

Assessment Procedure Consultation Responses

P416 'Introducing a route of appeal for the Annual Budget in line with the proposals for the Retail Energy Code'

This Assessment Procedure Consultation was issued on 7 April 2021, with responses invited by 22 April 2021.



Phase

Initial Written Assessment

Definition Procedure

Assessment Procedure

Report Phase

Implementation

Consultation Respondents

Respondent	Role(s) Represented
British Gas	Supplier
Elexon Board	Elexon Board
Scottish Power	Supplier

Question 1: Do you agree with the Workgroup's initial majority view that P416 does better facilitate the Applicable BSC Objectives than the current baseline?

Summary

Yes	No	Neutral/No Comment	Other
2	0	0	0

Responses

Respondent	Response	Rationale
British Gas	Yes	<p>We agree with the Workgroup's initial view that P416 does better facilitate the Applicable BSC Objectives rather than the current baseline.</p> <p>Appeal rights are an important element of an effective industry code governance structure.</p> <p>We believe that Applicable BSC Objective (d) Promoting efficiency in the implementation of the balancing and settlement arrangements will be positively impacted by the implementation of this modification.</p> <p>There is currently no direct route of appeal for any BSC Parties not in agreement with any items in the Annual Budget, and who feel their comments have not been addressed during the drafting phase of the Business Strategy/Annual Budget. A Party who is sufficiently motivated could lobby other BSC Parties to support the removal of Elexon Board members, which would be both disproportionate and inefficient in most cases. Introducing a route to challenge items in the Annual Budget in a limited and specific way is therefore an improvement in efficiency in the implementation of the balancing and Settlement arrangements.</p>
Scottish Power	Yes	SP agrees this modification better facilitates relevant objective d

Question 2: Do you agree with the Workgroup that the draft legal text in Attachment B delivers the intention of P416?

Summary

Yes	No	Neutral/No Comment	Other
2	0	0	0

Responses

Respondent	Response	Rationale
British Gas	Yes	We agree that the draft legal text delivers the intention of P416
Scottish Power	Yes	-

Question 3: Do you agree with the Workgroup's recommended Implementation Date?

Summary

Yes	No	Neutral/No Comment	Other
2	0	0	0

Responses

Respondent	Response	Rationale
British Gas	Yes	We agree with the Workgroup's recommended Implementation date. This will allow the new arrangements to be implemented in time for next year's budget setting process.
Scottish Power	Yes	-

Question 4: Do you agree with the Workgroup that there are no potential Alternative Modifications within the scope of P416 which would better facilitate the Applicable BSC Objectives?

Summary

Yes	No	Neutral/No Comment	Other
2	0	0	0

Responses

Respondent	Response	Rationale
British Gas	Yes	We agree that there are no potential Alternative Modifications within the scope of P416 which would better facilitate the Applicable BSC Objectives.
Scottish Power	Yes	-

Question 5: Do you agree with the Workgroup's assessment of the impact on the BSC Settlement Risks?

Summary

Yes	No	Neutral/No Comment	Other
2	0	0	0

Responses

Respondent	Response	Rationale
British Gas	Yes	We agree that this modification will have no impact on the BSC Settlement Risks.
Scottish Power	Yes	-

Question 6: Do you agree with the Workgroup's assessment that P416 does not impact the European Electricity Balancing Guideline (EBGL) Article 18 terms and conditions held within the BSC?

Summary

Yes	No	Neutral/No Comment	Other
1	0	1	0

Responses

Respondent	Response	Rationale
British Gas	Yes	We agree that this modification will have no impact on the EBGL
Scottish Power	-	-

Question 7: Will P416 impact your organisation?

Summary

Yes	No	Neutral/No Comment	Other
0	1	1	0

Responses

Respondent	Response	Rationale
British Gas	-	We understand that this modification will only directly impact us if we choose to make use of the appeals mechanism.
Scottish Power	No	-

Question 8: Will your organisation incur any costs in implementing P416?

Summary

High	Medium	Low	None	Other
0	0	0	2	0

Responses

Respondent	Response	Comment
British Gas	No cost	No
Scottish Power	No cost	No cost has been identified

Question 9 How long (from the point of approval) would you need to implement P416?

Summary

0-6 months	6-12 months	>12 months	Other
2	0	0	0

Responses

Respondent	Response	Rationale
British Gas	5 Working Days	5 working days. It makes no difference whether this is implemented as part of or outside normal BSC Systems Releases.
Scottish Power	-	No lead time would be required

Question 10: Do you agree with the Workgroup's proposed de minimis threshold criteria? If yes, please give your preference as to whether one or two other Voting Party Groups would be appropriate to include. If no, please provide your rationale.

Summary

Yes	No	Neutral/No Comment	Other
1	1	0	0

Responses

Respondent	Response	Rationale
British Gas	Yes	<p>We agree with the Workgroup's proposal that there should be a de minimis threshold. Our preference would be that one other Party Group must support the appeal.</p> <p>This option would seem reasonable and ensure that no single party can prevent expenditure being incurred by the Board.</p>
Scottish Power	No	<p>No. There are over 100 Voting Parties (including Voting Party Groups)</p> <p>An appeal supported by only 2 Voting Party Groups with an aggregate share of 5% is too few parties.</p> <p>It also excludes those parties who are not part of a Voting Party Group which is of course perverse and unlikely to be what the Proposer intended.</p> <p>Setting this bar too low could lead to multiple appeals on different grounds and delay the budget process.</p> <p>And the market share criterion could exclude even a multiple number of smaller parties from raising an otherwise legitimate appeal.</p> <p>The de minimis should be restated as:</p> <p>"the threshold for a valid appeal will be 10 or more Voting Parties in support of the appeal"</p>

Respondent	Response	Rationale
		<p>This is the same as the Quoracy threshold for General Meetings which seems a reasonable rationale.</p> <p>This allows for smaller players who might be adversely affected by a proposed budget line to agree an appeal, or indeed larger parties where they have the support of other smaller parties and are not exercising their own market power to raise an appeal in their narrow interest</p>

Question 11: Do you agree with the Workgroup that BSC Change activities should be exempt from the appeals process? If you agree that BSC Change activities should be exempt, which of option 1 or option 2 is do you believe is most appropriate and why?

Summary

Yes	No	Neutral/No Comment	Other
2	0	0	0

Responses

Respondent	Response	Rationale
British Gas	Yes	<p>We agree with the Workgroup the that BSC Change activities that have already received approval from Ofgem should be exempt from the appeals process. We prefer option 2 of the legal drafting as follows:</p> <p>The option 2 variant of the legal text for section 6.4.9 below:</p> <p>'No appeal to the Authority may be allowed pursuant to paragraphs 6.4.6(b) and/or 6.4.6(d) in respect of any cost item that relates to BSCCo's role, powers, functions and responsibilities under Section F. This option is a more limited BSC change exemption as it does allow appeals against BSC Change spending in the following cases:</p> <ul style="list-style-type: none"> • Elxon has not followed the correct process when approving a specified Annual Budget cost item; or • The highlighted cost item is manifestly inappropriate <p>This option would still allow appeals that relate the budget line items relating to Section F in the above limited circumstances which does seem reasonable.</p>
Scottish Power	Yes	<p>"SP believes that Option 2 raises the prospect of parties trying to overturn a change that they do not like by appealing the BSCCo's budget and therefore limiting its ability to implement the change.</p> <p>It is for Panel to hold BSCCo to account for the robustness of its budgeting.</p> <p>With regard to this, SP believes that P416 should require Panel to ensure BSCCo Budget proposals reconcile with estimates discussed during the Change Process.</p>

Respondent	Response	Rationale
		SP therefore supports Option 1"

Question 12: Do you have any further comments on P416?

Summary

Yes	No
1	1

Responses

Respondent	Response
British Gas	No
Scottish Power	<p>"An error in the legal drafting could lead to BSCCo being unable to meet it's legal liabilities. To wit. 6.4.11 a) iii) Please delete "which it has previously incurred in accordance with the Code" We cannot expect BSCCo to breach a legal obligation to pay, regardless of whether that obligation arises under Code or elsewhere; and indeed whether the obligation arose 'previously' or in the future."</p> <p>Is there an opportunity for the Annual Budget to be issued earlier in the year "September" and to include a more granular cost breakdown within it.</p> <p>Each line item within Annual Budget should have enough detailed information to allow a party to review line by line charges/cost/period for the forthcoming year (s). This would allow any issues to be highlighted sooner and be addressed in a timely manner.</p>

Ellexon Board Response

22 April 2021

FOR THE ATTENTION OF: bsc.change@ellexon.co.uk

P416 Introducing a route of appeal for the Annual Budget in line with the proposals for the Retail Energy Code - Assessment Consultation response

I am writing on behalf of the Ellexon Board to place on record our concerns around the proposals for the appeal of the BSCCo budget to Ofgem. We do not usually respond to consultations for change to the BSC, but in this case, we do so because we can foresee some serious disadvantages for the effective management of BSC business. These would be to the detriment of BSC Parties when the current arrangements are working well.

We believe that accountability to Parties is fundamental to BSC governance and fully support that principle. Since the implementation of P324 (Review of BSCCo's governance: introducing improved accountability to BSC Parties) in 2016, any Party has the right to

bring a special resolution to a meeting of Parties, and require a vote on any issue that a BSC Party wishes, including the budget. These provisions, along with other formal and informal communications, mean that there is already considerable pressure on Elexon to listen to Parties' views on the budget. The Board is concerned that both the informal and formal routes of objection to the Budget have not been fully explored in the consideration of P416, and therefore that the need for such an appeal has not been demonstrated.

We make a number of additional points:

1. One of our biggest concerns is that the proposed modification, in its current form, enables all the existing processes which permit Parties to demonstrate disagreement with the Board and influence it directly, to be by-passed entirely. It is therefore bound to reduce the potential opportunities for resolving problems speedily and on behalf of all BSC parties. We support the current drivers on us to have good consultation with the industry we serve, and to promote processes that get support of the industry for BSCCo's forward plan and budget. To that end, we have increased the opportunities for consultation on future expenditure by including a webinar on the business plan as well as helping the formal processes for industry to provide its comments by making the documents as accessible and readable as we can. In each of the last 4 years (since P324), we have informally engaged early with the Panel on the basis that it is able to anticipate many of the Parties' opinions. The Panel can confirm that its comments are as a result given strong consideration by the Board. These arrangements seem to have worked very well, and the special resolution process has not been used.
2. We are especially concerned that, given its potential impact, the proposed modification allows an appeal by a very small number of BSC parties, i.e. a minimum of just two, out of the almost 500, all of whom could be impacted by the appeal. In such circumstances, a wide consultation by Ofgem would seem unavoidable. The pity of this is that the special resolution process introduced by P324 would have facilitated just such a consultation, in a timely manner, and indeed a ballot of all Parties, but can be circumvented completely by this modification. A relevant example of this issue might be an appeal by just two Parties against the budget for our major new digital platform, where the budget is inevitably for several tens of millions of pounds. We are extremely concerned that such an appeal would lead to significant delays (see paragraphs 3 and 4) to the benefits of an industry-wide project, and even ultimately, in theory, to the abandonment of a programme, which has already been much discussed, explained and justified. Moreover, it is plainly possible in such circumstances for Elexon to be put in a position where its contractual obligations might be breached
3. We have similar concerns that the prospect of indefinite uncertainty and major delay in the event of an appeal is very high. Although there are arrangements for some continuity and de minimis thresholds, the effective veto on relevant expenditure for the periods of time required for Ofgem consideration, which have no limit, could make the management of BSC business very difficult indeed. They would probably also add unnecessary costs. Once again, we point out that the internal special resolution process referenced above sets out a very clear and manageable time scale for testing industry opinion on the associated issues.
4. While similar budget appeal provisions exist in a small number of other codes our understanding is that an appeal to Ofgem has only been used twice (both in respect of the same company for two successive years). In neither case has Ofgem yet reached a conclusion, the first having been raised more than 18

months ago. It is our view that the BSC special resolution process will reach a conclusion faster than an appeal to Ofgem; we note that Ofgem is unable to commit to specified timescales.

5. In our view there is also an important corporate governance principle involved here, which is that a company's board of directors should be responsible (and accountable) for its budget and strategy. The effect of P416 could be to make Ofgem, not the directors, ultimately accountable for potentially large parts of Elexon's budget. Although other Code Bodies' Boards appear to have accepted this proposition, we are concerned that it would raise serious questions as to whether the Elexon directors, having reached their decisions on the budget most likely to promote success for the company, can properly carry out their fiduciary duties if such decisions were then required to be changed by Ofgem on appeal. Furthermore, there are a number of specific potential consequences of the Board's inability to determine its own budget, e.g.
- i. the ability of Elexon to enter into binding commercial agreements for a future budget period will be negatively impacted, as counterparties cannot have the same certainty of the company payment obligations being fulfilled. If additional exit or suspension provisions have to be included, they will inevitably increase contract costs;
 - ii. Elexon's ability to recruit suitable NEDs might be reduced if their critical responsibilities for the governance of the company are compromised;
 - iii. Given current discussions about smoothing the budget, in the event of Elexon wishing to borrow funds for whatever reason, the cost of doing so would increase, at the expense of BSC parties, as the funding provider would view the ability of Elexon to repay as being weakened.

Ofgem may well wish to consider such fundamental issues in the Code Governance Review rather than take a piecemeal approach. In that case, at least, there is a strong argument for deferring any decision until the outcome of the Codes Review is implemented.

6. Finally, we note that Elexon is an unregulated company in the usual sense of the word, and so this provision appears disproportionate as well as problematic.

We hope that these arguments show why we believe that the current processes for budget approval and objection are well constructed and working well, and that the addition of an appeal process, as currently proposed to Ofgem, will actually make the situation worse. If our view is not accepted, we strongly recommend at least that the special resolution process must be used first, to demonstrate industry support.

Yours sincerely,

Michael Gibbons CBE, FEI

Elexon Board and BSC Panel Chairman