

Changes to legislation: There are currently no known outstanding effects for the Energy Act 2023, Part 1. (See end of Document for details)

SCHEDULES

SCHEDULE 16

MERGERS OF ENERGY NETWORK ENTERPRISES

PART 1

FURTHER DUTIES OF COMPETITION AND MARKETS AUTHORITY TO MAKE REFERENCES

1 Part 3 of the Enterprise Act 2002 (mergers) is amended as follows.

Commencement Information

II Sch. 16 para. 1 in force at Royal Assent, see [s. 334\(2\)\(j\)](#)

2 After section 68 insert—

“Mergers of energy network enterprises in Great Britain

68A Relevant merger situations involving energy network mergers

- (1) For the purposes of this Part, 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.
- (2) For the purposes of this Part, the types of “energy network enterprise” are—
 - (a) an enterprise holding a licence under section 7 of the Gas Act 1986 (gas transporter);
 - (b) an enterprise holding a licence under section 6(1)(b) of the Electricity Act 1989 (transmission of electricity), except as mentioned in subsection (3);
 - (c) an enterprise holding a licence under section 6(1)(c) of the Electricity Act 1989 (distribution of electricity), except as mentioned in subsection (3).
- (3) An enterprise holding a licence under section 6(1)(b) or (c) of the Electricity Act 1989 is not an energy network enterprise if—
 - (a) the licence was granted following a tender exercise, and
 - (b) either—
 - (i) the enterprise does not hold any other licence of a type mentioned in subsection (2), or
 - (ii) the enterprise holds one or more other licences under section 6(1)(b) or (c) of the Electricity Act 1989 and each of those other licences was granted following a tender exercise.

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- (4) The Secretary of State may by regulations amend this section by—
- (a) adding to subsection (2) an enterprise holding a licence under the Gas Act 1986 or the Electricity Act 1989 of a type that is not specified in that subsection;
 - (b) creating an exception in relation to a type of enterprise specified in subsection (2);
 - (c) amending or removing an exception that applies in relation to a type of enterprise specified in subsection (2).
- (5) Before making regulations under subsection (4), the Secretary of State must consult—
- (a) the Gas and Electricity Markets Authority, and
 - (b) the CMA.
- (6) In this section, “tender exercise” has the same meaning as in section 6CD of the Electricity Act 1989.

68B Further duty to make references in relation to completed mergers

- (1) The CMA must make a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 if the CMA believes that it is or may be the case that—
- (a) a relevant merger situation involving an energy network merger has been created, and
 - (b) the creation of that situation has caused, or may be expected to cause, substantial prejudice to the ability of the Gas and Electricity Markets Authority, in carrying out its functions under Part 1 of the Gas Act 1986 or Part 1 of the Electricity Act 1989, to make comparisons between energy network enterprises of the type involved in the energy network merger;
- but this is subject to subsections (2) and (3).
- (2) The CMA may decide not to make a reference under this section if it believes that any relevant customer benefits in relation to the creation of the relevant merger situation outweigh the prejudice mentioned in subsection (1)(b).
- (3) The CMA must not make a reference under this section in any circumstances described in section 22(3).
- (4) A reference under this section must, in particular, specify—
- (a) the enactment under which it is made, and
 - (b) the date on which it is made.

68C Further duty to make references in relation to anticipated mergers

- (1) The CMA must make a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 if the CMA believes that it is or may be the case that—
- (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation involving an energy network merger, and

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- (b) the creation of that situation may be expected to cause substantial prejudice to the ability of the Gas and Electricity Markets Authority, in carrying out its functions under Part 1 of the Gas Act 1986 or Part 1 of the Electricity Act 1989, to make comparisons between energy network enterprises of the type involved in the energy network merger,
but this is subject to subsections (2) and (3).
- (2) The CMA may decide not to make a reference under this section if it believes that—
 - (a) the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference, or
 - (b) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the prejudice mentioned in subsection (1)(b).
- (3) The CMA must not make a reference under this section in any circumstances described in section 33(3).
- (4) A reference under this section must, in particular, specify—
 - (a) the enactment under which it is made, and
 - (b) the date on which it is made.

68D Opinion of the Gas and Electricity Markets Authority

- (1) Before forming a view for the purposes of section 68B(1)(b) or (2) or 68C(1)(b) or (2)(b), the CMA must—
 - (a) ask the Gas and Electricity Markets Authority to give an opinion, and
 - (b) consider that opinion.
- (2) Where the CMA makes a request under this section, the Gas and Electricity Markets Authority must give its opinion on—
 - (a) whether and to what extent the creation of the relevant merger situation has prejudiced, or may be expected to prejudice, the Authority's ability, in carrying out its functions under Part 1 of the Gas Act 1986 or Part 1 of the Electricity Act 1989, to make comparisons between energy network enterprises of the type involved in the relevant merger situation, and
 - (b) whether any prejudice is outweighed by any relevant customer benefits in relation to the creation of the relevant merger situation.
- (3) The Gas and Electricity Markets Authority must prepare and publish a statement of the methods it considers should be applied in forming an opinion on the matters mentioned in subsection (2).
- (4) The statement must, in particular, set out—
 - (a) the criteria to be used for assessing the effect of any particular energy network enterprises ceasing to be distinct enterprises on the Gas and Electricity Market Authority's ability to make comparisons between such enterprises, and
 - (b) the relative weight to be given to the criteria.

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- (5) Before preparing or altering the statement, the Gas and Electricity Markets Authority must consult—
- (a) the Secretary of State,
 - (b) the Scottish Ministers,
 - (c) the Welsh Ministers,
 - (d) the CMA, and
 - (e) each energy network enterprise.
- (6) The Gas and Electricity Markets Authority must from time to time—
- (a) review the statement, and
 - (b) where appropriate, change the statement and publish the new version.
- (7) In forming its opinion under this section, the Gas and Electricity Markets Authority must apply the methods set out in its latest statement.

68E Combined references

- (1) In respect of a relevant merger situation involving an energy network merger, the CMA may—
- (a) make a reference under both section 22 and section 68B, or
 - (b) make a reference under both section 33 and section 68C.
- (2) If the CMA does so—
- (a) the references may be decided by the same group constituted under Schedule 4 to the Enterprise and Regulatory Reform Act 2013;
 - (b) the functions of the CMA referred to in section 34C(1) and (2) may be carried out on behalf of the CMA by the same group in relation to both references; and
 - (c) the group’s duties under section 38 to prepare and publish a report on each reference may be satisfied by preparing and publishing a single report on both references.

68F Modification of this Part

- (1) In relation to—
- (a) a reference, or possible reference, under section 68B, and
 - (b) a reference, or possible reference, under section 68C,

Chapter 1 of this Part applies with the modifications set out in Schedule 5A.

- (2) In Chapters 2 to 5 of this Part, references to a provision of Chapter 1 include that provision as applied by subsection (1) and Schedule 5A.”

Commencement Information

I2 Sch. 16 para. 2 in force at Royal Assent, see [s. 334\(2\)\(j\)](#)

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“SCHEDULE 5A

Section 68F

ENERGY NETWORK MERGERS AFFECTING COMPARATIVE
REGULATION: MODIFICATION OF CHAPTER 1 OF PART 3**General modifications**

- 1 (1) Chapter 1 (other than sections 22 and 33) has effect as if—
 - (a) references to a reference or possible reference under section 22 were references to a reference or possible reference under section 68B, and
 - (b) references to a reference or possible reference under section 33 were references to a reference or possible reference under section 68C.
- (2) The references in sub-paragraph (1) to a reference under a section include a reference treated as made under that section.

Turnover

- 2 Section 23 (relevant merger situations) has effect as if—
 - (a) in subsection (1), for paragraph (b) there were substituted—
 - “(b) the value of the turnover in Great Britain of the enterprise being taken over exceeds £70 million.”;
 - (b) subsections (2) to (8) were omitted.
- 3 Section 28 (turnover test) has effect as if—
 - (a) references to the United Kingdom were to Great Britain;
 - (b) in subsection (5), for “The CMA shall” there were substituted “The CMA and the Gas and Electricity Markets Authority shall each”;
 - (c) the reference in subsection (6) to section 23(1)(b) included a reference to that provision as modified by paragraph 2 of this Schedule.

Relevant customer benefits

- 4 Section 30 (relevant customer benefits) has effect as if—
 - (a) in subsection (1)(a)(i), for “lessening of competition concerned” there were substituted “prejudice to the Gas and Electricity Markets Authority”;
 - (b) in subsections (2)(b) and (3)(b), for “a similar lessening of competition” there were substituted “a similar prejudice to the Gas and Electricity Markets Authority”.

Time limits for decisions about references

- 5 Section 34ZA(1)(a) (time-limits for decisions about references) has effect as if—
 - (a) the reference to section 22(2) were to section 68B(2);

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- (b) the reference to section 22(3) were to—
 - (i) that provision as applied by section 68B(4), and
 - (ii) section 68B(3);
- (c) the reference to section 33(2) were to section 68C(2);
- (d) the reference to section 33(3) were to—
 - (i) that provision as applied by section 68C(4), and
 - (ii) section 68C(3).

Questions to be decided in relation to completed mergers

- 6 Section 35 (questions to be decided in relation to completed mergers) has effect as if—
- (a) in subsection (1)(a), after “situation” there were inserted “involving an energy network merger”;
 - (b) in subsection (1)(b), for the words from “has resulted” to the end there were substituted “has caused, or may be expected to cause, substantial prejudice to the ability of the Gas and Electricity Markets Authority to make comparisons between energy network enterprises of the type involved in the energy network merger”;
 - (c) for subsection (2) there were substituted—

“(2) For the purposes of this section there is a prejudicial outcome if there is a situation described in subsection (1)(a) which has, or may be expected to have, the effect described in subsection (1)(b).”;
 - (d) in subsection (3), for “an anti-competitive outcome (within the meaning given by subsection (2)(a))” there were substituted “a prejudicial outcome”;
 - (e) in subsections (3)(a) and (b) and (4), for “lessening of competition” (in each place it appears) there were substituted “prejudice”.

Questions to be decided in relation to anticipated mergers

- 7 Section 36 (questions to be decided in relation to anticipated mergers) has effect as if—
- (a) in subsection (1)(a), after “situation” there were inserted “involving an energy network merger”;
 - (b) in subsection (1)(b), for the words from “result” to the end there were substituted “cause substantial prejudice to the ability of the Gas and Electricity Markets Authority to make comparisons between energy network enterprises of the type involved in the energy network merger”;
 - (c) after subsection (1) there were inserted—

“(1A) For the purposes of this section there is a prejudicial outcome if there are arrangements described in subsection (1)(a) which may be expected to have the effect described in subsection (1)(b).”;

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- (d) in subsection (2), for “an anti-competitive outcome (within the meaning given by section 35(2)(b))” there were substituted “a prejudicial outcome”;
- (e) in subsections (2)(a) and (b) and (3), for “lessening of competition” (in each place it appears) there were substituted “prejudice”.

Duty to remedy effects of completed or anticipated mergers

- 8 Section 41 (duty to remedy effects of completed or anticipated mergers) has effect as if—
- (a) in subsection (1), for “an anti-competitive outcome” there were substituted “a prejudicial outcome (within the meaning of section 35(2) or 36(1A))”;
 - (b) in subsection (2)(a) and (b), for “lessening of competition” there were substituted “prejudice”;
 - (c) in subsection (4), for “lessening of competition” there were substituted “prejudice”.

Commencement Information

I3 Sch. 16 para. 3 in force at Royal Assent, see [s. 334\(2\)\(j\)](#)

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