

# P374 'ALIGNING THE BSC WITH THE EB GL CHANGE PROCESS AND DEROGATION APPROACH' PROGRESSION

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**MEETING NAME** BSC Panel Meeting

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**Date of meeting** 13 December 2018

**Paper number** 285/04

**Owner/author** Elliott Harper

**Purpose of paper** Decision

**Classification** Public

**Summary** To inform the BSC Panel on the progression options for P374, in order that it can make an informed decision on how best to further progress the Modification.

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## 1. Background

- 1.1 SSE raised P374 on 5 November 2018, which seeks to ensure that the BSC is aligned with the European Electricity Balancing Guideline (EB GL) derogation and change process. It will do this by ensuring that BSC Modifications are not implemented until the EB GL change process has completed. Further, it seeks to ensure that BSC Derogations (granted under the BSC's sandbox process) cannot be granted for provisions that impact the EB GL balancing terms and conditions.
- 1.2 SSE doesn't believe the BSC explicitly reflects the changes introduced by the EB GL in respect of derogations (Article 62(2)) and amendments (Articles 4, 5, 6 and 10) to the terms and conditions related to balancing (Article 18). SSE believes that without this (P374) Modification, the BSC will not be aligned with the EB GL, which could cause confusion or create ambiguity for BSC Parties and the BSC Panel when applying or interpreting the BSC arrangements.
- 1.3 Modification [P362 'Introducing BSC arrangements to facilitate an electricity market sandbox'](#) introduced the ability for the granting of derogations against provisions of the BSC upon application and consideration of the merits of the case. SSE assert that the terms and conditions related to balancing submitted in accordance with Article 18, however, cannot be derogated against, in accordance with Article 62(2), once it has been approved by the National Regulatory Authority (Ofgem).
- 1.4 SSE believes a BSC change is necessary to limit any potential misunderstanding by Parties, interested third parties and the Panel when considering BSC Derogation requests that could result in inadvertent breach of European Law. SSE contends that a change would provide certainty that GB national arrangements comply with European Law when administering BSC Derogation requests impacting Article 18 terms and conditions relating to balancing.

## 2. ELEXON's Legal View

- 2.1 ELEXON as the BSCCo cannot align its legal interpretations of the EB GL provisions to those highlighted by SSE as it is not yet clear how the EB GL change process requirements should be interpreted. Ofgem has not made any decision in regards to the Article 18 terms and conditions and it is therefore not clear what the implications are for the BSC. Ofgem indicated at the Panel meeting on 8 November 2018, that there will likely be amendments to the proposed terms and conditions relating to balancing and subject to these amendments, we would then expect Ofgem to set an implementation date or timeframe.

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- 2.2 In addition to the uncertainty related to the interpretation of the EB GL, ELEXON also has concerns with the proposed legal text. Prior to P374 being raised, we provided comments on the draft legal text, for consideration by the Proposer. The Proposer decided to keep the legal text substantially the same. Details can be found in appendix 2 of the P374 Initial Written Assessment (IWA) on the [P374 webpage](#). Since SSE raised P374, we identified seven areas of concern with the proposed legal text with further detail contained in Section 2 and Appendix 2 of the P374 IWA. These concerns range from adherence to drafting good practices to the use of references that are not included in the BSC, which is problematic.
- 2.3 Furthermore, we note that the BSC sandbox provisions (H10.4.3(d)(iii)) already preclude derogations that would be contrary to EU Law and therefore it would not be good legal text drafting practice to include a list of provisions which cannot be derogated. Including the list may lead to unintended interpretations of the more general preclusion, and will unnecessarily "hard-code" requirements which are likely to change in the future.
- 2.4 We have offered to assist SSE with re-drafting the legal text in consideration of our views regarding best legal drafting practise and have planned to further discuss these concerns with SSE in advance of the Panel meeting on 13 December 2018. An update will be presented at the Panel meeting. In absence of the outcome of these discussions, at the time of writing this paper our legal views on the proposed legal text remain consistent with those presented in the P374 IWA. Therefore, as the BSCCo we cannot endorse the proposed legal text in its current form.

## 3. Panel consideration of the P374 IWA on 8 November 2018 ([284/14](#))

- 3.1 We prepared the IWA in accordance with BSC Section F 'Modification Procedures' 2.1.8 to assist the Panel in its determination of how to proceed with P374, which included an assessment of the implications of the Modification. We noted that this assessment under BSC Section F highlighted the differing legal perspectives between SSE and ELEXON as the BSCCo. As a result of the differing legal perspectives, we presented two sets of recommendations on how the Panel may wish to proceed with the Modification.
- 3.2 Whilst unusual for there to be two sets of recommendations, we were duty bound to inform the Panel of the uncertainty in relation to the EB GL requirements and the concerns with the quality of the proposed legal text, and to provide transparency in relation to P374 with respect of the differing legal interpretations.
- 3.3 The Panel determined that it required further information in order to inform a decision on the most appropriate progression route for P374 and therefore unanimously deferred its decision until the December 2018 Panel meeting pending further information from Ofgem.

## 4. P374 Letter to Ofgem

- 4.1 As part of the IWA, we outlined information from Ofgem that we believed would better inform the Panel's decision on how P374 should proceed.
- 4.2 Following BSC Panel deliberations and the determination to defer its decision until further information is provided, the [BSC Panel Chair wrote to Ofgem](#) on 15 November 2018 requesting that it provides guidance on seven items outlined within the letter in advance of the December Panel meeting on 13 December 2018.
- 4.3 We contacted Ofgem for a progression update and Ofgem informed us that it notes the timetable the BSC Panel requested in order to make a decision on P374 progression at the December 2018 meeting. Ofgem highlighted that it is aiming to provide feedback by this time.

## 5. Panel's Options

- 5.1 At its meeting on 13 December 2018, the Panel has four options to progress with P374:

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## 1) Further deferral of P374

If Ofgem does not respond to the Panel's request for further information on the items contained within the letter dated 15 November 2018, or does not provide guidance suitable for the Panel to make an informed decision on the progression of P374, the Panel may wish to further defer its decision. The Panel may wish to take this action if it feels it still cannot make a decision, as the information required has not been provided and that information is critical to making its decision. If Ofgem provides its guidance before the next panel meeting, the Panel should carefully consider the information provided in deciding whether or not to defer again.

As advised by ELEXON in the previous Panel meeting, a second deferral does not appear to have been anticipated in the drafting of the relevant provision (F2.2.5), however, a second deferral is not expressly precluded by the provision. The Code is silent as to how the Panel ought to proceed when the information that it determined it requires in order to make a decision is not available by the time of the next Panel meeting.

However, if Ofgem has satisfactorily provided guidance on the items the Panel should be in a position to decide whether to proceed into one of the following three phases.

## 2) Send P374 into the Report Phase

If the Panel is provided with all relevant information to make an informed decision on the progression of P374, it may wish to send the Modification into the Report Phase, aligning to the Proposer's recommendations. We would typically expect this to be self-evident or of an inconsequential nature (see F 2.2.4).

If the Panel wishes to send P374 into the Report Phase, we encourage the full considerations of the implications of the proposed legal text when determining the appropriate progression approach for P374. The legal text proposed by the Proposer is not accorded any status under the Code.

If the Panel proposes to recommend approval of the Modification, the Panel may commission legal text when in the Report Phase and prior to issuing the Report phase Consultation (F2.7.2). This could take the form of the Proposer's legal text or an entirely new set of legal text because the Proposer's legal text is not accorded any status under the Code. The Panel can further amend the legal text following the Report Phase Consultation (F2.7.5(c));

If the Panel proposes to recommend rejection of the Proposed Modification, the Panel is obliged to consult with Ofgem as to whether Ofgem would like the Modification Report to include Legal Text. (F2.7.3). If Ofgem responds in the affirmative, the Panel is obliged to commission legal text. As above, this could take the form of the Proposer's legal text, or an entirely new set of legal text, because the Proposer's legal text is not accorded any status under the Code.

## 3) Send P374 into the Definition Procedure

The Definition Procedure exists to define the issue/defect relating to a Modification Proposal through a two month Workgroup process. As there are differing legal views on the interpretations of the EB GL provisions, this could be an appropriate progression route to discuss the Modification in an open forum, if Ofgem does not provide clear direction in response to the Panel's questions.

However, we would encourage the Panel to consider the value that a Workgroup could add, and hence whether a two month Definition Procedure would be the most efficient means of progressing P374 in the absence of full guidance from Ofgem.

## 4) Send P374 into the Assessment Procedure

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The purpose of the Assessment Procedure is to evaluate whether the Proposed Modification better facilitates the achievement of the Applicable BSC Objectives and whether any Alternative Modification would, as compared to the Proposed Modification, better facilitate achievement of the Applicable BSC Objectives. The Panel may wish to send P374 into the Assessment Procedure in order that a Workgroup can discuss and devise the solution to P374.

However and as noted previously, the benefits of the Assessment Procedure in relation to P374 progression are unclear as there is uncertainty over the value that a Workgroup could add, given that it is Ofgem who can provide a clear steer on the issues outlined in P374.

### 6. Recommendations

6.1 We invite you to:

- 1) **NOTE** the update provided; and
- 2) **DETERMINE** the progression approach for P374.

#### **For more information, please contact:**

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