

[Response from an Energy Network Enterprise]

1. The CMA's document contains some overlap with Ofgem's draft statement of methods in terms of the substance of the test which will be applied (ie how prejudice and relevant customer benefits (RCBs) will be assessed). We believe the following key points which we have made in response to Ofgem should also be reflected in the CMA document, namely that the Statement of Methods should:
 - include a fifth criterion in the assessment of impacts which involves consideration of potential mitigations available to Ofgem and the number and quality of remaining independent observations (mirroring similar criteria currently used by Ofwat for the purposes of the similar water regime);
 - reconsider the evidential burden on Ofgem to establish "substantial prejudice" (which we consider should require quantitative analysis in all circumstances) and the evidential burden placed on the merging parties to prove the existence of relevant customer benefits;
 - revisit the criteria currently proposed to assess the impact of the merger on comparisons to take account of the ongoing operation of the price control post-merger and the ongoing, standardised regulatory reporting requirements which would apply; and
 - make it clear that the appropriate counterfactual may not be 'business as usual' but may for example involve acquisition by a different type of investor (noting that the CMA has previously assessed mergers against alternative purchaser counterfactuals (e.g. in Cellnex / CK Hutchison)).
2. It would be helpful if the CMA could explain in more detail how it will identify "substantial" prejudice (as is required by the legislation), and to give examples of how this assessment is performed.
3. The draft statement of methods does not provide for the sharing of Ofgem's economic analysis or other evidence during the Phase 1 process. This would be helpful to ensure that Ofgem and the parties are aligned on the accuracy and completeness of Ofgem's analysis and evidence, and would be in line with Ofgem's publicly stated commitment to transparency, where it accepts that transparency is an important part of its statutory duties and a core governance principle. The CMA's guidance (or Ofgem's draft statement of methods) should set out the timescales around this process.
4. Similarly, to the extent that the CMA continues to engage with Ofgem during Phase 2 and be influenced by Ofgem's views and submissions (para 1.18), the CMA should ensure that the merging parties have access to the underlying analysis and data informing Ofgem's views, so that they can make representations as appropriate.
5. Ofgem says (para 8.18) that given the tight timeframe of the Phase 1 investigation, it expects parties to send all information to Ofgem and the CMA at the same time. We recognise that this will normally be good practice, but would encourage the CMA and Ofgem to consider whether setting out such a blanket expectation is appropriate, given that there may be some instances where it is not appropriate or necessary to send information to both Ofgem and the CMA.