

2023 No. 1185

COMPETITION

The Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) and Energy Network Mergers (Consequential Amendments) Order 2023

<i>Made</i>	- - - -	<i>7th November 2023</i>
<i>Laid before Parliament</i>		<i>9th November 2023</i>
<i>Coming into force</i>		<i>6th December 2023</i>

The Secretary of State makes this Order in exercise of the powers conferred by sections 28, 121 and 124(2) of the Enterprise Act 2002(a) and section 330 of the Energy Act 2023(b).

PART 1
GENERAL

Citation, commencement and extent

- 1.**—(1) This Order may be cited as the Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) and Energy Network Mergers (Consequential Amendments) Order 2023.
- (2) This Order comes into force on 6th December 2023.
- (3) This Part and Part 2 extend to England and Wales, Scotland and Northern Ireland.
- (4) Part 3 extends to England and Wales.

PART 2
MERGER FEES AND TURNOVER

Amendments to the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003

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- (a) 2002 c. 40. Section 28 was applied in relation to references or possible references under section 68B or 68C of that Act with the modifications set out in paragraph 3 of Schedule 5A, by section 68F of that Act; and sections 68A to 68F of, and Schedule 5A to, that Act were inserted by the Energy Act 2023 (c. 52), paragraphs 2 and 3 of Schedule 16. Section 121 was amended by the Communications Act 2003 (c. 21), paragraph 23(3)(a) of Schedule 16 and paragraph 1 of Schedule 19; by the Enterprise and Regulatory Reform Act 2013 (c. 24), paragraph 156 of Schedule 5; and by the Energy Act 2023, paragraph 30 of Schedule 16.
- (b) 2023 c. 52.

2. The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003(a) is amended as follows.

3. In article 2(d) for “22 or 33” substitute “22, 33, 68B or 68C”.

4. In article 3(b) for “22 or 33” substitute “22, 33, 68B or 68C”.

5. In article 4(2) after “33(2)(b)” insert “or 68C(2)(a)”.

6. In article 5, after paragraph (3) insert—

“(3A) For the purpose of determining the amount of the fee payable under article 3(b) for decisions made in relation to a possible reference under section 68B or 68C of the Act including as part of a combined reference described in section 68E(1) of the Act, paragraphs (1) to (3) of this article have effect as if references to the United Kingdom were to Great Britain.

(3B) The amount of fee payable under article 3(b) for a decision made in relation to a combined reference described in section 68E(1) of the Act is—

(a) in relation to a combined reference described in section 68E(1)(a) of the Act, the sum of the amounts that would have been payable under article 3(b) for—

(i) a decision made in relation to a possible reference under section 22 of the Act; and

(ii) a decision made in relation to a possible reference under section 68B of the Act;

(b) in relation to a combined reference described in section 68E(1)(b) of the Act, the sum of the amounts that would have been payable under article 3(b) for—

(i) a decision made in relation to a possible reference under section 33 of the Act; and

(ii) a decision made in relation to a possible reference under section 68C of the Act.”.

7. In article 11, after paragraph (4) insert—

“(5) For the purpose of determining the turnover of an enterprise which is subject to a possible reference under section 68B or 68C of the Act, this article and Schedule 1 have effect as if references to the United Kingdom were to Great Britain.”.

PART 3

CONSEQUENTIAL AMENDMENTS

Consequential amendments to the Water Mergers (Modification of Enactments) Regulations 2004

8. The Water Mergers (Modification of Enactments) Regulations 2004(b) are amended as follows.

9. In regulation 3 after paragraph (d) insert—

“(da) sections 68A to 68F and Schedule 5A (mergers of energy network enterprises in Great Britain);”.

10. In regulation 17 in paragraph (a)(i), (d)(i) and (d)(ii) for “22 or 33” substitute “22, 33, 68B or 68C”.

(a) S.I. 2003/1370; relevant amending instruments are S.I. 2004/3204, 2012/1878, 2014/534.

(b) S.I. 2004/3202, amended by S.I. 2014/549, 2015/1936, 2019/93.

- 11.** In regulation 17A—
 - (a) in paragraph (a)(i) after “73(2)” insert “or (3B)”;
 - (b) for paragraph (b) substitute—
 - “(b) in subsection (2)—
 - (i) for “the purposes of section 73(2) or (3B)” there were substituted “those purposes”; and
 - (ii) in paragraph (a) for “section 73(2)” there were substituted “section 33D(1) of the 1991 Act”.”.
- 12.** In regulation 17B in paragraph (b)(i) for “or 45” substitute “, 45, 68B or 68C”.
- 13.** In regulation 18 in paragraph (a) after “22” insert “or 68B”.
- 14.** In regulation 19 in paragraph (a) after “33” insert “or 68C”.
- 15.** In regulation 20 in paragraph (a) for “or 33” substitute “, 33, 68B or 68C”.
- 16.** In regulation 21 for “or 33” substitute “, 33, 68B or 68C”.
- 17.** In regulation 22 for “or 33” substitute “, 33, 68B or 68C”.
- 18.** In regulation 23 for “or 33” substitute “, 33, 68B or 68C”.
- 19.** In regulation 24 for “or 33” substitute “, 33, 68B or 68C”.
- 20.** In regulation 26 in paragraph (a) for “or 33” substitute “, 33, 68B or 68C”.
- 21.** In regulation 27 in paragraph (a) for “or 33” substitute “, 33, 68B or 68C”.
- 22.** In regulation 28—
 - (a) for “sections 22 and 33” in the heading and in both places it appears, substitute “section 22, 33, 68B or 68C”;
 - (b) in paragraph (b) for “or 33” substitute “, 33, 68B or 68C”.
- 23.** In regulation 29—
 - (a) in paragraph (a)(i) for “or 33” substitute “, 33, 68B or 68C”;
 - (b) in paragraph (a)(ii) for “subsection (2)(b) of section 33” substitute “section 33(2)(b) or 68C(2)(a)”;
 - (c) in paragraph (b)(i) for “section 33” substitute “section 33 or 68C”;
 - (d) in paragraph (b)(ii) for “section 22 or 33 as if it had been made under section 33 or (as the case may be) 22” substitute “section 22 or 68B as if it had been made under section 33 or 68C or to treat a reference under section 33 or 68C as if it had been made under section 22 or 68B”.
- 24.** In regulation 30 for “or 33” substitute “, 33, 68B or 68C”.
- 25.** In regulation 30A for “or 33” substitute “, 33, 68B or 68C”.
- 26.** In regulation 30B in paragraph (a)(i) and (b)(i) for “or 33” substitute “, 33, 68B or 68C”.
- 27.** In regulation 34 for “or 62” substitute “, 62, 68B or 68C”.

Andrew Bowie
Minister for Nuclear and Networks
Department for Energy Security and Net Zero

7th November 2023

EXPLANATORY NOTE

(This note is not part of the Order)

Part 2 of this Order amends the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (S.I. 2003/1370) (“the 2003 Order”). The 2003 Order provides for merger fees to be payable in respect of mergers that are assessed under Part 3 of the Enterprise Act 2002 (c. 40) (“the Act”). It also provides for the determination of turnover of the company being taken over, both for the purposes of assessing whether the test is met for a relevant merger which may have to be referred, and for determining the fee payable.

As a result of the amendments and modifications made to Part 3 of the Act by the Energy Act 2023 (c. 52), a special regime applies to relevant mergers between energy network enterprises. Sections 68B and 68C of the Act place a duty on the Competition and Markets Authority (“the CMA”) to refer an energy network merger to a group established by the CMA (“CMA group”) if certain conditions are met.

This Order amends the definition of “merger reference” in article 2(d) of the 2003 Order such that a reference by the CMA under section 68B or 68C of the Act is included in this definition.

This Order amends article 3(b) of the 2003 Order so that a fee is payable to the CMA in relation to the making by the CMA of a reference to a CMA group under section 68B or 68C of the Act. A new article 5(3A) is included so that the fee payable is calculated by reference to the value of the turnover in Great Britain of the energy network enterprise being taken over. A new article 5(3B) is included so that, for combined references made as described in section 68E of the Act, a fee is payable in respect of the reference made under section 22 or 33 of the Act and a separate fee is payable in respect of the reference made under section 68B or 68C of the Act.

This Order also amends article 11 of the 2003 Order so that, in respect of references made by the CMA under sections 68B and 68C of the Act, the turnover relevant to the determination under article 11 and Schedule 1 is turnover in Great Britain.

Part 3 of this Order makes amendments to the Water Mergers (Modification of Enactments) Regulations 2004 (S.I. 2004/3202), to update references to provisions in Part 3 of the Act, in consequence of the new provisions for relevant mergers between energy network enterprises which have been added to Part 3 of the Act by the Energy Act 2023.

An impact assessment published on 7th July 2022 alongside the Energy Bill (as it was) when introduced to Parliament, contains an assessment of the impacts that the energy networks special merger regime will have on society, including costs and benefits to businesses and consumers. The impact assessment is available from the Department for Energy Security and Net Zero at 3-8 Whitehall Place, London, SW1A 2EG and at <https://bills.parliament.uk/bills/3311/publications>.

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