

# Review of the Energy Market Investigation (Electricity Transmission Losses) Order 2016

Final decision and Notice of Variation

13 November 2024

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# 1. Summary

- 1.1 In line with its statutory duty under sections 92 and 162 of the Enterprise Act 2002 (the Act), the CMA keeps the portfolio of undertakings and orders arising from its markets and mergers work under review, including through considering those undertakings and orders that should be reviewed where there are reasons to suspect that one or more changes in circumstance have taken place.
- 1.2 In March 2024, the CMA was contacted by the Department for Energy Security and Net Zero (DESNZ) regarding the impact of the coming into force of certain provisions in Part 5 of the Energy Act 2023 (EA23)<sup>1</sup> on the [Energy Market Investigation \(Electricity Transmission Losses\) Order 2016](#) (the Order). DESNZ informed the CMA that amendments made to the Electricity Act 1989 (EA89) by Part 5 of EA23, and the proposed establishment of a new Electricity System Operator (ESO), by virtue of Part 5 of EA23, could amount to a change of circumstances that required the Order to be varied. DESNZ requested that the CMA undertake a formal review of the Order on the basis that if the Order were not varied the full implementation of Part 5 of EA23 and establishment of the ESO could unintentionally deprive the Order of continued effect.
- 1.3 The purpose of this review is to determine whether there has been a change of circumstance and, if so, to amend the Order to take account of the amendments made to the Electricity Act 1989 by Part 5 of EA23 and the establishment of the ESO.
- 1.4 Given that, in this instance, the CMA considered that the change of circumstances and the outcome that would be required to resolve the resulting regulatory inconsistency would both be clear, the CMA exercised its discretion to proceed directly to publication of, and consultation on, a Provisional Decision, a Notice of Intention to Vary the Order, and the substance of the proposed variations. The consultation opened on 23 July 2024 and closed on 23 August 2024. The CMA received one response, in support of the Provisional Decision.
- 1.5 This document sets out the CMA's Final Decision that relevant changes of circumstances have taken place and that, as a result, Part 1 (Article 2.1) and Part 4 of the Order (the Relevant Parts of the Order) are no longer appropriate

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<sup>1</sup> Some provisions in Part 5 of EA23 came into force on Royal Assent (EA23, s.334(2)(h)). Most of its other provisions were brought into force by the Energy Act 2023 (Commencement No. 1) Regulations 2024 (S.I. 2024/32). DESNZ intends that the remaining provisions (s.166(2) and s.168(2)) will be brought into force when the ISOP is designated (see further paragraph 3.7 below).

as originally drafted and should be varied by means of a variation order. It also gives formal Notice of Variation.

1.6 The CMA has published its Variation Order alongside this Final Decision.

## 2. Legal Framework

- 2.1 The CMA has a statutory duty under section 162 of the Act to keep under review undertakings and orders accepted or made under the Act.<sup>2</sup> From time to time, the CMA must consider whether, by reason of any change of circumstances:
- (a) undertakings are no longer appropriate and need to be varied, superseded or released; or
  - (b) an order is no longer appropriate and needs to be varied or revoked.
- 2.2 The nature of the CMA's consideration of any change of circumstances will depend on the individual circumstances affecting a particular undertaking or order. However, the change of circumstances must be such that the undertaking or order is no longer appropriate in dealing with the competition problem and/or adverse effects which it was designed to remedy, if it is to lead to either variation or termination.<sup>3</sup>
- 2.3 The process the CMA follows when conducting reviews of undertakings and orders is set out in CMA11, *Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders*.

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<sup>2</sup> In addition, Schedule 24 of the Enterprise Act 2002 requires the CMA to keep under review undertakings originally agreed under the Fair Trading Act 1973.

<sup>3</sup> CMA11, paragraph 2.5.

## 3. Final Decision

### Background

#### *The market investigation and the Order*

- 3.1 The CMA's market investigation into the energy market found, among other things, an adverse effect on competition (AEC) resulting from the absence of locational pricing in the wholesale electricity market. The CMA found that the problem was likely to distort competition between generators, with likely short- and long-run effects on electricity generation and demand.
- 3.2 To address its concerns, the CMA made the Order, which imposes a set of obligations on the Transmission Company (defined below) about Transmission Losses.<sup>4</sup> The definition of Transmission Company is therefore key to the Order.
- 3.3 Article 2 of the Order defines 'Transmission Company' as National Grid Electricity Transmission plc (NGET), or any successor body, as the holder of a transmission licence in relation to which the Gas and Electricity Markets Authority (GEMA) or the Secretary of State has issued a 'Section C Direction' (as defined in the transmission licence) and where Section C of the transmission licence remains in effect.
- 3.4 Article 2 of the Order defines 'Transmission Licence' as a licence granted or treated as granted under section 6(1)(b) of the Electricity Act 1989.
- 3.5 In 2019, the system operator functions of NGET, including those relating to Transmission Losses, passed to National Grid ESO (NG ESO). However, the licence under which NG ESO carries out the functions previously carried out by NGET is a licence of the same kind as NGET's licence.

#### **Reasons for undertaking a review**

- 3.6 In March 2024, DESNZ notified the CMA that the coming into force of Part 5 of EA23 and the establishment of a new ESO would have an impact on certain definitions in the Order. The CMA decided to undertake a formal review of the Order to determine whether this represents a relevant change of

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<sup>4</sup> The units of electricity unaccounted for on the Transmission System as allocated in accordance with the BSC and the Order.

circumstances which would result in the Order being no longer appropriate as currently drafted.

## **Change of circumstances**

- 3.7 Part 5 of the EA23 introduces an ESO licence, held by a single entity (the Independent System Operator and Planner (ISOP)), which carries out the transmission system operator functions relevant to the Order.
- 3.8 Part 5 of EA23, NG ESO (ie the company currently subject to the Order) (a) extracts NG ESO from the National Grid group; (b) gives it a new corporate identity as the National Energy System Operator (NESO); and (c) enables it to become the holder of an ESO licence and be designated as the ISOP by the Secretary of State under section 162 of EA23.
- 3.9 Section 166(2) of EA23 is in force from the time when NESO is designated as ISOP and granted the ESO licence (1 October 2024). Similarly, although some of the consequential amendments to existing legislation reflecting these changes set out in the Energy Act 2023 (Consequential Amendments) Regulations 2024 (S.I. 2024/706) have already been in force, others come into force immediately after the coming into force of section 166(2).
- 3.10 In relation to the Order, the current definitions of 'Transmission Licence' and 'Transmission Company' are no longer appropriate because they do not include an ESO licence or the holder of an ESO licence, and so do not cover the situation where a successor body to what were originally NGET's functions in relation to Transmission Losses holds an ESO licence, as will be the case for the ISOP/NESO. Therefore, unless the Order is varied, it would not apply to ISOP/NESO. Moreover, the specific provisions in the Order regarding obligations under the Transmission Licence (as defined in the Order) are no longer be appropriate because the ESO licence, which contains such obligations, is not a Transmission Licence as defined under the Order.

## **Stakeholder responses to the CMA's Provisional Decision**

- 3.11 The CMA received one response, from National Grid ESO (NG ESO), to its Provisional Decision and Notice of Intention to Vary. NG ESO supported the CMA's Provisional Decision and suggested some minor amendments to the proposed variations, most of which the CMA has implemented. Where the CMA has not implemented a proposed variation, this is because the CMA intends to achieve the necessary outcome expediently.



## **Changes to the Order**

3.12 The CMA's view is that the following variations should be made to the Order so that it becomes consistent with the changes introduced by Part 5 of EA23:

- (a) The defined term relating to the Transmission Company should be replaced with a new defined term: 'System Operator Company', with a new definition denoting that entity as the holder of an ESO Licence.
- (b) The Order should be varied to reflect the fact that the functions and obligations of the Transmission Company will be governed by an ESO licence rather than a Transmission Licence.

## **Conclusions on change of circumstances and appropriate outcome**

3.13 The CMA concludes that:

- (a) The coming into force of Part 5 of EA23 and the Secretary of State's proposal to establish the ESO amount to a relevant change in circumstances.
- (b) As a result, the provisions of the Order described above are no longer appropriate as currently drafted as they will no longer apply to NESO as holder of an ESO licence.
- (c) The most appropriate outcome is to vary these provisions by means of a variation order.

## **4. Notice of Variation**

- 4.1 As envisaged in paragraph 3.35 of [CMA11](#), and required under Schedule 10 of the Act, the CMA hereby gives notice of Variation of the Order to update the Relevant Parts of the Order and make minor amendments to the remainder of the Order to ensure the Order remains coherent.
- 4.2 The accompanying Variation Order has been published alongside this Final Decision.