ELEXON

BSC CHANGES TO IMPLEMENT ELEXON'S OWNERSHIP CHANGE

The Government's intent to establish a Future System Operator (FSO) consequentially requires Elexon's ownership to change. The Government has decided that Elexon's ownership will move from National Grid Electricity System Operator (NGESO) to an industry ownership model.

This consultation closes 5pm on 4 October 2023.

Public

Document owner	Document number	Date
Lawrence Jones	**V1.0**	**4 October 2023**

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There are four parts to this document:

- This is the main document. It provides the background and context to this consultation, as well as details of how the draft legal text delivers the policy intent.
- Attachment A contains the draft redlined changes to the BSC.
- Attachment B contains the draft redlined changes to the Elexon Articles of Association (AoA).
- Attachment C contains the specific questions on which we seek your views. Please use this form to provide your response to these questions and to record any further views or comments you wish to be considered.

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Why are we consulting?

We are issuing this informal consultation as part of a process led by the Department for Energy Security and Net Zero (DESNZ) and Ofgem. The purpose of this consultation is to confirm that the proposed changes to the BSC meet the policy intent, as published by DESNZ and Ofgem. These changes aim to transition Elexon's ownership from NGESO to industry ownership, as part of the Future System Operator (FSO) project.

Please use the form in Attachment C to provide your responses to the questions in this document, and to record any further views or comments you wish to be considered by 5pm on 4 **October 2023**.

Next steps

Following the closure of this consultation, we will publish the collated non-confidential responses on the Elexon Website. We are not intending to publish a document with Elexon, DESNZ, or Ofgem replies to the consultation responses. Rather, the responses to this consultation, including any confidential ones, will be shared with DESNZ and Ofgem, for them to finalise the required amendments to the BSC for Elexon's ownership change.

The Energy Bill[1] grants relevant powers to DESNZ and Ofgem to make the necessary licence and code changes for the FSO project, as well as powers to ensure that Elexon's employees retain access to their pensions and to create a Transfer Scheme for this transaction.

This consultation runs alongside Ofgem's consultation on new electricity supply and generation license conditions for Elexon's new ownership arrangements. The statutory consultation on the code and licence changes is planned for Autumn 2023. For the latest details on the FSO project see the relevant DESNZ[2] and Ofgem[3] pages.

[1] https://bills.parliament.uk/bills/3311
[2] https://www.gov.uk/government/publications/energy-security-bill-factsheets/energy-security-bill-factsheet-future-system-operator
[3] https://www.ofgem.gov.uk/energy-policy-and-regulation/policy-and-regulatory-programmes/future-system-operation-fso

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Background

DESNZ and Ofgem have announced their commitment to establish a Future System Operator (FSO)[4]. The FSO will supersede the Electricity System Operator (ESO) – and the equivalent in the gas market, the Gas System Operator, currently provided by National Grid Electricity System Operator (NGESO). The aim of the FSO is to help the country achieve its net zero emissions target by 2050. The FSO will be a new expert, impartial body that will be responsible for operating and planning the electricity and gas networks. It will also be responsible for providing independent advice to the Government and Ofgem on the future of the energy system. The FSO will be funded by consumers through price control arrangements. It will be licensed and regulated by Ofgem. The FSO will be accountable to Parliament through DESNZ.

Elexon are an independent entity wholly owned by NGESO, our only shareholder currently. Elexon's share will be transferred to the parties which will be named in the auxiliary letter that will accompany the licence condition. The objective of Elexon's change in ownership is not to reform Elexon's roles or day-to-day governance but to ensure the continuation of its successful operations under a new ownership structure.

DESNZ and Ofgem issued a consultation on Elexon's ownership[5] on 14 July 2022, with response invited by 22 September 2022. A guiding principle was that Elexon should continue to retain its operational independence and remain accountable to the industry it serves. Two models were consulted on, having considered several options:

1. Public ownership as a subsidiary of the FSO; and
2. Industry ownership, owned by a representative group of industry stakeholders.

Their response[6] was published in April 2023, with the enduring ownership to be in the private sector, with industry parties holding the shares. This stated that:

- Initially, Elexon's share will be transferred to the 13 licensed BSC funding parties, who each held a greater than 2% funding share as of 1 January 2023. The specific parties that will initially hold Elexon shares will be named in the auxiliary letter that will accompany the licence condition. These funding parties contribute to Elexon's monthly costs based on their electricity trading, supplying, or generating activities.
- The qualifying parties will each be required to assume ownership of one Elexon share. This will be mandated by a new licence condition, the method and phrasing of which is proposed in the associated Ofgem consultation on new electricity supply and generation licence conditions to implement new ownership arrangements for Elexon.
- DESNZ and Ofgem reserve the right to temporarily transfer Elexon into public sector ownership, should the execution of the permanent ownership option risk delaying the formation of the FSO.

We sought to avoid duplicating the policy in this document, so far as is possible. Rather, we have provided a summary and explanation of how we believe the changes to the BSC and Elexon's AoA achieve the policy intent.

There will need to be further changes to the BSC to facilitate the establishment of the FSO. This consultation, along with the associated legal text, concerns only the changes to Elexon's ownership. Ofgem will be consulting on the licence changes needed to give effect to Elexon's ownership change in tandem with this consultation. The statutory consultation will then be issued in Autumn 2023.

[4] https://www.gov.uk/government/consultations/proposals-for-a-future-system-operator-role

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1090161/elexon_ownership_consultation.pdf

[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1144431/elexon_ownership_government_response.pdf

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Draft BSC legal text

We have drafted the proposed changes to the BSC (see Attachment A) to deliver the policy decision. Below we outline the key changes and the questions we seek views on.

To change Elexon's ownership from NGESO to an industry model, changes to BSC Section C[7] 'BSCCo and its Subsidiaries' and to Elexon's Articles of Association (which are incorporated into the BSC by virtue of Section C2.1.2) are required.

The ownership model for BSCCo is based on a designated set of shareholders, classified as 'Mandated Parties' (the parties mandated as a result of a relevant licence condition) or 'Eligible Parties' (all other parties except BSCCo itself). These shareholders each hold ordinary shares of £1 in the capital of BSCCo. Shareholders cannot hold more than one share, and no one outside of Mandated or Eligible Parties can be a shareholder. The shareholding is regulated by specific provisions, which also outline how shares can be transferred or allotted, as well as under what conditions shares can be revoked or returned. In the case of discrepancies, the rules in the BSC take precedence over the company's AoA.

Shareholders will have no obligation to finance BSCCo beyond their shareholding (except for any other obligation as a BSC Party) and their rights and obligations are outlined exclusively in the BSC.

BSC Section C Reference	Summary of Change made	Rationale
C 2.2 to 2.6	Deleted existing text and referenced that the new ownership details are captured in a new Annex C-3.	These paragraphs set out the current requirements relating to NGESO as Elexon's sole shareholder. These will no longer be needed so are deleted in their entirety and replaced with a new Annex.
C-3 1.1	New paragraph that introduces new defined terms.	This paragraph has been added to aid clarity and understanding.
C-3 1.2	New paragraph that details the shareholding structure and allows for an initial ownership transfer to the Mandated Parties, and any subsequent share transfers that occur prior to the Mandatory Ownership Transfer Date.	This paragraph is needed to formalise the categories of shareholders and to make clear, for the benefit of Parties generally and the shareholders, that shareholder rights will be governed by the provisions of the Annex. 1.2.3 recognises that there may have been a transfer to the 'initial' mandatory parties prior to those parties licences having been changed.
C-3 1.3	New paragraph that details the process for becoming a new shareholder of Elexon. It states that each Mandated Party will apply to become a shareholder as soon as possible after a direction is given by the Authority or the Secretary of State. In such a case, BSCCo will either transfer one share to the Mandated Party or allot them one share. The same applies to an Eligible Party approved by BSCCo. However, no party, whether Mandated or Eligible, can hold more than one share at any given time, and no one outside of these parties can become a shareholder. The shareholders agree to create or authorize the issue of further shares if	This paragraph is needed to set out how Parties become shareholders. One point to note is that, unlike for Mandatory Parties, Elexon will have discretion to refuse shares to Eligible Parties. This was included in case there was a public policy reason why it was undesirable for a particular party to be a shareholder of Elexon (e.g. a Party that was subject to sanctions). In some circumstances, shareholder approval may be needed to issue new shares (which may be needed if all of the issued shares have been allotted). 1.3.4 is therefore needed to ensure this approval is provided.

[7] https://bscdocs.elexon.co.uk/bsc/bsc-section-c-bscco-and-its-subsidiaries

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BSC Section C Reference	Summary of Change made	Rationale
	none are available. The nominal price for each share transferred or allotted is set at £1.00.	
C-3 1.4	New paragraph that details how shareholders transfer its share and cease to be a shareholder. It allows an Eligible Party to transfer its share to a nominee at any time. A Shareholder must transfer its share if it ceases to be a Party, if the relevant licence license is surrendered or revoked (for Mandated Parties), or if directed to do so by the Secretary of State, Authority, or BSCCo (for Eligible Parties). A retiring shareholder is obligated to pay any unpaid amounts on its shares and transfer them at par ('face value') to a nominee selected by the Directors. If a retiring shareholder fails to transfer shares, a Director can execute the transfer on behalf of the retiring shareholder. The nominee holds the transferred shares until directed by the Directors to transfer them, and during this period, all rights attached to the share are suspended. The paragraph also distinguished Mandated Licensees and Mandated Parties. This reflects that the Licence will allow Parties with a Licence obligation to hold a share to delegate that duty to another BSC Party, provided that Party is part of the same corporate group.	3.1.4 is needed to set out the arrangements when shareholders, cease being shareholders. As with RECCo, a nominee shareholder will be established so any person who ceases to be a shareholder will need to transfer their shares to the nominee.
C-3 1.5	New paragraph detailing further obligations of shareholders. They are prohibited from encumbering their shares or disposing of them outside of the procedures outlined in the Annex C-3. Shareholders are required to respect the operational independence of BSCCo and are committed not to interfere with BSCCo's functions under the Code. Shareholders must exercise their rights to uphold the provisions of the Code or any direction of the Panel. This includes amending BSCCo's Memorandum or Articles of Association, appointing or removing directors, approving annual accounts, authorizing the issue of further shares, and any other acts relating to BSCCo that require shareholder approval. The section also details possible steps shareholders may take, including convening general meetings and passing resolutions.	These undertakings replicate the current undertakings that exist for NGESO as Elexon's sole shareholder. They are designed to guarantee Elexon's independence by constraining shareholders rights so that those rights may only ever be exercised in order to give effect to the BSC. The text, however, makes clear that shareholders should not be restricted from exercising their rights, in their capacity as BSC Parties, under the Code.
C-3 1.6	New paragraph that shareholders will have no liability to provide any finance to Elexon or its subsidiaries, nor to any other BSC Party, other than beyond its obligation a BSC Party more generally e.g. to pay Trading Charges.	The purpose of this paragraph is to ensure that shareholders have no financial liability in their capacity as shareholders. This includes an explicit acknowledgement that, for private companies limited by shares, the shareholders liability is

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BSC Section C Reference	Summary of Change made	Rationale
		limited to any amounts unpaid on their shares (where, for the BSC, the shares will have a nominal value of £1.00). Shareholders will, however, be funding parties under the BSC; 1.6.1 does not change Parties existing financial obligations under the Code.
C3 1.7	New paragraph that outlines the principles that apply in the event of winding up Elexon. It stipulates that the assets and resources of BSCCo should be transferred to any successor under the Code to BSCCo. After payment or settlement of all liabilities, any remaining amount should be paid to Trading Parties in their Annual Funding Shares or as determined by the Authority. Shareholders have the right to be paid the amount of any taxation they may be liable for in connection with the winding up. All parties are expected to take lawful steps to ensure these principles are given effect.	This recognises that if Elexon was ever wound up, any value that exists in the company should be recoverable by Trading Parties who have funded Elexon rather than shareholders.
C-3.1.8	Paragraph relating to shareholder legal requirements.	NGESO currently has equivalent protections in the BSC. Although the need for these protections only arises because Elexon is a wholly owned subsidiary of NGESO, whereas following the transfer Elexon will have multiple shareholders. However, we have added this paragraph in response to provide comfort to shareholders. The purpose of the drafting is to provide protection to shareholders in the event that their ownership of a share in Elexon causes them to incur a liability under a legal requirement.
C-3 1.9	Paragraph relating to tax liabilities.	NGESO currently has equivalent protections in the BSC. Although the need for these protections only arises because Elexon is a wholly owned subsidiary of NGESO, whereas following the transfer Elexon will have multiple shareholders. However, we have added this paragraph in response to provide comfort to shareholders. The purpose of the drafting is to provide protection to shareholders in the event that their ownership of a share in Elexon causes them to incur a tax liability.
C-3 1.10	New paragraph that explains how to address potential conflicts between Annex C-3 of the BSC and the AoA. It states that the provisions of this Annex should prevail in the event of any ambiguity or discrepancy. Shareholders are obliged to exercise their rights to ensure the provisions of	The Annex creates a regime relating to Elexon's shareholders that is normal in an industry code context, but is otherwise unusual in the context of the rights and powers of shareholders normally. Whilst the Articles of Association have been aligned to the BSC, the BSC is the principal document setting out shareholder rights so this

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BSC Section C Reference	Summary of Change made	Rationale
	this Annex are upheld, even if it requires amendment to the Articles.	provision ensures the BSC takes precedence over the Articles.
C-3 1.11	New paragraph that requires each shareholder to cooperate with other shareholders to carry out, evidence, and confirm their rights under, and the intended purpose of, this Annex. Shareholders are expected to execute and deliver necessary instruments and documents, and take actions as may be reasonably requested from time to time.	This is a fairly generic obligation which is included to facilitate co-operation amongst shareholders if, for example, shareholder resolutions are needed to give effect to the Code (this is not anticipated).
C-3 1.12	New paragraph that enables shareholders representatives to recover reasonable expenses incurred in attending shareholder meetings.	This reflects the position for members of the Panel and Committees.

Consultation Question
Do you agree that the draft BSC legal text, in Attachment A, delivers the intent of the Elexon ownership policy decision? *Please provide your rationale.*
Please provide your views using the response form in Attachment C

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Articles of Association

We have drafted the changes to Elexon's AoA (see Attachment B) to deliver the policy decision. We have added comments to assist in understanding the reasons and thinking behind the proposed changes.

Elexon's AoA can only be changed as part of an approved BSC Modification Proposal.

AoA Reference	Summary of Change made	Rationale
Memorandum of Association	Memorandum deleted.	Under the Companies Act 2006, the memorandum of association of a company no longer forms part of a company's constitution and is treated as a "snapshot" of the subscribers at the company's formation. We have therefore deleted this section (a) because it is no longer relevant; and (b) to avoid any suggestion that it imposed a restriction on the company's ability to issue shares.
Paragraph 1	Definition of 2006 Act inserted.	This defines the Companies Act 2006 which is now referred to in the AoA.
Paragraph 1	Definition of BSCCo Nominee inserted.	This cross refers to the definition in the Code, and is needed because of Article 48.
Paragraph 1	Reference to Transmission Company deleted.	The AoA contained a restriction on Transmission Company directors, which has been deleted (as has this accompanying definition).
Paragraph 1	Definition of writing inserted that allows electronic forms of company resolutions.	Where Elexon will have multiple shareholders, its governance arrangements need to allow for more modern ways of agreeing resolutions.
Paragraph 2	List of Table A articles that are excluded from Elexon's AoA amended.	Table A were the pro forma articles that applied to companies incorporated under the Companies Act 1985, and which form the basis of Elexon's AoA. The identified provisions have been referred to (and therefore excluded) in order to reflect the additional changes to the AoA necessitated by the change of Elexon's ownership model.
Paragraph 3	Paragraph amended to reflect Directors' power to allot shares.	The Code changes allow for BSC Parties to become voluntary shareholders in Elexon. If/when this happens, Elexon's directors will need the power to allot new shares, which this allows.
Paragraph 4 and 5	Paragraphs deleted to remove restrictions on director's power to allot shares.	Current restrictions on directors' power to allot shares deleted, as the restrictions are no longer required given that the Code changes allow for BSC Parties to become voluntary shareholders in Elexon.
Paragraph 6	Paragraph amended so that the disapplication of statutory pre-emption rights references the 2005 Act.	A pre-emption right gives existing shareholders the right of first refusal on new shares. This is not consistent with Elexon's ownership model so the pre-emption rights have been disapplied. The current drafting updates the original provision to ensure it is effective under the 2006 Act (where the AoA are a Companies Act 1985 document).
Paragraph 7	Rights of lien removed.	Deleted because we will only be issuing shares at their nominal value and they will be fully paid up. This aligns Elexon's AoA to those of RECCo which has a similar ownership model.

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BSC Changes to Implement Elexon's ownership change

AoA Reference	Summary of Change made	Rationale
Paragraph 8	Paragraph amended so that rights for directors to refuse registration of new shares are subject to provisions in the Code.	The intention of this drafting was to align the AoA to the Code so that, if the Code requires a share transfer, the Directors are required to register the new shareholder, but where the Code provides discretion, this is also supported by the Articles.
Paragraph 14	Provisions added allowing for a poll vote at general meetings.	This change is intended to align the current AoA to the position in the 2006 Act. It will make no difference to voting rights, but will make the management of meetings where we have multiple shareholder more efficient as the rules will be based on the current statutory regime. The reference to the chairs right to demand a poll just reflects the statutory position, and the reference to the directors aligns Elexon's AoA to the 2006 Act Model Articles.
Paragraph 15	Existing provisions about written resolutions (and replace with updated provisions) removed.	Since the thinking around electronic written resolutions has moved on considerably since Elexon's Articles were drafted, this change reflects the provisions of Companies Act 2006 relating to written resolutions apply (including in relation to circulation by electronic means). See also inclusion of definition 'writing'. This change will facilitate more efficient governance of Elexon where it has a number of shareholders.
Paragraph 16.1	Text relating to corporate officers removed.	Text deleted as it is inconsistent with section 323 of the 2006 Act.
Paragraph 16.3	Text related to multiple proxies removed.	Elexon will only have one class of share so this text is removed to avoid any confusion. The text is now also better aligned to s324 of the 2006 Act.
Paragraph 17	New provisions around shareholder appointing proxies added.	Amended to align with the 2006 Act/Model Articles. This alignment will make the management of meetings with multiple shareholders more efficient.
Paragraph 18	Additional wording to refer to the Code inserted.	Additional wording recognises that shareholder rights are constrained by the Code
Paragraph 23	Restriction on NGET officers being directors of Elexon removed.	Removed on basis that NGESO will no longer be Elexon's shareholder.
Paragraph 26	Majority shareholders' right to appoint and remove directors deleted. Text inserted to cross refer to the Code in reference to who can be appointed as a director.	Appointments of directors are dealt with in the Code (and shareholder rights in this respect are constrained by the Code). This text is removed to align AoA to BSC.
Paragraph 35	Provisions relating to written resolutions amended.	In keeping with other provisions in the AoA where references to written resolutions have been updated, this change reflects the same approach for directors' resolutions as it would be inconsistent for different rules to apply. The new wording substantially mirrors the wording in RECCo's AoA.
Paragraph 37	New provisions relating to the management of directors' interest inserted.	New conflict provisions reflect different conflict provisions under the 2006 Act and broadly mirror RECCo's.

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AoA Reference	Summary of Change made	Rationale
		This change was considered necessary because the BSC requires Elexon to appoint industry directors and where Elexon will also have industry shareholders, there is more likelihood of potential conflicts of interests that need to be managed.
Paragraph 43	Wording amended to reference the 2006 Act.	Amended to align with the 2006 Act and to remove reference to obsolete forms of communication.
Paragraphs 47 and 48	New provisions that (i) require shareholders to give effect to the Code; and (ii) reflect the restrictions on the BSCCo Nominee set out in the Code.	The new provisions in these paragraphs are the counterparts to the provisions in Annex C-3 of the legal text, whereby the rights and powers of the shareholders generally, and specifically the BSCCo Nominee, are restricted by the legal text in the Code. The provisions in the Articles are intended to ensure those restrictions also form part of the Articles.

Consultation Question
Do you agree that the draft Articles of Association text, in Attachment B, delivers the intent of the Elexon ownership policy decision? *Please provide your rationale.*
Please provide your views using the response form in Attachment C

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