that enables further case-by case assessment when required. All of the options before us seek to ascribe a generic gloss to the Connection Exclusion and do not provide for case-by-case assessment by reference to the words of the Connection Exclusion itself. On that basis, we consider that (in light of the conclusions reached in the Judgment) we cannot lawfully approve any option under CMP368*." [emphasis added].

This proposal *enables further case-by-case assessment* …[as] *required* in order to undertake the 'CUSC Calculation'[4].

This proposal also accords with the Judgement[5] (in the recent Judicial Review of the CMA's consideration of the CMP317/327 and CMP339 Appeal) where the Judge noted, at paragraph 57, that:

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

This follows on from the Judge's consideration (as noted at paragraph 53) of the Authority's reasoning, provided in the CMP317/CMP327 decision[6], namely that:

> "*We set out our analysis of the correct interpretation of the Connection Exclusion in Legal Annex Two. In summary we consider that the Connection Exclusion includes all charges paid by generators in respect of Local Assets whether shared/sharable or otherwise) that were required to connect the generator(s) in question to the NETS as the NETS existed at the time the generator(s) wished to connect. We consider that charges paid by generators in relation to Local Assets*

[1] download (nationalgrideso.com)
[2] Commission Regulation (EU) No 838/2010 of 23 September 2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging (Text with EEA relevance) (legislation.gov.uk)
[3] download (nationalgrideso.com)
[4] See, for example, references within the Judgement (such as paragraph 30) and the CMP317/327 GEMA decision (such as page 7 and also paragraph 13 of the Legal Annex One) as regards the 'CUSC Calculation'.
[5] SSE Generation Ltd & Ors, R (On the Application Of) v Competition And Markets Authority [2022] EWHC 865 (Admin) (11 April 2022) (bailii.org)
[6] Internal pages 18 and 19

which existed at the point at which such generator(s) wished to connect to the NETS do not fall within the Connection Exclusion.

By way of an illustrative example, suppose that two generators connect to the transmission system in a similar area at different times. For the first generator ("Generator One") to connect, a Local Circuit and Local Substation are installed. Generator One pays Local Circuit and Local Substation [Transmission Network Use of System] Charges in respect of these "Local Assets" based on its Transmission Entry Capacity. As the Local Assets were required to connect Generator One to the NETS as the NETS existed at the time the Generator One wished to connect, those charges fall within the Connection Exclusion.

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

For the avoidance of doubt, if Generator One and Generator Two had both wanted to connect to the NETS at the same time and Local Assets were installed for them to share a connection from the outset, the Local Charges paid by both Generator One and Generator Two in respect of those Local Assets would fall within Connection Exclusion."

This proposal also accords with the express suggestion made by the Authority[7], in its Direction to the CUSC Panel (published on 26th May 2022[8]), namely that:

"*We appreciate that CUSC Parties may want the CUSC to indicate principles (beyond the words of the Limiting Regulation itself) which may be relevant to identifying whether particular charges fall within the Connection Exclusion. We consider that any proposed change brought forward to do so would need to take into consideration what is said in the Judgment. Any such proposed changes should be progressed through a separate CUSC Modification Proposal*."

It is also important to be mindful of what the Authority noted, on page 5 of its CMP391[9] proposal, namely that:

"*The Judge held at paragraphs 42-45 of the Judgment that the Limiting Regulation requires more than just that "annual average transmission charges" fall within the Permitted Range, and that the Authority cannot lawfully approve a proposal that does not fully and correctly reflect the Connection Exclusion*" [emphasis added]

[7] It was also made, by the Authority, in the CMP368 decision under 'Next Steps' on page 15.
[8] See CUSC Panel Papers V3 at CUSC Panel Meeting - 27.05.22 | National Grid ESO
[9] download (nationalgrideso.com)

The Judgement, in this regard, was also summarised by the CMA, in its 20th May 2022 decision[10], at paragraph 2.4 (c) (ii):

> "*Properly construed, Part B of the Annex to Regulation 838/2010 sets requirements both: (a) as to the lower and higher limit of the annual average transmission charge (paragraph 1 read with paragraph 3); and (b) on how the annual average transmission charge is to be calculated (paragraph 2). There is no hierarchy within these obligations. Generators should pay annual average transmission charges that are both calculated in the prescribed way (requiring proper application of both the connection exclusion and ancillary services exclusion) and fall within the specified range. Failing to give effect to the connection exclusion is as much a breach of Regulation 838/2010 as failing to give effect to the requirement that charges fall within the specified range*" [emphasis added]

In this regard this proposal will mean that *generators …pay annual average transmission charges that are … calculated in the prescribed way* (by the) *proper application of … the connection exclusion* and thus *give* (practical) *effect to the connection exclusion*.

This proposal will also ensure that there is transparency and legal certainty for stakeholders (including the Authority) that the CUSC Calculation is undertaken in a way that *fully and correctly reflects the Connection Exclusion* when put into practice.

The conclusions we take from these views of the Authority, the CMA and the Court, as set out above, is:

(i) that a case-by-case assessment is required when determining, for the purposes of undertaking the CUSC Calculation, what is (and what is not) a pre-existing asset when a generator connects to the system (based on the GEMA example[11]);
(ii) that it is not appropriate to apply a 'one size fits all' generic approach; and
(iii) that the performance of the CUSC Calculation needs to be transparent and ensure legal certainty for stakeholders, by setting this out in the CUSC (as, for example, the ESO proposed with CMP317 and the Authority directed with CMP327).

These are, therefore, the issue within the CUSC that this proposal will address.

Why change?

This change is required to provide legal certainty and transparency of the CUSC Calculation including, in particular, the correct application of the connection exclusion for the following reasons:

1. Accepting that the application of the test will depend on a case by case assessment of the charges and assets in issue, it is clear that someone – presumably either GEMA or NGESO[12] – will need to carry out the relevant calculation.

[10] Decision (publishing.service.gov.uk)
[11] As noted in paragraph 53 of the Judgement.
[12] This proposal is based on the CUSC Calculation being performed by the ESO (not GEMA).

2. Given that the calculation arises as a result of a legally binding obligation and is an important component in the overall charging structure for network access charging for generators, it is important that the calculation is conducted in a transparent manner, so that those affected by it can understand the process and, where appropriate, challenge it if they disagree.

3. Setting out the parameters which are in fact used for assessing the charges in a given area will also be important for regulatory consistency and to ensure a common approach is adopted nationwide.

4. If the calculation process remains opaque, a generator will not be able to ascertain whether or not the calculation has been conducted correctly. That has an adverse, negative impact on its ability effectively to enforce its legal rights.

5. As a matter of legal certainty, an entity which is or might well be adversely affected by a public law decision ought to be entitled to know the reasons for that decision, so that it can consider its options for seeking a legal review of the decision. Otherwise the legal rights are not capable of effective or meaningful enforcement. Publication of the method of calculation to be used (and the case by case results) in giving effect to the Connection Exclusion (as properly construed) is therefore an important aspect of ensuring that the rule of law is observed.

What is the proposer's solution?

In order to ensure legal certainty and transparency to stakeholders (including The Authority) as to the performance by the ESO of the calculation of the Connection Exclusion as part of the overall assessment of whether (or not) transmission charges paid by Generators in GB fall within the range set in the Limiting Regulation (by way of the CUSC Calculation) it is necessary to identify the details (beyond the words of the Limiting Regulation itself) which are relevant to determine whether (or not) particular charges fall within the Connection Exclusion.

The Judgement concluded that the Limiting Regulation places two obligations (that both have to be undertaken) namely that the CUSC Calculation must be carried out correctly and that the result (of that calculation) must be within the prescribed range (set out in the regulation).

Legal certainty and transparency therefore requires that the calculation must be done correctly and it must be seen to be done correctly.

Without this transparency, industry would have no assurance regarding whether or not the CUSC Calculation has been done correctly, or whether the overall result is correct.

It is therefore essential that, if the obligation to do the calculation is placed on ESO[13], then the ESO conforms with a public description that details both:

1) The methodology in terms of the broad principles the ESO will apply (when performing the CUSC Calculation) as a test to either include or exclude each (local) circuit and (local) asset, as well as how the entirety (end-to-end) of the compliance calculation will be carried out; and

[13] Which we believe it should.

2) The results of applying the broad principles on a case-by-case basis, including the rationale within the principles for either including or excluding every element of charge, as well as what and why there were exceptions to the rule. This should provide sufficient detail to stakeholders such that it is possible for them to clearly see, peer review, replicate (if they wish to) and, if necessary, challenge the ESO's result(s) in terms of the CUSC Calculation using the publicly available data (arising from this proposal's solution) regarding the classification of each circuit and asset charge all the way through the calculation to the final end result.

Draft Legal text

The Legal Text will be developed in due course following the Workgroup deliberations.

This proposal concerns Section 14 only. However, if during the Workgroup deliberation it is determined that a change to Section 11 is required; as, for example, arose with the progression of CMP317/327 through the Workgroup stage, which necessitated the raising of CMP339; then we will be happy to be guided by the Workgroup in raising such a proposal, if required, at that time.

What is the impact of this change?

Proposer's assessment against CUSC Charging Objectives

Relevant Objective	Identified impact
(a) That compliance with the use of system charging methodology facilitates effective competition in the generation and supply of electricity and (so far as is consistent therewith) facilitates competition in the sale, distribution and purchase of electricity;	**Positive** By ensuring transparency and legal certainty as to how certain charges are to be treated by the ESO when undertaking the CUSC Calculation this will ensure compliant TNUoS charges which, in turn, will better facilitate effective competition. This is because it will reduce generator cost of capital by providing both legal and regulatory certainty regarding how the Limiting Regulation will be applied. This will feed through to lower cost to customers via lower CfD and Capacity Mechanism bid prices, as well improved international competitiveness of GB

	generators which will reduce both the system and customer cost of achieving Net Zero and do so in a way that facilities competition.
(b) That compliance with the use of system charging methodology results in charges which reflect, as far as is reasonably practicable, the costs (excluding any payments between transmission licensees which are made under and accordance with the STC) incurred by transmission licensees in their transmission businesses and which are compatible with standard licence condition C26 requirements of a connect and manage connection);	**Positive** By ensuring that the performance of the CUSC Calculation is undertaken in a transparent and legally certain way this will ensure that charges arising from the application of the charging methodology better reflect costs incurred.
(c) That, so far as is consistent with sub-paragraphs (a) and (b), the use of system charging methodology, as far as is reasonably practicable, properly takes account of the developments in transmission licensees' transmission businesses;	**Neutral**
(d) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency *; and	**Positive** As with CMP391, this proposal is required to correctly reflect the Limiting Regulation practically within the CUSC. The Limiting Regulation is a relevant legally binding decision of the European Commission.
(e) Promoting efficiency in the implementation and administration of the system charging methodology.	**Positive** As identified by the Authority in the CMP391 proposal, it is important that the CUSC (via a proposal) fully and correctly reflect the Connection Exclusion which this proposal does; by identifying whether (or not) particular charges fall within the Connection Exclusion; and this promotes efficiency in the implementation and administration of the system charging methodology as, for example, it avoids

	disputes being raised by stakeholders to the Authority if uncertainty and a lack of transparency around the detail of the performance of the CUSC Calculation by the ESO as regards which charges, on a case-by-case basis, are included or excluded for the purposes of the Connection Exclusion.
*The Electricity Regulation referred to in objective (d) is Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast) as it has effect immediately before IP completion day as read with the modifications set out in the SI 2020/1006.	

Proposer's assessment of the impact of the modification on the stakeholder / consumer benefit categories	
Stakeholder / consumer benefit categories	**Identified impact**
Improved safety and reliability of the system	**[Select impact]** [Please provide your rationale. Will this change mean that the energy system can operate more safely and reliably now and in the future in a way that benefits end consumers? This area would relate to changes which balance the system safely, securely and at optimum cost, particularly for consumers in vulnerable situations. It would also consider changes which introduce flexibility across the market to flow energy at the most efficient profile, lower operational costs and make sure GB consumers can access the cheapest sources of energy. Examples of changes include: • security of supply • changes to the balancing regimes e.g. charging changes
Lower bills than would otherwise be the case	**[Select impact]** [Please provide your rationale. Will this change lower consumers' bills by controlling, reducing, and optimising spend, for example on balancing and operating the system? This area would relate to changes that are likely to benefit end consumers. This could include any change where it has been demonstrated that it could lower bills for end consumers. If possible, this section should include any quantifiable benefits.

	Examples of changes include:
Benefits for society as a whole	**[Select impact]** [Please provide your rationale. This area would focus on demonstrating why and how the change can improve the quality of service for some or all end consumers. Improved service quality ultimately benefits the end consumer due to interactions in the value chains across the industry being more seamless, efficient and effective.]
Reduced environmental damage	**[Select impact]** [Please provide your rationale. Will this proposal support: • new providers and technologies? • a move to hydrogen or lower greenhouse gases? • the journey toward statutory net-zero targets? • decarbonisation? This area would relate to changes which demonstrate innovative work to design solutions which ensure the system can operate in an environmentally sustainable way both now and in the future. Examples include: • Gas quality blending • Carbon Capture and Storage New technologies, e.g. wind power]
Improved quality of service	**[Select impact]** [Please provide your rationale. This area would relate to any other identified changes to society, such as jobs or the economy. For example, by 2050, energy system decarbonisation efforts could add 19 million jobs and £52tn of gross domestic product (GDP) to the global economy, increasing the GDP of Northern and Western Europe by 1.25% and 2.5% respectively. It could also generate a 15% increase in global welfare and reduce negative health effects caused by local air pollution by 60%.]

When will this change take place?

Implementation date
One Business Day after the Authority approval.

Date decision required by
To be confirmed

Implementation approach
This CUSC Modification Proposal gives practical effect to the Limiting Regulation within the CUSC (per the view of the High Court) in a transparent and legally certain way.

Proposer's justification for governance route

Governance route: Urgent modification to proceed under a timetable agreed by the Authority (with an Authority decision)

In light of the Judgement and CMP391 modification proposal directed by the Authority, legal certainty and transparency is required as to the process to be followed by the ESO when performing the CUSC Calculation (that is in respect of the measuring of compliance with the range set out in the Limiting Regulation) in terms of which charges; such as for local circuits and local assets, fall within, or out-with, the Connection Exclusion when performing the CUSC Calculation.

Furthermore, as noted on page 4 of the CMP391 draft Final Modification Report[14]:

> "*we [GEMA] consider that the Connection Exclusion is unlikely to be capable of prescriptive definition within the CUSC (beyond the words of the Limiting Regulation itself), without some provision that enables further case-by-case assessment when required*."

This proposal introduces the provision that, practically, enables the further case-by case assessment to be undertaken as part of the performance of the CUSC Calculation in a legally compliant manner.

In respect of the Authority's published[15] urgency criteria this is **a current issue** which; as witnessed by, for example, the expediency directed, by the Authority, to the progression of CMP391; needs to be addressed with urgency.

This is because without this legal certainty and transparency; as to the practical process to be performed by the ESO when undertaking the CUSC Calculation; then the assessment of whether (or not) the transmission charges paid by generators in GB fall within (or out-with) the range prescribed in the Limiting Regulation (and thus are, or are not, those transmission charges paid by generators in GB compliant with that regulation) will be uncertain and this gives rise to "**a significant commercial impact on parties, consumers or other stakeholder(s)**".

It also gives rise to concerns that the ESO will "**be in breach of any relevant legal requirements**" when seeking to perform the said CUSC Calculation; absent of the legal certainty and transparency from this proposal; as to how practically to treat, on a case by case basis, the requisite physical assets (and charges) required for connection of each generator to the system in light of the Judgement.

In respect of governance, and for the avoidance of doubt, as regards CMP391 in the context of 'pending modification' (raised by Code Admin as a 'critical friend') it should be noted that that would only apply if this proposal was having "substantially the same effect" as CMP391. But this proposal is a different proposal as the Authority said it was (by what they said in their 'Next Steps' – see 'What's the Issue' above) so therefore it can't have substantially the same effect (as CMP391). This proposal is not dependent on CMP391. This proposal is about the process to be applied to perform the CUSC Calculation in a legally compliant manner and make those results available.

[14] download (nationalgrideso.com)
[15] Ofgem Guidance on Code Modification Urgency Criteria | Ofgem

Interactions

☐Grid Code	☐BSC	☐STC	☐SQSS
☐European Network Codes	☐ EBR Article 18 T&Cs[16]	☐Other modifications	☐Other

None identified

Acronyms, key terms and reference material

Acronym / key term	Meaning
BSC	Balancing and Settlement Code
CMP	CUSC Modification Proposal
CUSC	Connection and Use of System Code
EBR	Electricity Balancing Regulation
ESO	Electricity System Operator
STC	System Operator Transmission Owner Code
SQSS	Security and Quality of Supply Standards
T&Cs	Terms and Conditions

Reference material

- See footnotes.

[16] If your modification amends any of the clauses mapped out in Exhibit Y to the CUSC, it will change the Terms & Conditions relating to Balancing Service Providers. The modification will need to follow the process set out in Article 18 of the Electricity Balancing Guideline (EBR – EU Regulation 2017/2195) – the main aspect of this is that the modification will need to be consulted on for 1 month in the Code Administrator Consultation phase. N.B. This will also satisfy the requirements of the NCER process.