

Energy network mergers: guidance on the CMA's procedure and assessment – CMA:190

Responses to consultation document

3 April 2024

© Crown copyright 2024

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Contents

	<i>Page</i>
1. Introduction	2
2. Summary of consultation responses	4

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’s⁴ ability to carry out its functions to make comparisons when setting price controls.
- 1.3 The CMA prepared and consulted on its draft ‘Energy network mergers: Guidance on the CMA’s procedure and assessment’ (‘**energy network merger guidance**’), between 13 December 2023 and 24 January 2024.⁵
- 1.4 In that consultation document⁶ the CMA described its intent to publish the final version of the energy network merger guidance on its webpages at <http://www.gov.uk/cma>, and to publish a summary of the responses received during the consultation. This is that summary.

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 The CMA consulted with Ofgem in the preparation of this draft guidance. 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. Ofgem also consulted on its ‘statement of methods’ over this time period.

⁶ [Consultation document \(publishing.service.gov.uk\)](http://publishing.service.gov.uk).

- 1.5 The CMA's 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 EA02.⁷ 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.
- 1.6 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,⁸ including similar guidance in respect of the 'special' water merger regime.⁹

⁷ 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.

⁸ [CMA mergers guidance - GOV.UK \(www.gov.uk\)](http://www.gov.uk).

⁹ [Water and sewerage mergers: CMA49 - GOV.UK \(www.gov.uk\)](http://www.gov.uk).

2. Summary of consultation responses

- 2.1 The CMA received two responses to its consultation, one from a law firm, Linklaters, and one from an energy network enterprise, [§<].
- 2.2 The feedback related principally to the CMA's approach to substantial prejudice, how the CMA and Ofgem would operate, and feedback on other procedural steps.
- 2.3 This Guidance consultation response sets out the key issues raised by the responses to the draft Guidance, our views on these issues, and where relevant, the changes we have made to the Guidance as a result.

Substantial prejudice

- 2.4 Both respondents requested the CMA to provide further guidance on the extent of prejudice to Ofgem that it would consider "substantial" and to give examples of how this assessment is to be performed.
- 2.5 The CMA has considered whether it should seek to provide further explanation of the term "*substantial prejudice*" in guidance at this time. The CMA has concluded it should not.
- 2.6 The revised Guidance sets out the type of factors that the CMA may consider when assessing the impact of the merger on the value of Ofgem's comparisons, and also makes clear that its assessment on whether to refer the case for a phase 2 investigation will always be considered on a case-by-case basis. The CMA's Merger Assessment Guidelines (CMA129) makes clear, drawing on jurisprudence from over the years, that for the purposes of merger control, the term 'substantial' in the context of a substantial lessening of competition can encompass a range of meanings depending on the facts of a case, and does not necessarily mean 'large', 'considerable' or 'weighty' in absolute terms.
- 2.7 Consistent with that, and the approach of the courts to the term 'substantial', the CMA explains in CMA129 that, *'an element of judgement is necessary in deciding whether any loss of competition is substantial rather than any exact quantitative measurement. The CMA does not apply any thresholds to market share, number of remaining competitors or on any other measure to determine whether a loss of competition is substantial. The CMA will decide whether a loss of competition is substantial under the applicable legal standard. Substantial in the context of an SLC does not necessarily mean 'large', 'considerable' or 'weighty' in absolute terms. Rather, it can encompass a range of meanings and will depend on the facts of the case'* (2.7-9). That is

necessarily at a high-level. The CMA will keep this guidance under review and consider whether in light of case experience it is appropriate to give further guidance.

CMA & Ofgem engagement and information

- 2.8 The energy network enterprise stated that it was concerned that Ofgem's draft statement of methods did not expressly provide for the sharing of Ofgem's economic analysis or other evidence during the phase 1 process. The CMA guidance explains in paragraph 3.21 that in CRM cases the merger parties will receive the issues letter with a non-confidential version of Ofgem's opinion.
- 2.9 The energy network enterprise, described the feedback it had given on Ofgem's draft statement of methods, which the CMA considered.
- 2.10 The law firm invited the CMA to provide more detail on the role Ofgem will play at phase 2, including on remedies. The energy network enterprise also requested the CMA explain in more detail how it will engage with Ofgem, and how the CMA will enable the merger parties to make representations on any analysis or data informing Ofgem's views. The law firm noted confidentiality concerns might be addressed by a confidentiality ring.
- 2.11 As explained in the consultation document,¹⁰ the CMA has sought in this guidance to avoid replicating material in other CMA guidance and considers it appropriate to continue, in relation to the scope of its engagement with Ofgem at phase 2, to cross-refer to the relevant sections of its existing guidance on jurisdiction and procedure (CMA2) (see paragraph 1.18 and footnote 17).
- 2.12 The CMA has added some further drafting in the revised guidance (paragraph 3.27) that explains that where it receives evidence or submissions from Ofgem during phase 2 it would, in its approach to disclosure, treat these in line with its approach to evidence from third parties generally at phase 2. In accordance with its established procedures, where the CMA considers that it must disclose highly confidential third party information as part of the gist of the case, it may choose to impose additional safeguards (including, through use of a confidentiality ring); such assessments will be made on a case-by-case basis.
- 2.13 The law firm further noted that the CMA should approach the evidence Ofgem provided to answer the phase 1 question, with care in phase 2 when

¹⁰ [Consultation document \(publishing.service.gov.uk\)](https://publishing.service.gov.uk).

answering the substantive question. As described above, the CMA will treat evidence at phase 2 in accordance with the phase 2 balance of probabilities standard'. Given the cross references to the wider merger guidance we did not amend this guidance to make that point.

- 2.14 The law firm acknowledge that 'the CMA might not be well-placed at this stage to give detailed examples on RCBs in an energy network merger' but invited the CMA (or Ofgem) to give the types of evidence that the CMA would expect to receive for determining whether any RCBs proposed by the parties amount to "qualifying" RCBs. The CMA notes that in addition to this guidance, it has also published guidance on Merger Remedies CMA87, which provides general guidance and is of application here too. As above with CMA2, the CMA has sought to avoid repetition or replication between guidance.
- 2.15 The law firm welcomed, in principle, the co-ordination between the CMA and Ofgem described in the guidance. It invited the CMA to supplement this guidance with what it described as 'best practice' found elsewhere in the CMA's merger guidance, e.g. where practicable issuing information requests in draft etc. The law firm also gave feedback on the CMA and Ofwat's engagement in water mergers, identifying it was not always clear what information each regulator had what, or what it needed; it invited further clarity on the extent of information exchange between the CMA and Ofgem at different stages of the process, but cautioned sharing all information with Ofgem and the CMA at the same time may not be always be appropriate. The energy network enterprise, gave similar feedback noting that sharing information with the CMA and Ofgem may generally be best practice, there may be instances where it is not appropriate or necessary to send information to both Ofgem and the CMA.
- 2.16 The CMA believes encouraging merger parties to, where appropriate, share the same information with the CMA and Ofgem, and at the same time may help to address some of the concerns identified. In respect of process or 'best-practice', as explained above the CMA has sought not to replicate guidance on matters addressed elsewhere in the CMA's existing guidance. The CMA proposes to publish, with Ofgem, a statement later this year on how the two organisations envision working together.

Other procedural steps

- 2.17 When conducting parallel reviews under the 'ordinary' and 'special' regime, the law firm encouraged the CMA to seek to 'the extent possible' allow 'the timetables to be run independently', noting that the guidance provided that '*the CMA will endeavour to investigate the cases together*'. It also invited further guidance on timelines and staffing of case teams.

- 2.18 The revised guidance explains that whilst the CMA will approach these issues on a case-by-case basis, its starting point is that where appropriate, and consistent with the scheme of the legislation which makes special provision to enable combined references, it will seek to review both cases in parallel. The law firm gave examples of where that starting point might be displaced. The CMA has amended the guidance at footnote 4 to make clearer that the CMA's expectation that it will conduct parallel reviews, and/or combined reviews at phase 2, is a starting point and merger parties should raise with the CMA in pre-notification if the circumstances would make a different approach more appropriate.
- 2.19 In respect of UiLs the law firm noted that the CMA explained that in a phase 1 it expects to place "significant weight" on Ofgem's opinion on the prejudice it will suffer. It invited the CMA to be explain if it expects this approach to apply to the consideration of '*Ofgem's opinion on the effectiveness of the UiLs offered (Paragraph 6.18)*'. The CMA has done so (see paragraph 6.18). The law firm also suggested that the CMA clarify the length of any public consultation in the guidance. The period is prescribed in Schedule 10 to the EA02 and the CMA has made this addition (see paragraph 3.21, final bullet).