Energy network mergers

Guidance on the CMA's procedure and assessment

CMA190

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1. Introduction

Scope of the guidance

1.1 The Energy Act 2023 (EA23) introduces into the Enterprise Act 2002 (EA02) a special merger regime applicable in certain circumstances to mergers involving two or more energy network enterprises (which are referred to as 'energy network enterprises' in this guidance)[1] of the same type in Great Britain (referred to as 'energy network mergers').[2] This guidance is concerned with the policies, procedure and methodology that the Competition and Markets Authority (CMA) will use in discharging its functions under the EA02.

1.2 This guidance should be read alongside other detailed guidance that the CMA has published or adopted in relation to merger control provisions of the EA02.[3] This guidance cross-refers to other CMA guidance extensively and the CMA strongly recommends that merger parties make themselves familiar with these guides. Where this guidance is different from the CMA's other merger control guidance, this reflects the specific merger control regime applicable to energy network mergers and this guidance takes precedence.

1.3 While the energy market is largely regulated and each energy network enterprise is a regional monopolist for the network services they provide, there are certain aspects of the market that are not subject to regulation, or have some degree of competition. If the businesses of both merging parties involve energy network enterprises of the same type, and also include other activities, the CMA will consider the parts of the transaction relating to the overlapping energy network enterprises under the special energy network merger provisions and the parts of the transaction relating to the parties' other activities under the general merger provisions of the EA02. If, in such a case, a merger is likely to give rise to competition issues, interested parties should refer to the CMA general merger guidance. The CMA will consider these issues on a case-by-case basis, however, to minimise the burden on the parties, where a transaction is being considered under both the special

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[1] 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).

[2] 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.

[3] For further information on competition issues please see the CMA's general merger guidance documents on our webpages.

energy network merger regime and the general merger regime, the CMA will generally endeavour to investigate the cases together.[4]

1.4 This guidance reflects the views of the CMA at the time of publication and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. It may in due course be supplemented, revised or replaced. The CMA's webpages will always display the latest version of the guidance. Where there is any conflict, or difference in emphasis or detail between this guidance and other guidance produced or adopted by the CMA, the most recently published guidance takes precedence.

1.5 For merger cases that are referred for an in-depth phase 2 investigation, the final decision-making authority is an independent group of experts selected from a panel appointed by the Secretary of State (the inquiry group). Where this guidance is expressed to apply to the CMA's policy when making decisions at phase 1 whether to refer a merger for an in-depth phase 2 investigation, this does not bind the independent inquiry group when undertaking its assessment at phase 2.

Purpose of the special energy network merger regime

1.6 The intention of the special energy network merger regime is to ensure that a merger between two or more energy network enterprises of the same type in Great Britain will not substantially prejudice the Office of Gas and Electricity Markets' (Ofgem)[5] ability to make comparisons for the purpose of carrying out its statutory functions under Part 1 of the Gas Act 1986 or Part 1 of the Electricity Act 1989.[6]

1.7 An 'energy network merger' for the purpose of this guidance means a merger which involves the merger of two, or more, energy network enterprises of the same type, eg of two electricity distribution licensees or two electricity transmission licences (see paragraph 2.10 and 2.11).

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[4] Section 68E EA02 makes provision for the CMA to make combined references under the energy network merger regime and the general merger regime, in which case the same group may consider the Phase 2 references jointly. If merger parties have reason to believe their merger is one where reviewing the cases together may not be appropriate, , they should explain this early in prenotification (see below).

[5] 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).

[6] Sections 68B(1) EA02 in respect of completed mergers, and 68C(1) EA02 in respect of anticipated mergers.

Who does what?

1.8 Under the special energy network merger regime, the CMA and Ofgem have specific roles during the phase 1 investigation process. The CMA is the UK's primary competition authority and is responsible for the merger control regime in the UK. However, Ofgem also has a statutory role in the phase 1 assessment of energy network mergers. The following section provides a brief overview of how these roles interrelate.

Role of the CMA

1.9 In line with the general mergers regime, the special energy network merger regime provides for a two stage process for energy network mergers (described below in Chapters 2 and 3).

1.10 Before the CMA forms a view on whether there is a duty to refer an energy network merger to Phase 2, it must request and consider Ofgem's opinion on whether and to what extent the creation of the relevant merger situation has prejudiced, or may be expected to prejudice Ofgem's ability to make comparisons between energy network enterprises of the type involved in the relevant merger situation, and whether any prejudice is outweighed by any relevant customer benefits in relation to the creation of the relevant merger situation.[7]

1.11 The CMA has the power under EA02 to accept undertakings in lieu of a phase 2 reference in relation to energy network mergers, as it can with general mergers. In relation to energy network mergers the UILs must remedy, mitigate or prevent the merger's prejudicial effect on Ofgem's ability to make comparisons.[8] When considering whether to accept UILs the CMA must request and consider Ofgem's opinion on the effect of the undertakings offered.[9]

1.12 Where the CMA refers the merger for an in-depth phase 2 investigation, it conducts a further analysis and the inquiry group must decide:[10]

- whether an energy network merger has been created or will be created;

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[7] Section 68D EA02.

[8] Before the CMA decides whether or not to accept UILs, it will request and consider Ofgem's opinion on the effect of the UILs. See section 73(3B) and (3C) EA02.

[9] Section 73(3D) EA02.

[10] Sections 35, 36 and 41 EA02 as modified by Schedule 5A to EA02.

- whether the energy network merger has substantially prejudiced, or may be expected to substantially prejudice, the ability of Ofgem to make comparisons between energy network enterprises; and

- where there is a prejudicial outcome, on the appropriate remedy.[11]

The role of Ofgem

1.13 Ofgem is a non-ministerial government department governed by the Gas and Electricity Markets Authority (GEMA) which works to protect customers, especially vulnerable people, in Great Britain by ensuring they are treated fairly and benefit from a cleaner, greener environment. Ofgem regulates the electricity and gas sector in Great Britain, including granting, modifying and enforcing licences, approving significant changes to the industry documents, and setting price controls for the network businesses and the price cap for energy supply companies.

1.14 Energy network enterprises are regional monopolies in relation to the licensed services they provide and are regulated by Ofgem in accordance with its statutory duties, in particular to protect the interests of existing and future consumers by working to deliver a greener, fairer energy system.[12] Ofgem compares information between energy network enterprises to regulate prices, and set incentives for energy network enterprises to promote choice and value for customers, improve their quality of service, and maintain a reliable and secure network.

1.15 Ofgem has the statutory duty of, where asked by the CMA, giving its opinion;

- whether and to what extent the creation of the merger has prejudiced, or may be expected to prejudice, Ofgem's ability, in carrying out its functions to make comparisons between energy network enterprises of the type involved in the merger, and

- whether any prejudice is outweighed by any relevant customer benefits in relation to the creation of the relevant merger situation.

1.16 When forming its opinion on these points, Ofgem must apply the methods set out in its statement of methods.[13] The statement of methods, sets out the criteria Ofgem will use in its assessment of the effect of the merger on its

[11] Section 41 EA02 (as modified by Schedule 5A to EA02). This may include behavioural, intellectual property and/or divestiture remedies.
[12] Section 4AA the Gas Act 1986 and section 3A the Electricity Act 1989.
[13] Sections 68D(3) to (7) EA02.

ability to make comparisons, and the relevant weight that it will place on each criterion.[14]

1.17 Where merger parties have offered UILs, the CMA must request and Ofgem must give its opinion on the effect of the UILs offered. The CMA must consider Ofgem's opinion.[15]

1.18 Ofgem does not have an express statutory role in a CMA phase 2 investigation and the final decision on whether to allow the merger to proceed is made by the inquiry group. However, based on its past experience in the water merger control regimes,[16] the CMA expects that in Phase 2 it will continue to engage with Ofgem building on the engagement at Phase 1, and Ofgem's views and submissions will play an important role in those investigations.[17]

[14] Section 68D(4) EA02.
[15] Section 73(3D) EA02.
[16] See paragraph 1.23 of the guidance on the CMA's procedure and assessment in water and Sewerage mergers (CMA49).
[17] See also CMA2 *Mergers: Guidance on the CMA's jurisdiction and procedure,* which describes the CMA's experience of working closely with sectoral regulators in the assessment of mergers and the careful consideration the CMA gives their views (currently chapters 2 (2.11), 9 (9.44), and 15 (15.3)).
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2. The legal framework

Introduction

2.1 The following chapter provides an overview of the statutory questions the CMA is required to answer in relation to energy network mergers.

Statutory questions

2.2 The EA02 imposes a duty on the CMA to refer completed and anticipated energy network mergers for an in-depth phase 2 investigation where the CMA believes that:

(a) there are arrangements in progress or in contemplation which have resulted or, if carried into effect, will result in the creation of a relevant merger situation involving an energy network merger; and

(b) the creation of that situation has caused, or may be expected to cause, substantial prejudice to the ability of Ofgem to make comparisons between energy network enterprises of the type involved in the energy network merger.

2.3 However, the CMA may decide not to make a reference where:

(a) for anticipated mergers, the arrangements are not sufficiently far advanced or not sufficiently likely to proceed to justify a reference;[18] or

(b) the energy network merger has substantially prejudiced, or is likely to substantially prejudice, Ofgem's ability to make comparisons between energy network enterprises, but that this prejudice is outweighed by RCBs relating to the merger.[19]

2.4 Before forming a view on the statutory questions described in 2.2(b) or 2.3(b) above, 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.[20] In view of the two-phase structure of the merger control regime, the CMA considers that for the purposes of the exception in (b) its duty to refer will apply if it believes that there is a realistic prospect of substantial prejudice to Ofgem's ability to make

[18] Section 68C(2)(a) EA02.
[19] Sections 68B(2) and 68C(2)(b) EA02.
[20] Section 68D(1)&(2) EA02.

comparisons between energy enterprises resulting from the energy network merger.

2.5 Where the CMA is under a duty to refer an energy network merger for a phase 2 investigation it may accept UILs to remedy, mitigate or prevent the merger's prejudice to Ofgem's ability to make comparisons between energy network enterprises.[21] When forming a view on UILs the CMA must consider the need to achieve as comprehensive a solution to that effect on Ofgem as is reasonable and practicable.[22] Moreover, the CMA must request and consider Ofgem's opinion on the effect of the offered UILs.[23]

2.6 Following a reference for a phase 2 investigation, the inquiry group must:

(a) confirm that an energy network merger has taken place or that arrangements are in progress which, if carried into effect, will result in an energy network merger; and

(b) determine whether the energy network merger has substantially prejudiced, or may be expected to substantially prejudice, Ofgem's ability to make comparisons between different energy network enterprises of the type involved in the energy network merger.[24]

2.7 If the inquiry group decides that there is a prejudicial outcome, it must decide the following additional questions:

(a) whether the CMA should take action for the purpose of remedying, mitigating or preventing the prejudice that has resulted, or may be expected to result, from this prejudice;

(b) whether the CMA should recommend the taking of action by others for this purpose; and

(c) in either case, what action should be taken and what is to be remedied, mitigated or prevented.[25]

2.8 In deciding whether action should be taken and, if so, what action, the inquiry group may in particular have regard to the effect of any such action on any RCBs in relation to the merger, provided that this would not prevent a solution

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[21] Section 73(3B) of EA02.
[22] Section 73(3C) EA02.
[23] Section 73(3D) EA02.
[24] Sections 35(1) and 36(1) EA02 as modified by paragraphs 6 and 7 of Schedule 5A EA02.
[25] Sections 35(3) and 36(2) EA02 as modified by paragraph 8 of Schedule 5A EA02.

to the prejudice concerned or the benefits are substantially more important than the prejudice.[26,27]

Jurisdiction

2.9 The CMA has jurisdiction to examine an energy network merger under the special energy network merger regime where:

- arrangements are in progress which, if carried into effect, will result in a merger of any two or more energy network enterprises of the same type (anticipated merger), or such a merger has taken place;[28] and
- where the merger has taken place, the merger completed not more than four months before the reference for a phase 2 investigation, unless completion took place without this having been made public and without the CMA being informed of it.[29]

The merger of two or more energy network enterprises of the same type

2.10 To establish if the transaction will result or has resulted in a merger of two or more energy network enterprises of the same type the CMA must determine if the merger parties are energy network enterprises (and, if so, whether they are of the same type). Both parties (or where the merger is between more than two parties, at least two of those parties) must be energy network enterprises of the same type for the special energy network merger regime to apply.[30] Where only one party is an energy network enterprise, or if the parties are energy network enterprises of different types, the transaction would be subject to assessment under the general merger regime set out in EA02.

2.11 The CMA must also determine whether the energy network enterprises will cease or have ceased to be distinct. This concept has the same meaning as in the general merger regime, and hence the CMA must identify whether the energy network enterprises are being brought under common ownership or

[26] Further discussion on RCBs can be found in Chapter 5.
[27] Sections 35(4) and 36(3) EA02 as modified by paragraphs 6 and 7 of Schedule 5A EA02.
[28] Section 68B and 68C EA02.
[29] Section 24 EA02.
[30] Section 68A(1), which provides '*a relevant merger situation involves an energy network merger if two or more of the enterprises that cease to be distinct are energy network enterprises of the same type'*, with section 68A(2) making provision for the '*the types of "energy network enterprise"*'. See also paragraph 910 of the *Explanatory Notes* to the Energy Act 2023 for a useful further exposition.

control.[31] Further guidance on this concept can be found in Chapter 4 of the Guidance on the CMA's jurisdiction and procedure (CMA2).

The turnover test

2.12 The jurisdictional test is based on turnover only and will be satisfied if the value of the turnover in Great Britain of the enterprise being taken over exceeds £100 million.[32] This differs from the general merger regime where mergers may qualify for investigation based on a turnover test or a share of supply test.[33]

2.13 The method of calculating the relevant turnover is consistent with the approach taken in the general merger regime.[34]

Time limits for reference decisions

2.14 After starting an investigation, the CMA is required to decide within a timetable of 40 working days whether its duty to refer is met. As in the general merger regime, this timetable starts on the first working day after the CMA confirms to the merger parties that it has received sufficient information to enable it to begin its investigation.[35]

2.15 In addition, as in the general merger regime, for the CMA to be able to refer a completed merger, the reference must take place within four months from the date of completion or, where completion was not made public and the CMA was not informed of it, within four months from the earlier of the time that material facts are made public or the time the CMA is told of material facts.[36] Further guidance on this concept can be found in Chapter 4 of CMA2 (currently paragraphs 4.47 to 4.51).

Merger fees

2.16 Subject to some limited exceptions, a fee is payable in respect of any energy network merger where the CMA reaches a decision on whether or not to refer

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[31] Section 26 EA02.
[32] Paragraph 2, of Schedule 5A to EA02 amended by the DMCC Act.
[33] Section 68F EA02 and paragraph 2 of Schedule 5A EA02. The share of supply test is where the enterprises that cease to be distinct supply or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it. The merger must also result in an increment to the share of supply or acquisition.
[34] Although only turnover in Great Britain (rather than the United Kingdom) is to be taken into account. Further guidance on this concept can be found in Chapter 4 of CMA2.
[35] Section 34ZA EA02.
[36] Section 24 of EA02.

the merger for a phase 2 investigation. This fee is applicable irrespective of whether a reference is made.[37]

2.17 The merger fee for energy network mergers is calculated by reference to the value of the turnover in Great Britain of the energy network enterprise being taken over and is payable to the CMA when the decision on whether or not to refer the merger for a phase 2 investigation is announced. The bands for this fee are, as for other mergers, as follows: [38]

- £120,000 where the value of the UK turnover of the enterprise being acquired is over £70 million but less than £120 million.
- £160,000 where the value of the UK turnover of the enterprise being acquired is over £120 million.

2.18 In addition, in relation to a combined reference,[39] the merger fee payable is the sum of the fee that would be owed in respect of a review[40] under the energy network merger regime and the fee that would be owed in respect of a review[41] under the general merger control regime.

2.19 For further information on merger fees please see Merger fees payment information on the CMA webpages and in CMA2.

[37] Pursuant to section 121 of the EA02 and the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended, most recently, by the *Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) and Energy Network Mergers (Consequential Amendments) Order 2023* SI 2023/1185).

[38] In practice as the jurisdictional test described above is based on turnover the lower bands which related to a turnover below that are not applicable to this regime so are not described in this guidance.

[39] Discussed in 1.3 of this Guidance and in accordance with section 68E EA02.

[40] Pursuant to sections 68B or 68C EA02.

[41] Pursuant to sections 22 or 33 EA02.

3. The merger process

Introduction

3.1 This chapter of the guidance provides more detail on certain aspects of the phase 1 and phase 2 energy network merger process. Annex A provides an overview of the principal stages and timings in a phase 1 and a phase 2 investigation. Annex B outlines the key interactions between the CMA and Ofgem in the phase 1 investigation.

Notifying energy network mergers

3.2 The UK merger regime is a voluntary notification regime. This means that there is no legal requirement to notify the CMA of an energy network merger even if it meets the jurisdictional threshold. However, the CMA keeps merger activity under review, and it may investigate mergers on its own initiative if a merger has not been notified.[42]

3.3 Where the CMA learns of an energy network merger, it may decide to send merger parties an enquiry letter requesting information about the transaction, in particular, to understand if the jurisdiction thresholds have been met.

3.4 Where merger parties have decided to make a voluntary notification to the CMA of the energy network merger, they are encouraged to enter into pre-notification discussions with the CMA and Ofgem at the same time.[43]

Information exchange between the CMA and Ofgem

3.5 Sharing of information (including data) between the CMA and Ofgem is crucial for the effective fulfilment of their respective duties under the special energy network merger regime and should reduce the burden on merger parties that could otherwise arise, for example from duplicative information requests. The CMA and Ofgem may, where appropriate, discuss with each other energy network merger issues that the merging parties bring to their attention, including pre-notification drafts and information obtained throughout the phase 1 investigation.

3.6 Any disclosure of information between the CMA and Ofgem, and any use by the recipient of such information, shall only be to the extent permitted by law,

[42] Further information can be found in CMA2, currently paragraphs 6.4–6.6 in particular.
[43] Further information can be found in CMA2, currently paragraphs 6.18–6.20 in particular.

including by reference to the provisions of Part 9 of the EA02 and Section 105 of the Utilities Act 2000.[44]

3.7 To minimise the burden on merger parties, where appropriate, Ofgem and the CMA will coordinate information requests. The CMA expects that the merger parties will work closely and openly with both itself and Ofgem throughout the entire phase 1 and phase 2 processes including any UIL process. In addition to relying on the 'gateways' for information exchange in Part 9 of the EA02 and Section 105 of the Utilities Act 2000, the CMA may request a waiver from the merger parties to allow disclosure of information between it and Ofgem.

Pre-notification

3.8 As is the case in the general merger regime, companies and their advisers are strongly encouraged to contact the CMA, and Ofgem, at an early opportunity to discuss the application of the Act to a merger situation. The CMA would strongly encourage pre-notification with the CMA and Ofgem take place at the same time.

3.9 The CMA's view on the importance and benefits of pre-notification are set out in CMA2 in the section on pre-notification. The CMA expects that pre-notification is likely to be particularly valuable in energy network mergers as the energy network sector is complex and features a high degree of specialised regulation. Discussions in advance can be used to clarify the information that the CMA, and Ofgem, require from the merger parties in order to start the investigation.

3.10 Pre-notification is the process in which the CMA ensures that it has all the information it needs before formally starting its merger inquiry. The 40 working day period within which the CMA must decide whether the test for reference is met begins on the working day after the CMA has confirmed to the merger parties that: (a) it is satisfied that it has received a complete Merger Notice meeting the requirements of the Act: or (b) the CMA believes that it has sufficient information to enable it to begin its investigation. In the case of energy network mergers, this will include the information Ofgem requires, in the form of a Merger Assessment Submission (and other information set out in Ofgem's Statement of Methods), to enable its assessment of the merger required for the purpose of providing its opinion to the CMA.[45] Merger parties

[44] For further information about information sharing between the CMA and Ofgem please see *Statement of intent*.
[45] For further information on the Merger Assessment Submission, see *Ofgem's approach to energy network mergers and statement of methods.*

should allow sufficient time in their planning for this and should approach Ofgem at the earliest opportunity to start this process.

Fast track reference cases

3.11 Energy network mergers are not in-scope of the section 34ZD EA02 *Fast-track reference requests*. The effect of this is that the CMA will not be able to operate the statutory 'fast-track' in respect of the competition assessment of energy network mergers, or combined cases.

3.12 As explained in paragraph 1.3 the CMA will generally endeavour to apply the special energy network merger regime together with the general merger regime, this means the CMA is unlikely to operate the statutory 'fast-track' process for the competition assessment in combined cases.

3.13 However, in some circumstances the CMA may consider whether it is appropriate to administratively accelerate the energy network merger assessment of a case to a phase 2 investigation where there is sufficient evidence of an adverse impact on Ofgem's ability to make comparisons for a reference, where this reflects the wishes of the merger parties and provides sufficient time for Ofgem to provide its opinion. For a case to be administratively fast-tracked the CMA must have evidence in its possession at an early stage of the investigation that it believes that the test for a reference to phase 2 is met and the notifying parties must have requested by conceding in writing that the test for reference is met and given consent for the use of the procedure.

Energy network merger assessment

3.14 A detailed discussion of the CMA's phase 1 merger assessment process in the general merger regime is in CMA2. This discussion also applies to energy network mergers except as set out below.

3.15 The assessment phase starts by the CMA issuing notice of commencement of the case on its webpages. An 'invitation to comment' to invite interested third parties to submit their views to the CMA on the transaction will also be issued around that time.[46] The CMA will also contact and interact with third parties directly to obtain their views on the merger, this may include other

[46] In some cases, the CMA may contact third parties and/or publish an invitation to comment notice during the pre-notification stage.

governmental bodies, industry, customer and consumer groups, to understand their views and request evidence to support them.

3.16 The CMA will liaise closely with both the merger parties and Ofgem during the lifetime of the case. The CMA will take account of the evidence provided by these third parties, including the merger parties and Ofgem, when forming its decision on the merger.

3.17 There may be a need for additional or more comprehensive information from merger parties beyond what is provided to the CMA in order to start its investigation.[47] Where the CMA identifies a need for further information it will ask for the data, information or documents as soon as it is clear that they are necessary.

3.18 The CMA has 40 working days to complete the initial phase 1 process. Ofgem and the CMA will work closely together throughout the phase 1 investigation.[48] Ofgem has a statutory role in phase 1 to provide the CMA with its opinion at key stages of the investigation. A table in Annex B lists the principal stages in phase 1 and an overview of the responsibilities of Ofgem and the CMA at each stage. Ofgem will input into the merger process at the following stages:

- **Pre-notification**: The CMA expects that the merger parties will engage with both Ofgem and the CMA during pre-notification.
- **Day 1:** The CMA will not start the investigation until it has sufficient information and Ofgem has the necessary information it requires to carry out its assessment.
- **No later than day 15:** Before the CMA's internal state of play meeting, Ofgem will provide the CMA with its draft opinion on whether the merger has substantially prejudiced or is likely to substantially prejudice its ability to make comparisons and its view of whether any such prejudice is outweighed by any RCBs of the merger.[49]
- **No earlier than day 25:** If the CMA decides to hold a case review meeting,[50] Ofgem will attend the issues meeting with the merger parties and will submit its final opinion to the CMA no later than two working days

[47] The CMA has the power under section 109 of the EA02 to issue a notice to require a person to provide information and documents or to give evidence. Section 109 of the EA02 applies to the CMA's investigations of energy network mergers in both phase 1 and phase 2 pursuant to section 68F EA02.
[48] For information on how the CMA and Ofgem will work together in practice, see *Statement of intent* [to be adopted].
[49] This is no later than 15 working days after the investigation has started.
[50] See CMA2, paragraphs 9.53 to 9.67 .

before the CMA sends the issues letter to the merger parties. Ofgem and the CMA will discuss the issues letter before it is sent to the parties. The merger parties will be sent a non-confidential version of Ofgem's opinion with the issues letter.

- **By day 40:** The CMA will decide whether to refer the energy network merger for a phase 2 investigation and CMA will provide the reasons for its decision to the merger parties.

3.19 If the CMA finds that it is under a duty to refer the merger for a phase 2 investigation the merger parties have an opportunity to avoid this outcome by offering the CMA UILs at phase 1. The CMA cannot impose remedies on the merger parties at phase 1.

3.20 Merger parties can discuss potential UILs with the case team or decide to offer UILs at any stage of the phase 1 investigation. The statutory framework means that the CMA will only formally consider UILs after a decision has been taken. Notwithstanding this, the CMA strongly recommends that where merger parties believe a merger has the potential to raise concerns they consider possible UILs during pre-notification and in the early stages of the investigation and discuss these with the CMA case team and Ofgem. These discussions can help merger parties to identify if the UILs being discussed might be suitable to address any concerns. These early discussions also help to ensure that if the CMA reaches a decision to provisionally refer the case for a phase 2 investigation the merger parties will be able to formally propose UILs quickly and maximise the chances of the UILs being accepted.[51]

3.21 The latest the parties can offer such UILs is five working days after receiving the CMA's reasons for its decision that the duty to refer is met. Where the parties make such an offer, the CMA must decide within ten days of the decision, taking account of Ofgem's views, whether there are reasonable grounds for believing that the UILs offer or a modified version of them might be accepted by the CMA. If so, the CMA must reach a final decision on acceptance of the UILs within 50 working days from the date of the parties' receipt of the CMA's decision that the duty to refer is met. The CMA can extend this period by a further 40 working days if it considers there are special reasons for doing so. The high-level process and indicative timings following the receipt of the duty to refer decision are:

[51] For further information see CMA2, Chapter 9.

- **UILs day 0-5**: During the five-day period that the parties have to offer UILs following receipt of the CMA's decision Ofgem may attend meetings or calls with the CMA and merger parties on UILs.

- **UILs by day 9**: Ofgem submits its provisional opinion on the UILs offered to the CMA by the ninth day following the CMA's decision.

- **UILs by day 10:** The CMA considers Ofgem's provisional opinion and the evidence submitted by the merger parties and decides whether there are reasonable grounds for believing that the UILs offered (or a modified version of them) might be accepted by the tenth day following the CMA's decision.

- **UILs consultation:** If the CMA decides to consult on the UILs offered Ofgem will give detailed consideration to the UILs offered and submits its final opinion to the CMA two days before the start of the consultation.

- **UILs by day 50:** After the public consultation (of at least 15 calendar days) the CMA decides whether or not to accept the UILs offered and publishes its decision.

Publication

3.22 By working day 40 of the phase 1 investigation the CMA is required to publish a notice of its decision and provide the reasons for its decision to the merger parties.[52] In some cases this is accompanied by a press release. Following discussions with the merger parties and Ofgem a non-confidential version of the full CMA decision will be published at a later date.

3.23 A link to the CMA's and Ofgem's publications related to the merger will be provided on each organisation's respective websites. Unless otherwise agreed with the CMA, Ofgem will not normally publish its opinion until after the CMA has published its full non-confidential decision.

Phase 2 process

3.24 If the CMA refers an energy network merger for a phase 2 investigation, in line with the general merger regime the CMA has 24 weeks for this investigation. This may be extended by up to eight weeks if it considers that there are special reasons why a report cannot be prepared and published

[52] See further CMA2, Chapter 9.

within the deadline. A diagram outlining the process and the expected timelines that apply to general mergers can be found in Annex A.

3.25 Guidance on the phase 2 process and the role of the Inquiry Group and case team, and the process for phase 2 is set out in CMA2. The process for energy network merger investigations will follow the same procedure as general merger investigations.

3.26 The appointed Inquiry Group are the decision makers on phase 2 inquiries. Their role is to set the overall direction of the inquiry, review the appropriate evidence and analysis, and answer the statutory questions on the case. Inquiry Groups are required by law to act independently of the CMA Board, and therefore make their own independent decisions, based on the objective evidence before them. The inquiry groups are supported by a CMA case team.

3.27 In contrast to a phase 1 investigation, Ofgem does not have an express statutory role in a phase 2 merger. However, it is likely that the CMA will continue to work closely with Ofgem throughout a phase 2 investigation. The CMA will, in its approach to disclosure to the merging parties of any evidence or submissions provided by Ofgem, adopt the same approach as that which it takes regarding third party evidence and submissions at phase 2.[53]

[53] See CMA2, paragraphs 11.57-11.63, which sets out the CMA's approach to disclosure in its report setting out its provisional decision on the statutory questions the Inquiry Group must decide at phase 2.

4. Analytical approach and methodologies

Introduction

4.1 The question of substance that the CMA has to consider in its decision on energy network mergers is whether the merger may substantially prejudice Ofgem's ability to make comparisons between energy network enterprises of the same type, and if so, to what extent. The basic analytical framework on this question applies across both phases 1 and 2 of the CMA's investigation.

4.2 There are different legal tests that apply at phase 1 and phase 2 and as a consequence of this, there are different evidential thresholds on prejudice between the two phases. The question for the CMA at phase 1 is whether there is a '**realistic prospect**' that a merger would substantially prejudice Ofgem's ability to make comparisons between energy network enterprises. At phase 2 the question for the CMA is whether the merger would, on a '**balance of probabilities**,' substantially prejudice Ofgem's ability to make comparisons.[54] Given these different legal tests, and the time constraints, a Phase 2 investigation is typically more in-depth than a Phase 1 investigation.

4.3 The section below explains briefly the main areas where Ofgem makes comparisons, and the factors that the CMA may take into account in its assessment of prejudice, which makes reference to Ofgem's statement of method.

Use of comparators by Ofgem

4.4 Ofgem is responsible for the economic regulation of the energy network sector in Great Britain.

4.5 As each energy network enterprise is effectively a regional monopoly for their network service, comparative regulation has underpinned the way Ofgem has regulated the energy network sector since privatisation. Ofgem uses comparisons both during the price control process, for example in setting price limits and service quality requirements or to set incentives, and between price controls, for monitoring and enforcement, and spreading best practice.

4.6 If more energy network enterprises of the same type cease, or have ceased, to be distinct because they are being brought under common ownership or

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[54] The 'realistic prospect' formulation is shorthand for more complex statutory language. The Court of Appeal clarified the meaning of 'is or may be the case that … may be expected to result' used in sections 22 and 33 in its judgment dated 19 February 2004 in *IBA Health Limited v OFT* [2004] EWCA Civ 142.

common control, there is a potential detriment to Ofgem's ability to make use of comparators in setting controls.

4.7 Ofgem's regulatory framework for network enterprises uses the concept of a 'notional efficient' network licensee. A notional efficient network licensee is a hypothetical construct that Ofgem uses as a 'yardstick' for actual network licensees when setting expenditure allowances, performance targets, and regulatory incentives that rewards licensees that move closer to (or beat) the yardstick and penalises licensees that fall behind. Ofgem estimates the performance levels and expenditure of a notional licensee by making comparisons of the actual and planned performance and expenditure of actual licensees. Comparisons help Ofgem overcome issues of imperfect and asymmetric information, to better allow it and other stakeholders to assess company performance, and enable it to identify the levels of performance that can be expected from a well-run and notionally efficient network operator.

4.8 This comparative approach can improve cost estimation, as Ofgem is better able to assess the true costs of energy network enterprises by comparing costs across a number of independent firms operating in similar circumstances, and to control for differences between companies. The number and quality of comparators is of particular importance to econometric modelling since its statistical robustness depends on the number, independence, and degree of variation of observations.

4.9 In *Ofgem's approach to energy network mergers and statement of methods*, Ofgem describes in Chapter 4 how it uses comparators to achieve a number of regulatory purposes:

(a) the role of comparisons in setting outputs,

(b) the role of comparisons in setting revenue allowances,

(c) the role of comparisons in calibrating uncertainty and risk-sharing mechanisms,

(d) the role of comparisons in driving ongoing improvements in cost efficiency,

(e) the role of comparisons in driving ongoing performance improvements,

(f) the role of comparisons in supporting Ofgem's enforcement functions,

(g) the role of comparisons in encouraging high quality regulatory submissions and engagement with regulatory processes.

4.10 Ofgem's approach to regulation and therefore how it uses comparators has evolved over time and can be expected to continue to evolve in response to developments in the sector.

Impact of a merger on Ofgem's ability to make comparisons

Ofgem's statement of methods

4.11 In *Ofgem's approach to energy network mergers and statement of*, Ofgem explains that at a high-level the different ways in which a merger could have detrimental impacts on Ofgem's ability to make comparisons between energy network enterprises, which include:

(a) *a reduction in the quality of available information on costs and performance* – there is a risk that, even if there continue to be separate reporting obligations in respect of each network licensees, there may a reduction in the quality of information available for comparisons, e.g. increased common costs incurred centrally (see below on loss of diversity of approach);

(b) *a reduction in the diversity of management approaches and practices* – there is a risk that a merger leads to a reduction in the diversity of management approaches and practices weakening the use of comparators and limiting the availability of information on effective innovation, efficient levels of costs and good performance;

(c) *a reduction in the rivalry between network licensees* – Ofgem's ability to use its regulatory mechanisms to mimic competitive pressures risks being reduced if licensees are in common ownership or control and the incentive to compete between licensees is diminished.

4.12 Ofgem explains it expects to give its opinion to the CMA on the likely extent of the impact of the merger on its ability to make comparisons between energy network enterprises shaped by four criteria:

- **Criterion 1**: Could the merger lead (or has the merger led) to a loss, or a deterioration in the quality, of information available to Ofgem on a) the relationship between costs and performance; and b) exogenous drivers of costs and performance such as regional factors (eg urbanity, sparsity)?

- **Criterion 2**: Could the merger lead (or has the merger led) to a loss, or a deterioration in the quality, of information available to Ofgem on good performance/behaviours and efficient levels of costs?

- **Criterion 3**: Could the merger lead (or has the merger led) to a reduction in the diversity of management approaches and practices in a way that adversely affects the availability of information of good performance and efficient levels of costs?

- **Criterion 4**: Could the merger lead (or has the merger led) to a reduction in rivalry between network enterprises in a way that adversely affects the incentive of individual licensees to pursue performance improvements and cost efficiencies?

CMA approach

4.13 The CMA considers that an increase in common ownership or control across one or more companies has the potential to affect the ability of Ofgem to make comparisons. A merger may have an adverse impact on Ofgem's ability to:

(a) set price controls (in relation to each network service);

(b) monitor and incentivise service quality and innovation; and

(c) use comparisons to carry out ongoing monitoring and enforcement activities, and to identify and spread best practice.

4.14 Some examples of the type of factors that the CMA may consider (consistent with Ofgem's statement of methods) when assessing the impact of the merger on the value of Ofgem's comparisons are:

(a) **Number and quality of independent observations that remain.** Any reduction to the number of comparators can have an impact on the robustness of Ofgem's analysis by reducing the number of independent observations available to compare costs, outputs and service quality. The CMA will consider the impact of a merger on the number and quality of comparators, and whether this is likely to make Ofgem's analysis less robust, for example by reducing the precision of its cost modelling. Other things being equal, the impact from the loss of a comparator (particularly where others have been lost in the past) may be expected to increase for each successive merger that occurs, as fewer comparators would remain.

(b) **Loss of an independent comparator.** An energy network merger brings under common ownership or control two or more types of licenced business. In general, it is anticipated that companies under common ownership may behave in similar ways, affecting how their future performance on costs, outputs, quality and innovation, including how this

information is monitored and recorded. Therefore, an energy network merger may reduce the value of comparisons made by Ofgem.

(c) **Extent to which the merger will change benchmarks**. If at least one of the merging companies is high performing in some areas, there is a greater risk of detriment for customers than if both companies are poor performers. This is because there is a risk that a high performing comparator might be lost as a result of the merger, which would have an adverse impact on cross-industry benchmarks, reducing the scale of challenge for other companies in the sector. At the same time there may be potential benefits of a high performing company taking over a poorer performing company, since it might improve the performance of a poorer performing company by providing improved efficiency or service to a greater number of customers, though this would need to be evidenced. When assessing whether one or both merger parties is high performing the CMA will examine their performance at the last price determination and actual or expected changes, eg their expected performance at the next determination.

(d) **Loss of a company with important similarities.** A merger can lead to the loss of a company with important similarities to the remaining companies. For example, a merger between companies with similar make-up (eg urbanity, sparsity) could affect Ofgem's ability to make comparisons across companies that are operating in similar circumstances facing similar issues.

(e) **Loss of a company with important differences.** A merger can lead to the loss of a company with important differences from the remaining companies. These differences can take the form of best practice in some areas, or the use of innovative approaches. The loss of these important differences in approach as a result of the merger can have an adverse impact on Ofgem's use of comparators.

(f) **A change to Ofgem's approach.** It may be possible for Ofgem to change the way that it regulates to offset, at least to some extent, the potential detriment from the loss of a comparator. This could include using different econometric techniques or a different choice of benchmark within the sample.

4.15 In considering the impact of a merger on Ofgem's ability to make comparisons the CMA will take into account the relevant factors set out above. Hence the impact depends on the circumstances of the merger under consideration not merely the loss of a comparator. Consequently, it is not possible to state, for example, a minimum number of comparators below which Ofgem's ability to

make comparisons would be substantially prejudiced. Other things equal, the impact from the loss of a comparator (particularly where others have been lost in the past) may be expected to increase for each successive merger that occurs, as fewer comparators would remain.

4.16 Where possible and appropriate the CMA will seek to quantify the adverse effect of the merger. The CMA notes that it is also Ofgem's intention, 'to the extent that it is analytically feasible, … to quantify the impact of the merger on existing and future consumers in monetary terms', and where possible and appropriate will welcome the submission of such analysis in its opinion. The CMA's decisions will be based on an assessment of both quantified and non-quantified impacts.

4.17 In reaching its decision at phase 1 the CMA will place significant weight on Ofgem's opinion on whether the merger is likely to prejudice its ability, in carrying out its functions, to make comparisons between energy network enterprises. The prospect of a clearance at phase 1, on the basis of a lack of substantial prejudice, or acceptance of UILs is likely to be higher when the views of the parties and Ofgem on the impact of the merger are relatively aligned. In particular, where Ofgem considers that a merger is likely to lead to prejudice, but the parties disagree with its analysis, and a detailed analysis is required for the CMA to take a decision, the CMA would typically expect the case to progress to phase 2.[55]

4.18 To be satisfied that the CMA's duty to refer the case for a phase 2 investigation does not apply, the CMA needs to be able to make a decision that the merger is not likely to substantially prejudice Ofgem's ability to make comparisons within the constraints of the phase 1 timetable. Therefore, even where there is agreement in principle between Ofgem and the parties on whether the merger is not likely to lead to prejudice, the CMA may conclude that the issues are sufficiently complex that a referral is necessary to come to a conclusion. This would need to be considered on a case-by-case basis, based on a review of the specific circumstances of the evidence provided.

[55] The time and resource constraints of the phase 1 merger process imply that the CMA will not be able to undertake extensive analysis at phase 1 in order to arbitrate between widely differing estimates of a merger's impact provided by the parties and Ofgem.

5. Relevant customer benefits

Introduction

5.1 At phase 1, one of the exceptions to the CMA's duty to refer energy network mergers for an in-depth phase 2 investigation applies if the RCBs in relation to the energy network merger outweigh any prejudice to Ofgem's ability to make comparisons. Further, the CMA may also have regard to RCBs in deciding on any remedies in a phase 2 investigation.

5.2 The CMA has published guidance on RCBs in its *Mergers: Exceptions to the duty to refer CMA64*. That guidance, as amended from time to time, should be consulted with this chapter providing further information on potential RCBs and their role in energy network merger investigations.

Possible relevant customer benefits in energy network mergers

5.3 With the introduction of the new energy network merger regime in 2023, the CMA is not well placed in this first iteration of its energy network merger guidance to give detailed guidance on the type of RCBs that parties might present or how it may approach them. However, some guidance can be given based on its experience of operating the general merger and special water merger regimes.

5.4 RCBs may be taken into account during both phase 1 and phase 2 of the special energy network merger regime. RCBs are limited to benefits to 'relevant' customers in the form of:

- lower prices, higher quality or greater choice of goods or services in any market in Great Britain; or
- greater innovation in relation to such goods and services.[56]

5.5 Energy network mergers that lead to cost savings may generate RCBs if they lead to lower prices. An energy network merger might lead to cost savings due to economies of scale or scope in the supply of network services. The CMA will assess both the expected cost savings and the extent to which any such cost savings can be expected to lead to RCBs by being passed on to the merged company's customers. In assessing RCBs the CMA will have regard

[56] Section 30 EA02 as modified by paragraph 4, *Relevant customer benefits*, of Schedule 5A to EA02.

to the timing and relative certainty of the proposed benefits, including the mechanism by which cost reductions would result in lower prices.

5.6 An RCB may also arise from higher quality. Before deciding that such a benefit is an RCB, the CMA would have to be satisfied that it would be unlikely to accrue without the merger, eg that it could not be achieved through investment by one or both of the parties on an individual basis.

5.7 In addition, an RCB could take the form of greater choice of goods or services, or greater innovation. As above, the CMA would have to be persuaded on the basis of compelling evidence that such benefits were merger-specific, realistic, and would be passed through to customers.

CMA approach to relevant customer benefits in phase 1

5.8 Where the CMA concludes that there is a realistic prospect that a merger gives rise to substantial prejudice to Ofgem's ability to make comparisons, it will further consider whether the likely prejudice is outweighed by RCBs in reaching its decision on whether the reference test is met. Quantitative and qualitative measures of both the prejudice and the RCBs may be considered. It is not sufficient that there are merely some theoretical benefits to customers: the merging parties must demonstrate that benefits will be passed on to customers and that those benefits will outweigh the identified prejudice.

5.9 In reaching its decision on whether a merger should be referred to phase 2 the CMA will place significant weight on Ofgem's opinion on whether the prejudice identified is outweighed by any RCBs relating to the merger.

CMA approach to relevant customer benefits in phase 2

5.10 At phase 2, in deciding on remedies the CMA may have regard to the effect of any such action on any RCBs in relation to the merger, provided that: (a) a consideration of those benefits would not prevent a solution to the prejudice concerned; or (b) the benefits that may be expected to accrue are substantially more important than the prejudice concerned.[57] If the first circumstance is applicable, the CMA will, wherever possible, seek to choose remedial action that would not adversely affect the RCBs. If the second circumstance is applicable it may be taken into account in the CMA's decision on whether remedial action should be taken, and if so, what action that should be.

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[57] Sections 35(7) and 36(6) of EA02 as modified by Schedule 5A EA02.

6. Approach to remedies

Introduction

6.1 The general aim of remedies in energy network mergers is to remedy, mitigate or prevent the prejudicial effect of the merger on Ofgem's ability to make comparisons.

6.2 This section supplements the CMA merger remedies guidance, in relation to energy network mergers.[58]

6.3 At Phase 1, where the CMA decides that there is a realistic prospect that the merger gives rise to substantial prejudice to Ofgem, the CMA has discretion to accept UILs instead of making a reference to Phase 2. In exercising this discretion, the CMA may accept from the merger parties, undertakings to take such action as the CMA considers appropriate to remedy, mitigate or prevent the prejudice concerned or any adverse effect resulting from it.[59]

6.4 At Phase 2, where the CMA concludes that a relevant merger situation has resulted, or may be expected to result, in substantial prejudice to Ofgem's ability to make comparisons, it is required to decide whether action should be taken to remedy, mitigate or prevent the prejudice or any adverse effect resulting from the SLC. The CMA is also required to decide whether such action should be taken by itself or recommended for others, such as Government, regulators or public authorities.[60] In either case, the CMA must state in its final report the action to be taken and what it is designed to address.

Types of remedies

6.5 Remedies may be either structural or behavioural.

6.6 Structural remedies are intended to restore all or part of the industry structure prior to the merger, for example:

- prohibition of a proposed merger,
- divestiture of a completed acquisition, or

[58] *Merger Remedies* (CMA87).
[59] Section 73(3B) EA02.
[60] Sections 35 and 36 EA02 as modified by Schedule 5A EA02.

- partial prohibition or divestiture (covering part of one or more of the merging companies' businesses, for example either through a reduced equity stake; or through the sale of a non-contiguous part of the energy network enterprise, which could create an additional independent comparator).

Prohibition and divestiture

6.7 Given that the effect of the merger is to change the structure of the industry, and the ability to make comparisons, remedies that aim to restore all or part of the status quo ante industry structure are likely to be a direct way of addressing the substantial prejudice or its adverse effects.

6.8 Accordingly, with a proposed merger, the most effective remedy will often be the prohibition of the merger (or in the case of a completed merger, a divestiture).

6.9 As an alternative to either prohibition or divestiture of the acquired business, the CMA may consider divestiture of the acquirer's holdings in other energy enterprises, where this would be as effective in restoring Ofgem's ability to make robust comparisons.

Partial prohibition and divestiture

6.10 Partial prohibition and divestiture (rather than outright prohibition or full divestiture) may be an appropriate remedy in some cases. This may be the case when Ofgem's ability to make comparisons would be restored by divestiture of part of one of the merging companies. A partial divestiture might be of a stand-alone, going-concern licensed business, for instance divesting a licensed business from the wider corporate group.

6.11 The *Mergers Guidance* (CMA87) outlines the CMA's general approach to defining divestiture packages (see Chapter 5 (Divestiture Remedies)).

6.12 There are two key questions that will help to determine whether partial prohibition or divestiture can be an effective remedy in an energy network merger case:

- whether the business or assets to be divested provide the basis of a viable business that can operate independently of the merging firms and, in a reasonably short time can be expected to provide an effective comparator to Ofgem; and

- whether there is a suitable purchaser of the assets who will be capable of operating the assets and running a viable, independent and competitive business.

6.13 As with other remedies, the CMA will have regard to RCBs in considering partial prohibition and divestiture.

6.14 In relation to full or partial divestiture at either phase 1 or phase 2, the CMA's approval of the purchaser would be required before the divestiture is allowed to be completed. Further guidance on purchaser suitability is in Chapter 5 of CMA87, in particular paragraphs 5.20 to 5.32.

Behavioural remedies

6.15 In the general merger regime, the CMA has a preference for structural remedies over behavioural remedies because structural remedies are more likely to deal with an SLC directly and comprehensively, whereas behavioural remedies are less likely to have an effective impact and require more monitoring and enforcement.[61]

6.16 However, certain behavioural remedies may in principle be more likely to operate satisfactorily where the company operates in a regulated environment and where there are expert monitors, such as may be the case for energy network enterprises and Ofgem.[62]

6.17 The assessment of whether a behavioural remedy may be effective will depend on the circumstances of the case, and the characteristics of the prejudice to be remedied, but in principle this could include changes to the merging companies' price caps; performance commitments and incentives; business separation;[63] and licence conditions requiring the provision of information to Ofgem.[64] In such circumstances the time period that such commitments would apply must be clearly identified.

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[61] See paragraphs 3.45-3.56 CMA87.

[62] *Merger Remedies* (CMA87), paragraph 3.48.

[63] For example, a requirement to maintain separate management and/or separate accounting and reporting arrangements that are subject to external assurance assessments (this could, for example, involve the creation of a separate company to manage particular parts of the energy networks).

[64] Such remedies would take the form of the CMA recommending that action be taken by others, in particular Ofgem modifying licensing conditions.

Phase 1 – Undertakings in lieu of a reference

6.18 Where the CMA decides in phase 1 that the reference test is met, the parties may offer UILs.[65] The CMA will consider whether the proposed UILs would remedy, mitigate or prevent the prejudicial effect of the merger on Ofgem's ability to make comparisons. When considering UILs the CMA must have regard to the need to achieve as comprehensive a solution as reasonable and practicable to the prejudicial effect on Ofgem's ability to make comparisons. The CMA may have regard to the effect of accepting UILs on any RCBs in relation to the merger. Where UILs are offered by the merger parties the CMA must consider Ofgem's opinion on the effectiveness of the UILs offered, and would expect to place significant weight on it.[66] Guidance on the CMA's general policies on UILs is available in the CMA's Merger Remedies.[67]

6.19 In order to accept UILs the CMA must be confident that the potential concerns regarding prejudicial effect that have been identified in its investigation would be resolved by means of the UILs without the need for further investigation. UILs are therefore appropriate only where the remedies proposed to address any concerns are both clear cut and capable of ready implementation.[68]

6.20 The CMA will generally expect UILs to restore Ofgem's ability to make comparisons between energy network enterprises to a level similar to that which existed pre-merger.

6.21 Structural remedies are capable of being clear-cut solutions in energy network mergers as they are in the wider economy and in line with its general merger guidance (and as discussed above).

6.22 The CMA will consider behavioural remedies for mergers in markets in which there already exists a significant degree of regulation (such as energy network mergers) and describes above in 6.26 to 6.28 what in principle may be in scope.[69] Within regulated sectors, an agreement to clear cut and enforceable licence modifications may be similarly effective to a structural remedy depending on the nature of the prejudice that would otherwise arise. However, there would need to be a binding commitment to any such licence modifications, and the form would need to be clear and unambiguous.

6.23 Whilst this provides flexibility to consider both behavioural and structural remedies on a case-by-case basis, the CMA will nevertheless expect UILs to

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[65] Section 73 EA02.
[66] See Chapter 3, paragraph 2.5 for further information.
[67] CMA87, paragraphs 3.25-3.33
[68] *Merger Remedies* (CMA87), paragraph 3.27.
[69] *Merger Remedies* (CMA87), paragraph 3.48.

remedy, mitigate or prevent the prejudicial effects to meet the test that no reference to phase 2 is required. The CMA would not accept behavioural remedies that are solely for the purpose of providing RCBs (ie benefits to the customers of the merging companies) in phase 1, where there is evidence of likely prejudice arising from the merger, and the behavioural remedies do not address that prejudice. This is comparable to the general merger regime, where RCBs are a potential exception to the duty to refer a merger to phase 2 however any RCBs must outweigh the SLC in all affected markets at phase 1.[70] A phase 2 investigation allows the CMA to take a balanced view of the way in which any RCBs might form part of the remedial action required, the phase 1 process should not attempt to pre-empt this if at phase 1 it is identified that a prejudice is likely to be arising from the energy network merger.

6.24 The CMA would expect parties to engage with both the CMA and Ofgem at the earliest opportunity to discuss potential UILs.

[70] See paragraph 5.15.

Annex A: Principal stages and interaction between the CMA and Ofgem during a phase 1 investigation

Day[71]	Stage	CMA	Ofgem
Typically at least two weeks before notification	Pre-notification	The CMA and Ofgem discuss the transaction with the parties, including the relevant information required from the parties necessary to prepare the opinion and start the investigation.	
1	Commencement of phase 1	The CMA publishes on its website the notice of commencement of phase 1	
1	Information gathering	The CMA and Ofgem will continue to liaise with the parties throughout the 40 working day period and request further information as appropriate.	
1-10	Invitation to comment	The CMA will publish an invitation to comment notice on its webpages inviting views from third parties. The CMA will provide Ofgem with any responses received by third parties that are relevant for its assessment.	
15–20	State of play meeting	The CMA will hold a 'state of play' discussion with the merger parties.	Ofgem will attend the state of play meeting. Ofgem will provide the CMA with a draft opinion on the transaction no later than day 15.
Phase 1 decision (for cases raising no serious concerns)			
By day 40	Phase 1 decision (for cases raising no serious concerns)	CMA clears the transaction and issues a clearance decision.	
Phase 1 decision process (for cases raising more complex or serious concerns)			
By day 40 but typically no earlier than day 25	Issues letter	CMA will share and discuss the issues letter with Ofgem before sending it to the merger parties. CMA sends an issues letter to the parties. CMA organises an issues meeting	Ofgem provides the CMA with its final opinion on the issues raised by the merger no later than two working days before the issues letter is sent to the parties. Ofgem provides the CMA with a confidential and non-confidential version of its opinion; the parties will receive the non-confidential version when they receive the issues letter.
	Issues meeting	The CMA will consider any response Ofgem subsequently makes to the parties response to the issues letter. The CMA may ask Ofgem to provide supplementary information in relation to its opinion or additional evidence submitted by the parties.	Ofgem will attend the issues meeting. Ofgem will be available to meet the CMA case team and explain the reasoning and analysis in its opinion. Where appropriate Ofgem will provide the CMA with its reply to the parties' response to the issues letter and issues meeting.

[71] Working days.

Day[71]	Stage	CMA	Ofgem
By day 40	Phase 1 decision (for cases raising more complex or serious concerns)	CMA holds an internal case review meeting.	
		CMA publishes notice of its decision (whether the test for reference has been met).	
After day 40	Publication of the decision	At a later date the CMA will publish a full non-confidential decision.	Ofgem will provide a non-confidential version of its opinion to the CMA following the publication of the CMA's full decision.
Undertakings in lieu of a reference			
Before day 40	Preliminary discussion on UILs	The CMA will inform Ofgem as soon as practical of any material discussions on UILs. The CMA will share with Ofgem any relevant information provided by the parties on potential UILs.	(Where appropriate) Ofgem may attend meetings and/or calls between the CMA and the merging parties when discussing UILs. Ofgem will provide the CMA with a written or oral provisional opinion[72] on any potential UILs that have been raised by the parties.
0–5 days after reference decision	Parties offer UILs	If no UILs are offered within 5 days of the decision the CMA will refer the merger for a phase 2 inquiry. CMA will share with Ofgem UILs offered.	
0–10 days after reference decision	Consideration of the UILs	The CMA considers the UILs and Ofgem's provisional opinion and makes a decision whether to provisionally accept or reject the UILs offered.[73]	Ofgem provides the CMA with a provisional opinion on the UILs offered by the parties no later than 9 days after the reference decision.
Within 50 days of the reference decision	Agreement and acceptance	The CMA gives detailed consideration to the UILs offered and publishes draft UILs for comment. If UILs are agreed the CMA publishes notice of acceptance; if not the transaction is referred to phase 2.	Ofgem submits its final opinion to the CMA on the UILs offered by the parties no later than two days before the consultation period begins.[74]

[72] This provisional opinion may not reflect Ofgem's final formal view and may not have approval from its board.
[73] Where there is a disagreement between the CMA and Ofgem on the UILs offered, the CMA will inform Ofgem before it takes its final decision. Where UILs proposed by the merger parties are rejected by the CMA the merger will proceed for a phase 2 investigation.
[74] For further information please see *Statement of intent* [to be adopted].

Annex B: Principal stages of a CMA merger investigation

Figure 1 below 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.

Figure 1: CMA merger investigations – principal stages