

Draft energy network mergers: guidance on the CMA's procedure and assessment

Consultation document

13 December 2023

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1. Introduction

Introduction

- 1.1 The Energy Act 2023 (**EA23**) amended the Enterprise Act 2002 (**EA02**) to create a new ‘special’ merger regime to investigate energy network mergers in Great Britain, alongside the ‘ordinary’ merger control regime.¹
- 1.2 The legislation will mean that, where an energy network enterprise² is merging with another energy network enterprise that holds the same type of licence (an ‘**energy network merger**’), then the Competition and Markets Authority (**CMA**)³ will be empowered to also investigate if the merger may substantially prejudice Ofgem’s ability to carry out its functions to make comparisons when setting price controls.
- 1.3 The CMA has prepared and is consulting on its draft ‘Energy network mergers: Guidance on the CMA’s procedure and assessment’ (‘**energy network merger guidance**’).
- 1.4 The CMA has consulted with Ofgem⁴ in the preparation of this draft guidance.
- 1.5 Ofgem has a new statutory role in the energy network merger review process. The CMA is required to request, and Ofgem must give, its opinion on whether the merger may prejudice its ability to carry out its statutory functions to make comparisons between energy network enterprises of the type involved in the relevant merger situation. In forming its opinion under this section, Ofgem must apply the methods set out in a statement of methods, which it has consulted on and published.⁵
- 1.6 Ofgem is also currently consulting on its ‘statement of methods’.

¹ Section 204 and Schedule 16 of the EA23 introduce changes to Part 3 of the EA02 applicable to a relevant merger situation. The general merger regime (merger control provisions in the EA02) applies to energy network enterprises in Northern Ireland. The Utility Regulator is responsible for regulating the electricity, gas, water, and sewerage industries in Northern Ireland, promoting the short- and long-term interests of consumers.

² An energy network enterprise is an enterprise carried on by a company holding a licence under section 7 of the Gas Act 1986 (gas transporter), section 6(1)(b) of the Electricity Act 1989 (transmission of electricity) or section 6(1)(c) of the Electricity Act 1989 (distribution of electricity), except in relation to the transmission or distribution of electricity, where the licence was awarded by way of a competitive tender (s.68A(2) EA02).

³ The CMA is the UK’s economy-wide competition and consumer authority and works to promote competition for the benefit of consumers, both within and outside the UK. Its aim is to make markets work well for consumers, businesses, and the economy as a whole.

⁴ Ofgem is a non-ministerial government department governed by the Gas and Electricity Markets Authority (GEMA) and to which many of GEMA’s statutory functions are delegated (in respect of which it acts on behalf of GEMA).

⁵ Section 68D EA02.

- 1.7 The CMA's draft energy network merger guidance is concerned with the policies, procedure and methodology that the CMA will use in discharging its energy network merger functions under the EA02.⁶ It largely focuses on the 'special' features of the energy network merger regime and the guidance will need to be read alongside the wider merger guidance the CMA has published on its merger function.
- 1.8 The CMA has set out in a number of pieces of published guidance general information for the business and legal communities and other interested parties on its practices and processes in connection with its powers under the EA02 to investigate mergers. The CMA maintains a collection of guidance published by the CMA on mergers work on its website,⁷ including similar guidance in respect of the 'special' water merger regime.⁸

Context of consultation on updates to wider CMA merger guidance and Phase 2 process

- 1.9 The CMA is currently also consulting on 'Mergers: Guidance on the CMA's jurisdiction and procedure' (**CMA2revised consultation**), which sets out the CMA's procedures in operating the merger control regime set out in the Act.⁹
- 1.10 The amendments being consulted on in that CMA2revised consultation cover updates to the phase 2 merger process, updates to other aspects of the merger processes (revisions to the phase 1 Merger Notice and the CMA's Template Waiver), and other general amendments, including making amendments to reflect the new special energy network merger regime, and this then forthcoming guidance.¹⁰
- 1.11 These proposed amendments to CMA2 are of relevance to this consultation on the draft energy network merger guidance as it makes refers to the merger process described for fully in CMA2, especially at phase 2.
- 1.12 For readers convenience, where relevant, the CMA has identified the relevant cross-reference to both the existing CMA2 paragraph or chapter and the paragraph or chapter in the new version of CMA being consulted on in [].

⁶ This guidance forms part of the advice and information published by the CMA under section 106 of the EA02, paragraph 25 of Schedule 16 to the EA23 amended s.106 EA02 to provide the CMA must '*prepare and publish general advice and information about (a) the making and consideration by it of references under section 22 or 33, 68B or 68C*' i.e. the new energy network merger provisions.

⁷ [CMA mergers guidance - GOV.UK \(www.gov.uk\)](http://www.gov.uk).

⁸ [Water and sewerage mergers: CMA49 - GOV.UK \(www.gov.uk\)](http://www.gov.uk).

⁹ [Changes to CMA mergers guidance \(CMA2\) - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

¹⁰ See proposed new 2.11, 4.68 and 15.2 of [Mergers: Draft Revised Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#).

Scope of the consultation

- 1.13 This consultation seeks the views of interested parties on the draft energy network merger guidance.
- 1.14 The specific questions on which we are seeking respondents' views are provided in Section 3.3 of this consultation document.
- 1.15 This consultation is aimed at those who have an interest in the CMA's energy network merger processes. In particular, it may be of interest to energy network enterprises and their legal and other advisers.

2. The energy network merger review guidance

2.1 The draft energy network mergers guidance has six chapters:

- Chapter 1 – Introduction
- Chapter 2 – The legal framework
- Chapter 3 – The merger process
- Chapter 4 – Analytical approach and methodologies
- Chapter 5 – Relevant customer benefits
- Chapter 6 – Approach to remedies

2.2 **Chapter 1**, introduces the ‘special’ energy network merger regime, and describes how it operates alongside the ‘ordinary’ merger regime.

2.3 It explains that the energy network merger guidance should be read alongside other detailed guidance that the CMA has published or adopted in relation to merger control provisions of the EA02. It then briefly outlines the process and the respective roles of the CMA and Ofgem in Phase 1 and Phase 2 of a merger review.

2.4 **Chapter 2**, describes the legal framework, in particular the ‘statutory questions’, jurisdiction and merger fees.

2.5 The statutory questions are in essence, is there an energy network merger, and has it substantially prejudiced, or is likely to substantially prejudice, Ofgem’s ability to make comparisons between energy network enterprises (which is not outweighed by relevant customer benefits (RCBs) relating to the merger).

2.6 Before forming a view on the statutory questions, the CMA must ask Ofgem to give an opinion, and consider that opinion, on both the likely prejudice, and extent of such prejudice, and whether such prejudice is outweighed by RCBs. Ofgem’s opinion is prepared by applying its statement of methods, on which it has consulted and published.

2.7 Where the CMA believes that that it is or may be the case that statutory questions are met and so is under a duty to refer an energy network merger for a phase 2 investigation it may accept undertakings in lieu of a reference (UILs) to remedy, mitigate or prevent the merger’s prejudice to Ofgem’s ability to make comparisons between energy network enterprises. The CMA must request and consider Ofgem’s opinion on the effect of the offered UILs.

- 2.8 The chapter also explains the basis for the CMA's jurisdiction over energy network mergers, in essence where two or more energy network enterprises of the same 'type' merge. It explains that new section 68A makes provision for the 'types' of energy network enterprises.
- 2.9 It finally describes the fees which are payable.
- 2.10 **Chapter 3**, describes the practicalities of the merger process and how the CMA expects it to operate.
- 2.11 The draft energy network merger guidance describes the process of the CMA keeping merger activity under review, and notifying the CMA of a merger.
- 2.12 It describes the value and importance of prenotification discussions with the CMA and Ofgem, especially in the energy sector, to clarify the information the CMA and Ofgem require to start the investigation.
- 2.13 It describes the process and expected timelines the CMA expects to adopt during Phase 1, and the possibility of an administrative 'fast-track' reference.
- 2.14 The draft energy network merger guidance sets out the expected phase 1 steps and timescale and describes the process by which parties can offer, the CMA can consider, informed by Ofgem's opinion, UILs.
- 2.15 The guidance briefly describes the Phase 2 process, explaining that the Phase 2 process will be consistent with the 'ordinary' process and refers readers to the relevant sections of the Phase 2 guidance. This is where the proposed updates to the phase 2 merger process being consulted on in CMA2revised consultation are particularly relevant.
- 2.16 Chapter 4, describes the analytical approach and methodologies the CMA expects to adopt.
- 2.17 It describes the different legal standards that apply at phase 1 and phase 2, with the question for the CMA at phase 1 being whether there is a 'realistic prospect', and at phase 2 on a 'balance of probabilities, that a merger would substantially prejudice Ofgem's ability to make comparisons between energy network enterprises.
- 2.18 The Chapter briefly describes the use of comparators by Ofgem, and its proposed approach in its draft 'statement of methods', and then provides some examples of how the CMA expects it might approach the analysis.
- 2.19 Chapter 5, refers to the CMA's published guidance on RCBs in its *Mergers: Exceptions to the duty to refer CMA64*. It provides guidance on possible

RCBs in energy network mergers, and the CMA's approach at phase 1 and phase 2.

- 2.20 Chapter 6, describes the CMA's expected approach to remedies. Again this is supplemental to the CMA's existing guidance on merger remedies, with reference drawn to the Ofgem's role as an expert regulator in the sector. The chapter also describes the CMA's expected approach to UILs.
- 2.21 Annex A is a table that describes the principal stages and interaction between the CMA and Ofgem during a phase 1 investigation.
- 2.22 Annex B, is a flow diagram that provides a high-level summary of the principal stages in phase 1 and phase 2 merger investigations undertaken by the CMA under the EA02 from initial contact with the CMA, through to a full phase 2 investigation.

3. Questions for consideration

In responding to these questions, please give your reasons and any relevant supporting information or evidence.

- 3.1 Overall, is the Draft Guidance sufficiently clear and helpful?
- 3.2 What, if any, aspects of the Draft Guidance do you consider need further clarification or explanation, and why? In responding, please specify which Chapter and section (and, where appropriate, the issue) each of your comments relate to.
- 3.3 Are there any other amendments which you consider ought to be made to the Draft Guidance?

4. Consultation process

How to respond

- 4.1 The CMA encourages parties to respond to the consultation in writing (by email or letter) using the contact details provided in paragraph 4.5 below.
- 4.2 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 4.3 In pursuance of our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide a non-confidential version for publication on our webpages which omits that material and explain why you regard it as sensitive at the same time (see further paragraphs 4.7 4.7to4.13 4.13 below).

Duration

- 4.4 The consultation will run from 13 December 2023 to 24 January 2024.

Contact details

- 4.5 Responses should be submitted (by email or letter) by no later than **5:00pm on Wednesday 24 January 2024** and should be sent to:

EnergyNetworkMergerGuidance@cma.gov.uk

Compliance with government consultation principles

- 4.6 In preparing this consultation, the CMA has taken into account the published [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

Statement about how we use information and personal data that is supplied in consultation responses

- 4.7 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation.

This legislation is the UK General Data Protection Regulation (GDPR)¹¹ and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.

- 4.8 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the Draft Revised Guidance, before it is finalised and issued.
- 4.9 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).
- 4.10 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 4.11 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration any representations made by you here in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 4.12 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

¹¹ The UK GDPR refers to the EU GDPR ((EU) 2016/679, which has been adopted into UK law by the EU Withdrawal Act 2018, as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019.

4.13 Further details of the CMA's approach can be found in the Transparency and Disclosure: Statement of the CMA's Policy and Approach (CMA6).¹²

After the consultation

4.14 After the consultation, the CMA will decide whether to make any the changes to the draft energy network merger guidance.

4.15 The CMA will publish the final version of the energy network merger guidance on its webpages at <http://www.gov.uk/cma>. The CMA will also publish a summary of the responses received during the consultation. These documents will be available on CMA webpages.

¹² <https://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-andapproach>