



Department for  
Business, Energy  
& Industrial Strategy

# Energy Security Bill Policy Statement

Energy Network Special Merger Regime

December 2022



© Crown copyright 2022

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit [nationalarchives.gov.uk/doc/open-government-licence/version/3](https://nationalarchives.gov.uk/doc/open-government-licence/version/3) or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

Where we have identified any third-party copyright information you will need to obtain permission from the copyright holders concerned.

Any enquiries regarding this publication should be sent to us at: [energybill2021@beis.gov.uk](mailto:energybill2021@beis.gov.uk)

---

# Contents

Summary	4
New Power: to add to the types of energy network enterprise in scope, create exceptions from that list, and amend/remove existing exceptions for types of enterprises within the scope of the regime	5
Background	5
Application in Practice	5
Existing Powers that Government has plans to rely upon: to require fees to be paid and to determine how turnover should be calculated	7
Existing Powers that Government does not have plans to rely on at present: to make amendments, modifications and provisions on technical and operations provisions in the Enterprise Act 2022	8
Background	8
Application in Practice	8

## Summary

The Energy Security Bill was introduced into Parliament on 6 July 2022. This Bill will deliver a cleaner, more affordable and more secure energy system for the long term. It builds on the ambitious commitments in the British Energy Security Strategy to invest in homegrown energy and maintain the diversity and resilience of the UK's energy supply.

The Energy Security Bill makes provisions to amend the Enterprise Act 2002 to require the Competition and Markets Authority (CMA) in certain circumstances to assess whether a merger between energy network enterprises substantially prejudices the energy regulator Ofgem's ability to carry out its functions when Ofgem compares data from these enterprises to set price controls. The CMA may decide not to refer a merger for full investigation where there is a consumer benefit from the merger that outweighs this prejudice. The Energy Networks Special Merger regime builds on the UK's general merger regime (noting that the Energy Networks Special Merger regime will only apply to energy network enterprises in Great Britain), that assesses whether there has been or will be a substantial lessening of competition, as set out in the Enterprise Act 2002.

Government is taking one new power under the Energy Networks Special Mergers regime and amending a further eight powers that already apply to the UK's general merger regime, so that the existing powers, which allow for smooth functioning of the merger regimes, also apply to the Energy Networks Special Merger regime. These powers have been grouped in to three categories for the purposes of this policy statement. (1) New Power; (2) Existing Powers that Government has plans to rely on; and (3) Existing Powers that Government does not currently have plans to use but may need in the future. For more details on the justification and use of the powers, please refer to the Delegated Powers Memorandum.

# New Power: to add to the types of energy network enterprise in scope, create exceptions from that list, and amend/remove existing exceptions for types of enterprises within the scope of the regime

## Background

This new power is to amend the types of energy network enterprise to which the regime applies. The power enables this to be done by: adding to the types of licence holders that constitute energy network enterprises and so are in scope; creating exceptions in relation to the types of energy network enterprises specified as being in scope, so that some may be exempted from being in scope; and amending or removing exceptions that already apply. This power is under section 68A(4) Enterprise Act 2002, as amended by this Bill.

Government does not plan to rely on this power at present because the regime has been set up to reflect the energy system as it currently operates. However, there may be future changes in the energy industry that affect the way that certain activities in the sector are licensed and regulated and therefore impact on the types of enterprise that ought to be within or excluded from the scope of the energy network merger regime.

Before the Secretary of State may exercise the power, there is a requirement to consult the Gas and Electricity Markets Authority (GEMA) (Ofgem's Governing body) and the CMA.

## Application in Practice

The power is a Henry VIII power with negative Parliamentary procedure. It is relatively limited in its likely application. This is because the power can only be used to add to, create exceptions for or amend/remove the exceptions which apply to the types of energy network enterprises that are in scope, by virtue of the licences they hold and the way those licences have been awarded.

Currently, energy network enterprises which are granted their licence(s) exclusively through competition, are excepted from the list of enterprises that are in scope of the regime.

As the scale of energy network activity that takes place following competitive tenders increases, it is foreseeable that future licensees who were previously out of scope, may have enough valuable data that Ofgem can use when setting the price control. It may then be

appropriate for the Secretary of State to exercise the power to remove exceptions so that such companies are brought within scope of the merger regime.

The speed and nature of the energy system transformation needed to meet our net zero commitments means that changes to the scope of the merger regime (should changes be needed) would need to be swift and efficient. This power would enable such swift and efficient changes.

## Existing Powers that Government has plans to rely upon: to require fees to be paid and to determine how turnover should be calculated

These powers are set out in section 121 and section 28(2) of the Enterprise Act 2002, as amended by this Bill. Government's intention is to lay a Statutory Instrument following Royal Assent of the Energy Security Bill to amend the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 so that fees are payable in respect of energy network mergers investigated under the Enterprise Act 2002 and to determine how their turnover is to be calculated. For details of how Government intends to rely on these powers, please refer to the draft statutory instrument published on Gov.uk:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1100215/indicative\\_draft\\_statutory\\_instrument\\_-\\_merger\\_fees\\_and\\_determination\\_of\\_turnover.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1100215/indicative_draft_statutory_instrument_-_merger_fees_and_determination_of_turnover.pdf).

# Existing Powers that Government does not have plans to rely on at present: to make amendments, modifications and provisions on technical and operations provisions in the Enterprise Act 2002

## Background

The Energy Network Special Merger regime builds on the existing UK merger framework, and as such several operational powers under the existing framework will also apply to the Energy Network Special Merger regime, in some cases with amendments or modifications to enable this application. This Bill does not amend or modify these existing powers, or the Parliamentary procedure associated with them, beyond what is necessary to make the powers apply to the Energy Network Special Merger regime. Most of these existing powers are Henry VIII powers.

The existing powers in this grouping are:

- Existing power under section 28(6) to amend the turnover threshold in section 23 Enterprise Act 2002.
- Existing power under section 34 Enterprise Act 2002 to make provision in relation to sections 27 and 29 Enterprise Act 2002 (on when enterprises cease to be distinct and when multiple transactions on different dates can be deemed to have occurred on one date in relation to anticipated mergers).
- Existing powers under section 40(8) and (12) Enterprise Act 2002 to amend and make provision for time limits for CMA investigations and reports.
- Existing power in section 41B Enterprise Act 2002 to amend the period in which the CMA must take remedial, mitigating or preventative action.
- Existing power under section 101 Enterprise Act 2002 to make regulations for the purposes of sections 96 to 100 of that Act, relating to merger notices.
- Existing power under section 102 Enterprise Act 2002 to modify sections 97 to 101 of the Enterprise Act 2002.

## Application in Practice

As with the new power in group one above, Government does not have plans to rely on any of these powers at present because the regime has been set up to reflect the energy system and wider merger landscape as it currently operates. It is possible that there will be future changes



in the energy industry or merger landscape that will necessitate different regulatory practice, requiring the use of these powers.

The below section provides some non-exhaustive examples of how the powers may be used in the future or provides examples of how they have been used previously.

**The section 28(6)** power on amending the turnover threshold could be required to allow the turnover threshold level to be amended in line with inflation, or as the size and scale of the energy networks adapt to the challenge of decarbonisation and the shift away from fossil fuels. Similarly, if the turnover threshold for the UK's general merger regime on substantial lessening of competition were changed, the Secretary of State may wish to maintain consistency across merger regimes and do likewise for the Energy Network Special Merger regime. Under this section, GEMA and the CMA are required to keep the threshold sum under review and to provide advice to the Secretary of State on whether the sum remains appropriate.

**The section 34** power sets out when enterprises cease to be distinct and when multiple transactions on different dates can be deemed to have occurred on one date, both in relation to anticipated mergers. Government anticipates that, if this power were to be utilised, it would likely be to ensure consistency with existing merger regimes.

**The section 40(8) and (12)** powers allow the Secretary of State to make regulations for amending time limits for CMA investigations and procedures, and to make regulations for the purpose of section 39(8) (which provides that where the time limit is extended because a party has not complied with a notice to be a witness or provide evidence, this continues until the witness/evidence has been provided or the CMA cancels the extension). These powers have not been relied upon for the general UK merger regime previously, but may be required to allow practical details of the merger regime to stay up to date with the advice and decisions of the relevant regulators, and to reflect how these aspects of the regime are operating in practice.

**The section 41B** power would be used to amend the time period in which the CMA must take remedial, mitigating or preventative action. Government envisions that this power may be used if evidence shows that the time period for the CMA to do so is not appropriate to remedy the prejudices identified by the CMA. The Secretary of State must consult the CMA, and other persons considered appropriate, before exercising the power. This would enable the remedial period which applies under the Energy Networks Special Merger Regime to be adjusted so that it balances the necessary scope to deal with real world operation, with certainty for businesses as they forward plan during a merger.

**Section 101** empowers the Secretary of State to make regulations in relation to particular procedural and technical aspects of merger notices. This power has previously been used to make The Enterprise Act 2002 (Merger Prenotification) Regulations 2003 and Government anticipates any future use of this power would follow a similar approach.

**The section 102** power allows modification of sections 97 to 101 for the purposes of determining the effect of giving a merger notice and the action which may be or is to be taken by any person in connection with such a notice<sup>1</sup>. This power could be used to ensure the

regime fits with market practice or developments. For example, if the six-month period after the initial reference period set out under section 100(1)(e) Enterprise Act 2002, following which mergers may be referred, was being exceeded regularly under business-as-usual operation, it may be determined that an alternative period would be more appropriate, and the section 102 power could be relied on.

Ultimately, these powers are operational and technical and would be used (if appropriate) to allow the smooth running of the merger regimes.

---

This publication is available from: [www.gov.uk/beis](http://www.gov.uk/beis)

If you need a version of this document in a more accessible format, please email [enquiries@beis.gov.uk](mailto:enquiries@beis.gov.uk). Please tell us what format you need. It will help us if you say what assistive technology you use.