

**8 May 2024**

By e-mail to:

Dear Code Governance Reform Teams

**Re: Implementation of the Energy Code Reform**

Thank you for the opportunity to respond to this consultation.

Elexon is the Code Manager for the Balancing and Settlement Code (BSC), one of the major codes which sets out the rules for the electricity market, so that Britain's energy system operates effectively.

We are responsible for managing and delivering the end-to-end services set out in the BSC and accompanying systems. Elexon provides governance, settlement and data platforms (Elexon Kinnect) that enable the smooth operation of the wholesale electricity market. This includes responsibility for the delivery of balancing and imbalance settlement, and the provision of assurance services to the BSC Panel and BSC Parties (energy Suppliers, Generators, Flexibility Service Providers and Network Companies across Great Britain).

Elexon manages both the assessment, as well as the development, implementation and operation of changes to central systems and processes. For 25 years, Elexon has played a leadership role in facilitating changes in market rules to open new markets to a greater number of participants. In addition, we offer our expertise to convene industry, Government and Ofgem in considering future changes and innovation against the existing industry rules, for the benefit of consumers and broader society.

Through our subsidiary, EMR Settlement Ltd, we calculate, collect and distribute payments to Contract for Difference (CfD) generators and Capacity Market (CM) providers, on behalf of the Low Carbon Contracts Company (LCCC). These services are provided to LCCC through a contract and on a not-for-profit basis. EMR Settlement Ltd is also the Nuclear Regulated Asset Base (RAB) Model Revenue Collection agent for LCCC.

Elexon is also appointed by Ofgem as the Senior Responsible Owner (SRO) to deliver the Market-wide Half Hourly Settlement (MHHS) Programme and has been appointed as the manager for the Data Integration Platform (DIP). This is a data transfer system built alongside a data repository, which will be used to share half hourly consumption information from consumers' smart meters with Elexon, once half-hourly settlement goes live in March 2025.

As of April 2024, Elexon will also administer a new scheme for around 340 energy intensive industries (EIs) in Great Britain to compensate them for the cost of network charges on their electricity bills (Network charge discount for Energy Intensive Industries). The scheme is one of

the three measures that have been introduced under the Government's British Industry Supercharger (BIS) scheme to help energy intensive industries to be more competitive.

As a neutral, reliable, not-for-profit market expert, we continuously look to evolve and innovate for the benefit of our customers and their end consumers.

Below we provide a summary of the key points of our response to this consultation and deal with these in detail in our response to those of your questions, which we believe are relevant to Elexon.

The views expressed in this response are those of Elexon Limited, and do not seek to represent the BSC Panel or Parties to the BSC.

If you would like to discuss any areas of our response, please contact Marta Milan, Senior Advisor by email [marta.milan@elexon.co.uk](mailto:marta.milan@elexon.co.uk).

Yours sincerely,

Peter Stanley  
Chief Executive Officer  
Elexon

## Executive Summary

Elexon is committed to working collaboratively to create a new code framework and licence regime that is forward-looking, in line with the government's net zero target, and which benefits the end-consumer. To achieve these objectives, we believe it will be important that the new licence framework is agile, adaptable and flexible, and does not become an unwieldy and rigid framework.

Generally, Elexon supports the high-level contents of the Code Manager licence ('the licence skeleton') as proposed in this first consultation. We will respond with more specific assessments during the second consultation phase, where, as anticipated, a full set of licence conditions and associated policy proposals will be defined in greater detail by the Department of Energy Security and Net Zero (DESNZ).

We believe that, to ensure that Code Managers can evolve in their role to meet the changes and challenges of the future in the most effective and efficient way, it is critically important to develop a proportionate, light-touch, outcomes-based licensing regime.

Moreover, consideration must be carefully given to prevent a disproportionate compliance burden, which would drive unnecessary, increased costs into the system. For this reason, we believe that the new licence regime should not duplicate or overlap with the general law, or provisions detailed under existing codes or existing good governance.

Below we summarise our view on the key aspects of Ofgem's proposal.

We note that the response to this consultation should be read in conjunction with [Elexon's response to Ofgem's code reform implementation consultation](#).

### Code Manager Licence

- Elexon supports the proposal of a "light-touch licence" where some obligations will be set out at a high level in the Licence, with further detail in the relevant code (or potentially in other documents, such as a guidance document referred to in the licence), and that licence obligations may be both prescriptive and principles based.

### Not-for-profit requirement

- Elexon supports the proposal that licensed Code Managers will be required to carry out their core regulated business on a not-for-profit basis. This will ensure Code Managers will focus on the best outcomes under the code.
- Elexon also supports the proposal of using reputational criteria for the evaluation of the performance incentive of Code Managers, as this is in line with the choice of the non-for-profit model.

### Setting Code manager budget

- Elexon is supportive of the option that Code Managers will set their own budgets ahead of the year. However, we note that some elements of the proposed licence condition look overly detailed and prescriptive, an approach which does not seem aligned to the objective of developing a "light touch" licence.
- Elexon believes that the licence should define the budget process at a high level to ensure standardisation across codes and accountability of Code Managers, by setting standards and budget objectives. However, in Elexon's view, the detail of the budget setting framework, including milestones and deadlines, should be set out in codes, rather than in the licence.
- The licence is, by its nature, a less flexible tool than the Code, since the process of modifying a licence is much more time-consuming and complex than that of a code. By virtue of this reason, we believe that the licence should therefore contain general

objectives and principles rather than more detailed rules, which may also be subject to change.

- We would not be in support of the current proposal of 3 budget versions being prepared (1 November, 1 January and 31 March) and welcome the opportunity to discuss alternative timeframes with the Department and Ofgem.

### **Code Manager Funding and Cost Recovery**

- Elexon agrees with the proposal that Ofgem should decide on a code-by-code basis whether to maintain existing cost recovery mechanisms or to introduce new arrangements.

### **Code Manager Incentivisation**

- We support Ofgem's proposal that performance incentives will be reputational, without revenue at risk.
- Elexon agrees with the proposal in the consultation that Code Manager Performance Indicators should not be incorporated into the licence itself. Elexon questions whether Performance Indicators need to be fixed in codes, or code subsidiary documents, and therefore be subject to the change process that applies to the code or code subsidiary document. Any such change processes should include consultation with stakeholders.
- We believe that it is important to allow for greater flexibility in ensuring performance indicators can be reviewed and amended when necessary.

### **Conflicts of Interest and Independence**

- Elexon would prefer a more flexible approach on restrictions to licensed activities. Whilst we welcome the option of exemptions, we would prefer a process that allows Ofgem to approve exemptions without needing a licence change, or potentially even a BSC modification.
- This would allow Ofgem control over Code Manager activities and for the industry, through the Stakeholder Advisory Forum (SAF), to play a role, but would keep the flexibility to respond to the changing electricity market in a more agile way.
- This could be done by including a power in the Licence for the Authority to expressly authorise a Code Manager to provide services other than the licensed activity. The process underpinning any such authorisation (e.g. any obligation to consult) could be included in the Licence, or the Licence could allow for such process to be included in the code. If any restrictions need to be established in order to manage a conflict of interest, then these could either be a condition of the Authority's approval or, where necessary, be included in the Code through a modification. In line with our view expressed earlier, our preference will be for the more detailed provisions to be included in a code rather than a licence.

### **Financial and Operational Controls**

- Overall Elexon believes that our existing Annual Business Plan process, setting a first-year budget and giving indicative numbers for the second and third years, and involving similar stakeholders as now, would continue to provide an excellent framework for the control and ambition of the licensed activities.
- We strongly prefer Option 1 over Option 2 for the assurance of financial stability given the comfort provided through existing Annual Business Plan and Annual Financial Report processes.

### **Code Maintenance and Modification**

- Elexon supports the proposal of including a standard licence condition that requires Code Managers to have in place and maintain the relevant code.

- We also support the idea of moving the current code owner licence obligations to the incoming Code Manager, and that the Code Manager will be responsible for the governance of the code.
- The current governance and decision-making and modification processes under the BSC have proven to be effective and efficient since the BSC went live in 2001, guaranteeing pluralism of opinions and being considered by the industry as a virtuous model of decision-making process. For these reasons, we believe it is necessary that the basic principles of these processes are maintained for the benefit of stability and continuity to protect stakeholders.
- An aspect to which Elexon believes it is important to draw to the attention of the Department and Ofgem concerns the level of detail to include in the code manager licence. In fact, on several occasions, having prescriptive rules and no margin of flexibility in the licence has resulted in an element of rigidity that has blocked, delayed or made the necessary change more complex or burdensome.

### **Code Manager Selection**

- Elexon supports Ofgem's proposal not to place additional restrictions or eligibility criteria in regulations on who can be selected as a Code Manager, aside from a mandatory assessment of conflicts of interest.
- Elexon supports the decision that selecting current code bodies would be the best route for Code Manager selection where the existing code administrator is performing well
- We also support the general factors identified: speed of delivery and value for money. However, we note that the experience and expertise to meet the eligibility criteria (currently a 'subsection' of the speed of delivery criterion) should be regarded as a separate factor, and that adequate weighting should be given to it.
- Elexon believes that the benefits of granting a licence on an enduring basis far outweigh the potential risks. An enduring licence will provide certainty and stability for both the Code Manager, the stakeholders, and the energy industry, which is already enduring a significant amount of change, as well as providing for long-term strategy.

**Proposals for Energy Code Reform, Code Manager Licensing and Secondary Legislation - Answers to consultation questions**

**Section 1. Code Manager Licence**

**Q1. To what extent do you agree with the proposed high-level content contained in the licence skeleton? For example, are any of the proposed contents unnecessary or are there any additional areas related to the code manager's role that should be subject to licence rules?**

In general terms we agree with the areas identified at high level in the proposed skeleton. However, we also note that the skeleton does not fully align with the draft licence. For instance, the reference to the modification procedures is missing, while elements that are in the draft licence are not captured by the skeleton.

We also note that at several points in the consultation, reference is made to future consultations on other aspects of the licence conditions. It would be desirable, also to adequately plan the necessary resources, to have a timeline of future consultations and understand which other areas will be subject to detailed consideration.

Elexon believes that the proposed licence condition on the budget looks very detailed and prescriptive, an approach which does not seem to be in line with the objective of defining a "light touch" licence.

**Section 2. Not-for-profit requirement**

**Q2.1: To what extent do you agree with our proposal that the code manager must fulfil its core licensed business on a not-for-profit basis?**

Elexon agrees that Code Managers should fulfil their core role on a not-for-profit basis and that the Code Manager should continue to be funded, as now, by code parties.

This proposal is in line with the current BSC governance, which has been demonstrated to work efficiently for over 23 years, and we believe that these arrangements will also motivate all the future code managers to deliver the best outcomes for the industry, consumers, and the drive toward Net Zero, rather than being driven by profit-maximisation.

Elexon also agrees that, under a not-for-profit model, cost efficiency can be achieved even in the absence of competitive pressure.

Elexon agrees with the proposal of using reputational criteria in the evaluation of the performance incentive of code managers as this option is in line with the choice of the non-for-profit model.

**Q2.2: To what extent do you agree that the draft licence conditions presented in Annex A ('Annual Budget of the Licensee' and 'Restriction on profit') capture the policy intent set out in this proposal? Do you have any other views or comments relating to the licence drafting?**

In general terms, Elexon supports the vision that Code Managers would be best placed to set their own budgets, but that appropriate industry scrutiny of budgets would be required, as exists today.

The process proposed (Part B. Consulting on the Draft Annual Budget and Work Plan) looks appropriate in terms of parties and stakeholders involved. We also agree with the general contents of the Draft Annual Budget and Work Plan (Part A).

However, we note that some of the draft licence conditions look very detailed and prescriptive, an approach which does not seem very in line with the objective of defining a “light touch” licence.

In this regard, we believe that the licence should define the budget process at a high level to ensure standardisation across codes and accountability of Code Managers, but that the detail of the budget setting framework, including milestones and deadlines, should be set out in codes, rather than in the licence.

Whilst we support the principle of standardisation of the rules across codes, this must be counterbalanced by a principle of proportionality and adequacy that attributes to the codes the role of defining the processes in detail.

This need is also linked to another general principle, that of flexibility, which we believe the new framework must have to be a tool that can enable, and not block initiatives and new opportunities.

A licence is by its nature is a less flexible mechanism than a code, as the process of modifying a licence is much slower and more complex than that of a code. Also, by virtue of this reason, we believe that the licence should follow Ofgem’s broader approach of moving to principles-based licence conditions which seek to achieve outcomes, rather than more detailed rules, which may also be subject to change.

Below are some of the most critical aspects of the current draft:

- The requirement of providing the Draft Annual Budget and Work Plan no later than by 1 November in the Preceding Financial Year is inappropriate, because at this stage there are too many uncertainties that cannot be taken into account fully. The proposed condition would have the effect of bringing forward the current process under the BSC by almost two months, a change that does not seem to be supported by well-grounded reasons and that Elexon believes could lead to inefficiencies, i.e. to the determination of a more approximate budget susceptible to future corrections, to the detriment of stability and certainty for the parties.
- The deadline of the 1st of January for the publication of the revised draft annual business budget is not appropriate given its nature of a Bank Holiday across the UK and following the Christmas period.
- We would not be in support of the current proposal of 3 budget versions being prepared (1 November, 1 January, and 31 March) for the abovementioned reasons but we welcome the opportunity to discuss alternative timeframes with the department and Ofgem.

Elexon believes that **clarifications** are needed on the following aspects:

- Elexon agrees with the principle of flexibility of the budget and allowing for budget revision in the course of the year, but it would be appropriate to understand what “materially” (in par. 1.14 letter a) means.
- With regard to the power for Ofgem to direct code managers to revisit the budget in certain circumstances outlined in the Part C (Directions from the Authority) the draft licence also prescribes (1.1, letter b) that “*where the Licensee has made no changes to the Draft Annual Budget and/or Work Plan*” the Licensee should “*provide to the Authority a comprehensive explanation of why the Licensee did not deem it fit to make changes*”. It is not clear what happens where the Authority considers that this justification is not adequate or sufficient. We also note that this type of scrutiny by the Authority is such that the licence condition is effectively enabling the Authority to sign off on the Budget. This approach in our view resembles an almost ex-ante scrutiny of costs and gives the Authority a role of control over the consultation and costs, which appears to be a hybrid solution between option 1 and option 3.
- Elexon believes that further consideration needs to be given to the defined terms which underpin the budgetary provisions. In particular, it needs to be clear that overhead costs that have been economically and efficiently incurred by the Code Manager, but which do

not directly relate to the performance of 'Relevant Code Manager Activities', should be recoverable. This would include costs relating to company governance and management, as well as activities that involve preparing for market change. We also note that the definition of Optional Services potentially differs from how this concept is described in the consultation document. The former anticipates costs for activities that are not Relevant Code Manager Activities, whereas the latter appears to describe costs for activities that are Relevant Code Manager Activities, but which are used to recover optional services requested by our customers.

We believe that the Code Manager should set their annual budget in collaboration with Ofgem, the Stakeholder Advisory Forum (SAF), and the industry, and that this collaboration should take place as part of the consultation process, but the Board of the Code Manager should be ultimately responsible for approving the annual Budget, having taking into account the comments received.

Under the governance arrangements in the BSC, the Board is accountable to BSC Parties and therefore has a duty to consider any issue raised by any BSC Party at any time, including any concerns raised in relation to the Budget.

Following the approval of [BSC modification P324](#), formal processes were introduced allowing BSC Parties to escalate issues to the Board by requiring the matter to be discussed and voted upon. BSC Parties can also propose a vote on a Binding Resolution to remove one or more Directors from the Board.

As recently as November 2021, the Authority recognised that these checks and balances already in place were appropriate and adequate to protect the parties from excessive costs or inappropriate decisions on the budget ([P416 Introducing a route of appeal for the Annual Budget](#)).

We therefore believe that these additional powers to give directions in the post consultation phase are redundant, and that Ofgem should play a critical and important role in the consultation process, scrutinizing and commenting on the draft budget, and, subsequently, ensuring that the approved budget as revised and resulted from the engagement with the parties will be implemented.

In our opinion these additional powers move the policy away too far from the principle of Ofgem's Option 1, of budgets set by the code managers, and should be limited to a request of justification rather than a request of change to the budget.

Finally, we note that the proposed conditions would impose new obligations on Ofgem which would require additional financial and human resources. This would have the effect of creating an additional layer of industry costs, and at the same time could entail the risk of weakening long-standing and effective governance processes.

### **Section 3. Setting Code Manager Budgets**

#### **Q3.1: To what extent do you agree with our preferred option 1 for setting budgets (budgets set by code manager)? Are there additional checks and balances we should consider and why?**

Elxon supports the preferred Option 1 (Code managers set their own budgets ahead of year). This option is well aligned with the current BSC methodologies and processes, which have proved to have suitable and efficient checks and balances.

Elxon agrees that this approach provides a suitable balance between allowing for budget scrutiny by industry stakeholders and Ofgem and ensuring that controls are not unduly burdensome.



Elexon agrees that the proposal that the Code Manager role is carried out on a not-for-profit basis will minimise the risk that code managers will be motivated to inflate their budgets and that this should reduce the need for Ofgem control over Code Manager budgets.

Regarding the limits of costs relating to external service providers, we recognise that, if Code Managers are permitted to outsource certain aspects of their role to for-profit providers, it would be beneficial that Code Managers would be required to set out costs incurred via third parties clearly in their budgets to allow stakeholder scrutiny.

**Q3.2: To what extent do you agree with our approach to Ofgem oversight of code manager budgets? We welcome views on whether it is feasible and desirable to enable Ofgem to require third-party assurance on budgets.**

Elexon agrees with the proposal in Option 1, i.e. that Ofgem has oversight but does not set budgets. We don't think it is helpful or productive to have Ofgem as an interactive party in budget setting for all codes as it may result in extra industry costs as Ofgem will feel obliged to spend additional resources scrutinising each Code Manager's budget that inevitably will also require extra resources at the Code Manager end too.

We also do not believe that it should be necessary to have third-party assurance from auditors on budgets – this should be an extreme, last resort step, if it is to be included.

**Q3.3: To what extent do you agree that the draft code manager licence condition presented in Annex A ('Annual Budget of the Licensee') captures the policy intent set out in this chapter? Do you have any other views or comments relating to the draft licence?**

As already outlined, Elexon would urge that the new framework should be a "light touch" licence. The conditions as proposed in the current draft do not seem to be in line with this policy intent and objective since they are prescriptive and very detailed.

It is not clear what a "detailed" workplan means. We note that it would be important to avoid the situation where the budget is presented in hundreds of cost codes that make it impenetrable to third party inspection.

#### **Section 4. Code Manager Funding and Cost Recovery**

**Q4.1: To what extent do you agree with our proposal that Ofgem should decide on a code-by-code basis whether to maintain existing cost recovery mechanisms or to introduce new arrangements?**

Elexon agrees. We see multiple benefits in this pragmatic approach as it would allow Ofgem to develop a new Code Manager Cost Recovery Methodology where appropriate, while allowing well-functioning mechanisms to be maintained. This would ensure value for money and adequate flexibility.

**Q4.2. To what extent do you agree with our proposals regarding code managers recovering costs, including that they should be required to comply with a charging methodology set out in the code and that they would be required to produce an annual cost recovery statement to allow for parties who expect to pay charges to be able to make a reasonable estimate of the amount they will be charged?**

Elexon agrees with the requirement to produce an annual cost recovery statement to allow for parties who expect to pay charges to be able to make a reasonable estimate of the amount they will be charged.

Generally, we support the principle that parties should be fully aware of their charges and able to make their own budget estimations. We note that the proposal is also aligned with current BSC processes.

**Q4.3: To what extent do you agree that the draft licence conditions presented in Annex A ('Code Manager Cost Recovery Methodology' and 'Code Manager Cost Recovery Statement') capture the policy intent set out in this chapter? Do you have any other views or comments relating to the draft licence condition?**

Elxon agrees with the principle that the licence should contain high-level requirements related to the cost recovery methodology and the cost recovery statement. We believe that the two conditions set out in 2.2 and 2.3 of the proposal regarding the Code Manager Cost Recovery Methodology are reasonable.

With regards to the Code Manager Cost Recovery Statement – the proposal indicates that it “*must be in a form approved by the Authority*” but does not propose any further specifics. It would be useful to understand the level of detail required in the Statement to understand whether BSC Section D would fulfil this condition.

**Section 5. Code Manager Incentivisation**

**Q5.1: To what extent do you agree with our proposal that the code manager licence will not include provision for financial performance incentives?**

Elxon agrees with the proposal. This is the most appropriate approach to incentivising a high standard of performance under a not-for-profit model.

We support Ofgem’s approach that performance incentives will be reputational, without revenue at risk.

We agree that, for not-for-profit Code Managers, reputational incentives are more appropriate, and would more effectively incentivise performance than financial incentives. We believe this is a better way of aligning Code Manager performance with the interests of Ofgem, BSC Parties and other stakeholders.

Elxon also believes that qualitative measures such as customer surveys would be the most suitable tools to track the performance of Code Managers as not for profit entities and that the Stakeholder Advisory Forums and code parties should have a role in assessing and reviewing Code Manager performance.

**Q5.2: To what extent do you agree with our proposal that the licence would allow code managers to modify KPIs in consultation with stakeholders, and report against these?**

Elxon believes it is important that there is sufficient flexibility in the licence drafting that the option to include performance indicators in subsidiary documents is possible as this is likely to be the most desirable approach under the BSC, both because of the nature of performance indicators and because this approach would allow for greater flexibility in ensuring the indicators can be reviewed and amended when necessary.

**Q5.3: To what extent do you agree that the draft code manager licence condition presented in Annex A ('Code Manager Performance Incentives') captures the policy intent set out in this chapter? Do you have any other views or comments relating to the draft licence condition?**

Elxon agrees that the proposed licence conditions capture the policy intent. Further, we strongly support the policy intent of the following:

- incentives should be reputational;
- incentives should not be documented in licences as this will stifle flexibility to be responsive to change;

- flexibility to ensure that incentives are appropriate for the Code/Code Manager to which they relate, having taken account of the views of stakeholders.

To the extent that further iterations of the draft licence include additions to the performance incentives, or references to them, we may need to reassess our answer to this question.

We nevertheless have the following detailed comments:

- The timescale referred to in 4.8 will need to be aligned to other related timescales so should be reviewed once the Code Manager licence is nearly finalised, and its impact on relevant codes is understood. For example, some metrics may not be immediately available at the end of the year until (e.g. financial performance metrics may not be available until accounts for the year are closed – or, indeed within 30 days of year end, as currently proposed);
- licence conditions should be flexible enough to allow utilisation of existing reporting, where appropriate.
- 4.8(b)(ii) refers to service levels. There was no other reference to service levels in the document, so we were not completely sure what the implications of this drafting are.

## **Section 6. Conflicts of Interest and Independence**

### **Q6.1: To what extent do you agree that the proposed package of conditions should be included in the Code Manager licence, to manage potential conflicts of interest?**

Elexon agrees with Ofgem that the overall aim of the reform is to promote decision-making and empowerment of the Code Manager, whilst ensuring they remain accountable.

However, Elexon believes that this objective could best be achieved by condition 6.3 containing either a standalone discretionary authorisation to grant such exemptions or add a high-level process for such authorisation into the code manager licence.

Elexon would not support listing each non-BSC activity in the licence. In our experience, the need of changing the licence will act as a significant barrier to Government and Ofgem initiatives and create unnecessary additional work for Ofgem. Currently we don't have any such limitations and we can therefore enable new functions through code changes, which have always proven to be very fast, efficient and effective. On the contrary, and limiting ourselves to mentioning only several recent cases, a change of licence would have been necessary in the event that there has been a Licence Listing Licensed Activities for enabling Elexon in all these cases:

- to act as the payment provider for the Government's Energy Bill Relief Scheme for non-domestic electricity customers ([Mod. P449 'Non-domestic Energy Bill Relief Scheme'](#));;
- to implement and administer the payment scheme for Suppliers as part of the Government's Energy Price Guarantee scheme for domestic electricity customers (Mod. P446 [Domestic Energy Price Guarantee Scheme](#));
- to enable Elexon to administer the government scheme for moving support payments to Energy Intensive Industries (P468 Enabling Elexon to support the [Electricity Support and Payments Regulations 2024](#));;
- to act as MHHS Senior Responsible Owner where we have taken on a role managing the industry wide implementation of MHHS (rather than just implementing MHHS arrangements in the BSC which would be a core BSC function).

The proposed alternative solution would allow Ofgem control over Elexon's activities but keeps the flexibility to respond to the changing electricity market in a more agile way where it would no longer have to go through the process of changing the actual licence.

Whilst we would still expect a consultation with stakeholders to form part of the approval process for new roles, and an approval from Ofgem, the administrative requirements and timescales involved in the modification process are not ideally suited to this sort of decision.

In practice, this could be done by including any authorisation process into the BSC process or by an express Authority approval, authorising it to conduct non-BSC activities. Please find below our suggested alternative to the proposed licence conditions. Just by way of illustration the condition could look like this:

*“The Authority may at any time authorise the Licensee to conduct or engage in an activity that is not a Licensed Activity”.*

This condition could be qualified by referring to a process outside the licence conditions (a subsidiary document that could be changed from time to time without a licence change or the BSC) or it could contain broad parameters by which such direction could be made.

By way of illustration, the qualification within the licence could read:

*“[...] in accordance with the principles set out in (licence subsidiary document).*

**Q6.2: To what extent do you think it is necessary to include additional prescription relating to:**

- **Restrictions on directors' affiliations; and/or**
- **Business separation requirements?**

We support the concept of two, or 20%, of directors being sufficiently independent directors, as set out in Licence Condition 8. We note that this reflects existing Elexon governance where the BSC requires us to have two non-executive directors who are independent from industry.

As regards to additional potential future restrictions on directors' affiliations, whilst we agree with the need for impartiality, we strongly disagree that there should be licence conditions that prevent Code Managers from drawing on industry experience and expertise, which is of great value to the Code Manager in carrying out its work.

Elexon's Board is made up predominantly from industry members, who have a strong mix of multi-disciplinary experience and a composition that follows corporate governance best practice.

The Elexon Board is responsible for:

- Providing leadership to Elexon;
- Setting the company's strategic aims, including the approval of its annual business plan and strategy;
- Reviewing the performance for the company's management;
- The governance of the company;
- Ensuring that Elexon's obligations to its stakeholders are understood and met.

Given the nature of Code Managers and the role they play vis-a-vis industry, our view is that to effectively carry out its functions, be able to provide input and carry out its activities of leadership and control over the governance and operations of the company, the Board must have industry-specific experience. Further restrictions on affiliations for all board members would effectively drain the Board from industry expertise and experience.

We believe that having a minimum number of non-industry directors appropriately manages the risk, alongside the standard, universally accepted conflict of interest approach.

We would also advocate for a limited number of executive directors, including the CEO, continuing to form part of Code Manager Boards as this will contribute to the pool of industry and internal company knowledge (though clearly not as independent directors).

**Q6.3: To what extent do you agree with our proposals that the licence conditions listed below should include the possibility of exemptions? Are there any other proposed conditions that you think should include the possibility of exemptions?**

- **Restrictions on activity and investments**
- **Restriction on the licensee becoming a related undertaking**
- **Restrictions on directors' affiliations**

Generally, Elexon agrees with these proposals. However, as mentioned above:

- we would prefer a more flexible approach on restrictions to Licensed Activities, by the inclusion of a process that enabled the same level of assurance around conflicts of interest, but which was less onerous for both parties;
- we agree with the proposal to have two sufficiently independent directors, but we do not agree that there should be further restrictions on directors' affiliations (other than as set out in company law and corporate governance best practice).

**Q6.4: To what extent do you agree that the draft licence conditions presented in Annex A ('Conflicts of interest') capture the policy intent set out in this chapter? Do you have any other views or comments relating to the draft licence condition?**

We agree that the draft licence conditions capture the policy intent to mitigate conflict of interest and promote independence and accountability of the Code Manager.

## **Section 7. Financial and Operational Controls**

**Q7.1: To what extent do you agree with the proposed requirements on financial and operational controls? Do you have any views on the options presented for obtaining assurance on financial stability of the code manager?**

Code Managers do need to be financially secure and have sufficient financial flexibility to manage their business.

We suggested that we do not need to follow the Certificate of Adequacy route with Code Managers because of:

1. The well-established business plan and budgeting process, with provision for the revision of budgets where necessary;
2. The principle of mutualisation, if one or more funders fails to pay and
3. That any limited company has to decide each year whether it can prepare its accounts on a going concern basis (next 12 months) and give a certificate of viability (business plan period).

**Q7.2: To what extent do you agree that the draft licence conditions presented in Annex A ('Financial and operational controls') captures the policy intent set out in this chapter? Do you have any other views or comments relating to the to the draft licence condition?**

We don't have additional comments.

## **Section 8. Code Maintenance and Modification**

**Q8.1: To what extent do you agree with our proposal to require code managers, in their licence, to have in place and maintain the relevant code?**

Elexon supports the proposal of including a standard licence condition that requires Code Managers to have in place and maintain the relevant code.

We also support the proposal of moving the current code owner licence obligations to the incoming Code Manager, and that the Code Manager will be responsible for the Governance of the code, including the maintenance and modifications.

As a general point, Elexon supports the reform to the extent that it brings benefits for the parties and the energy industry. It is important to highlight that the current governance and decision-making and modification processes under the BSC have proven to be effective and efficient since the BSC went live in 2001, guaranteeing pluralism of opinions and being considered by the industry as a virtuous model of decision-making processes making.

For these reasons, we believe it is necessary that the basic principles of these processes are maintained for the benefit of stability and continuity to protect stakeholders.

Another aspect to which we believe it is important to draw the attention of DESNZ and Ofgem concerns the level of detail to include in the Code Manager licence. In fact, on several occasions, having prescriptive rules and no margin of flexibility in the licence has resulted in an element of rigidity that has blocked, delayed or made the necessary change more complex or burdensome, as we highlight in some practical examples below.

With specific regards to the code modification procedures, there have been several recent examples where the BSC Modification Procedures specified in the Transmission Licence have restricted changes to the BSC.

For example, the development of the Data Integration Platform (DIP) change process has been significantly complicated by the constraints in the Transmission Licence.

The Transmission Licence in Licence Condition C3 establishes the role of the BSCCo as a code administrator and authorises the incorporation of the BSC with prescribed provisions for the modification process. It enables Elexon to meet this role and provide and administer the balancing and settlement services at the core of the BSC.

To expand the vires of the BSC to include facilitation of the DIP arrangements and enable the proposed DIP change process, discussions are on-going about how to mitigate the need for a licence change. Were the Transmission Licence less prescriptive, this additional licence change would not be required.

Elexon believes that it is fundamental that in the new framework current Code Managers continue to play an appropriate role in the modification process.

With regards to the role of the Stakeholder Advisory Forums (SAFs), Elexon welcomes the proposal of including an obligation in the licence to have a SAF in place and include key elements of its role.

The consultation document highlights that the role of SAFs will be defined in more detail by Ofgem in a future consultation. Elexon welcomes the opportunity to submit proposals to Ofgem that can help in defining possible options.

We also note that the future thinking should include also the role of the sub-committees of the existing Panels, which carry out important operational and assurance functions. More generally, and as also outlined in our response to the Implementation Consultation, clarifications on how the decision-making process should work and the role of the Strategic Direction are required. We are looking forward to engaging with DESNZ and Ofgem to consider the new approach and suggest new arrangements.

Elexon supports the proposal of including the requirement of having Consumers' representatives as members of the SAFs in the licence. The BSC Panel is already composed of a group of industry experts and consumer representatives and can therefore be regarded as fitting the suggested model.

Regarding the direct code change (Ofgem's power to modify the codes directly under defined circumstances), Elexon supports this proposal.

**Q8.2: To what extent do you agree on the initial drafting proposed for the 'Code maintenance and modification' standard licence condition presented in Annex A?**

Elxon supports the need to define the reform in different phases ('staggered approach'). However, we highlight that it would be appropriate, also to adequately plan human and material resources, to have a more detailed picture of the different phases/milestones and consultations relating to the different areas and licence conditions.

To this end, we hope that Ofgem and DESNZ will be able to publish a schedule with the timing for the publication of future consultations (and related areas/licence conditions).

## **Section 9. Code Manager Selection**

### **Q9.1: To what extent do you agree with the proposal not to place additional restrictions or eligibility requirements on who can be selected as a code manager in regulations, aside from a mandatory assessment of conflict of interest?**

Elxon supports Ofgem's proposal not to place additional restrictions or eligibility criteria in regulations on who can be selected as a Code Manager, aside from a mandatory assessment of conflict of interest.

The assessment by Ofgem and the mitigation measures mechanism should act as a sufficient and effective tool. Moreover, we agree that, where Ofgem is not satisfied that a conflict-of-interest risk is manageable, or the prospective Code Manager is unwilling to implement appropriate mitigations, then the regulations would serve to prevent a Code Manager licence from being granted to that body.

### **Q9.2: To what extent do you agree with the proposal to consider speed of delivery and value for money when deciding how to select code managers? Do you have any views on our proposed preference for non-competitive selection?**

Elxon agrees that getting a Code Manager in place as quickly as possible will generally be in the best interests of both industry and consumers.

For this reason, Elxon supports the decision that selecting current code bodies would be the best route for Code Manager selection where the existing code administrator is performing well, as this will be the fastest option and because of the importance of preserving good practices and processes and avoiding disruption as much as possible.

Elxon also supports the general factors identified: speed of delivery and value for money. However, we note that the experience and expertise to meet the eligibility criteria (that is currently a 'subsection' of the speed of delivery criterion) should be regarded as a separate factor and that adequate weighting should be given to it.

Elxon agrees with the assessment of the value for money factors and related criteria.

### **Q9.3: To what extent do you agree with the proposed process and criteria for appointing a code manager on a non-competitive basis?**

Elxon agrees with the proposed processes and assessment criteria (ability to comply with the licence conditions, availability of resources, suitability to hold a licence and 'fit and proper' assessment). We also agree with the indicative preference for non-competitive selection where beneficial.

We agree with the proposal not to include these criteria in the regulations.

### **Q9.4: Do you have any views on whether code manager licences should be granted on an enduring versus time-limited basis?**

Elxon believes that the benefits of granting a licence on an enduring basis far outweigh the potential risks.

An enduring licence will provide certainty and stability for both the Code Manager and the stakeholders, as well as providing for long-term strategy.

Another element that needs to be considered is the importance of retaining organisational knowledge. Code Managers, in view of their non-profit nature and the functions they perform, are entities with specific skills that are difficult to compare with other entities.

Elexon is a trusted, neutral, market expert and these characteristics have proved to be very valuable over the years, and they are likely to become even more important in the drive to Net Zero.

Changing organisation after a few years without there being any serious reasons and despite the performance reaching good levels would only risk nullifying the knowledge acquired and jeopardise the stability of the processes, with a consequent increase in costs and disruption to the detriment of the system, the stakeholders and, ultimately, consumers.

Moreover, under a time limited licence, the Code Manager would inevitably dedicate resource to ensuring the licence was renewed, which could lead a semi-regular diversion of resources from code operation, and the additional costs.

Ofgem has the power to amend licences through the statutory process so, in our view, there is no need of a time bound licence to get improved licence terms.

Even in the case of continuing licence conditions, there would always be remedies available to the Government and the Authority to intervene, including revocation, in the circumstances specified in the licence.

These circumstances are not specified and more clarity on these aspects will be beneficial. In general terms, Elexon would support the revocation of the licence in the case of serious and repeated negligence, and/or long-term failure of performance.