

Addendum to Final Modification Report

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.

About This Document

This document is a response to questions from the Authority relating to Urgent Modification P438. It attempts to alleviate any concerns about the legal compliance of the Modification and clarify the powers that P438 would grant to Elexon for dealing with sanctions. This document should be considered as an addendum to the P438 Final Modification Report, and as such it should be considered when the Authority decide whether to approve or reject P438.



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FMR Addendum

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1 Clarification of Section H Powers

The Authority requested more information on the powers that Elexon could exercise under Section H and how these would be relevant to sanctions. The table below details the complete list of actions that can be taken upon the occurrence of a Default, as per BSC Section H. The table also summarises the purpose of each of the powers in relation to sanctions, and who would be required to approve the action.

Summary of powers detailed in Section H			
Section	Description	Ultimate Approval	Purpose
3.2.1(a)	Notify all other BSC Parties	BSC Panel	Enables Elexon to confirm to BSC Parties that another BSC Party is subject to sanctions. Some may not be aware and this will enable them to consider carrying out their own impact assessment and to determine whether existing Energy Contract Volume Notifications (ECVN) or Metered Volume Reallocation Notifications (MVRN) should remain in place and/or alternative ECVN/MVRN should be made.
3.2.1(b)	Cross refers to 3.2.2 – see below		
3.2.1(c)	Remove Interconnector Error Administrator (IEA) registration and require Interconnected System Operator to become IEA	Depending on nature of interconnection, Ofgem or the Department for Business, Energy and Industrial Strategy (BEIS)	Not relevant to sanctions.
3.2.1(d)	De-energisation of Balancing Mechanism (BM) Units	Ofgem and either the relevant Distribution System Operator (DSO) or National Grid Electricity System Operator (NGESO)	This power has never been exercised and we wouldn't expect to use this for active sites. This would more likely be used to tidy up BM Units that were dormant as a consequence of any other steps taken in respect of the designated entity.

Summary of powers detailed in Section H			
Section	Description	Ultimate Approval	Purpose
3.2.1(e)	Expulsion from BSC	For licensed companies, Ofgem	<p>The implementation of this comes with a notice period of at least 60 days during which the BSC Panel must consult with Parties and Ofgem. Ofgem consent is needed for the expulsion of licensed entities. The purpose of this in the context of sanctions is broadly equivalent to a force majeure provision in other contracts that ultimately allow a termination.</p> <p>It is recognised that this is not suitable to progress fully until the licence has been revoked and customers/assets moved to another company that can meet licence conditions and all energy Code obligations.</p> <p>Where a designated entity has no licences, e.g. Non Physical Trader, this would enable a full exit from the BSC.</p>
3.2.1(f)	Notify the Funds Administration Agent (FAA) that the Party is in Default	BSC Panel	Not relevant for sanctions given new H3.2.2(h).
3.2.2(a)	Suspend the right to submit ECVNs or disapply ECVNs	BSC Panel	This, together with 3.2.2(b) below, effectively prevents a designated entity from trading under the BSC arrangements so would be necessary where a sanction required any dealing with a designated entity to stop. This would protect Elexon, its sub-contractors and any BSC Parties that were counterparties to the contracts notified under the ECVN.
3.2.2(b)	Suspend the right to submit MVRNs or disapply MVRNs	BSC Panel	Substantially the same rationale as 3.2.2(a) above.
3.2.2(c)	Suspend the right to be allocated BM Unit Metered Volumes in respect of Interconnector BM Units	BSC Panel	This would prevent a designated entity from trading via interconnector volumes and would be needed where a sanction required a cessation of dealing.
3.2.2(d)	Suspend the right to submit Bid-Offer Pairs	BSC Panel (following consultation with NGESO)	Suspends right to participate in Balancing Mechanism which may be needed to support NGESO in ceasing dealing with a designated entity.

Summary of powers detailed in Section H			
Section	Description	Ultimate Approval	Purpose
3.2.2(e)	Suspend the right to register new Metering Systems and BM Units	Ofgem	Prevents designated entity from taking on new customers. The registration of Metering Systems and BM Units could constitute dealing as (particularly with respect to Metering Systems), these are a pre-condition to participation in the BSC arrangements.
3.2.2(f)	Suspend the right to receive BSC reports and data	BSC Panel	Unlikely to be material.
3.2.2(g)	Suspend the right to vote in Panel elections	BSC Panel	Unlikely to be material.
3.2.2(h)	New provision allowing Panel to suspend payment of any amounts under the Code	BSC Panel	This would enable Elexon/Elexon Clear to suspend any payments to a designated entity, specifically Trading Charges, reconciliation of BSC Charges or any Supplier Charges.

The Authority also asked how the BSC default regime worked in the context of existing law and whether Elexon anticipated that this Modification would be at odds with any legal requirements. We don't see how the BSC approach could be viewed as being in conflict with the Sanctions and Money Laundering Act (SAML) 2018 or regulations made pursuant to it. We are not aware of any aspect of the SAML, or related regulations, that regulate how private contracts should address the risks arising from a counterparty becoming a designated entity. In particular, the proposed BSC drafting does not create any rules that would require Elexon, or any other BSC Party, to act in breach of the SAML. However, it does provide a set of measures that we believe would enable Elexon and BSC Parties to comply with sanctions made under the Act, even if the outcomes that arise from implementing some of those measures may be slightly different than would be required by the law. As you know, however, it is not uncommon for private contracts to include obligations which relate to statutory obligations but which are more onerous than the underlying rules.

In developing this modification, Elexon did consider other possible approaches. In particular, we did not feel that force majeure provisions (or similar) would work under the BSC because the Code is essentially a set of rules for making calculations that lead to a set of payments being made. Most of the obligations in the BSC are ancillary to these calculations so including provisions that would relieve Parties from performance doesn't make as much sense as it would in more conventional contracts. We were also mindful that force majeure provisions (or similar) would have the potential to create confusion within settlement given the uncertainty as to how sanctions should be implemented.