

ELEXON

29 March 2022

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RE: Request to treat BSC Modification [P438 'Amending the BSC to address sanction orders'](#) as an Urgent Modification Proposal'

Dear Colin,

The BSC Panel, at an Urgent Panel Meeting on 29 March 2022, unanimously agreed to recommend to Ofgem that P428 should be treated as an Urgent Modification Proposal. The Proposal Form details the Modification Proposal, including the case for urgency. We detail the proposed urgent procedure and timetable below. We summarise the key requests and rationale in this letter.

Modification Background

The UK has initiated sanctions on certain individuals and entities associated with Russia. The current wording of the BSC includes no reference to sanctions. Given this, if sanctions were applied to a BSC Party and BSCCo was required to comply with a sanctions order, there is no clear mechanism to allow it to do so within the terms of the BSC.

This introduces the risk that actions taken by BSCCo to comply with any sanctions could conceivably put BSCCo in breach of contract, where those actions taken would be in contravention of its obligations under the BSC. This in turn could leave BSCCo open to a potential legal claim from the designated entity subject to the sanctions, or from any counterparty to the BSC if steps were taken that were not authorised by the BSC.

In addition, the wording of sanction orders can be inherently vague, so it may not always

be obvious what steps need to be taken to comply with them. As a result, even if a sanctions order included caveats to limit claims for breach of contract, there would be a risk that BSCCo could take a step that went beyond the scope of the sanctions order, or conversely not far enough. This is a particular risk as sanctions are unlikely to be designed to fully align with BSC concepts.

There are no other provisions in the BSC that address this risk, for example there are no generic force majeure provisions such as those referenced within the Connection and Use of System Code (CUSC) and other industry codes, whereby parties can be relieved of performance of their obligations to the extent that sanctions constitute force majeure events. To introduce a general force majeure provision to the BSC at this stage would be a much more significant step than the proposed Modification, and with potentially significant implications for Settlement.

This Modification seeks to remove the litigation risks to Elexon and the consequential costs to BSC Parties of complying with any sanctions. It seeks to mitigate the risk to BSCCo and BSC Parties in complying with any sanctions order by introducing a new event of default where a BSC Party becomes a designated person under the Sanctions and Anti-Money Laundering Act 2018 or Regulations made under that Act. It will include the steps that could flow from a sanctions order, including, for example, suspension of payments, suspension of notifications, suspension of registrations and any associated governance to enable such suspensions.

Justification for Urgency

The Elexon Legal team have advised that the Modification proposal should be granted Urgent status in order to rectify the defect in the BSC that could conceivably put BSCCo or other BSC Parties in breach of the Code should BSCCo be required to give effect to a sanction order. They believe that the current situation in relation to potential sanctions means the risk of inadvertent contravention of the BSC due to the need to apply sanctions is high and should be addressed urgently.

The Panel agreed with the Proposer that this Modification meets the [Ofgem urgent criterion](#) (c). This Modification is linked to a current issue that if not urgently addressed may cause a party to be in breach of any legal requirements for the reasons detailed by the Proposer in the Proposal Form.

If Urgent status is not granted for this Modification there is a risk that BSCCo or BSC Parties may be in breach of contract by contravening obligations under the BSC if any BSC Party becomes a designated person in the near future. For the avoidance of doubt, compliance with a sanctions order is a legal requirement and has to be complied with, with or without this proposed modification. The Panel unanimously recommend that the Modification follow an Urgent Modification Proposal procedure, with two potential progression timetables.

The Panel noted that P438 would not meet the Self-Governance criteria as it is proposing a material amendment to the Codes governance procedures by introducing a new Event of Default. Further, as the Panel is recommending urgency, the Modification must be considered by Ofgem.

Proposed Urgent Progression Timetables

The Panel unanimously preferred proposed procedure and timetable 1, but has recommended a second procedure and timetable, should Ofgem not be in a position to approve the first. The Panel recommend two approaches due to P438 impacting provisions in the BSC that constitute Electricity Balancing Guideline (EBGL) Article 18 balancing terms and conditions. The BSC (as required by UK legislation following Brexit) requires a consultation on the Modification Proposal for a period of not less than one month (see [Section F 2.9.4B](#)). The Panel believe this one month consultation should take place after P438 has been implemented. Any consequential Modifications could subsequently be raised, where necessary. This approach still includes a five working day consultation before implementation to give participants an opportunity to provide their views to the modification proposal and/or this approach. The Panel urges Ofgem to consider removal of the EBGL change process or at the very least for a revision to the process to allow for urgent matters to be processed more quickly.

Panel believes that the dynamic environment in regards to potential sanctions warrants an expedited timetable, and that this route would fulfil the requirements of the EBGL change process whilst rectifying the identified defect as soon as possible. This is Proposed Progression Timetable 1.

Proposed Progression Timetable 1	
Event	Date
Modification presented to Panel	29 March 2022
Submitted to Authority for decision on urgency	1WD following Panel presentation
Urgent Modification Consultation	5WD, beginning the day after Authority decision
Draft Modification Report presented to Panel	2WD following consultation closure
Final Modification Report submitted to Authority	1WD following presentation to Panel
Modification implemented	1WD after Authority approval
EBGL Consultation period	One calendar month, beginning the day after implementation
Raise any consequential Modifications	As soon as possible following closure of consultation

Alternatively, the Authority may choose to fulfil the EBGL consultation requirement within the usual progression of the Modification (i.e. instead of a 5WD consultation, circulate for a period of one calendar month). The Panel believes that the significant delay caused by the month long EBGL consultation poses an increased risk to BSCCo and BSC Parties if a Party were to become a designated person before this Modification was implemented. This is Proposed Progression Timetable 2.

Proposed Progression Timetable 2	
Event	Date
Modification presented to Panel	29 March 2022
Submitted to Authority for decision on urgency	1WD following Panel presentation
Urgent Modification Consultation	One calendar month, beginning the day after Authority decision
Draft Modification Report presented to Panel	2WD following consultation closure
Final Modification Report submitted to Authority	1WD following presentation to Panel
Modification implemented	1WD after Authority approval

The Panel appreciates the tight timelines and thanks Ofgem in advance for a timely response.

Yours sincerely,

Michael Gibbons
Panel Chairman

List of enclosures
Attachment 1: P428 Proposal Form and Legal Text
Attachment 2: P428 BSC Panel Slides