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Ofgem Special Merger Regime SoM Consultation Response Matrix

Response Number:	Responder	Consultation Response	Special Merger Consultation Reference	Ofgem Response	Change to SoM
1	Respondent 1	"the Statement of Methods contains references to a number of concepts and mechanisms that are specific to RIIO-2 or RIIO-1. Although RIIO-3 plans to retain many of these features, there are likely to be changes to the way that these operate. "in our view, it would be more effective to take a more general approach to the guidance."	Chapter 4	We have added further clarification in a new paragraph (4.4) to clarify the use of RIIO-2 and RIIO-1 examples.	Para 4.4
2	Respondent 1	"Whilst the Statement of Methods does contain references to engagement between Ofgem and the merging parties at the pre-notification stage and throughout the life of the investigation, specific mention of engagement during Phase 1 would help reinforce this further."		The consultation noted in different places the importance of engagement between Ofgem and merging parties during Phase 1. See paras 8.3, 8.7, 8.19, 8.20 of the Statement of Methods. We don't think that any additional references are needed to reinforce this further.	No revision
3	Respondent 1	"We note that Paragraphs 3.2 and 3.3 also refer to "energy network enterprises of the type involved in the relevant merger situation". We would welcome further clarity as to		We have provided further clarity on our approach to IDNOs and iGTs in a new paragraph (1.7).	Para 1.7

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		the meaning of enterprises "of the type involved", including whether this intends to designate a sub-set of energy network enterprises as subject to the regime. "		New paragraph 1.7 sets out our approach to IDNOs and iGTs. It is not within Ofgem's powers to "clarify that mergers involving IDNOs and IGTs will not be subject to the regime". Whether or not such mergers are prioritised for review is a matter for the CMA, not Ofgem. Ofgem must respond with an opinion as requested by the CMA – and the statement in 1.7 adequately sets out Ofgem's intended approach. When referring to 'licensees of the type involved' we mean the merging energy network enterprises of the same type, which is the wording used in the Act. The explanatory notes to the Energy Bill as brought from the House of Lords on 25th April 2023 (Bill 295) clarified that 'of the same type' means energy network enterprise that holds the same type of licence.	

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4	Respondent 1	Para 13. "We suggest removing this reference to the CMA's typical expectation and including an explicit clarification on the weight accorded to Ofgem's opinion, which, in turn, ought to be compatible with the statutory instrument underpinning it."	Paragraph 2.14	Ofgem will be performing its statutory role to provide an opinion to the CMA. Please refer to the CMA's Guidance and consultation for further information on how CMA will use the opinion that we will provide.	No revision
5	Respondent 1	"We would welcome clarification on the application [availability & quality of information] to particular types of companies. Ofgem could, for example, clarify whether the acquisition of a frontier" company would lead to a higher prejudice than the acquisition of an underperforming" company. Outlier performers are likely to have a different impact on Ofgem's ability to make comparisons between energy networks. We would welcome any guidance as to whether Ofgem might be more concerned about under- or overperformers, why this may be the case and whether this depends on specific areas and/or performance parameters."	Paragraph 3.4	We recognise that the extent of any impact on our ability to make comparisons depends on the particular circumstances of the merging parties and this is already reflected in the document. We said in paragraph 6.3 that we would take account of the circumstances of the merging parties when making our assessment. Also noting in 3.4b the impact on the structure of the energy network enterprises and their behaviour. We noted in para 5.4 of the consultation document that: "[a] merger would not automatically result in the consolidation of two or more	No revision

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				licensed entities into one licensed entity, as this consolidation would require modifications to the licences of the merging network licensees which can only take place following the relevant statutory process." In paragraphs 5.5 and 5.6 we set out our view on how prejudice could arise through a reduction in the quality of information on costs and performance, even if the licensed entities are not consolidated following a merger. Concerns about our ability to make effective comparisons are not limited to mergers involving 'outlier' performers. Specifically: • Mergers involving a high performing licensee could lead to a reduction in the quality of information reported on efficient costs or high performance. • Mergers involving any licensee could lead to a loss of information on the relationship	

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				between costs, performance and exogenous drivers of costs. Moreover, Ofgem would also need to consider the impact of the merger on the fact that a licensee is perceived to be a high performer at one price control review does not necessarily mean that its performance relative to its peers would stay the same into the future.	
6	Respondent 1	"we would welcome an explicit statement that qualitative approaches would not be prioritised above quantitative approaches without clear justification. We would further welcome clarifications as to whether Ofgem is likely to prioritise certain analytical tools over others (e.g. static versus dynamic, forward-looking versus historical approaches) and whether this is expected to vary between specific building blocks/ parameters of its comparative regulation."	Paragraph 3.8	We said in paragraph 3.8 that: "We expect that our assessment of the extent of the prejudice arising from the merger would involve both quantitative and qualitative elements. […] To the extent that it is analytically feasible and robust, we will aim to quantify the impact of the merger on existing and future consumers in monetary terms. […] It is unlikely that we would be in a position to quantify the full extent of	No revision

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				either the prejudice or the RCBs, and there are likely to be qualitative considerations on both sides. In paragraph 3.9 we said: "We will combine the results of our qualitative and quantitative assessments to arrive at a holistic assessment and view of the extent of any prejudicial impact." We do not intend to prioritise qualitative approaches over quantitative approaches without clear justification, which could include considerations around availability of quantitative data, and reasonable time or resource constraints. Our assessment of the prejudice and benefits arising from a merger is likely to draw on a range of tools, including static and dynamic approaches, using historical and forward-looking information.	

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7	Respondent 1	"This statement risks prejudicing the outcome of Ofgem's assessment in all cases and may act to deter beneficial combinations in the energy sector and ultimately could lead to a chilling effect on investment in the sector."	Paragraph 3.8	Our intention was not to prejudice the outcome of our assessment and have revised the sentence accordingly.	Para 3.7 amended
8	Respondent 1	"However, this paragraph demonstrates that there is a significant disparity between the approach used to setting totex allowances for transmission versus distribution networks. We encourage Ofgem to provide further comfort and clarity regarding the exact extent and scope of benchmarking and costs comparisons when setting allowances for transmission and distribution networks, and to explain the underlying reason and	Paragraph 4.7	Further information about the approaches used and the rationale for doing so can be found in the relevant price control decision documents. [1]	No revision

[1] RIIO-2 Final Determinations for Transmission and Gas Distribution network companies and the Electricity System Operator | Ofgem

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		rationale behind such disparity of use between these."			
9	Respondent 1	"Whilst we understand the role of comparisons supporting enforcement functions at a high level, we would caution Ofgem to focus its exercise under the Statement of Methods to the merger environment. Future investigations/enforcement action will be uncertain and efficiencies arising from a merger should not be discarded due to a potential risk or desire of taking a comparative approach to remedies for enforcement action in the future."	Paragraphs 4.19-4.21	Chapter 4 of our consultation document sets out the different ways in which comparisons between network licensees support us in carrying out our statutory functions. We intend to consider the potential impact of a merger on our ability to make comparisons across the full range of functions under Part 1 of the Gas Act 1988 and the Electricity Act 1989. As part of this assessment, we will consider the extent to which those impacts are subject to uncertainty and give appropriate weight to impacts that take account of that uncertainty.	No revision
10	Respondent 1	"Whilst we agree with Ofgem's assessment that comparisons between energy network enterprises can be used to encourage engagement with regulatory processes, we consider that BPI may not be the most effective example of this. Our view is that comparisons between network licensees' business plans are not required for the BPI tool to function – for example, the fact	Paragraph 4.23	The BPI is used here for illustrative purposes only. We disagree with the respondent's view that comparisons are not necessary for the BPI to function. It is through comparisons of the quality and completeness of these submissions that we calibrate and apply the BPI.	No revision

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		that other network licensees are unable to meet a given set of minimum requirements does not mean that those requirements are not achievable."			
11	Respondent 1	"We consider this paragraph to be overly pessimistic with regard to the impact of a merger and fails to fully recognise the potential of such transactions to bring material benefits to consumers, not least because energy mergers could exhibit clear and material economies of scale. We would advise that the general advantages of mergers should also be outlined here – for example, it should be recognised that combining non-operational functions can lead to significant cost savings which, in turn, translate into lower bills for consumers. The same principle applies at Paragraphs 6.3 and 6.5 relating to assessing mergers against the criteria, which unduly focuses on the fact that "a merger between a highly efficient licensee	Paragraphs 5.5 and 5.6. 6.3 and 6.5	We acknowledge the lack of focus on the potential benefits of mergers and have added a new chapter 6 setting out the potential benefits of a merger.	New Chapter 6 added to decision

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		and a less efficient one could lead to costs being reported jointly (or allocated in some way), which in turn could mean the loss of information on efficient costs".			
12	Respondent 1	"It is not automatically the case that mergers impact diversity of management approaches and practices, or that diversity of management approaches necessarily has a positive impact on efficiency and performance. It is equally conceivable that the consolidation of management control may in fact increase efficiency and performance, such as where the practices of a well-performing and highly efficient licensee are adopted to improve those of an underperforming and less efficient licensee. We would recommend that Ofgem clarify its assertions in this paragraph, noting examples of networks owned by the same shareholders which have clearly different efficiency and performance levels. In particular, where there are limited "common" shareholders, such assumptions should not be	Paragraphs 5.7 and 5.8	We acknowledge that management approaches are not always adversely impacted by mergers and may have a positive impact on efficiency and performance. This is now addressed in a new chapter 6 to acknowledge potential benefits of mergers.	Chapter 6 added

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		made solely because one shareholder has control over two separate networks of the same type."			
13	Respondent 1	"As TIM is not limited to electricity transmission operators only, we recommend amending this paragraph to also reference gas transmissions, gas distribution and electricity distribution."	Para 5.11	Para 5.11 amended.	Para 5.11
14	Respondent 1	"We are not aware of any evidence that this has been the case in relation to networks which are already owned by the same shareholders. We would welcome any indication as to the underlying empirical evidence or economic theory behind the assertions in this paragraph. Otherwise, we would encourage Ofgem to conduct case-specific analysis, without adopting a rebuttable presumption-type approach."	Para 5.12	Ofgem will consider the evidence and undertake case-specific analysis on potential prejudice when providing its opinion to the CMA. We have revised para 5.12 to clarify this position.	Para 5.12
15	Respondent 1	"Whilst we welcome the use of the NIC tool, we note that previous NICs have involved multiple applications from multiple energy network companies under the	Para 5.13	It is not our view that mergers would make it more difficult to judge NIC applications. Mergers could reduce the competitive rivalry between network licensees, which in turn could have a	No revision

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		same corporate structure and, in some cases, multiple applications from the same energy network company. For example, in the 2020 NIC, A Transmission operator submitted two proposals to the electricity NIC, one of which was granted funding. On this basis, it does not appear to be the case that energy network mergers make it more difficult to judge NIC applications."		detrimental impact on the quality of submissions and our ability to drive innovation through comparing submissions against each other and rewarding the best with funding.	
16	Respondent 1	"We also note that the NIC tool has been replaced by the SIF as part of RIIO-2. We would suggest amending Paragraph 5.13 to reflect this change and to explain how the SIF would be affected by a loss of rivalry between network licensees."	Para 5.13	The NIC is used here as an example of a regulatory mechanism that uses competition between licensees. The SIF does not make explicit use of competition.	No revision
17	Respondent 1	"Such focus on reduction of rivalry fails to take account of the wider benefits of mergers that result in an underperforming company being managed or owned by a group that also controls a well-performing company. In this scenario, the performance of both may be improved and we would	Para 5.15	We acknowledge the imbalance of the position set out in the consultation and have introduced a new chapter (6) to reflect the potential benefits of mergers.	Chapter 6 added

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		suggest explicit acknowledgement of this benefit."			
18	Respondent 1	"Whilst we welcome the inclusion of specific criteria, we consider that there is significant commonality between the criteria identified (which all stem from the loss of intensity of competition between networks, which is already limited). As such, we invite Ofgem to consider the additive value of each of these."		While we accept there could be some commonality between the criteria, they are intended to capture the different ways in which a merger could have a prejudicial impact on our ability make effective comparisons. However, in light of the feedback to our consultation we have reviewed and made relevant changes to the criteria.	Para 7.1-7.7
19	Respondent 1	"We encourage Ofgem to consider historical evidence, including from prior mergers, when devising its merger assessment criteria. We note, for example, that in the past, consolidation of licensees into a smaller number of ownership groups has not arisen or led to a complete merger of licences (i.e. combining two licences into one) and that there is no reason to consider that future mergers would necessarily lead to that outcome (thus preserving separate reporting at a licensee level). Since Ofgem would continue to have	Paragraphs 6.1 to 6.7	We have noted in Chapter 5 that a merger would not automatically lead to a reduction in the number of licensees with separate reporting obligations. There is not a prior expectation of harm suggested by criterion 1. In paragraphs 5.5 and 5.6 we set out our view on how prejudice *could* arise through a reduction in the quality of information on costs and performance, even if the licensed entities are not consolidated following a merger.	No revision

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		access to the same level of information on operating conditions, an a priori expectation of harm (as currently suggested by criterion one under Paragraph 6.1), would not always be justified."			
20	Respondent 1	"We invite Ofgem to consider the wider regulatory tools at its disposal when undertaking its harm-benefit analysis. We note, for example, that if a merger were to lead to some weakening of the intensity of competition in certain areas (e.g. in innovation projects or performance terms), Ofgem is also able to make countervailing adaptations to its regime that may offset this. For example, incentive rates could be tailored appropriately, as could the benefits of lean business planning and volunteering information."	Paragraphs 6.1 to 6.7	We have addressed this in para 7.7.	Para 7.7
21	Respondent 1	"We welcome the discussion of RCBs, we consider that the guidance given in this section could be more detailed and, in particular, could include examples	Paragraphs 6.8 to 6.16	We have provided further guidance in chapter 6 to acknowledge potential benefits of mergers and address RCB's.	Chapter 6 added

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		of RCBs that would outweigh the prejudice relating to the merger. For example, Ofwat's approach to mergers and Statement of Methods (the "Ofwat Statement of Methods") gives examples of relevant customer benefits, such as "improving security of supply", and lists specific customer benefits that are more likely to be relevant, such as licence modifications. Similar guidance in respect of energy network mergers would be helpful. "			
22	Respondent 1	"Paragraph 6.9 – RCBs, inclusion of future customers: "In this context, relevant customers are customers of the merging enterprises at any point in the chain of production and distribution and are therefore not limited to final consumers and include future customers." We would suggest incorporating more specific examples of benefits to future customers, such as avoiding insolvency or special administration.	Paragraph 6.9	We have provided further guidance in chapter 6 to acknowledge potential benefits of mergers and address RCB's.	Chapter 6 added

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23	Respondent 1	Paragraph 6.12 – RCBs, Criterion one: "Is there compelling evidence that the merger would, or is likely to, lead to RCBs within a reasonable period?" We welcome Ofgem's explanation of the three criteria it will use to evaluate RCBs. However, it would be useful to include guidance as to what might constitute a reasonable period and to outline the factors that may affect this assessment. Merging parties will be able to provide more helpful explanations of likely RCBs if given clearer guidance on this point. This will, in turn, make it easier for Ofgem to provide its opinion on the likelihood of RCBs arising. "	Paragraph 6.12	We have amended the criteria for RCBs to provide additional clarity to take account of feedback. The term "reasonable period" is from the Act. A "one size fits all" approach to what constitutes a "reasonable period" would not be appropriate and what is "reasonable" will likely need to be assessed on a case by case basis.	Para 7.9-7.17
24	Respondent 1	"We would welcome any guidance as to the types of evidence (and/or worked examples of likely RCBs) which would meet such a "high evidential bar". We note that the Ofwat Statement of Methods does not refer to a "high evidential bar", but states that Ofwat will need	Paragraph 6.15	We have made relevant changes to the section related to the assessment criteria for RCBs in response to the consultees' feedback. We have also changed the reference to 'detailed and compelling evidence'. We will require compelling evidence from merging parties to demonstrate that RCBs	Para 7.9-7.17

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		"compelling evidence" to recommend that RCBs outweigh any prejudice resulting from the merger. Based on our experience advising parties in relation to the special water merger regime under the Water Industry Act 1991, absent such guidance, it would be difficult for practitioners and merging parties to evaluate RCBs."		outweigh any prejudice through benefits in the form of, for example, lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods and services . The evidence may be utilised in both our quantitative and qualitative assessment. The submissions should set out the assumptions made and analysis undertaken, allowing us to review and reproduce the results where appropriate. We expect the merging parties to explain the reliability of those forecasts/projections.	
25	Respondent 1	"To ensure merging parties are able to offer the most appropriate UILs, we consider it would be useful to include further guidance as to what would constitute "a level similar to that which existed pre-merger". We would also welcome further clarity as to whether Ofgem would accept a UIL that achieves some remedy but	Para 7.2	We do not propose to provide further guidance on whether particular UILs would be acceptable as that would depend on the circumstances of the particular merger and the nature and extent of any prejudice that we find.	No revision

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		does not look to exactly replicate Ofgem's ability to run comparators prior to the merger. For example, in the Pennon / Bristol Water merger, Ofwat accepted UILs to provide separate reporting information for the two entities and to accept separate price controls for the entities' wholesale activities. Guidance as to whether similar UILs would be acceptable in an energy network merger would be welcome."			
26	Respondent 1	"Whilst we understand additional information may be required by Ofgem at short notice, we would urge Ofgem to exercise caution with any such request. Merging parties will already be required to provide large amounts of information to the CMA and this burden should not be unnecessarily increased by additional short-notice requests from Ofgem. It would be helpful for Ofgem to note that this power will only be exercised in limited circumstances in light of the fact	Para 8.15	The Statement of Methods already notes at paragraph 9.13, that, where appropriate, Ofgem and the CMA will coordinate information requests to minimise the burden on merging parties. We will collaborate with the CMA to avoid duplicative requests. To help further, the merging parties may want to agree to a waiver to allow disclosure of information from the CMA to Ofgem. In addition, at paragraph [9.5], we note that the pre-notification process can be used to clarify the	No revision

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		that extensive information will be provided to the CMA. A coordinated approach to information gathering is paramount to ensure that the new regime does not create duplicative requests, with the consequent undue burden on merging parties.		CMA and Ofgem require from the merging parties in order to start the investigation. This can help reduce the amount of information that is provided at notification and streamline subsequent information requests to the merging parties during the investigation. We note that the power to request additional information may be exercised when additional or comprehensive information might be needed. In addition we also note that we will ask for any further information or documents as soon as it is clear that they will be necessary.	
27	Respondent 1	"The Statement of Methods indicates that "To assist the functions of both the CMA and Ofgem in this tight timeframe of the Phase 1 investigation, parties are expected to send all	Para 8.15	The request for parties to submit their information to both the CMA and Ofgem at the same time aims to secure adequate time for both regulators to do their own, independent assessments and	Para 9.19

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		information to Ofgem and the CMA at the same time". We urge Ofgem to reconsider whether this default position is appropriate. The CMA process is independent from Ofgem's and it is not always appropriate to automatically send all information required by the CMA to Ofgem in parallel. For example, merging parties may have concerns in relation to sharing confidential information (which is not directly relevant to Ofgem's assessment) with Ofgem where a price control process is underway. We would therefore suggest that this statement is qualified, in line with the approach taken in the Ofwat Statement of Methods, to note that "all parties are encouraged to send all information to Ofwat and the CMA at the same time".		to avoid separate, but similar, requests leading to extra work for the merging parties. To facilitate this, and as also noted at paragraph 9.13, the CMA may request a waiver from the merging parties to allow disclosure of information to Ofgem. However, if merging parties do not plan to share the same information with Ofgem and CMA, they are encouraged to notify Ofgem and explain their reasons. As the mergers notification regime is a voluntary one, we have replaced the word 'expected' to 'encouraged' to reflect this.	
28	Respondent 1	"The Statement of Methods indicates that "We will publish a non-confidential version of our opinion after the CMA makes and	Paragraph 8.22	Revision applied and text added for clarity	Para 9.19

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		publishes its decision on whether the merger should be referred to Phase 2". (59) We note that Appendix 2, Annex 2 of the Statement of Methods outlines that merging parties will receive Ofgem's opinion together with the issues letter. We welcome the fact that this is expressly set out in the Statement of Methods but to ensure maximum clarity, we suggest referencing this in the main text of the document rather than in the Appendix only."			
29	Respondent 2	"We consider it is essential that Ofgem presents a thorough quantitative assessment of prejudicial impact in any opinion it provides to the CMA, expressed in terms of quantified consumer detriment (higher prices, poorer quality etc). Without such a quantitative assessment, it will be exceptionally difficult to balance the claimed detriment against the claimed RCBs. It is important for stakeholder confidence in the process that the weighing up of	Paragraphs 3.8 and 3.9	We state in paragraph 3.8: "We expect that our assessment of the extent of the prejudice arising from the merger would involve both quantitative and qualitative elements. […] To the extent that it is analytically feasible and robust, we will aim to quantify the impact of the merger on existing and future consumers in monetary terms. […] It is unlikely that we would be in a position to quantify the full extent of	No revision

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		costs and benefits is as transparent and objective as possible."		either the prejudice or the RCBs, and there are likely to be qualitative considerations on both sides. In paragraph 3.9 we further add: "We will combine the results of our qualitative and quantitative assessments to arrive at a holistic assessment and view of the extent of any prejudicial impact."	
30	Respondent 2	"To the extent that Ofgem does intend to rely on qualitative assessment, Ofgem should provide more detail in the Statement of Methods around what any qualitative assessment of the extent of prejudice would involve. For example, Ofgem could give examples of qualitative assessments in its Statement of Methods and explain how this interacts with its assessment of RCBs."	Paragraphs 3.8 and 3.9	We set out our approach and the criteria for assessing the impact of a merger and RCBs. It is not possible to provide meaningful examples of qualitative assessments, noting qualitative assessments will be specific to the individual circumstances of the merger and the evidence submitted by the merging parties.	No revision to decision
31	Respondent 2	"we suggest the statement in para 3.8 could be softened from "we anticipate that any merger will	Paragraph 3.8	We have amended the wording in para 3.8.	Para 3.8

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		likely have a negative impact on our ability to perform meaningful benchmarking" to "could potentially have a negative impact"			
32	Respondent 2	"We would note that many of the areas of prejudice will potentially be correlated with RCBs, and this will need to be dealt with in a robust and consistent manner. We request that the possibility of these correlations is explicitly acknowledged in the Statement of Methods, otherwise there is a risk that there will be a presumption in favour of prejudice in these circumstances.	Chapter 5	We have added a new Chapter covering the benefits of a merger.	Chapter 6 added
33	Respondent 2	As part of a holistic assessment Ofgem should consider whether any of the potential adverse effects identified could be mitigated through other mechanisms available to Ofgem. For example, the new Return Adjustment Mechanisms (RAMs) which Ofgem introduced as part of RIIO-2 are perceived as mitigating	Chapter 6	We have addressed this in paragraph 7.7.	Para 7.7

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		the information asymmetry between Ofgem and companies and reducing the risk of detriment to consumers resulting from Ofgem's imperfect knowledge of efficient industry costs. […]These same mechanisms could also be used by Ofgem to mitigate any loss of comparator information resulting from the merger, and Ofgem's assessment of the impact should encompass this possibility. (This is different from mitigating measures that would require the cooperation of the merging network operator(s) and which would be dealt with via the undertakings in lieu (UIL) process).			
34	Respondent 2	2.6: "Ofgem says (para 1.7) that in the case of a merger between two or more IDNOs ('network licensees whose network charges are not currently controlled by Ofgem'), it would not expect there to be any prejudice to its ability to make comparisons in respect of such a transaction. We would welcome Ofgem also confirming that it would not expect there to	Paragraph 1.7	It is not the purpose of the SoM to clarify whether a merger between a DNO and iDNO is likely (or not) to cause any prejudice to our ability to make comparisons. Mergers that involve two or more energy network companies holding a licence of the same type fall within the scope of the special merger regime. However, if all merging parties are	Para 1.7

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		be any prejudice in the case of a merger between a DNO and an IDNO."		network licensees and their network charges are not controlled by Ofgem, then we would not currently expect there to be any prejudice to its ability to make comparisons. Also, see our response to comment no. [3] above.	
35	Respondent 2	"We are entering a period of unprecedented levels of investment in electricity network infrastructure (both transmission and distribution) to support the UK's legally binding obligations to achieve net zero. This will likely present significant challenges to many existing network companies in raising the necessary equity finance. In situations where a merger is being contemplated, this may reflect the fact that continuation of current ownership is not a viable option in terms of future funding requirements. Hence, in assessing RCBs it will be important to define an appropriate	Paragraph 6.3, Paragraphs 6.8 to 6.16	We have revised the document.	Para 7.8-7.17

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		counterfactual, which may involve purchase of the network operator by other investors rather than continuation of the status quo. This aligns with recent practice of the CMA, which has assessed mergers against alternative purchaser dynamic counterfactuals"			
36	Respondent 2	"…it is important that Ofgem's (and the CMA's) approach to assessing RCBs is sufficiently broad to encompass the characteristics of the company proposing the merger and other investors who might form the counterfactual. For example, Ofgem and the CMA should be able to take into account the wider benefits to consumers stemming from a prospective purchaser's: • track record of engineering-led investment in energy networks and innovation; • ability to raise investment when required and leverage strong credit ratings;	Paragraphs 6.8 to 6.16	Ofgem will undertake a case-specific assessment of the RCBs and will consider the points raised in the response on a case-by-case basis and if substantiated with evidence.	No revision

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		• access to global procurement and supply chains, and associated cost benefits for DNO customers; • access to state of the art expertise in critical areas such as network management and cyber security; and how such benefits might differ under the counterfactual, particularly if that counterfactual is likely to involve acquisition by an infrastructure or pension fund with limited operational experience, a short investment time horizon and limited capacity to raise equity for the levels of capex growth needed to achieve net-zero.			
37	Respondent 2	"In light of Ofgem's new Net Zero duty, it is particularly important that Ofgem factors in relevant net zero considerations in giving its opinion to the CMA. This means that Ofgem must attach appropriate weight to the implications of different ownership outcomes for achieving necessary	General	We note that benefits to future consumers is a relevant consideration, and Ofgem will take account of such benefits provided these are substantiated with evidence. Please refer to Chapter 6 where we set out the potential benefits of mergers.	Chapter 6 added

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		levels of future investment. Ofgem's assessment framework must be broad enough to recognise the benefits to future consumers of achieving net zero, and the critical role that timely investment in network infrastructure will play in this. Similar considerations should also apply to the CMA, given that one of its medium term priorities is to 'help accelerate the UK's transition to a net zero economy"			
38	Respondent 2	"The statutory definition of RCBs encompasses lower prices, higher quality, greater choice and greater innovation. We believe this definition is sufficiently broad to encompass the likely benefits that will be in play in merger situations, but it is important that appropriate weighting is given to different categories of benefit. For example, whilst lower prices are clearly a key consideration, the extent to which mergers may impact the outcome of network price controls may be relatively modest in the context of the	Paragraphs 6.8 to 6.16	Ofgem will consider if sufficient evidence is provided of the benefit using an appropriate counterfactual. Please refer to the updated text in Chapter 7	Chapter 7

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		overall bill, albeit reasonably likely to occur. Other categories of benefit may be less likely to be realised but far greater impact if they do occur. For example, there is growing awareness of the need for cyber resilience and the severe disruption that can result from cyber-attacks, and benefits of expertise in these areas should be given appropriate weight. Similarly, consumers' long term interests in decarbonisation and achievement of net zero should mean an appropriately high weighting for attributes that can help to achieve those outcomes, such as skills and expertise in flexibility services, for example."			
39	Respondent 2	"We think Ofgem should add a fifth criterion as follows: • Criterion five: Could [/would] any potential adverse effects identified through the application of Criteria one to four be mitigated through other mechanisms available to Ofgem such as the Return Adjustment Mechanisms	Paragraphs 6.1 to 6.7	We have amended our Chapter 7 relating to RCB's. However we have not added a specific 5th criterion as proposed	Para 7.17

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		This would mirror a similar criterion in Ofwat's methodology which reads, "are there alternative approaches available to us to offset the loss of this comparator? – that is, could we amend our regulatory approach to offset the loss of this comparator? We note however that changes that could be made to improve the way we regulate to reflect good regulatory practice absent the merger should not be seen as offsetting the prejudice – they should be included in the baseline assessment. As part of its assessment, Ofgem should consider the number and quality of independent comparators which would remain following the merger. Again, this is a factor which Ofwat expressly acknowledges in its methodology."			
40	Respondent 2	"In respect of the second criterion, we would question how robustly Ofgem will be able to assess the extent to which a merger could result in a deterioration in the quality of information collected and	Paragraphs 6.1 to 6.7	We would highlight that in paragraph 3.8 of the consultation document, we expect our assessment to involve quantitative and qualitative elements. To the extent feasible, we will aim quantify the detriment that could arise	Para 7.1-7.8

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		reported by the network operators on good performance/ behaviours and efficient levels of costs. Ofgem mandates how costs and performance are reported via the Regulatory Reporting Packs and extensive suites of tables which network operators are required to submit to Ofgem, and we would expect each of the merging parties to continue reporting in much the same way post-merger. A deterioration in the quality of information would therefore only arise if the values of the data items being reported changed as a result of the merger, and quantifying this would require highly subjective judgement from Ofgem. In this context we would welcome further detail or examples from Ofgem on how its approach might differ according to whether the merging companies are considered to be under- or over-performing or neither. Similar comments would apply to the first criterion."		from the changes referred to in the criteria. This kind of forward-looking assessment of potential harm necessarily involves some use of regulatory judgement. We have amended the relevant section to provide further clarity and guidance.	

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41	Respondent 2	"We think the criteria (and, in particular, the first and second criteria), establish too low a bar, implying that any loss or deterioration in quality of information will potentially result in prejudice. The word "could" is used in each criterion whereas the test in the Act for prejudice is "may be expected to" - a higher bar. We believe criteria one to four should include additional wording that indicates the materiality of the loss/deterioration that is relevant; this could be done, for example, through adding to the end of each criterion the words "in a way that [materially] adversely affects our ability to make comparisons with other network companies".	Paragraphs 6.1 to 6.7	The criterion will be used to assess the likely impact of the merger. However, it remains the case that we must provide our opinion to CMA as to "whether and to what extent the 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". The suggested changes are therefore not necessary.	No revision
42	Respondent 2	"We further consider that Ofgem's proposed third and fourth criteria fail to account for the continued operation of the price control in driving efficiencies following the merger. The merging entities will remain subject to strict reporting requirements and incentives through the RIIO framework. The	Paragraphs 6.1 to 6.7	We acknowledge this point and have provided further clarity and guidance.	Para 7.2-7.7

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		criteria should explain how Ofgem will account for the continued operation of the price control in assessing efficiency impacts or, at a minimum, expressly acknowledge this will be considered as part of its assessment."			
43	Respondent 2	"many of the areas of prejudice will potentially be correlated with RCBs. There should be an explicit acknowledgment of this in the context of the first three criteria, and of the need to avoid a presumption in favour of prejudice in these circumstances."	Paragraphs 6.1 to 6.7	We have revised the text to provide further clarity & guidance.	Para 7.8-7.17
44	Respondent 2	"Ofgem's Statement of Methods (para 6.3) says Ofgem's assessment will, where possible, be based on a comparison between the factual (with merger) and counterfactual (without merger) situation. Ofgem should expand this paragraph to make it clear that Ofgem will need to give careful consideration to the definition of the most appropriate counterfactual, which may not be maintaining the status quo but	Paragraphs 6.1 to 6.7	We have provided further clarity in our decision document.	Para 7.12

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		rather acquisition by some other party."			
45	Respondent 2	4.7. "We think it would be helpful if Ofgem could give some concrete examples in this section to help illustrate its approach. In particular, we request that Ofgem provide some examples of "substantial" prejudice (versus non-substantial prejudice) given this is a specific requirement in the energy legislation (which is not present in the water regime)."	Paragraphs 6.1 to 6.7	It is for the CMA to assess and decide whether the prejudice is 'substantial'. Please refer to the CMA's Guidance for any relevant references. Ofgem's role is to provide an opinion on whether and to what extent the 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	No revision
46	Respondent 2	"Ofgem refers to the need to consider counterfactuals in the context of assessing the impact (para 6.3) but makes no mention of it in the section titled "How we will assess any RCBs against these criteria" (paras 6.14 to 6.16). Ofgem should include similar wording about counterfactuals in this section, including to consider carefully the definition of the most appropriate counterfactual (see point 0 in section 0 above)."	Paragraphs 6.8 to 6.16	We have provided further clarification in our decision document.	Para 7.9-7.17

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47	Respondent 2	5.2: "The consultation (para 6.15) states that Ofgem proposes to apply a relatively high evidential bar to any conclusion that the RCBs outweigh any prejudice arising from the merger given that (a) the purpose of Ofgem's assessment is to inform the CMA's decision on whether to refer the merger to a more detailed Phase 2 investigation and (b) Ofgem's principal objective is to protect the interests of existing and future consumers. We query whether it is appropriate to impose a higher evidential bar for the RCB assessment than it is for the prejudice assessment as this potentially introduces a presumption against the merger which is not contemplated in the Energy Act 2023 regime. A merger could potentially result in considerable consumer benefit (e.g. through economies of scale leading to lower consumer prices) and taking an approach that makes it easier to establish prejudice than benefit could risk	Paragraphs 6.8 to 6.16	See also, our response to comment no. [35 & 36]. It is not our intention to introduce an evidential bar that would make it easier to establish prejudice than benefit. We acknowledge potential benefits that an energy network merger could provide. However, we want to highlight that such benefits should be supported by robust evidence that would outweigh the prejudice. We have made some relevant changes to the text.	Para 7.9-7.17

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		undermining the interests of consumers. It is not clear to us why the rationales given for imposing a higher evidential bar justify this approach in light of the above and we therefore believe that paragraph 6.15 should be removed from the Statement of Methods.			
48	Respondent 2	"We suggest that Ofgem include examples in each category of RCB (as is done in the equivalent Ofwat guidance). Examples could make reference to the benefits which could be delivered by certain types of investor (compared to a counterfactual investor) particularly in the context of delivering net zero."	Paragraphs 6.8 to 6.16	We have amended the text in our decision to improve the guidance.	Para 7.13-7.17
49	Respondent 2	"Although Ofgem commits to using quantitative data where possible to carry out the assessment of prejudice and RCBs and weighing the two against each other (para 3.8), the wording in para 6.14 (assessment of RCBs) appears to imply that the RCB assessment will be more of a qualitative one.	Paragraphs 6.8 to 6.16	We have amended the text in our decision to improve the guidance.	Para 7.13-7.17

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		Ofgem should amend para 6.14 to make it clear that both the prejudice and RCB assessment should, to the extent feasible, be based on quantitative analysis, supplemented by a qualitative assessment where necessary and appropriate."			
50	Respondent 2	"The draft Statement of Methods does not provide for the sharing of Ofgem's economic analysis or other evidence during the review process. Sharing this information would help to ensure that Ofgem and the parties are aligned on the accuracy and completeness of Ofgem's analysis and evidence and would be in line with Ofgem's publicly stated commitment to transparency, where it accepts that transparency is an important part of its statutory duties and a core governance principle. The draft Statement of Methods (or the CMA's guidance) should set out the timescales around this process."		Ofgem will be engaging with the parties during the pre-notification and Phase 1 process and will be publishing its opinion and the reasoning behind it. The parties will receive a non-confidential version of our opinion along with the issues letter. We believe there is no need for further clarification in the Statement of Methods.	No revision
51	Respondent 2	"Ofgem says (para 8.18) that given the tight timeframe of the Phase 1 investigation, it expects		We note that a similar point was made by Respondent 1. See comments No [27] above.	Para 9.19

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		parties to send all information to Ofgem and the CMA at the same time. We recognise that this will normally be good practice but would encourage Ofgem to consider whether it needs to set out such a blanket expectation, given that there may be some instances where it is not appropriate or necessary to send information to both Ofgem and the CMA."			
52	Respondent 2	"The CMA's draft guidance on energy network mergers (CMA190) states at paragraph 6.16 that 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 Ofgem. We believe that this principle should be stated in Ofgem's Statement of Methods at section 7 ('Undertakings in lieu of a Phase 2 reference). Certain behavioural undertakings, such as undertakings to maintain separate network licensees with separate reporting obligations, are likely to		We have acknowledged in Chapter 5 that a merger would not automatically lead to a reduction in the number of licensees with separate reporting obligations. In addition, the CMA Guidance provides detail on their approach to remedies.	Chapter 5

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		resolve concerns Ofgem may identify in an energy networks merger, and this should be set out explicitly in Ofgem's Statement of Methods."			
53	Respondent 3	"Efficient ownership structures are beneficial for consumers. When the right companies own and operate the right businesses they deliver better performance at a lower cost. 1. Regulators should only interfere in the market determining this when it is clear that otherwise the outcome would be detrimental for consumers. The new regime for assessing energy network mergers recognises this high hurdle. Before intervening, the CMA must be satisfied both that (i) the merger would substantially prejudice Ofgem's ability to make comparisons between networks and (ii) that this is not outweighed by other benefits."	n/a	This position is reflected in the CMA Guidance and the SoM	No revision
54	Respondent 3	"Ofgem is wrong to start from the presumption that a merger will have a negative impact on its	n/a	We have reviewed and revised the text in our decision to clarify our position that not all mergers will have	Para 3.8

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		ability to perform meaningful benchmarking.		a negative impact on our ability to undertake meaningful assessments:	
55	Respondent 3	Changes in ownership will not alter the number of ring-fenced licensees. There will be no change in the amount of information Ofgem receives and no material reduction in the quality of the information for the majority of cost and output categories. Companies are required to report costs at a licensee level, the number of licensees under any comparative benchmarking would not change. Companies are obliged to allocate consolidated company costs appropriately between licensees under single ownership.	n/a	Paragraphs 5.5 and 5.6 set out our view on how prejudice could arise through a reduction in the quality of information on costs and performance, even if the licensed entities are not consolidated following a merger.	No revision
56	Respondent 3	For those areas where a merger would result in Ofgem receiving less varied information, it is not	n/a	We note that the WPD merger with Central Networks in 2011 happened before the new special merger regime	No revision

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		necessarily the case that this would substantially prejudice Ofgem's ability to compare networks. Ofgem has previously recognised this when awarding price control settlements, and in taking no other steps than recalculating cost sharing splits as a form of "merger tax". Following WPD moving from two to four licensees in April 2011, Ofgem amended the IQI mid-period with "no other steps … taken to reduce allowed revenues in the form of a merger tax". Additionally, Ofgem recalculated the IQI with a low impact from the merger. WPD was 51% for DCPR5, with Central Networks 47%, and it ended up being 49% when taking the four into account.		came into force. Ofgem is now specifically required to consider whether the merger would prejudice its ability to make comparisons, and we will assess any new mergers under the new regime.	
57	Respondent 3	Ofgem has a wide array of tools available to it when comparing network companies. Ofgem currently effectively regulate the GDN sector despite fewer licences and ownership groups with ostensibly similar models and	n/a	Ofgem recognise it has a wide array of tools at its disposal and will take account of any mitigations that it can put into place when assessing the impact of mergers.	No revision

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		sound outcomes. All the evidence suggests that the DNO sector could see further consolidation without there being any substantial harm to Ofgem's ability to undertake comparative benchmarking, and a policy that is unduly cautious around such mergers will simply deny customers the potentially material and enduring benefit of economies of scale and scope."			
58	Respondent 3	"Overall, Ofgem's approach is skewed inappropriately against mergers and, if implemented as set out here, we do not believe it is likely to assist the CMA in striking the right balance. Ofgem's Statement of Methods should set out how it will seek to seek to "quantify the impact of the merger on existing and future consumers in monetary terms". The consultation is essentially silent on this. A stylised example, from a simple yardstick regime, suggests less than 3.5p.p loss of	n/a	In our consultation we state our aim to carry out a quantitative assessment to the extent that it is feasible. The nature and extent of any quantitative assessment would depend on the quality and extent of the information provided by the merging parties and will be dependent on a case-by-case basis for each merger. .	No revision

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		incentive power would arise from a six to five merger.			
59	Respondent 3	Under a yardstick regime, companies are incentivised to find cost efficiencies that in turn lower their share in the yardstick. The company benefits from the difference between their efficient cost and the new yardstick value. In this framework we can characterise the strength of the incentives as the benefits retained from each saving. The company share of the yardstick (i.e., amount of the whole) sets the power of the incentive. We set out calculations for a notional yardstick with the number of companies reducing from six to five, showing the lost incentive power being only 3.3p.p.	n/a	The stylised example provided is overly simplistic in its approach to assessing relative company performance and only considers the static impacts and does not take account of dynamic forward-looking factors.	No revision
60	Respondent 3	Ofgem has set out four high level criteria for assessing the impact of a merger on its ability to compare networks, which it states are all equally relevant. The criteria are		We have revised the decision text to provide further clarity on our assessment criteria.	Para 7.1 - 7.7

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		duplicative and/or not strictly relevant to assessment and will therefore overstate any negative impact. Criteria one and two are very similar in that they relate to Ofgem's ability to assess "what does good look like?". It is difficult to envisage how an assessment that a merger caused harm in one category would not automatically be reflected in both. Criterion two is the only real test here, with criterion one simply duplicating rather than adding.			
61	Respondent 3	Accepting Ofgem's basis of concern, criteria three and four would impact future network performance, rather than impact Ofgem's ability to make comparisons. It is Ofgem's ability to compare that is the only relevant test.	n/a	Our criterion will be used to assess the likely impact of a merger. We need to understand this information in order to assess not only the impact on our ability to make comparisons, but also whether there are any RCBs, which negate any prejudice we identify. Criterion 3 related to the availability of information relating to good	No revision

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				performances and efficient level of costs. Criterion 4 relates to our ability to compare performance and efficiencies, and also RCBs.	
62	Respondent 3	The detrimental impact to benchmarking test is that the merger must "substantially prejudice" Ofgem's ability to compare networks, yet Ofgem has presumed all mergers will reduce its ability to do so, included criteria that do not go to its ability to do so and omitted from its four criteria any reference to how it will quantify the extent of any prejudice."		We note that Ofgem must provide its opinion as to whether the merger will prejudice (rather than "substantially prejudice") Ofgem's ability to make comparisons between energy network enterprises. However, Ofgem has not made any assumptions about future mergers. Instead, the criterion will be used to assess the likely impact of each merger on a case-by-case basis. We need to understand this information in order to assess not only the impact on our ability to make comparisons, but also whether there are any RCBs, which negate any prejudice we identify.	Clarification made to Para 3.7

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				It is not possible to provide additional information at this stage on the approach to quantification. Our approach will be based on the specifics of the merger and the nature of evidence available on a case-by-case basis.	
63	Respondent 3	When assessing the upside to consumers of any merger, Ofgem's approach is unduly restrictive and is likely to understate any benefits. Any benefit of a merger requires "compelling evidence", measured over a "reasonable period", that is "directly and predominantly attributable" to the merger, arbitrarily requires that the benefits persist for the same amount of time as the reduction in Ofgem's ability to benchmark, and completely ignores the factors which would justify a presumption		We have included a section on the relative benefits of mergers.	Chapter 6

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		that there will be benefits (e.g. economies of scales)."			
64	Respondent 3	"Ofgem's approach is skewed inappropriately against mergers and, if implemented as set out here, we do not believe it is likely to assist the CMA in striking the right balance."		We have considered the consultation responses and revised our text in the decision to clarify our position and remove any inadvertent inference that we deem mergers to be inherently negative	Chapters 6 & 7