

## Phase

Proposal

Consultation

Report Phase

Implementation

## P438 'Amending the BSC to address sanction orders'

The current wording of the BSC includes no reference to sanctions. Given this, there is a risk that implementing sanctions or complying with a sanctions order would put BSCCo in breach of the BSC and open BSCCo up to potential claims from the designated entity subject to any sanctions, or from other third parties if steps were taken that were not authorised by the BSC. This Modification seeks to remove this risk by introducing the concept of sanctions into the BSC, as a new Event of Default.



The BSC Panel recommends **approval** of P438.



Ofgem have granted P438 as an Urgent Modification Proposal.



The BSC Panel **does** believe P438 impacts the European Electricity Balancing Guideline (EBGL) Article 18 terms and conditions held within the BSC.

This Modification is expected to impact:

- All BSC Parties (including BSCCo)

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## About This Document



Not sure where to start? We suggest reading the following sections:

- Have 5 mins? Read section 1
- Have 15 mins? Read sections 1, 9 and 10
- Have 30 mins? Read all except section 6
- Have longer? Read all sections and the annexes and attachments
- *You can find the definitions of the terms and acronyms used in this document in the [BSC Glossary](#).<sup>1</sup>*

This is the P438 Final Urgent Modification Report, which Elexon has submitted to the Authority on behalf of the BSC Panel. It includes the Panel's full views and the responses to the Panel's Urgent Modification Consultation. The Authority will consider this report and will decide whether to approve or reject P438.

There are four parts to this document:

- This is the main document. It provides details of the solution, impacts, costs, benefits/drawbacks and proposed implementation approach.
- Attachment A contains the approved redlined changes to the BSC for P438.
- Attachment B contains the P438 Modification Proposal Form.
- Attachment C contains the full responses received to the Panel's Urgent Modification Consultation.

P438  
Final Modification Report

26 May 2022

Version 1.0

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<sup>1</sup> <https://www.elexon.co.uk/glossary/?show=all>

## Why Change?

The current wording of the BSC includes no reference to sanctions. Given this, if BSCCo was required to implement sanctions or comply with a sanctions order, there is no mechanism within the BSC to allow it to do so.

This introduces the risk that implementing sanctions could put BSCCo in breach of contract, whereby the implementation of a sanction would be in contravention of its obligations under the BSC. This in turn could leave BSCCo open to a potential claim from the designated entity subject to the sanctions, or from any counterparty to the designated entity if steps were taken that were not authorised by the BSC. Any costs associated with these risks would be borne by BSC Parties. Even though complying with a sanctions order would be a legal requirement (criminal offence not to comply), the legal risks of the associated breach of contract are well established under case law and it is therefore important these risks are addressed as soon as possible.

## Solution

This Modification would introduce a new Event of Default under [Section H 'General'](#)<sup>2</sup> which would arise if a BSC Party became a designated person under the Sanctions and Anti-Money Laundering Act 2018 or Regulations made under that Act and where compliance with the BSC would result in a breach of any sanctions. This would introduce a contractual right and codified route under the BSC to facilitate compliance with any sanctions orders. This should include the governance required to deal with the application of sanctions and provide protection for Parties and Elexon in complying with a sanctions order.

**Please note** that we are proposing changes to the legal text, following a comment in the consultation. Further details are provided in section 8.

## The case for Urgency

[Ofgem granted P438 'urgent status' on 20 April 2022](#)<sup>3</sup> as they are satisfied it is related to a current issue that if not urgently addressed may cause a party to be in breach of relevant legal requirements (in accordance with its [urgency criteria](#)<sup>4</sup>).

The Proposer, National Grid Electricity System Operator (NGESO), requested P438 be treated urgently. The Panel agreed and recommended P438 be treated urgently at an ad-hoc Panel meeting on 29 March 2022.

<sup>2</sup> <https://www.elexon.co.uk/the-bsc/bsc-section-h-general/>

<sup>3</sup> <https://www.elexon.co.uk/mod-proposal/p438/>

<sup>4</sup> <https://www.ofgem.gov.uk/publications/ofgem-guidance-code-modification-urgency-criteria-0>

## Impacts & Costs

Costs Estimates			
Organisation	Implementation	On-going	Impacts
Elexon	<£1k	£0	Changes to three BSC Sections required to implement this Modification
Industry	£0	£0	The BSC changes do not impose any obligations over and above those already mandated by the BSC, or any that may be required as a result of a sanctions order.
<b>Total</b>	<b>&lt;£1k</b>	<b>£0</b>	

## Implementation

The Panel recommended P438 be implemented **1WD following Authority decision**, as part of a special BSC Release. This will ensure the Modification is implemented as soon as possible, which is required to ensure BSCCo can effectively give effect to any sanction orders.

Elexon are not currently aware of any upcoming or potential sanctions orders, but believe any risk should be mitigated as soon as possible.

## Recommendation

The Panel unanimously agrees that P438 will better facilitate the achievement Applicable BSC Objective (d) 'Promoting efficiency in the implementation and administration of the balancing and settlement arrangements'.

The Panel therefore unanimously recommends to Ofgem that P438 should be **approved**.

## 2 Why Change?

### What is the issue?

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 within the BSC to allow it to do so seamlessly.

This introduces the risk that actions taken by BSCCo to comply with any sanctions could put BSCCo in breach of contract, whereby 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 contractual rights and obligations could be suspended should a party be subject to a sanctions order.

Even though complying with a sanctions order would be a legal requirement (criminal offence not to comply), the legal risks of the associated breach of contract are well established under case law and it is therefore important these risks are addressed as soon as possible.

### Urgent Code Modification

An [Urgent Code Modification](#) is a Modification Proposal which is linked to an imminent or current issue that, if not urgently addressed, may cause:

- A significant commercial impact on Parties, Consumers or stakeholders;
- A Party to be in breach of any relevant legal requirements; and
- A significant impact on the safety and security of the electricity/and or gas systems.

An urgent BSC Modification must follow a prescribed timetable approved by Ofgem, as described in [Section F2.9](#)<sup>5</sup>. This approved timetable can be found in Section 6.

This Modification is seeking to address a defect in the Code that could put the BSCCo or other BSC Parties in breach of the Code should the defect not be rectified. The current, increased likelihood of the government imposing sanctions that could impact a BSC Party and require action from the BSC mean that the likelihood of a breach of the BSC derived from the need to apply sanctions is particularly high and should be addressed urgently. Further, whilst this remains a risk, it could become an issue very quickly and therefore the solution detailed in this proposal to mitigate the risks detailed should be treated urgently.

<sup>5</sup> <https://www.elexon.co.uk/the-bsc/bsc-section-f-modification-procedures/>

## Cross-Code Considerations

Sanctions could be placed on any entities within, or associated with, the energy industry. Given the lack of clarity on what sanctions, if any, may be directed, and the identified risks to the BSC, Elexon reached out to other Code Bodies and relevant stakeholders to share thoughts and agree an aligned approach if required.

On 22 March 2022, Elexon facilitated a meeting with representatives of other Code Bodies, BEIS and Ofgem. The representatives from BEIS and Ofgem stated that it was premature for them to form a view on the risk of sanctions and what form they may take, if any, but were supportive of Code Bodies taking actions to mitigate the risk where required. Most other Code Bodies considered the risk to their Codes to be low as they had Force Majeure (FM) clauses in place. However, the BSC does not have such a clause and so Elexon stated its intent to raise this Modification with urgency. Representatives from other Codes agreed that they would perform further analysis on the potential risks and next steps to be discussed in a follow-up meeting on 5 April 2022.

At the second meeting the other Code Bodies confirmed their view that Force Majeure provisions in their Codes are sufficient where further detail on any potential sanctions is not available. All representatives at the meeting, including Ofgem and BEIS, agreed that the assembled forum could be used to coordinate an effective, cross-Code response at short notice if a sanction order were to come through that required it.

## Events of Default

This Modification would introduce a new Event of Default process. There are various circumstances in which a BSC Party can be in Default of the BSC. These include non-payment of charges, being in Credit Default for more than a specified number of times or period of time, or a material and/or persistent breach of the BSC. However, there is no Default process described in relation to a Party being subject to a sanctions order.

When a Default occurs, the Panel will meet to discuss it – sometimes at short notice. ELEXON informs the Defaulting Party or the administrator of the Panel meeting, and they can make representations to the Panel.

The Panel has a duty of care to protect other Parties from the Default and will try to minimise the potential debt. It will consider information that Elexon provides and consider the impact on the contracted counter Parties, and on the Defaulting Party.

For instance, it may not be in the interests of the industry as a whole, or individual counter Parties, to stop the Defaulting Party from trading immediately. A short period of time may be necessary for counter-parties to make alternative arrangements to sell their energy, and allowing trading to continue reduces overall exposure for other Parties. The Panel will provide support to the rest of the industry.

After the Panel has considered the case, it may take one or more of these steps, detailed in [Section H3.2](#) of the BSC. It may apply these resolutions in part or completely, effective from the Settlement Period it chooses. The Panel may:

- notify other Parties of the Default;
- suspend the Party's right to submit contracts and/or disapply existing contracts. The Panel may only disapply contracts that place the Party in further debt;

- suspend the Party's right to be allocated Metered Volumes to its Interconnector BM Units;
- suspend the Party's right to submit Bid-Offer Pairs. We will consult with NGESO on this action;
- suspend the Party's right to submit Replacement Reserve Bid Data. Elexon will consult with NGESO on this action;
- suspend the Party's right to register further Metering Systems and BM Units;
- suspend the Party's right to vote in BSC Panel elections and/or the right to receive reports and data. Elexon can provide reports where appropriate;
- require the Defaulting Party to de-energise Apparatus associated with their BM Units. The Authority will approve these actions; and/or
- expel the Defaulting Party from the BSC, subject to Ofgem approval.

For Suppliers that have insufficient contracted volumes of electricity to meet the demands of its customers, the Defaulting Supplier needs to pay imbalance Settlement charges for these volumes. If the Defaulting Supplier fails to pay, other Parties each pay a share of these charges. The Panel cannot stop a Supplier's payment liabilities escalating. This may happen when the Supplier continues to trade and/or its customers continue to consume energy before they are transferred to an alternative Supplier.

## Desired outcomes

This Modification seeks to mitigate the risk to BSCCo in complying with any sanctions order by introducing the concept of sanctions into the BSC Party Default arrangements. 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.

By using the existing Event of Default mechanism, the process for dealing with sanctions uses an established process that is well understood by BSC Parties, is transparent (in that the outcomes of Panel decisions around Events of Default are communicated to all BSC Parties) and provides a degree of flexibility in how the BSC could deal with this scenario.

The default process would allow the BSC to react quickly to sanctions through the well tested mechanism of holding an urgent Panel meeting. As with other defaults, the BSC Panel would have discretion as to which steps to take. However, all steps would have a contractual basis under the BSC so there would be no risk of taking a step that was not authorised by the Code.

Introducing an Event of Default also allows for a targeted approach. Whilst other industry codes have generic force majeure provisions, introducing something similar to the BSC would be a very significant change as it would need an assessment of what obligations Parties would be relieved on in the event of a force majeure and what the impact of this would be on Settlement. In addition, force majeure provisions will generally relieve parties from obligations only to the extent of that they are impacted by an FM event. This would mean that Elexon and each BSC Party would need to undertake its own analysis of the extent to which its obligations under the BSC were impacted by a force majeure event.

### Proposed solution

This Modification would introduce a new Event of Default under [Section H 'General'](#) which would arise if a BSC Party became a designated person under the Sanctions and Anti-Money Laundering Act 2018 or Regulations made under that Act and where compliance with the BSC would result in a breach of any sanctions. This would introduce a contractual right and codified route under the BSC to facilitate compliance with any sanctions orders. This should include the governance required to deal with the application of sanctions. This process would also clarify the requirements of any BSC Party, with regards to BSC processes, in dealing with a designated entity subject to sanctions. This process would differ from existing Event of Default processes in two key ways:

1. The provisions that allow Elexon to stop paying defaulting parties under [Section N 'Clearing, Invoicing and Payment'](#)<sup>6</sup> only apply where the defaulting Party has payments outstanding to BSCCo. However, for an Event of Default to work in the context of sanctions, Elexon must be able to withhold payments under any circumstances; and
2. Charges under [Section D 'BSC Cost Recovery and Participation Charges'](#)<sup>7</sup> (and Supplier Charges under [Section S, Annex S-1 'Performance Levels and Supplier Charges'](#)<sup>8</sup>) are not covered by the Section H default provisions. As a result, Elexon needed to introduce provisions that allows it to withhold those payments where necessary.

Elexon considers that including this new Event of Default process is the most effective way to mitigate the risk of contravening the BSC when giving effect to sanction orders.

### Benefits

This Modification will primarily ensure that BSCCo is able to comply with a sanctions order without being in breach of the BSC. It will additionally use the opportunity to provide certainty in terms of BSC requirements and governance for any counterparties of an entity subject to sanctions.

The compliance risk in the context of the BSC will primarily rest with BSCCo as most of the obligations and activities that are likely to be impacted by sanctions are BSCCo (or the BSC Clearer's) obligations. This Modification will benefit BSC Parties as they would ultimately pay for any costs associated with breach of contract claims against Elexon. It would further benefit Parties by:

- Providing a transparent process for ensuring that the BSC arrangements can comply with legal requirements;
- Utilising an existing process that will be well understood by BSC Parties; and
- Some of the steps open to the BSC Panel may help some Parties from themselves inadvertently breaching sanctions e.g. the suspension/cancellation of Energy Contract Volume Notifications (ECVNs) and Meter Volume Reallocation Notifications (MVRNs) may provide some protection in certain circumstances

<sup>6</sup> <https://www.elexon.co.uk/the-bsc/bsc-section-n-clearing-invoicing-and-payment/>

<sup>7</sup> <https://www.elexon.co.uk/the-bsc/bsc-section-d-bsc-cost-recovery-and-participation-charges/>

<sup>8</sup> <https://www.elexon.co.uk/the-bsc/bsc-section-s-annex-s-1-performance-levels-and-supplier-charges/>



## Legal Text Changes

To give effect to P438, amendments are required to:

- [BSC Section D 'BSC Cost Recovery and Participation Charges'](#)
- [BSC Section H 'General'](#)
- [BSC Section N 'Clearing, Invoicing and Payment'](#)

These changes can be seen in the proposed redlining in Attachment B.

## 4 Applicable BSC Objectives

Impact of the Modification on the Relevant Objectives:	
Relevant Objective	Identified impact
a) The efficient discharge by the Transmission Company of the obligations imposed upon it by the Transmission Licence	Neutral
(b) The efficient, economic and co-ordinated operation of the National Electricity Transmission System	Neutral
(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	Neutral
(d) Promoting efficiency in the implementation of the balancing and settlement arrangements	<b>Positive</b>
(e) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency [for the Co-operation of Energy Regulators]	Neutral
(f) Implementing and administering the arrangements for the operation of contracts for difference and arrangements that facilitate the operation of a capacity market pursuant to EMR legislation	Neutral
(g) Compliance with the Transmission Losses Principle	Neutral

The Proposer and the Panel believe this Modification will positively impact Applicable BSC Objective (d) as it will remove any ambiguity around how the BSC should treat sanctions orders and provide a compliant mechanism for the BSCCo and BSC Parties to enforce any sanctions imposed upon it or any other BSC Party.

### Estimated implementation costs of P438

If this Modification is not implemented, there is a risk of a sanctioned Party filing a legal claim against BSCCo for breach of contract by fulfilling the requirements of a sanctions order. The costs of this legal claim would be covered by all other BSC Parties via their Funding Shares.

Implementation cost estimates			
Organisation	Item	Implementation	Comment
Elxon	Documents	<£1k	Minor changes are required to three BSC Sections to implement this Modification
	Systems	£0	No system changes required to implement this Modification
	Other	£0	No other costs expected to implement this Modification
Industry	Systems & processes	£0	There are no expected costs for market participants to implement this Modification
<b>Total</b>		<b>&lt;£1k</b>	

### Estimated on-going costs of P438

On-going cost estimates		
Organisation	On-going	Comment
Elxon	£0	No ongoing costs are expected as this is a document-only change to ensure compliance with any sanctions orders without contravention of BSC obligations. Any costs associated with giving effect to a sanctions order would be subject to the scope and impact of that sanctions order i.e. on a case by case basis.
Industry	£0	The BSC changes do not impose any obligations over and above those already mandated by the BSC, or any that may be required as a result of a sanctions order
<b>Total</b>	<b>£0</b>	

## P438 impacts

Impact on BSC Parties and Party Agents		
Party/Party Agent	Impact	Estimated impact
All BSC Parties, including BSCCo	This Modification will impact all BSC Parties by ensuring that any sanctions can be effected without risking contravention of the BSC, therefore reducing the risk of any material impacts of a breach of contract being funded by BSCCo (and therefore BSC Parties). However, its impact would only be apparent if circumstances arose where the BSCCo was required to implement sanctions. <b>We are not aware of any existing or impending sanctions that would require BSCCo to take actions in relation to a sanctions order.</b>	L

Impact on the NETSO	
Impact	Estimated cost
No impact	N/A

Impact on BSCCo		
Area of Elexon	Impact	Estimated cost
Legal	This Modification will ensure that BSCCo is not in contravention of the BSC if it is required to implement a sanctions order against a BSC Party.	L

Impact on BSC Settlement Risks	
Elexon has not identified any impacts of this Modification on BSC Settlement Risks, as it will not impact Settlement directly. Rather it will ensure that Elexon can give effect to a sanctions order without being in contravention of the BSC.	

Impact on BSC Systems and process	
BSC System/Process	Impact
N/A	No impact

Impact on BSC Agent/service provider contractual arrangements	
BSC Agent/service provider contract	Impact
N/A	No impact

Impact on Code	
Code Section	Impact
<a href="#">BSC Section D 'BSC Cost Recovery and Participation Charges'</a> <a href="#">BSC Section H 'General'</a> <a href="#">BSC Section N 'Clearing, Invoicing and Payment'</a>	Changes required to make clear the process that should be followed should BSCCo be directed to give effect to a sanctions order

Impact on EBGL Article 18 terms and conditions and objectives	
<p>This Modification proposes amendments to Sections H and N3, which constitute EBGL Article 18 terms and conditions related to Balancing, as defined in <a href="#">Section F, Annex F-2</a>. The Modification has therefore been circulated for a consultation period of one calendar month, as required under the EBGL change process. The Panel do not believe P438 has any material impact on the EBGL provisions in the BSC and is therefore neutral and consistent with the EBGL objectives.</p>	

Impact on Code Subsidiary Documents	
CSD	Impact
N/A	No impact

Impact on Core Industry Documents and other documents	
Document	Impact
Ancillary Services Agreements	No impact. However, other Code Bodies may independently require a similar change. While they have force majeure provisions (unlike the BSC) , which they could initially apply, they would need to assess any risks of implementing sanctions against their Codes and any further steps that should be taken, which could include raising a modification.
Connection and Use of System Code	
Data Transfer Services Agreement	
Distribution Code	
Distribution Connection and Use of System Agreement	
Grid Code	
Retail Energy Code	
Supplemental Agreements	

Impact on Core Industry Documents and other documents	
Document	Impact
System Operator-Transmission Owner Code	
Transmission Licence	
Use of Interconnector Agreement	

Impact on a Significant Code Review (SCR) or other significant industry change projects
This proposal is not within the scope of an active SCR. On 31 March 2022 we requested to Ofgem that this Proposal be treated as an SCR-Exempt Modification Proposal. Ofgem confirmed its agreement that P438 should be treated as an SCR Exempt Modification on 8 March 2022.

Impact of the Modification on the environment and consumer benefit areas:	
Consumer benefit area	Identified impact
1) Improved safety and reliability	Neutral
2) Lower bills than would otherwise be the case	Neutral
3) Reduced environmental damage	Neutral
4) Improved quality of service	Neutral
5) Benefits for society as a whole	Neutral

No direct benefits or impacts on consumers have been identified. However, P438 would provide additional clarity for BSC Parties on actions and processes required should a sanctions order be applied to a BSC Party and will therefore provide increased certainty around the operation of the energy system.



### What are the consumer benefit areas?

- 1)** Will this change mean that the energy system can operate more safely and reliably now and in the future in a way that benefits end consumers?
- 2)** Will this change lower consumers' bills by controlling, reducing, and optimising spend, for example on balancing and operating the system?
- 3)** Will this proposal support:
  - i) new providers and technologies?
  - ii) a move to hydrogen or lower greenhouse gases?
  - iii) the journey toward statutory net-zero targets?
  - iv) decarbonisation?
- 4)** Will this change improve the quality of service for some or all end consumers? Improved service quality ultimately benefits the end consumer due to interactions in the value chains across the industry being more seamless, efficient and effective.
- 5)** Are there any other identified changes to society, such as jobs or the economy?

### Recommended Implementation Date

The Panel recommended P438 be implemented **1WD following Authority decision**, as part of a special BSC Release. This will ensure the Modification is implemented as soon as possible, which is required to ensure BSCCo can effectively give effect to any sanction orders.

**Ellexon are not currently aware of any upcoming or potential sanctions orders, but believe any risk should be mitigated as soon as possible.**

### Urgent Progression Procedure and Timetable

Ofgem approved the below Progression Procedure and timetable for P438 (option 2 as recommend by the Panel – see section 7 below for more details). This timetable will allow the defect to be addressed in the most efficient manner, whilst also fulfilling the requirements of the EBGL change process.

Urgent Progression Timetable	
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

Ofgem granted P438 'urgent status' on 20 April 2022 as they are satisfied it is related to a current issue that if not urgently addressed may cause a party to be in breach of relevant legal requirements (in accordance with its urgency criteria).

The Proposer, National Grid Electricity System Operator (NGESO), requested P438 be treated urgently. The Panel agreed and recommended P438 be treated urgently at an ad-hoc Panel meeting on 29 March 2022.

This Modification is seeking to address a defect in the Code that could put the BSCCo or other BSC Parties in breach of the Code should the defect not be rectified. Due to the current situation the risk of a breach of the BSC from the need to apply sanctions is particularly high and should be addressed urgently.

P438 was presented to the Panel at an urgent meeting on 29 March 2022. At this meeting, the Panel unanimously recommended that P438 should be progressed as an urgent Modification and approved due to its positive impact against Applicable BSC Objective (d). 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.

### BSC Force Majeure Provisions

The Panel discussed the approach of other Codes and existing BSC provisions, specifically in relation to Force Majeure (FM). The Chair questioned whether other Code Parties are able to rely on FM. NGESO explained that the initial thinking from other Codes is that they will rely on FM in the first instance as the potential for sanctions presented some risk, though the need to raise a specific change would need to be considered for each sanction.

A Panel Member questioned whether an alternative route was discussed for the BSC, noting that other Code Bodies are relying on FM. Elexon highlighted that FM was deliberately not included in the BSC as it would not be clear what the impact on Settlement would be and could be difficult to implement and unpick. A Panel Member also noted that FM provisions are still open to challenge and are often argued against when used due to their subjectivity. Therefore it would be preferable to have a specific process to handle sanctions. Elexon further detailed that the advantage with this Modification is that once a sanction is in place, it will trigger an Event of Default and the Panel can take any of the steps that flow from that without needing to analyse the precise ways in which the sanctions might impact the BSC.

### Risk of sanction orders

The Panel questioned what would happen if the British Government designated an entity or person under the relevant sanctions legislation that required Elexon to take action. The Company Secretary confirmed that it would be a criminal offence not to take the required action and therefore Elexon would have to comply with any relevant sanctions orders, and that unless this Modification was implemented the identified risks could become issues i.e. Elexon could be caught by litigation, the costs for which would be passed to Parties. A Member also noted the Modification would give the Panel the right to suspend income to the Party and freeze assets. However, a Panel Member questioned whether the Modification would allow Elexon to seize assets, if needed. Elexon noted the current drafting does not and so would need to look into this.

The ESO Representative highlighted that there are second order consequences to any sanction which need to be fully understood despite not being able to anticipate it. Therefore, additional work between the Codes needs to be undertaken to establish this. Elexon noted the exact impact would depend upon the scope of the sanctions order.

There was a discussion about whether the default trigger in the legal text was sufficiently flexible to capture all possible sanctions scenarios and a Panel Member suggested that the trigger could be widened in scope to capture any breach of applicable laws. Elexon highlighted that the legal text was drafted by a third party legal team with sanction specialists and he therefore had confidence in the proposed legal text. A Panel Member noted that the benefit of a tightly specified legal text was that it lent itself to a quick process.



## EBGL Change Process and progression

As part of the Urgent Modification Proposal process, detailed in Section F, Ofgem must approve an accelerated timetable proposed by the Panel. Elexon presented an Urgent Progression Timetable for the Panel to consider, noting a consultation period of one calendar month due to the requirements of the EBGL change process. A Panel Member queried whether Elexon have to comply with EBGL given the urgent nature of this Modification.

Elexon highlighted that the EBGL change process makes no allowances for urgency and therefore the one month consultation is required. This is not just a BSC obligation, but also required under retained EU law, following Brexit. The constraint on the urgency process from EBGL was discussed by the P392<sup>9</sup> Workgroup, who concluded and noted that a one month consultation would be required to comply with the EBGL requirements, despite undermining the urgency process.

Elexon further explained that the urgent modifications process does allow for further considerations of Modification solutions, following implementation. Although it would not be consistent with the BSC or the established EBGL change process, one option which would mitigate the risk would be to conduct the EBGL consultation after the Modification has been implemented and raise further Modifications to deal with any points that emerged from that consultation.

The Panel discussed the possibility of submitting two different timetables to Ofgem to allow it the option to expedite the progression of P438 given the circumstances. The second timetable would include the EBGL consultation period of one calendar month after implementation of P438 (if approved), but still have a consultation period of 5WD to allow industry comment. As above, any points that raised during that consultation could be addressed through subsequent Modifications. The Panel unanimously agreed that this would be the preferred option as it was its belief that the requirements of the EBGL change process would be met, and P438 would be progressed and implemented as soon as possible.

The Panel therefore agreed to submit two different Progression Timetables to Ofgem for its decision. These are shown below. The Panel's preferred timetable is shown as Proposed Progression Timetable 1, and the timetable originally presented is shown as Proposed Progression Timetable 2.

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<sup>9</sup> <https://www.elexon.co.uk/mod-proposal/p392/>

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 Authority decision
Raise any consequential Modification	As soon as possible following closure of consultation

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

Ofgem subsequently approved Progression Timetable 2.

The Panel agreed that the requirements of the EBGL change process severely limited the progression of an Urgent Modification. A Panel Member highlighted the need for this Modification is an exceptional case and noted that a one month consultation is not suitable for an Urgent Modification, as it is unjustifiable to delay implementation by a month. Elexon agreed to include a question in the consultation document to determine industry appetite for reform or removal of the EBGL change process, noting a change to legislation would be required to amend the EBGL change process.

The Panel agreed that, should urgency be rejected by Ofgem, that P438 should be submitted straight to the Report Phase given the urgent nature of the Modification, and that a Workgroup would offer little value at this stage as the legal text had already been worked up and would be consulted on. The Panel also considered whether a Workgroup should be held after implementation of P438 (if approved), as it is permitted for Urgent Modifications under Section F, if deemed necessary. The Panel did not consider this to be necessary as the changes being proposed are a general expansion of an existing process, but are interested in the industry's view on this.

## Retrospective Implementation

The Panel considered whether there was merit in highlighting a retrospective implementation date. A Panel Member expressed concerns with retrospection as this Modification had the potential to cause industry to speculate as to whether Elexon was aware that sanctions against BSC Parties were expected (which Elexon had no knowledge of). Retrospection would bring further uncertainty and concern on this point. It would be difficult to unpick Parties' positions retrospectively. It was suggested that the legal text could be drafted to take effect from the effective date of any relevant sanctions. This would mean that the solution would only be retrospective if a BSC Party was designated before the Modification was implemented and it would reflect that Elexon would need to comply with the sanctions from that date even if there was no Modification.

The Chair questioned whether the Panel agreed to make a recommendation to Ofgem that, in the event that sanctions are required to be effective before the end of the consultation process, the date of that sanction is the legally binding effective date for the Modification. The Panel disagreed with a majority of five to three members. A Panel Member noted that if Elexon were to go with the retrospective implementation, then it should be a separate Modification. The reason for not wanting retrospection was that it would add further uncertainty for Parties, where P438 is aiming to increase clarity.

## 8 Urgent Modification Consultation Responses

This section summarises the responses to the Panel's Urgent Modification Consultation on its initial recommendations. You can find the full responses in Attachment C. The Urgent Consultation was issued on 21 April 2022, with responses invited by 23 May 2022.

Two responses were received, one from a Supplier and one from NETSO.

Both the respondents agreed with the Panel's initial recommendation to approve the Modification, and neither respondent felt that P438 would impact their organisation, or that they would incur any implementation or ongoing costs.

Summary of P438 Urgent Modification Consultation Responses				
Question	Yes	No	Neutral/ No Comment	Other
Do you agree with the Panel's initial unanimous recommendation that P438 should be approved?	2	0	0	0
Do you agree with the Panel that the redlined changes to the BSC deliver the intent of P438?	1	0	0	1
Do you agree with the Panel's recommended Implementation Date?	2	0	0	0
Do you agree with the Panel's initial view that P438 should not be treated as a Self-Governance Modification?	2	0	0	0
Do you agree with the Panel's initial view that P438 does impact the EBGL Article 18 terms and conditions related to balancing held within the BSC?	2	0	0	0
Do you have any comments on the impact of P438 on the EBGL objectives?	0	2	0	0
Do you agree with the Panel that the EBGL Change process should be reviewed to better facilitate the progression of Urgent Modifications?	2	0	0	0
Do you think a Workgroup should be held after the implementation of P438 to review the implemented solution and consider if any further changes are required to address the defect?	1	1	0	0
Do you have any further comments on P438?	0	2	0	0

### EBGL Change Process

The respondents both agreed with the Panel that the EBGL Change process should be reviewed by BEIS and Ofgem to better facilitate the progression of Urgent Modifications. One respondent commented that "P438 provides a good example of EBGL constraints preventing UK from expediting necessary changes". This constrain can only be removed if retained UK law is amended.

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Final Modification Report

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## Post-Implementation Workgroup

There was no consensus between the respondents on whether a post-implementation Workgroup should be held to review the implemented solution and consider further changes. One respondent felt that no Workgroup was required, and thought it was important that the BSC Panel retained oversight of the solution. The other respondent felt that an Issue Group could be used to define the scope of any additional changes required to enhance the P438 solution.

Following the consultation, we believe that P438 should not be reviewed by a Workgroup (in accordance with F2.9.6) or an Issue Group. This is on the basis that there is not a reasonable level of support for a review from Parties, as only two responses were received to the consultation. One did not believe any further work was needed and the other, whilst indicating that a Workgroup should be held, did not express strong views in this regard and thought an Issue Group may be more appropriate.

## Proposed Legal Text

One respondent had a proposed amendment to the legal text. Their full comment is shown in the table below.

Legal text comments	
Location	Comments
Section N: Clearing, Invoicing & Payment 2.5.6	Please see below highlighted in red changes we believe should be included in this section of the legal text. "Where the right of a Defaulting Party to receive payment has been suspended under Section H3.2.2(h), no amount becoming due and payable (pursuant to this Section N) to such Defaulting Party shall be paid by the BSC Clearer to such Defaulting Party or assignee through whom such amount would benefit a Defaulting Party."

The intention of this paragraph of Section N is to ensure that Elexon is able to withhold payments to a sanctioned Party. However, it could be possible for a sanctioned Party to circumvent the restrictions in the Code by assigning its rights to receive payments to some other entity which is not subject to sanctions. There is potential for this under the BSC as, for example, Section H9.1.1 allows Parties to assign the right to payments received under the BSC by way of security e.g. for security for a loan.

If a sanctioned Party were able to assign its rights to receive payments to another entity, it might allow the designated entity to continue to benefit from the payments. The intention of the suggested amendment is to ensure that this would not be possible.

Elexon have amended the legal text so that in both Section D and Section N, it is clear that payments cannot be made to a sanctioned Party or to any person to whom they have transferred or assigned their rights under the Code.

This update to the legal text is not considered a material change as it is fully consistent with the intention of the Modification. The original drafting inadvertently narrowed the scope by referring only to amounts paid to a sanctioned Party rather than capturing payments made to or on behalf of a sanctioned Party.

P438 was presented to the Panel at an urgent meeting on 25 May 2022. At this meeting, the Panel unanimously recommended that P438 should be approved due to its positive impact against Applicable BSC Objective (d).

### Nature of sanctions

A Panel Member questioned if a sanctioned Party could still operate in the UK energy market and whether that would defy a sanctions order. Elexon responded that P438 would not prevent a sanctioned Party from operating but would stop the Party receiving payments from BSCCo, preventing the BSCCo being in breach of the sanctions order. Whether a sanctioned Party continuing to operate would defy a sanctions order would depend on the specific wording of the sanctions order itself, which can often be quite vague. Elexon notes that, should a sanctions order be placed, the Panel would be advised and consideration may be needed as to whether a further BSC Modification may be required (depending on the specifics of the sanction).

### Workgroup review

The Panel Chair asked the Panel if there were any comments regarding the requirement for a post-implementation Workgroup review of the Modification. There were no comments, and the Panel were happy to agree with Elexon's view that there was not a reasonable level of support for a review from Parties.

### Timeline for approval

It was noted that this Modification has been granted Urgent status and so a decision would be expected from Ofgem as soon as possible. The Panel asked how promptly Ofgem could expect to make a decision, given the relatively straightforward nature of the Modification. A representative from Ofgem stated that they would expect to be able to return a decision for this Urgent Modification within 10 to 15 calendar days.

### EBGL process

The Panel discussed the suitability of the EBGL process for Modifications of this sort, where the EBGL change process requires a one month consultation regardless of how urgent the issue may be. A Panel member commented that EBGL must be complied with unless UK retained law were amended, and that removing or amending the EBGL change process could impact the future trading relationship with the EU.

Another Panel Member suggested it may be possible to amend EBGL without impacting future access to cross-border balancing trade, for example allowing urgent modifications to proceed urgently and complete the EBGL consultation and make any further amendments after implementation. Another Member believed the EBGL change process was not working as advertised as P438 did not impact balancing.

The Panel noted that the EBGL consultation procedure has been unhelpful in the timeliness of the P438 Modification.

## 10 Recommendations

The BSC Panel recommends to the Authority:

- That P438 should be **approved**;
- That P438 **does** impact the EBGL Article 18 terms and conditions held within the BSC;
- That P438 is neutral and consistent with the EBGL objectives;
- An Implementation Date for P438 of:
  - +1 Working Day after Authority Decision; and
- That P438 should not be reviewed by a Workgroup (in accordance with F2.9.6) or an Issue Group;
- The BSC legal text for P438.