Assessment Report

P390 'Allowing extensions to ELEXON's business and activities, subject to additional conditions'

This Modification would introduce a framework into the BSC that allows the ELEXON Board to identify additional activities that ELEXON can undertake provided ELEXON consult on the proposed venture and certain conditions are met and with the consent of the Authority.

The P390 Workgroup recommends **approval** of P390

This Modification is expected to impact:

- BSC Parties
- ELEXON as the Balancing and Settlement Code Company (BSCCo)
- Ofgem

Phase

- Initial Written Assessment
- Definition Procedure
- Assessment Procedure
- Report Phase
- Implementation

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About This Document

This document is the P390 Workgroup's Assessment Report to the BSC Panel. ELEXON will present this report to the Panel at its meeting on 9 April 2020. The Panel will consider the Workgroup's recommendations, and will agree an initial view on whether this change should be made. It will then consult on this view before making its final recommendation to the Authority on 14 May 2020.

There are three parts to this document:

- This is the main document. It provides details of the solution, impacts, costs, benefits/drawbacks and proposed implementation approach. It also summarises the Workgroup's key views on the areas set by the Panel in its Terms of Reference, and contains details of the Workgroup's membership and full Terms of Reference.
- Attachment A contains the draft redlined changes to the BSC for P390.
- Attachment B contains the Business Requirements for P390.
- Attachment C contains the full responses received to the Workgroup's Assessment Procedure Consultation.

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1 Summary

Why Change?

The Balancing and Settlement Code (BSC) restricts the activities of ELEXON and in the absence of a specific Modification any additional activities cannot be pursued by ELEXON (even when those activities would be of benefit to BSC Parties, industry generally and/or the consumer).

In the past specific Modifications have been necessary to enable ELEXON to provide the Warm Homes Discount Reconciliation service, EMR settlement, and to enable ELEXON to tender for the gas performance assurance framework and Retail Energy Code (REC) manager roles.

Despite receiving industry support for taking on new activities, such individual Modifications to extend ELEXON's vires are time consuming and can be an unnecessary distraction for industry. They could also result in ELEXON being unable to pursue an opportunity within a required timeframe, despite the benefits this could bring to Parties and ultimately consumers.

Solution

P390 would introduce a framework into the BSC that allows the ELEXON Board to identify additional activities that ELEXON can undertake provided certain conditions are met and with the consent of the Authority.

All of the conditions introduced in previous Modifications to ELEXON's vires, P330 'Allowing ELEXON to tender for the Uniform Network Code Gas Performance Assurance Framework Administrator (PAFA) role' and P365 'Enabling ELEXON to tender for the Retail Energy Code (REC)' are included, plus some additional conditions to safeguard the interests of BSC Parties.

The Workgroup have included a 10 Working Day consultation to occur prior to the Board's decision to bid, to which all interested parties, including the BSC Panel, will be invited to respond to. Non-confidential responses will be consolidated and published on the BSC Website.

ELEXON will then pass responses to the consultation, the Board's provisional views on each of the P390 conditions and any other suitable information to Ofgem for a 15 Working Day period.

In this window, Ofgem may reject the proposal or request an extension if they need more time to consider the proposal – if none of those actions are taken, then the Authority's consent for an expansion in vires is given under the P390 solution.

Impacts & Costs

ELEXON will be required to amend the BSC and its guidance documents to implement P390, which will cost approximately £400.

BSC Parties will be indirectly impacted as a result of the changes to the ELEXON vires. As ELEXON operates on a not for profit basis, Parties will be asked to fund any bids following implementation (subject to certain limits, restrictions and repayment obligations detailed in section three below).

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The mechanism for an Authority decision on each requested extension of business, previously achieved via the Modification process, will be altered.

Implementation

The P390 Workgroup and Proposer suggest that this Modification is implemented **5 Working Days after Authority Decision**.

Recommendation

The Workgroup believes that P390 **would** better facilitate Applicable BSC Objective (c) and (d) compared to the current baseline, and so should therefore be **approved**. The Workgroup unanimously believe P390 should be submitted to the Authority for decision (**not a Self-Governance Modification Proposal**).

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2 Why Change?

Background

ELEXON Vires

ELEXON "vires" set out what ELEXON is allowed to do and are described under BSC Section C 'BSCCo and its Subsidiaries', with subsection 1.2 'Role and powers, functions and responsibilities of BSCCo' stating in 1.2.2 that:

"Subject to the further provisions of this Section C, BSCCo shall have the powers, functions and responsibilities set out in or assigned to it pursuant to the Code, and shall not undertake any business or activity other than as provided for in the Code."

As a result of these provisions, each time an opportunity arises where ELEXON might be able to extend the company's business beyond those activities contemplated in the Code, a Modification, following the BSC's Modification Procedures, or a direction by the Secretary of State or Ofgem under statutory powers is required to implement a change in the vires.

Previous Extensions of ELEXON's Vires

Ofgem have already approved two Modifications in the past 5 years to extend ELEXON's vires and the scope of activities that ELEXON is permitted to undertake:

- Code manager for the Retail Energy Code – permitted via P365; and
- Gas Performance Assurance Framework Administrator (PAFA) – permitted via P330.

P365 'Enabling ELEXON to tender for the Retail Energy Code (REC)'

Hudson Energy raised P365 'Enabling ELEXON to tender for the Retail Energy Code (REC)' on 19 January 2018.

P365 enabled the ELEXON Board to decide whether or not to bid for the role of REC administrator (and perform the role if the contract is awarded to ELEXON).

This would be done via a separate not for profit subsidiary - REC Administrative Service Company (RECASCo) - with the cost of bidding for that role funded by ELEXON up to a maximum of £100,000. These bid costs would be BSCCo Costs so would be funded by BSC Parties. If ELEXON bids for this role and is successful then the funding provided by ELEXON would become repayable to ELEXON (and therefore also returned to Parties). Furthermore, any shared overheads would defray BSC Costs for Parties.

The BSC changes enabled by the implementation of P365 ensured that BSCCo is ring-fenced from any enduring operational costs and risks associated with performing the role of REC administrator.

At high level, the changes resulting from P365:

- Established REC administration as a Permissible Activity under the BSC and established the appropriate legal entity, RECASCo;
- Detailed the arrangements under which ELEXON/BSCCo may provide a loan or grant credit to RECASCo for the purposes of bidding for the REC administration role, together with the requirement for cost to be ring-fenced and capped;

What is BSCCo?

The Balancing and Settlement Code (BSC) is a legal document which defines the rules and governance for the balancing mechanism and imbalance settlement processes of electricity in Great Britain. ELEXON is the legal entity that fulfils the role of administering the BSC. The BSC refers to this role being fulfilled by a Balancing and Settlement Code Company (BSCCo).

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- Detailed the arrangements for the repayment of any loan and what will happen in the event that RECASCo is unsuccessful in its bid; and
- Confirmed the shareholder arrangements with RECASCo and its relationship with ELEXON/BSCCo.

It should be noted that the proposed solution to P365 repeated the implementation approach developed during the assessment of P330 and the arguments set out in Ofgem's decision letter where the detailed rationale behind their decision to approve P330 is set out.

P330 'Allowing ELEXON to tender for the Uniform Network Code Gas Performance Assurance Framework Administrator (PAFA) role'

Scottish Power raised P330 'Allowing ELEXON to tender for the Uniform Network Code Gas Performance Assurance Administrator (PAFA) role' on 1 December 2015. Ofgem approved P330 on 2 June 2016. P330 enables ELEXON to bid to become the Gas Performance Assurance Framework Administrator (PAFA) (and perform the role if the contract is awarded to ELEXON). The changes resulting from P330 were substantially identical to those described above in relation to P365.

Ofgem's decisions to approve P330 and P365

Due to the parallels between P330 and P365, and this Modification Proposal P390, it is worth highlighting the reasons for Ofgem's decision to approve P330 and P365.

P330 decision

In its P330 decision letter, Ofgem stated that it had previously considered the case for allowing ELEXON to diversify its activities under P284.

In accepting BSC Modification P284 'Expansion of ELEXON's role via the 'contract model'' in September 2012, Ofgem set out its view that whilst there might be benefits of diversification, robust arrangements had to be put in place to mitigate any additional risk to the BSC and BSC Parties. Ofgem considered that the following criteria would have to be met:

- BSC Parties should benefit from any diversification;
- The arrangements should not place disproportionate risk on BSC Parties;
- Standards of service under the BSC should be maintained; and
- ELEXON's BSC role should not give it any undue competitive advantage in a contestable activity.

Ofgem also stated that it would be appropriate for the ELEXON Board and BSC Parties more generally to give further consideration to a more limited diversification under the existing structure.

Regarding Ofgem's wider statutory duties, Ofgem stated in its P330 decision letter that whilst the benefits of ELEXON's participation in the gas PAFA tender might not directly be of consideration for the BSC Objectives, that it considered that the existence of additional

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bidders in the Gas PAFA tender should improve the extent and quality of the competition for that contract.

P365 decision

In approving P365, Ofgem also referred to the P284 criteria and noted that it expected the BSCCo Board to satisfy itself that the first three criteria were met, whilst acknowledging that the last criterion was more appropriately a matter for the Authority and the approach taken to the REC manager procurement.

The decision letter also noted that one of the P365 consultation responses stated that P365 could have been wider in scope, enabling ELEXON to tender for any suitable opportunity that arises, and Ofgem suggested that this was something that might be considered in the future.

Examples of non-BSC work administered by ELEXON due to an extension of ELEXON's vires

P330 as referred to above, was approved by Ofgem in June 2016. ELEXON participated in the tender process to appoint the Gas PAFA but withdrew when the tender effectively required ELEXON to guarantee the liabilities of the ELEXON subsidiary, which was to provide the gas assurance services.

P365 as referred to above, was approved by Ofgem in April 2018.

ELEXON's vires has also been extended in recent years by the Secretary of State directing changes to the BSC. These changes have been directed under specific powers granted to the Secretary of State through legislation and related to:

- the administration of the Warm Homes Discount Scheme; and
- acting as the Settlement Services Provider for Contracts for Difference and the Capacity Market as part of Electricity Market Reform (EMR).

It should be noted that, subsequent to the Secretary of State's direction, ELEXON's role as operator of the Warm Home Discount Scheme was secured through competitive tender and the continuation of ELEXON's EMR settlement role is subject to periodic review and value for money assessments by ELEXON's customer, the Low Carbon Contracts Company (LCCC). The most recent value for money review was successfully completed in the first half of 2019.

As explained in the 2018/19 Annual BSC Report, this EMR settlement activity is ring fenced from BSC activities and is conducted via a separate subsidiary of ELEXON — EMR Settlement Ltd (EMRS). EMRS costs are borne by the LCCC and the ESC and not by BSC Parties. However, because EMRS occupies the same premises as ELEXON and uses ELEXON's shared services, EMRS makes a fair contribution to these costs based on headcount. This has resulted in around £726,000 in 2018/19 of ELEXON's fixed costs to be charged to LCCC and ESC, and nearly £4.5m to date which would otherwise have been borne by BSC Parties.

The ELEXON Board

The management of ELEXON as the Balancing and Settlement Code Company (BSCCo) is overseen by the ELEXON Board, which comprises an independent Chair, five independent Non-Executive Directors and the Chief Executive Officer. Of the independent non-

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executives, two are also independent from the electricity industry whilst three are appointed because they have relevant experience and/or of the industry.

The ELEXON Board is scheduled to meet on ten occasions each year, and will meet at other times where necessary. These meetings include main Board meetings, strategy meetings and committee meetings.

The Board publishes a circular every six months to keep Parties informed of the issues that the Board is currently focussed on.

Accountability of the Board

The ELEXON Board is ultimately accountable to BSC Parties.

BSC Parties can vote to remove ELEXON's directors at the Annual BSC Meeting or at a General Meeting of Voting Parties, which can be requested at any time.

BSC Parties also have the right to request a vote, at an Annual BSC Meeting or a General Meeting, on non-binding resolutions, which will be advisory in nature for the Board.

What is the issue?

The BSC restricts the activities of ELEXON. The Proposer notes that this is the case even when those activities would be of benefit to BSC Parties, industry generally and the consumer.

This has resulted in Parties to the BSC raising specific Modification Proposals to allow ELEXON to extend its "vires" with certain conditions as to ring-fencing of risk and how costs and benefits will be treated.

In the past, specific Modifications or explicit Secretary of State directions have been necessary to enable ELEXON to provide the Warm Homes Discount Reconciliation service, EMR settlement, and participate in gas assurance and REC manager appointment processes.

Despite receiving industry support for taking on new activities, such individual Modifications to extend ELEXON's vires are time consuming and can be an unnecessary distraction for industry. In short, the baseline is inefficient when activities are of clear benefit and low risk to industry.

The Proposal notes that they can also result in ELEXON being unable to pursue an opportunity within a required timeframe as each time an opportunity arises where ELEXON might be able to extend the company's activities a Modification Proposal is required to agree a change in the vires.

Under the last specific Modification (P365), which amended the ELEXON vires to allow ELEXON to bid for the Retail Energy Code Manager role, one Party suggested that the Proposal did not go far enough. They suggested that the ELEXON Board should be allowed to investigate any opportunity, which they felt allowed them to deliver the BSC services in a more efficient way.

Further, in its decision letter on P365, the Authority agreed that this was perhaps something that could be considered in future.

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3 Solution

Proposed solution

Under the P390 Proposed solution, BSC Section C 'BSCCo and its Subsidiaries' will be amended to remove the need for Modifications to be progressed to expand ELEXON's vires to areas which meet the P390 conditions, have been subject to consultation and Ofgem consent.

Prior to making a decision over whether to bid on a given opportunity, the ELEXON Board must satisfy themselves that each of the following conditions are met:

1. Activity must be related to the UK and/or the Republic of Ireland
2. Activity must be related to the gas, electricity, heat or transport sector
3. Activity must be linked to core competencies
4. BSC Parties should benefit from any diversification
5. The arrangements should not place disproportionate risk on BSC Parties
6. Standards of service under the BSC should be maintained
7. ELEXON's BSC role does not give it any undue competitive advantage in a contestable activity

The first three are new conditions introduced for P390, whereas the last four are the original conditions required by Ofgem following P384.

Expenditure

Additional restrictions will preclude ELEXON from spending more than 1% of that year's approved budget on participating in tender bids, with each individual bid capped at £100k (index-linked to inflation).

Although not new for P390, it's important to note that existing BSC provisions will ensure there is no cross subsidy from ELEXON to non-BSC activities.

If successful, expenditure prior to the start of the new activity has to be repaid by the subsidiary to ELEXON within 5 years of that new activity starting. All costs once the new activity has started will be funded by the new activity.

Any unsuccessful bid costs will be written off, having been funded by BSC Parties.

The costs of each bid (whether successful or unsuccessful) will be recorded and reported back to BSC Parties via the BSC Annual Report.

P390 Consultation

Before taking a decision to bid for a new non-BSC activity, the ELEXON Board shall seek comments from Parties, the Panel and any interested third parties, who will have 10 Working Days to provide comments to ELEXON.

In seeking comments, the Board shall issue information on the nature and scope of the activity which it is interested in but shall not be required to disclose any information that is

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confidential to third parties or which ELEXON reasonably regards as being a commercially sensitive element of its own proposition.

Prior to a consultation, ELEXON will send as much notice as is reasonably practicable to Parties, the Panel and interested third parties informing them that it intends to, or may intend to, seek comments on bidding for a new activity.

ELEXON will publish a summary of the comments received. As with responses to a Modification, any responses marked as confidential will not be published, but will be provided to the ELEXON Board and Ofgem.

P390 Ofgem Window

Following the closure of the consultation, ELEXON will pass responses, the Board's provisional views on each of the P390 conditions and any other suitable information to Ofgem for a 15 Working Day period.

In this window, Ofgem may reject the proposal or request an extension if they need more time to consider the proposal – if none of those actions are taken, however, then the Authority's consent for an expansion in vires is given.

Benefits of P390

The Proposer and Workgroup agree that the P390 solution offers benefits when compared to the baseline of having to progress a Modification:

- Time saved when compared to Modification timescales, allowing BSCCo to respond more quickly to an opportunity.
- Effort saved when compared to supporting a Modification in which a Proposer must be found, multiple written reports presented to the Panel and industry Workgroups formed depending on the complexity of the solution.

Legal text

The proposed redlined changes to the BSC to deliver P390 can be found in Attachment A. It includes the provisions previously approved under P330 and P365, plus the additional restrictions referred to in the Proposed Solution section above.

Are there any alternative solutions?

The Workgroup did not identify any alternative solutions, which it believes would better facilitate the Applicable BSC Objectives compared with the Proposed solution. However, the Workgroup did consider a number of variations and options, which are discussed in section six below.

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4 Impacts & Costs

No BSC Central Systems impacts have been identified.

Estimated central implementation costs

ELEXON's costs to implement P390 are approximately £600. These costs are primarily driven by the need to amend internal processes and documents.

- 1 Working Days effort to implement new internal processes and documents; and
- 2 Working Days effort to implement document changes to the BSC.

Estimated central ongoing costs

P390 will introduce a new mechanism for capturing market participant views and passing these, the Board's provisional views on each of the P390 conditions and any other suitable information to Ofgem.

ELEXON has estimated that each new business opportunity progressed via the P390 mechanism would require up to 3 Working Days of effort for ELEXON to support.

As part of the assessment for P390, ELEXON analysed the effort needed to progress previous vires Modifications. P330 was estimated to have required 170.25 Working Days with a sum estimated materiality of around £41,000. P365 was estimated to have required 44.5 Working Days with a sum estimated materiality of £11,000. The difference in effort can be explained by P330 being assessed by a Workgroup, whilst P365 went straight to the Report Phase (without assessment by a Workgroup).

Indicative industry impacts and costs

Responses to the P390 Assessment Procedure Consultation identified no impacts or costs resulting from implementation of P390.

Impact on BSC Parties and Party Agents	
Party/Party Agent	Potential Impact
All BSC Parties	No material impact is anticipated upon implementation of this Modification. However, BSC Parties will be indirectly impacted as a result of the changes to ELEXON vires. As ELEXON operates on a not for profit basis, Parties may be asked to fund any bids submitted following implementation subject to certain limits and restrictions and repayment obligations, but this is no different from the status quo.

Impact on the NETSO
There is no direct impact however, the NETSO may have an interest as a BSC Party.

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Impact on BSCCo	
Area of ELEXON	Potential Impact
ELEXON will be required to implement the proposed changes to the BSC should the Modification be approved.	

Impact on BSC Settlement Risks
No impacts on BSC Settlement Risks have been identified.

Impact on BSC Systems and processes	
BSC System/Process	Potential Impact
No impacts.	

Impact on BSC Agent/service provider contractual arrangements	
BSC Agent/service provider contract	Potential Impact
None.	

Impact on Code	
Code Section	Potential Impact
BSC Section C 'BSCCo and its Subsidiaries'	Changes will be required to implement the proposed solution.
BSC Section X Annex X-1 'General Glossary'	

Impact on Code Subsidiary Documents	
CSD	Potential Impact
None.	

Impact on other Configurable Items	
Configurable Item	Potential Impact
None.	

Impact on Core Industry Documents and other documents	
Document	Potential Impact
None.	

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Impact on a Significant Code Review (SCR) or other significant industry change projects
Ofgem as the Authority confirmed to ELEXON that P390 doesn't interact with any ongoing SCR on 12 September 2019. Further, the Workgroup didn't identify any interactions with ongoing SCRs.

Impact on Consumers
No detrimental impact on consumers is anticipated, however there are potential beneficial impacts that could accrue from ELEXON bidding and winning other work resulting in a defraying of material costs to BSC Parties.

Impact on the Environment
None anticipated.

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5 Implementation

Recommended Implementation Date

The Workgroup recommends an Implementation Date for P390 of:

- 5 Working Days after Authority Decision.

As a document-only change with no expected system or industry impacts, this Modification is recommended for implementation 5 Working Days after Authority Decision, to realise the benefits of the P390 solution at the earliest opportunity.

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6 Workgroup's Discussions

P390 Workgroup meetings were held on 18 November 2019, 18 December 2019, 23 January 2020 and 25 March 2020.

Throughout the Assessment Procedure for P390 discussions focused on finding the appropriate balance between reducing the time taken for the ELEXON Board to bid for appropriate opportunities of interest while ensuring that appropriate assurance, oversight and transparency remain for both BSC Parties and the Authority.

The Workgroup developed a number of high-level principles with which to evaluate the eventual solution:

1. P390 should remove undue barriers to ELEXON's ability to expand vires but appropriate accountability, transparency and oversight must remain.

2. P390 should be quicker than progressing a straight to Report Phase Modification while still providing an appropriate level of transparency and accountability in cases where ELEXON's interest in taking up the role is of clear benefit to BSC Parties.

P390 defect

At the first Workgroup meeting, the group discussed the defect that P390 is trying to address, with one Member seeking clarification on the P390 Proposer's views in this regard.

The Proposer reconfirmed their views as captured in the Proposal Form and Initial Written Assessment, namely that the need for a Modification to amend ELEXON's vires can lead to unfair delays and a competitive disadvantage for ELEXON when compared to its competitors. Further, it is not efficient use of ELEXON or industry resource.

The Workgroup generally agreed that the timescales associated with progressing a Modification can be lengthy and that this delay in action caused by a 3 to 9 month Modification process can leave ELEXON unable to pursue a suitable opportunity within a given timeframe.

Furthermore, the Proposer felt that the requirements imposed by the Modification process (evidenced by the delay in progressing P390 while the necessary number of Members were sourced) shouldn't be able to rule out opportunities for ELEXON that would be of benefit to industry.

ELEXON explained that the aim of this Modification is to arrive at an envelope of permissions and conditions under which the ELEXON Board could bid for activities that BSC Parties would be confident are inherently appropriate and sensible. Primary among ELEXON's concerns with progression of P390 is that the Parties who would fund these bids are comfortable that it protects their interests.

Timescales for tendering

ELEXON further explained that where there is a good amount of information released early in the tendering process as with the pre-consultations with the PAFA and REC roles, then the Modification timescales are less restrictive. However, for any roles which are less well understood or where timescales are otherwise reduced, this is where ELEXON can have an

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undue disadvantage due to the Modification process. For the opportunities that ELEXON is likely to seek, this is most likely to arise in a re-tendering process.

Members further described how working practices have changed in recent years, with more opportunities presenting themselves and requiring a more agile and 'fleet-of-foot' approach to take advantage of these opportunities.

Funding model considerations

One Member claimed that the current mechanism of ELEXON having to seek approval for additional activities was a limitation arising from ELEXON's funding model as a not-for-profit organisation that is funded by BSC Parties. The Member therefore questioned whether there was indeed a legitimate defect to address.

In this Member's opinion, ELEXON's funding model prevents it from pursuing additional activities without consent from BSC Parties. He noted that a licensee has no choice but to accede to the BSC and is therefore liable to pay BSC Costs that would be accrued via any unsuccessful bids for additional activities.

As any bids would be funded automatically, he contrasted ELEXON's natural wish to expand its vires with the restrictions of operating under the current funding model, and felt that restrictions to vires are therefore imposed by adherence to a funding model which puts BSC Parties on the hook for costs incurred by BSCCo.

He described the benefits of defrayment to BSC Parties as uncertain as it would depend on the success of both the bid attempt and the newly established subsidiary.

Cost Efficiency Analysis

In discussion over the defect identified by the P390 Proposer, the group explored how the need to progress and support a BSC Modification can be an inefficient use of industry resources for low-risk cases where ELEXON's interest in taking up the role is of clear benefit.

ELEXON analysed the costs incurred by previous Modifications P330 and P365 using estimates and a methodology for estimating industry effort that combined ELEXON effort, Workgroup attendance and the total number of Consultation respondents.

The results were presented the results to the group at its second meeting. P330 and P365 were document only changes, requiring no system changes or implementation effort from industry. P330 was estimated to have required 170.25 Working Days with a sum estimated materiality of around £41,000. P365 was estimated to have required 44.5 Working Days with a sum estimated materiality of £11,000. The difference in effort can be explained by P330 being assessed by a Workgroup, whilst P365 went straight to the Report Phase (without assessment by a Workgroup).

Accountability and transparency within the P390 Solution

The Workgroup discussed the accountability and transparency afforded by the current 'status quo' for a proposal to expand ELEXON vires - the Modification process.

In the Workgroup's view, this has the following benefits:

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- Giving BSC Parties notice of ELEXON's intentions and providing information about the role that ELEXON would potentially pursue upon the approval of Modifications such as P330 and P365;
- Giving BSC Parties the chance to provide their views via one or more consultations; and
- Providing the Authority with a chance to express their views and maintain oversight.

Regarding accountability, the Workgroup recognised that they had confidence in the existing Board members and that they trusted that any pursued opportunity would be a 'good fit' for ELEXON.

However, they acknowledged that this might not always be the case and there may be a need to 'futureproof' these mechanisms against a possible shift in personalities that make up the Board in the future via the inclusion of the P390 conditions in the BSC.

ELEXON noted the benefits of maximal transparency within the P390 solution, however the Workgroup accepted that confidentiality concerns would prevent the release of certain pieces of information over the course of preparing for a tender submission.

Accountability of BSCCo outside the Modification process

As described in Section 2, BSC Parties can vote to remove ELEXON's directors at the Annual BSC Meeting or at a General Meeting of Voting Parties, which can be requested at any time.

The group noted the accountability provided by this option, however one Member described this route as a 'nuclear option' that some Parties may be reticent to take despite wanting to express dissatisfaction with the Board.

ELEXON pointed out that an additional option is available in the form of a non-binding resolution. The Workgroup noted and agreed that the option to raise a non-binding resolution provides an effective option for Parties to voice displeasure before escalating to the 'nuclear option' of voting to remove one or more Board members.

One Member questioned whether, hypothetically, a group of BSC Parties could go to Ofgem and communicate any concerns with the actions of the Board. This was confirmed to be perfectly possible but would be 'non-official' and offer little transparency of the action to the wider market.

Consideration of bidding and tendering processes and timescales

To assist the Workgroup in their discussions, ELEXON prepared several process diagrams that illustrated the usual required steps in the tendering process, along with the time usually needed to complete each stage. This is illustrated below in Figure 1:

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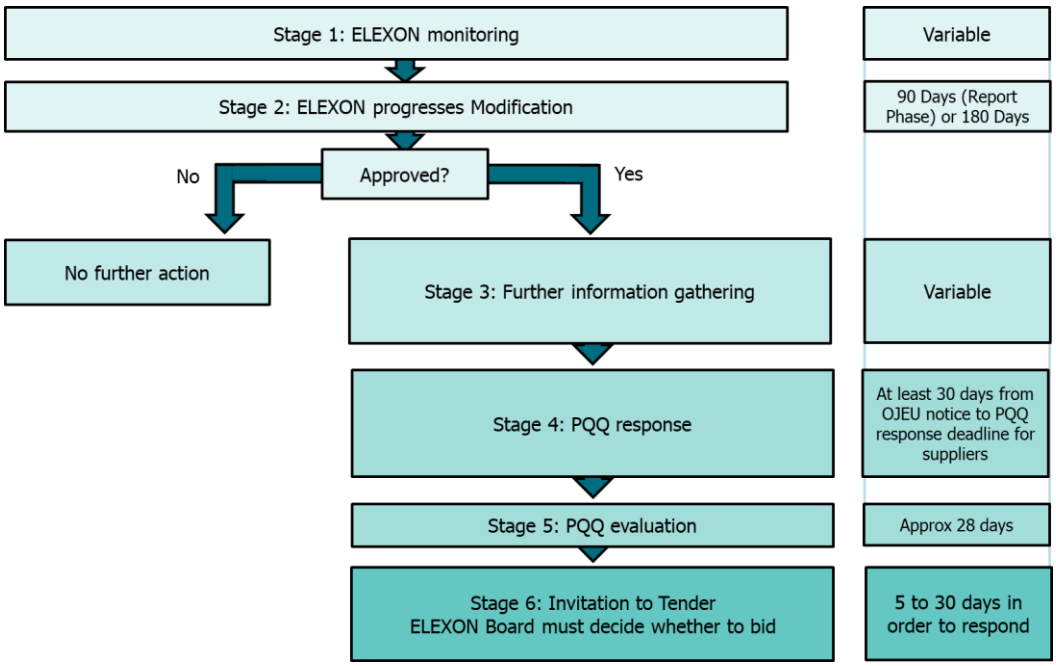


Figure 1

During the presentation, ELEXON highlighted that there are sometimes no definite timescales and that each step may be completed concurrently according to the tender and the demands of the contracting body, as illustrated by Figure 2

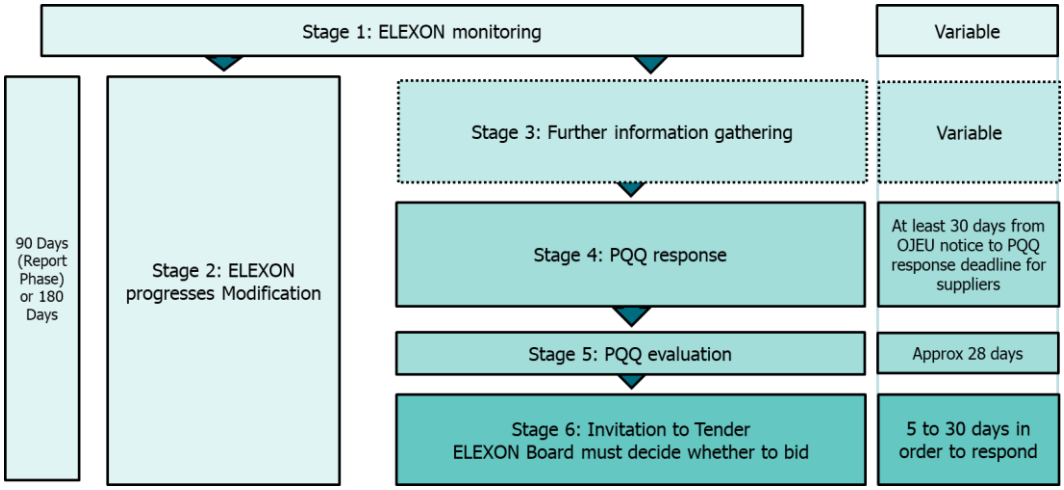


Figure 2

Often the timescales depend on the amount of information available at each stage for each contract and can vary on a case-by-case basis. For example, a 5 day turnaround to respond to an Invitation to Tender would require more information to be made available at an earlier stage, while a 30 day window to respond would usually mean that less information had been made available until this point in the tendering process.

P390 Conditions

The Workgroup considered each of the conditions proposed by P390, including those previously referenced by Ofgem, P330 and P365 (see section 3 for list of criteria).

The Workgroup were mostly comfortable with the P390 conditions proposed in the P390 Proposal Form and Initial Written Assessment.

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One Member raised the idea of including water (as other utility) as a new criteria. His rationale was that ELEXON has considerable experience with utilities and that the water market is fragmenting and could reasonably present a need for settlement at a future point. Also communications although more mature market.

The Workgroup considered these arguments but were of a majority view that this inclusion would not be necessary for the P390 solution, reiterating that if an opportunity such as this arose in the future, a Modification could be raised to support it.

Noting that the P390 criteria covered the main areas that ELEXON may reasonably be expected to have an interest and appropriate level of competency, the group also discussed how these criteria interact with each other to provide comfort that ELEXON would not be 'overstepping its bounds' in any activity made possible by P390.

The group drew out hypothetical examples to illustrate this point:

1. ELEXON opening a power station would meet the sector limitation (energy) but would not be permitted as it does not fall under ELEXON's core competencies.

2. ELEXON operating an airline would similarly meet the sector limitation (transport) but would not be permitted as it does fall under ELEXON's core competencies.

3. In contrast, ELEXON applying its core competency in management of large amounts of sensitive data to pursue a role in the medical, agricultural or tourism sectors would each be unworkable due to the failure to meet the sector limitation criteria.

Undue competitive advantage

The Workgroup noted that Ofgem criteria 4) 'ELEXON's BSC role should not give it any undue competitive advantage in a contestable activity' was not present in the original proposed P390 conditions.

It was clarified for the group that this was because this particular condition was seen as somewhat nebulous as a condition for the Board to consistently and satisfactorily evaluate an opportunity against.

Ofgem had indicated some specific concerns with ELEXON's perceived ability to secure an undue competitive advantage due to its access to BSC data and access to a larger pot of money (via BSC Parties) than other organisations might enjoy.

At this point ELEXON clarified that provisions in the BSC already exclude ELEXON from being able to use BSC data for the purposes of any commercial advantage for any commercial opportunity.

The Workgroup then discussed the second concern, with ELEXON noting that the condition to limit spending on tender participation to 1% of annual budget[1] should effectively limit the risk that ELEXON could have an undue advantage in terms of the amount of money that it could spend on a bid.

The group considered this sum in relation to Ofgem's concerns, with one member pointing out that the actual total could be in excess of £400,000 spent on one bid and that this

[1] The initial proposal included a 1% annual budget cap without the cap of £100k plus inflation on each separate bid. This was changed during the assessment of the Modification.

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could potentially be considered an undue competitive advantage for ELEXON to have access to that capital for bidding purposes.

After consideration, the Workgroup and Proposer agreed that introducing an inflation-linked cap of £100K per bid (from an annual 'pot' of 1% of BSC annual budget) would effectively mitigate this risk. This is on the basis that Ofgem approved this amount under both P330 and P365. It was also agreed that this amount should be index-linked to account for inflation.

Having acknowledged that the BSC contains a framework that effectively protects data and agreed an index-linked £100K cap per bid that would mitigate concerns about undue advantage in terms of funds - the group desired clarity on what benefits the continued inclusion of the 'undue competitive advantage' condition would offer, with ELEXON responding that it did not believe that it would offer any tangible benefits as specific concerns had been ably covered in existing provisions and additions to the P390 solution.

An Ofgem representative commented that the Authority still strongly desired the inclusion of the condition, however, due to the element of future-proofing it provided.

The group discussed whether there would be any risk in reintroducing this condition. ELEXON believed that there would not be any risk but again questioned the usefulness of having it if successfully mitigated by other elements of the BSC and solution.

It was also noted that including this criterion as a condition provides an opportunity to future-proof the P390 solution despite reaffirming conditions that are already in the BSC.

P390 Consultation

The Workgroup wished to explore some options for the incorporation of Panel consideration and/or industry consultation within the P390 solution to provide a chance for market participants to provide their views and to offer a greater degree of transparency. ELEXON highlighted that other code bodies are not required to consult.

ELEXON agreed to analyse and bring back some different options for Workgroup consideration in the second Workgroup:

1. Addition 1 – BSC Party Consultation. In this option BSC Parties are consulted on ELEXON's interest in participating in a bid, with the Board considering responses as part of its decision on whether to proceed. This would take an estimated 10 WDs for ELEXON to issue a consultation and for Parties to respond.

2. Addition 2 – BSC Party Consultation + Panel Veto. In this scenario, BSC Parties are consulted as with addition 1, with the BSC Panel deciding whether to permit further progression of a bid at the next suitable Panel meeting following closure of the consultation. This would take an estimated 15 Working Days for ELEXON to issue a consultation, ELEXON to prepare paper and Panel to consider a veto.

3. Addition 3 - BSC Party Consultation + Panel View. In this scenario, BSC Parties are consulted as with addition 1, with the BSC Panel meeting to discuss and provide a view that would then be fed back to the BSCCo Board deciding whether to permit further progression of a bid at the next suitable Panel meeting following closure of the consultation. This would take an estimated 15 Working Days for ELEXON to issue a consultation, ELEXON to prepare paper and Panel to provide a view.

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4. Additions 4 and 5 described scenarios where the Panel could provide a veto (addition 4) or non-binding view (addition 5) without a prior consultation step. This would take an estimated 5 Working Days for ELEXON to prepare paper and Panel to consider a veto.

While the Workgroup felt that the BSC Panel are senior representatives of BSC Parties as a whole and would therefore be well placed to provide an informed view on behalf of Parties, they were not comfortable with the idea of the Panel having a deciding vote in expansion of ELEXON vires as in Addition 2. This was because of a perceived adverse impact on the clarity of governance between the Panel and the Board. The Workgroup believed it important to maintain the responsibilities of the Board and Panel. To this end, the Workgroup also believed it important for the Board to maintain control over determining whether the conditions were satisfied and whether to bid.

The P390 Proposer was of the opinion that, as the Modification involves the addition of conditions that ensure expansions of vires are appropriate, both a consultation step and a Panel step (options 2 to 4) isnot necessary, noting that it would add extra timescales and inefficiencies on to the process.

Consequently, the Workgroup and Proposer agreed that a 10 Working Day consultation would provide sufficient chance for the market participants to provide their views (option 1). The P390 consultation will also invite the Panel to respond and provide their views, with non-confidential consolidated responses published on the BSC Website.

Workgroup Members stated that it would be beneficial to give industry participants as much notice of an impending consultation as possible. However, they did not want to prescribe a minimum time period for notice prior to a consultation taking place and were comfortable with an approach where ELEXON sends as much notice as reasonably practicable. The Workgroup noted that ELEXON are naturally incentivised to provide this information in a timely manner to facilitate support from industry.

P390 Ofgem Window

Just before the second P390 Workgroup, Ofgem contacted ELEXON to state that they were developing an interpretation of the **Electricity Transmission Standard Licence Conditions** section C3 para 1D:

> *'The BSC may include provisions allowing the BSCCo or any affiliate of the BSCCo to undertake activities other than those referred to in paragraphs 1, 1A and 1B above, subject to Authority consent.'*

In order to ascertain what this position may mean for the progression of P390, ELEXON engaged with the Authority on this point, inviting Ofgem to identify who they were seeking to protect and from what and how their concerns were not addressed in the proposed P390 conditions.

At the third Workgroup ELEXON provided an update that the Authority currently believes they should retain their role of consenting to expansions of ELEXON's role, finding it consistent with the Licence and not the right time to consider whether it needs to change, given the on-going Code Governance Review, which has identified accountability as a key issue.

ELEXON observed that given the development of the REC, and its desire for code bodes to be more accountable, it could be argued that now is the right time.

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While the group recognised that this position raises wider questions regarding Ofgem's position, they agreed that answers to these were not necessary to continue developing the P390 solution (outside the scope of P390).

The group discussed what would be passed over to Ofgem for decision, when and how.

In their discussions the Workgroup were mindful of striking a balance between a practical degree of flexibility in allowing Ofgem enough time to come to a decision versus rigidity in measurable timescales that would provide certainty to the ELEXON Board and reduce the time taken when compared to progressing an individual Modification for each requested extension of business.

The group considered different options with reference to the timescales and impacts they incur against a baseline timescale of 56 Working Days for a Straight-to-Report-Phase Modification. This included the original P390 solution (1WD), the solution with a consultation (21WDs) and variations of these involving a consultation and Ofgem approval window (41 WDs) and one with a consultation and Ofgem approval step with no time restrictions (estimated at 46 Working Days based on the current Authority KPI for reaching a decision on Modifications).

The P390 Proposer questioned whether the consultation step and Ofgem approval step could occur at the same time rather than running sequentially, however the Ofgem rep warned that the Authority would likely feel that this would provide insufficient information were they not to receive the consultation responses.

The Proposer and Workgroup opted for a solution whereby ELEXON issue a consultation and then pass responses, the Board's provisional views on each of the P390 conditions and any other suitable information to Ofgem for a 15 Working Day window (illustrated in the below illustration showing the finalised P390 process).

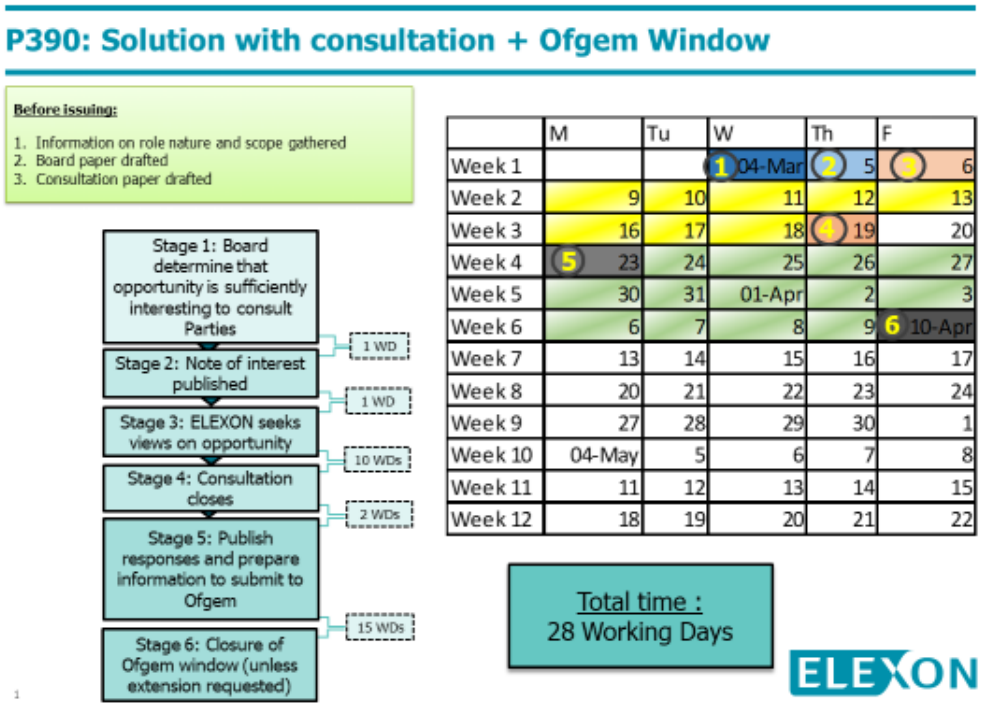


Figure 3

In this window, Ofgem may reject the proposal or request an extension if they need more time to consider the proposal – if none of those actions are taken, however, then the Authority's consent for an expansion in vires is given under the P390 solution.

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The Proposer and Workgroup noted that this approach met the criteria for Ofgem acceptance of P390, satisfied the Workgroup's desire for industry engagement in the form of a consultation and reduced the time taken to ensure that P390 would be more time-efficient than the status quo.

It was additionally noted that this approach to providing a window for Ofgem to act in P390 is similar to that of its role in Self-Governance Modifications and so would be more easily understood by BSC Parties and the wider industry.

The Workgroup also agreed to keep all of the conditions, despite Ofgem maintaining a consenting role and to keep the consultation. This would reduce the likelihood of Ofgem needing to conduct a consultation and provide Ofgem pertinent information

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7 Workgroup's Conclusions

The Workgroup **unanimously** believe that P390 **will** better facilitate the Applicable BSC Objectives and so should be **approved**. The Workgroup's recommendation to approve P390 remains unchanged since the Assessment Consultation.

At the final Workgroup meeting on 25 March 2020, Members considered the Assessment Procedure Consultation responses but confirmed that they had not altered their views on the solution or the Legal Text needed to deliver it.

Assessment Consultation responses

There were six responses to the APC, with responses received from Suppliers, the System Operator, Supplier Agents and one Trade Body.

Respondents unanimously agreed with the Workgroup that the P390 solution should not include a dedicated Panel approval mechanism. National Grid ESO reiterated their view that their preference is for Panel to have the power to veto tender bids however, given there was no appetite within the Workgroup for an alternate of this nature they are comfortable with the proposed P390 solution which incorporates a 10 Working Day consultation, open to all interested parties and the BSC Panel.

Five respondents agreed that the P390 solution better facilitates the BSC Objectives, while one did not, stating that P390 has no impact on the Objectives. Not all respondents gave views against the specific Objectives, but of those who did believed P390 better facilitated Objectives (c) and (d) for the reasons given by the Workgroup, noting that P390 delivers process and time efficiencies compared with the current practice of using individual Modifications to seek approval to tender for each additional business activity.

Five respondents agreed that the draft legal text delivers the P390 solution while one did not. The respondent who provided a 'no' answer acknowledged in the written commentary that they do believe it delivers the intention, but they disagree with the Proposal.

Four respondents agreed that there are no other potential Alternative Modifications thatbetter facilitate the Objectives, with one respondent disagreeing on the basis that they do not believe P390 has any impact on the Objectives.

Respondents unanimously agreed with the recommended implementation approach and identified no impacts, cost or lead times incurred for their organisations.

Workgroup's final discussions

Extension of P390 Conditions

One response to the Assessment Consultation called for an extension of the condition that "ELEXON's BSC role should not give it any undue competitive advantage in a contestable activity" to add non-contested activities and amend "undue competitive advantage" to "potential undue competitive advantage".

The Workgroup noted the arguments put forward and discussed the pros and cons of extending this principle in reference to their substantial previous discussions on this principle, captured in Section Six.

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The group considered the impacts of extending the principle to 'potential' rather than actual undue competitive advantage and how this might be achieved via business separation controls and non-disclosure agreements.

It was noted that this could present a risk of reducing appropriate activities that ELEXON is well qualified for due to its position as a leading code manager.

The Workgroup also discussed whether a change was needed to the solution to ensure ELEXON did not bid for anything that created a conflict of interest. A Member commented on the DWG example cited by the respondent, that Ofgem should have considered whether awarding ELEXON the lead for the DWG created a conflict of interest. Another Member believed it is ELEXON's duty to declare any conflict of interest.

Ultimately, the Workgroup were comfortable with the level of assurance provided by Board decision, industry consultation and Ofgem consideration of "undue competitive advantage" as described in the Legal Text, with no changes needing to be made.

The Proposer described the solution as the 'right balance' between conditions and safeguards and allowing ELEXON to seek new opportunities. Another Member believed that, the changes made to the solution during the Workgroup process now meant that the solution had sufficient checks and balances.

The Workgroup discussed the suggestion by a respondent to the Assessment Consultation to lower the maximum bid cost, but noted that these had been introduced as a baseline by previous Modifications and been approved by Ofgem. Therefore the Workgroup did not think a change to these were necessary.

The group considered the wording to condition 2 'Activity must be related to the gas, electricity, heat or transport sector' following a view given by a respondent to the Assessment Consultation that transport was not appropriate as it would not be any help to Parties or the delivery of the Applicable BSC Objectives. A Member commented that the P390 shifted the hurdle from Applicable BSC Objectives to the P390 conditions. The P390 conditions are intended to ensure that any expansion of vires would benefit Parties, for example through defrayed BSC Costs, and that it was P390 and not any new activity that would need to facilitate the Applicable BSC Objectives.

The Workgroup debated the wording of "transport" and explored whether this could be refined to reference only energy relating to transport. However, a change was not deemed necessary, noting that any opportunity would have to meet other conditions such as adherence with core competencies, so they were comfortable with the level of assurance provided.

Role of the BSC Panel

The group discussed the industry's response to a dedicated Panel approval mechanism and noted that there was insufficient industry appetite for such a role to be incorporated within the P390 solution.

One Member noted that the identification of appropriate opportunities for expansion is a Board-driven process rather than a Panel-driven one, and Members were comfortable that the additional conditions and assurances provided to Parties would negate the need for Panel involvement beyond an ability to respond to the consultation.

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Workgroup's final recommendations

Members' views against each of the Applicable BSC Objectives are summarised below.

Does P390 better facilitate the Applicable BSC Objectives?		
Obj	Proposer's Views	Other Workgroup Members' Views
(a)	• Neutral	• Neutral
(b)	• Neutral	• Neutral
(c)	• **Positive**	• **Positive** (majority)
(d)	• **Positive**	• **Positive** (unanimous)
(e)	• Neutral	• Neutral
(f)	• Neutral	• Neutral
(g)	• Neutral	• Neutral

Applicable BSC Objective (c)

A majority of Workgroup Members believe that P390 better facilitates Objectives (c) as it would facilitate the defrayment of costs to BSC Parties and reduce the cost of operating in the market, therefore opening up market entry to more competition in the generation and supply of electricity.

A minority of the Workgroup do not believe that P390 better facilitates Objective (c), as any competition benefits can currently be achieved via the status quo – progressing a Modification – and that P390 offers no distinct competitive benefits from the current baseline.

Applicable BSC Objective (d)

The Workgroup unanimously believe that P390 better facilitates Applicable BSC Objective (d) Promoting efficiency in the implementation of the balancing and Settlement arrangements.

Arguments for this include offering a more efficient and responsive process than the status quo and thus promoting the sharing of ELEXON's fixed costs across other activities, allowing costs to BSC Parties to be defrayed.

Participating in the tendering process for other activities will provide a view to BSC Parties of the competitiveness of ELEXON in delivering its existing obligations and be used to consider efficiencies that could be achieved from ELEXON and other like bodies.

Self-Governance

The Workgroup unanimously believes that this Modification **does not** meet the Self-Governance Criteria as it is likely have a material impact on criterion v. 'the Code's governance procedures or modification procedures'. It materially impacts criteria v, as it will enable ELEXON to bid for new opportunities, subject to the P390 process, without needing to progress a Modification first – it changes the barrier that needs to be cleared before ELEXON can pursue new opportunities.

What are the Applicable BSC Objectives?

(a) The efficient discharge by the Transmission Company of the obligations imposed upon it by the Transmission Licence

(b) The efficient, economic and co-ordinated operation of the National Electricity Transmission System

(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

(d) Promoting efficiency in the implementation of the balancing and settlement arrangements

(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]

(f) Implementing and administrating the arrangements for the operation of contracts for difference and arrangements that facilitate the operation of a capacity market pursuant to EMR legislation

(g) Compliance with the Transmission Losses Principle

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Legal Text

Following the Assessment Procedure Consultation, the Workgroup have not identified any changes to the existing legal text that need to be made.

Any alternatives

Following the Assessment Procedure Consultation, the Workgroup have not identified any alternative Modifications that would better meet the BSC Objectives.

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8 Recommendations

The P390 Workgroup invites the Panel to:

- **AGREE** that P390:
    - **DOES** better facilitate Applicable BSC Objective (c); and
    - **DOES** better facilitate Applicable BSC Objective (d);
- **AGREE** an initial recommendation that P390 should be **approved**;
- **AGREE** an initial Implementation Date of:
    - 5 Working Days following a decision from the Authority,
- **AGREE** the draft legal text;
- **AGREE** an initial view that P390 should not be treated as a Self-Governance Modification;
- **AGREE** that P390 is submitted to the Report Phase; and
- **NOTE** that ELEXON will issue the P390 draft Modification Report (including the draft BSC legal text) for a 10 Working Day consultation and will present the results to the Panel at its meeting on 14 May 2020.

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Appendix 1: Workgroup Details

Workgroup's Terms of Reference

Specific areas set by the BSC Panel in the P390 Terms of Reference
Whether the safeguards proposed by P390 in addition to those developed during P330 and P365 are appropriate?
Whether there will be a direct impact on BSC Parties resulting from implementation of the P390 solution?
What mechanisms should be put in place to ensure BSC Parties benefit from the activities of ELEXON's subsidiaries?
How to ensure that ELEXON is not cross-subsidising the subsidiaries?

Assessment Procedure timetable

P390 Assessment Timetable	
Event	Date
Panel submits P390 to Assessment Procedure	12 September 2019
Workgroup Meeting 1	18 November 2019
Workgroup Meeting 2	18 December 2019
Workgroup Meeting 3	23 January 2020
Assessment Procedure Consultation	10 Feb-28 Feb 2020
Workgroup Meeting 4	W/C 3 March 2020
Panel considers Workgroup's Assessment Report	9 April 2020

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Workgroup membership and attendance

P390 Workgroup Attendance					
Name	Organisation	18 Nov 2019	18 Dec 2019	23 Jan 2020	25 March 2020
Members					
Lawrence Jones	ELEXON *(Chair)*	✓	×	✓	☎
Elliott Harper	ELEXON *(Chair)*	×	✓	×	×
Ivar Macsween	ELEXON *(Lead Analyst)*	☎	☎	☎	☎
Terry Carr	*E.ON (Proposer)*	✓	☎	☎	☎
Andy Colley	SSE	☎	☎	×	☎
Colin Frier	Siemens	☎	☎	☎	☎
Emily Mason	Smartest Energy	✓	✓	✓	☎
Grahame Neale	National Grid	✓	×	×	×
Binoy Darsi	EDF	☎	×	×	×
Rick Parfett	ADE	✓	✓	☎	☎
Sarah York	National Grid	✓	✓	☎	×
Attendees					
Kathryn Coffin	ELEXON *(Design Authority)*	×	×	×	×
Tina Wirth	ELEXON *(Lead Lawyer)*	✓	✓	✓	×
Nicholas Brown	ELEXON *(SME)*	✓	✓	✓	☎
Steve Wilkin	ELEXON *(SME)*	✓	×	✓	×
Thomas Demetriades	ELEXON *(SME)*	×	✓	×	☎
Angela Love	ELEXON (*SME*)	×	✓	×	×
Nadir Hafeez	Ofgem	✓	×	✓	☎
Alisdair MacMillan	Ofgem	✓	×	×	×
Colin Down	Ofgem	×	✓	×	×
Megan Coventry	SSE	☎	☎	×	×

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Appendix 2: Glossary & References

Acronyms

Acronyms used in this document are listed in the table below.

Acronyms	
Acronym	Definition
BSC	Balancing and Settlement Code
BSCCo	Balancing and Settlement Code Company
DCUSA	Distribution Connection Use of System Agreement
EMR	Electricity Market Reform
IWA	Initial Written Assessment
MRA	Master Registration Agreement
PAFA	Performance Assurance Framework Administrator
REC	Retail Energy Code
RECAS	REC Administrative Services
RECASCo	REC Administrative Service Company
SCR	Significant Code Review
SPAA	Supply Point Administration Agreement
UNC	Uniform Network Code

External links

A summary of all hyperlinks used in this document are listed in the table below.

All external documents and URL links listed are correct as of the date of this document.

External Links		
Page(s)	Description	URL
2	BSC Section C 'BSCCo and its Subsidiaries'	https://www.elexon.co.uk/the-bsc/bsc-section-c-bscco-subsidiaries/
3	P365 'Enabling ELEXON to tender for the Retail Energy Code (REC)'	https://www.elexon.co.uk/mod-proposal/p365/
4	P330 'Allowing ELEXON to tender for the Uniform Network Code Gas Performance Assurance Administrator (PAFA) role'	https://www.elexon.co.uk/mod-proposal/p330/
4	P284 'Expansion of ELEXON's role via the 'contract model''	https://www.elexon.co.uk/mod-proposal/p284/
6	Low Carbon Contracts Company	https://www.lowcarboncontracts.uk/

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