

Modification proposal:	<b>Balancing and Settlement Code (BSC) P390: Allowing extensions to ELEXON’s business and activities, subject to additional conditions (P390)</b>		
Decision:	The Authority <sup>1</sup> directs that this modification be made <sup>2</sup>		
Target audience:	National Grid Electricity System Operator (NGESO), Parties to the BSC, the BSC Panel and other interested parties		
Date of publication:	19 March 2021	Implementation date:	Five working days after date of Authority decision

## Background

The BSC is derived from the Electricity Transmission licence held by NGESO. This licence defines the activities and remit of the BSC and ELEXON as the BSC Company. ELEXON’s activities are restricted and it can’t pursue additional activities without our approval. In the past, specific modifications have been required to enable ELEXON to provide the Warm Homes Discount Reconciliation service, Electricity Market Reform settlement, and to participate in the Retail Energy Code (REC) administrator appointment process.

E.ON UK PLC, the proposer of P390 (the Proposer) considered that the current modification process of seeking to extend ELEXON’s vires could be time-consuming and lead to ELEXON being unable to pursue an opportunity within a required timeframe.

Past BSC modifications have changed the BSC to extend the remit of ELEXON, or its affiliates, such as P330 and P365. P330 allowed ELEXON to bid to become the Gas Performance Assurance Framework Administrator. P365 changed the BSC to allow an ELEXON affiliate to bid for the role of REC administrator. The Proposer notes that each of these proposals has included provisions for a separate subsidiary to ensure that there is ring-fencing of any

<sup>1</sup> References to the “Authority”, “Ofgem”, “we” and “our” are used interchangeably in this document. The Authority refers to GEMA, the Gas and Electricity Markets Authority. The Office of Gas and Electricity Markets (Ofgem) supports GEMA in its day to day work. This decision is made by or on behalf of GEMA.

<sup>2</sup> This document is notice of the reasons for this decision as required by section 49A of the Electricity Act 1989.

enduring operational costs and risks associated with performing additional roles, beyond delivering the BSC activities.

For previous modifications where we approved an extension to ELEXON's vires,<sup>3</sup> we listed four criteria to assess whether such an activity would be appropriate for ELEXON to pursue. The criteria were:

- i) BSC Parties should benefit from any diversification,
- ii) the arrangements should not place disproportionate risk on BSC Parties,
- iii) standards of service under the BSC should be maintained, and
- iv) ELEXON's BSC role should not give it any undue competitive advantage in a contestable activity.

### **The modification proposal**

P390 was raised on 12 August 2019 to allow an ELEXON affiliate to pursue non-BSC business activities without the need to raise a modification each time. The Proposer considered that P390 would improve efficiency<sup>4</sup> and competition<sup>5</sup> in the BSC, saving industry time and effort. The Proposer also argued that P390 will benefit BSC parties by making ELEXON more competitive. Specifically, they suggested that in allowing ELEXON to explore wider avenues of revenue, its staff may acquire greater skills and experiences to offer better services to BSC parties.

P390 proposes to change the BSC to remove the need for separate modifications to be progressed and approved each time an ELEXON affiliate wishes to bid for a new role. It recognises the need for monitoring and management of such diversification and proposes the following safeguards.

1. Before making a decision over whether to bid on a given opportunity, the BSC Board must satisfy themselves that a number of conditions have been met,<sup>6</sup> including four

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<sup>3</sup> Ofgem approved [P330](#) on 25 May 2016 and [P365](#) on 10 April 2018.

<sup>4</sup> See standard condition C3 (3), BSC objective (d) of NGENO's Transmission Licence: "Promoting efficiency in the implementation and administration of the balancing and settlement arrangements"

<sup>5</sup> See standard condition C3 (3), BSC objective (c) of NGENO's Transmission Licence: "Promoting effective competition in the generation and supply of all electricity and (so far as consistent therewith) promoting such competition in the sale and purchase of electricity".

<sup>6</sup> P390 proposed legal text paragraph 4.1.2 states: Prior to commencing a tender for a Permissible Activity, BSCCo shall satisfy itself that the proposed PACo Role meets the following conditions:  
(a) that the proposed PACo Role relates to the UK and/or the Republic of Ireland;

- that are modelled on the criteria Ofgem considered when making its decisions on P330 and P365.
2. Before taking a decision to bid for a new non-BSC activity, ELEXON shall consult with industry.
  3. At the end of the consultation, Ofgem may veto the proposed decision to pursue a new activity.
  4. There are limits on the amount ELEXON can spend bidding on new activities.

The Proposer also noted that the BSC Board is accountable to BSC Parties and so, if BSC Parties were ever dissatisfied with the decisions of the BSC Board, the Proposer considers that ultimately they would have the ability to hold the Board to account.

### *P390 Workgroup Discussion & Consultation*

A P390 workgroup was formed to discuss the modification and develop a solution. The workgroup consultation received six responses with the majority expressing their support for P390. On 25 March 2020, the workgroup voted unanimously in favour of P390.

### **BSC Panel<sup>7</sup> recommendation**

At the BSC Panel meeting on 14 May 2020, the BSC Panel unanimously voted that P390 would better facilitate BSC objectives (c) and (d). The BSC Panel recommended that Ofgem accept this modification.

### *Send back*

On 25 November 2020, we decided to send back the P390 Final Modification Report (FMR) asking the BSC Panel to address concerns over equal treatment of access to data and the 'undue competitive advantage' condition (g) arising from the P390 legal drafting.

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- (b) that the proposed PACo Role relates to the gas, electricity, heat and/or transport sector;
  - (c) that the proposed PACo Role is linked to BSCCo core competencies;
  - (d) BSC Parties shall benefit BSCCo undertaking the proposed PACo Role;
  - (e) that BSCCo undertaking the proposed PACo Role shall not place disproportionate risk on BSC Parties;
  - (f) that BSCCo undertaking the proposed PACo Role shall not prevent standards of service under the Code from being maintained by BSCCo; and
  - (g) that BSCCo's role given to it under the Code shall not give it any undue competitive advantage in a contestable activity.

<sup>7</sup> The BSC Panel is established and constituted pursuant to and in accordance with Section B of the BSC and Standard Special Licence Condition C3 of the Electricity Transmission Licence.

On 10 December 2020, the BSC Panel voted on the revised FMR and associated legal text and agreed again that P390 better facilitated the BSC objectives. The revised FMR and legal text were submitted to us on 14 December 2020.

## **Our decision**

We have considered the issues raised by the modification proposal and both FMRs dated 28 May 2020 and 14 December 2020. We have considered the responses to the industry consultations which are attached to the FMR.<sup>8</sup> We have concluded that:

- implementation of the modification proposal will better facilitate the achievement of the applicable objectives of the BSC;<sup>9</sup> and
- directing that the modification be made is consistent with our principal objective and statutory duties.<sup>10</sup>

## **Reasons for our decision**

We consider this modification proposal better facilitates BSC objective (d) and has a neutral impact on the other BSC objectives.

### ***(c) promoting effective competition in the generation and supply of electricity, and (so far as consistent therewith) promoting such competition in the sale and purchase of electricity***

We note that the BSC Panel and workgroup consider that P390 better facilitates this objective because it may lead to BSC party costs being defrayed which in turn may lead to more participants entering the market. However, we remain unconvinced that this objective is better facilitated because we have not seen evidence that P390 will noticeably reduce BSC costs for individual market participants. Also, it isn't clear that P390 will enable ELEXON to pursue significantly more activities than would be the case through the current process of modifying the BSC each time a new opportunity arises.

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<sup>8</sup> BSC modification proposals, modification reports and representations can be viewed on the ELEXON website at [www.elexon.co.uk](http://www.elexon.co.uk)

<sup>9</sup> As set out in Standard Condition C3(3) of the Electricity Transmission Licence: <https://epr.ofgem.gov.uk>

<sup>10</sup> The Authority's statutory duties are wider than matters which the Panel must take into consideration and are detailed mainly in the Electricity Act 1989.

Nonetheless we do not believe that the revised proposal would have a negative impact on competition more broadly, as it includes safeguards to maintain a level playing field for access to data. Accordingly, we consider P390 has a neutral effect on this objective.

***(d) promoting efficiency in the implementation and administration of the balancing and settlement arrangements***

We share the view of the BSC Panel, workgroup and majority of consultation respondents that P390 better facilitates objective (d) as compared to the current baseline because it offers a more efficient and responsive process. We consider P390 positively impacts this BSC objective on efficiency by the potential number of days saved<sup>11</sup> in following the P390 process as compared to following the normal code modification process for this specific purpose.

ELEXON's vires have been extended on several occasions. Based on lessons learnt from these occasions, it has been possible to design a more efficient approach under P390 that contains appropriate safeguards. Streamlining this process may reduce the time and resource burden whilst at the same time giving stakeholders opportunity to engage by way of consultation and maintaining the regulatory oversight of ELEXON group activities.

In response to the Report Phase Consultation, one respondent expressed a preference for the BSC Panel to have oversight of the BSC Board's ability to tender for additional activities. We note that the workgroup view was that P390 conditions introduce sufficient safeguards to the P390 process, including our ability to veto ELEXON taking on additional responsibilities. The BSC Panel recommended that we approve P390 drafted on this basis.

One of the respondents to the assessment procedure consultation suggested extending the wording of P390 condition (g)<sup>12</sup> to seek to avoid potential conflicts of interest. We share the respondent's view that this condition is important and expect that identification and management of potential conflicts of interest would form part of any assessment of undue competitive advantage.

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<sup>11</sup> ELEXON estimated that P390 provided a saving of some 15 working days as compared to the current modification process, see page 23 of P390 FMR

<sup>12</sup> P390 condition (g) states: that BSCCo's role given to it under the Code shall not give it any undue competitive advantage in a tendering for the proposed PACo Role.

This consultee raised wider concerns about ELEXON holding certain offices (eg chair of DWG<sup>13</sup>) giving rise to potential conflict(s) of interest on whether or not the activity in question is contestable. In relation to the Market Wide Half Hourly Settlement project and its implementation, we have identified the potential for conflict of interest as an issue in our consultation on programme implementation principles (published on 22 January), and will be consulting further on means to manage it including formal governance controls and independent assurance.

This consultee also suggested that the amount ELEXON can spend on bidding for new activities should be clarified to avoid the risk of it having an unfair competitive advantage. In response, the workgroup introduced further safeguards including an inflation linked £100k cap on the standard amount spent on a bid. This level is in line with spend previously approved under P330 and P365, and we are satisfied with the additional protection that this provides, alongside other safeguards.

#### *Future working of P390*

In making this decision we have carefully considered the potential impact of P390 on the wider electricity market including our work in relation to market data access. Following our decision to send back the modification the legal text now includes the condition mitigating risks of an 'undue competitive advantage'<sup>14</sup> and ensures that ELEXON's affiliates don't have special access to data unavailable to other third parties. We expect ELEXON to consider and adhere to its obligations under competition law at all times, particularly in light of its unique position as provider of BSC services.

In particular, where ELEXON is intending to create, use and/or share data with a permitted affiliate, we shall expect this to be available to third parties on equal terms. The revised FMR clarifies that ELEXON would only share data with a permitted affiliate (ie subsidiary) – or any third party - where the BSC permits it. Indeed, in terms of data access, the BSC does not distinguish between ELEXON affiliates and third parties so these terms are equal and should remain so.

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<sup>13</sup> DWG is the Design Working Group for Market-wide Half Hourly Settlement

<sup>14</sup> P390 condition (g)

We have published information on our priorities for data governance in our Data Best Practice guidance<sup>15</sup>, our Digitalisation Strategy and Action Plan guidance<sup>16</sup>. Early drafts are available and we will consult on these in Spring 2021. In our Forward Work Programme consultation we also announced that we intend to conduct a holistic review to identify and understand new and existing data and digital monopolies and their implications for energy consumers, to inform our future response.

We recently approved P398<sup>17</sup>: *'Increasing access to BSC Data'* which is in line with the principles outlined in these data publications; it enables non-BSC parties including third parties to seek access to BSC data. We expect ELEXON to embed data best practices and continue to operate a level playing field when implementing P398, including by ensuring access to data for third parties on equal terms.

We understand from workgroup discussions that ELEXON will give us as much advance notice as possible when they intend to undertake any non-BSC activity. We welcome this early engagement, which will be an important part of ensuring the smooth running of this mechanism. For the avoidance of doubt, when considering such requests, our decision would be informed by - but not limited to - the considerations set out in P390. We would also give due regard to our principal objective of protecting the interests of existing and future consumers and other statutory duties.

## **Decision notice**

In accordance with Standard Condition C3 of the Transmission Licence, the Authority hereby directs that modification proposal BSC P390: 'Allowing extensions to ELEXON's business and activities, subject to additional conditions' be made.

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<sup>15</sup> <https://www.ofgem.gov.uk/publications-and-updates/early-draft-data-best-practice-guidance-available>

<sup>16</sup> <https://www.ofgem.gov.uk/publications-and-updates/early-draft-digitalisation-strategy-and-action-plan-guidance-available>

<sup>17</sup> <https://www.elexon.co.uk/mod-proposal/p398/>

**David Hall**

**Head of Industry Codes and Licensing**

Signed on behalf of the Authority and authorised for that purpose