Consultation Response

By email to smartmetering@decc.gsi.gov.uk

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Smart Metering Implementation Programme – Regulation Team
DECC
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London SW1A 2AW

ELEXON's response to DECC consultation on Stage 1 of the Smart Energy Code

We welcome the opportunity to respond to this consultation. We have based our response on sharing our experience of efficiently managing the Balancing and Settlement Code for over ten years and as the original contributors to the development of the Code Administration Code of Practice (CACOP). Where we have identified any parallels or inconsistencies with the CACOP we have noted these.

If you would like to discuss any areas of our response, please contact me on 020 7380 4213, or by email at david.jones@elexon.co.uk.

Yours sincerely

David Jones
Senior Regulatory and Market Advisor

A consultation on Stage 1 of the SEC

General question on SEC legal drafting
Question 1: Do you agree that the Government conclusions are appropriately reflected in the SEC Stage 1 legal drafting? Please provide a rationale for your views, and any further comments on the draft legal text.
Please see our comments on the legal drafting set out in our responses to questions 2, 5, 7, 8, 9, 10, 11 and 14.
DCC Charges
Question 2: Do you have any comments on format of the DCC's Charging Statement for Service Charges?
Section J of the SEC requires Parties to pay charges to the DCC in accordance with the applicable Charging Statement. The Section however provides limited information on the format of the Statement other than specifying publication dates in Section J4. We support the need to publish indicative charges in advance of when these will come into force and that, other than in exceptional circumstances, the charges should not be varied mid-year. We believe that the form of the Charging Statement must reflect Condition 19.4c of the Licence: allowing any existing or prospective SEC Party of other service user to readily make an estimate of the Service Charges they are likely to face. The Charging Statement must therefore be easy to assimilate.
Question 3: Do you agree with the thresholds applied to the 'first comer / second comer' principle (Five Year Rule for costs over £20,000)? If you disagree please set out the reasons for your preferred approach.
ELEXON has no view on the thresholds applied to the 'first comer/second comer' principles. This question is for DCC Users to answer. The principle of avoiding repeatedly charging for Detailed Evaluations by adopting a first comer / second comer approach appears reasonable. What is not evident from the SEC drafting is the degree of similarity that is required between proposed Elective Communication Services to qualify for this treatment and whether and how the DCC's allocation of charging will be reviewed.

SEC Panel
Question 4: Do you think the members of the Panel nominated by industry should be drawn from and elected in equal numbers by Party category OR be elected by all Parties (as set out in the legal drafting). Please give reasons for your answer.
ELEXON believes that a Panel could operate effectively under either election process. We note that electing members per Party category adds an additional level of complexity to the election arrangements, particularly if a candidate could represent more than one Party category or if a Parent company represents more than one user type (will there be restrictions on standing in more than one category or a limit to the number of votes cast by an organisation? If not, it is likely that such restriction may need to be developed). In addition, the population of DCC Users has the potential to shift significantly (unlike most industry codes) via the number of 'Other DCC User' category. In this case there may be a desire from users to reassess the allocation of Panel members. These issues should not exist under the 'elected by all Parties' model. Therefore, on balance we believe the 'elected by all Parties' model to be the best option for the SEC Panel. ***Observation on need for Panel members to understand DCC user issues*** The consultation notes the perceived importance placed on members having a good understanding of issues affecting DCC Users. Such direct experience is useful. However, the inclusion of consumer and independent members means that materials coming to the Panel need to be presented in a way that can be well understood by all Panel members. In addition it is likely that 'Other DCC Users' will have very different issues across a broad number of users. This is where we expect the SEC Administrator to add value, as they will need to ensure that materials being presented to the SEC Panel are understood by all to enable the Panel can make a robust decision.
Modifications
Question 5: Do you support the proposed composition of the Change Board and its decision making arrangements?
ELEXON has no view on the Change Board composition and its decision making arrangements. We believe with clarity on the roles, responsibilities and processes almost any solution for advancing change can be made to work. However, we would observe that it seems the process has been made more complex than necessary and creates seemingly unnecessary interactions between the Panel, Work Group and Change Board. This is

likely to only incur additional costs and time into the progression of Modifications. Questions that arise from the proposed design are:

- What is the rationale of the Report Phase consultation, if the Work Group has already consulted and the Panel simply confirms process has been followed? The Report Phase consultation was developed in existing Codes to allow Parties to comment on the initial recommendation of the Panel and to allow for comments on legal text (if not already developed in the Report Phase consultation). Arguably the Report consultation under this model would work best if the Change Board considered the draft report, then consulted, and lastly the final report went to the Change Board for its recommendation;
- Why is the Change Board sending back reports to the Work Group (via the Panel), if the Panel has already agreed that the Work Group has met its Terms of Reference? This creates the potential for conflict between the Panel and Change Board (presumably the Panel will believe its Work Group has met its Terms of Reference otherwise it would have not sent the report to the Change Board). In addition this creates a strange Governance issue, where the Change Board is dictating to the Panel;
- We are unsure what value the Change Board adds to the process, over and above a further mechanism to allow Parties to provide their view on the Modification, however the time for responding should be during consultation. Is there a risk that this will diminish the significance of the consultation? The absence of a requirement to act independently as a Change Board member is likely to encourage behaviour only to articulate those arguments that support your view, as opposed to considering all arguments?
- We note that the Panel may be considered the appellant body for appeals; however we cannot understand the rationale. If it is suitable to consider appeals, why can it not consider the merits of the Modification in the first place?

Question 6: Do you think that the SEC should provide for Parties and the consumer representative to appeal Change Board recommendations before they are submitted to Ofgem? If so, what is the appropriate mechanism for determining such appeals?

We do not have a view on this question as we believe it is for potential SEC Parties and consumer representatives to consider. However, we note that the Assessment consultation should be the mechanism for Parties to ensure they provide a full response to Modification Proposals and articulate the reasons for their response.

Question 7: Do you have any further comments, or views on the cost implications to SEC Parties, regarding the proposals for governance, the modification process and the approach to appeal rights set out here and reflected in the legal drafting of Stage 1 of the SEC?

Yes, we have a number of further comments, as follows:

SEC Panel powers to raise Modifications

It may be prudent to allow the SEC Panel to raise Modifications on other limited grounds and make provision for this in the existing drafting. For example, the Panel may wish to raise a change on the grounds of efficiency, or more specifically, where a change is identified by any specialist Panel group or Panel committee (e.g. security group). As the full SEC and smart solution is not yet fully defined, it should be possible for the SEC to provide for the Authority to agree other areas where the SEC Panel can raise Modifications.

Incorrect cross reference

A cross-reference in D1.3 (e) (ii) is incorrect. The reference should be to C7.2(c) and not C7.3(c) as stated.

Should the Modification Proposal form identify the perceived defect/issue?

The SEC drafting proposes that the Modification Proposal form should state the proposed change and why the change better facilitates the SEC Objectives. In existing Code templates, a description of the Issue or Defect is included. This allows proposers to articulate the problem and assists those assessing the issue to identify potential alternative solutions or variations to the proposed solution. This becomes critical where competing alternatives are developed as the assessment can then take account of how each addresses the original defect/issue.

Modification Register

It would seem inefficient to require the Secretariat to send a copy of the Modification Register at least once a month. It would seem more sensible to require the Modification Register to be updated after each Panel meeting (if any change in status occurred), published on the website and a copy provided to Parties upon request. In our experience Parties tend to prefer to choose what they want to receive, rather than be subject to information they do not desire just because the Panel must meet an obligation.

In addition it may be helpful to clarify that references to including a copy of 'every Modification Proposal' in the register can be achieved by simply adding a link/reference within the register, otherwise the Register may become quite cumbersome for recipients.

SEC consistency with language developed from the Code Governance Review

Ofgem's Code Governance Review introduced standard terminology across the major industry codes. We would expect the SEC to adopt the same terminology for similar steps related to the Modification process, where such terms already exist for current Codes. We note that, for example, the SEC uses the term 'Working Group' instead of 'Workgroup' which was adopted by existing Codes after the review (in addition, we note that the SEC uses the term Refinement Process which seems to be another new term for the process which is called 'Assessment' or 'Development' in other Codes). We have not reviewed all terms, however Ofgem may comment separately on this to ensure consistency with its on-going work.

Alternative Proposal(s)

The SEC permits only a single Alternative Modification Proposal. This is inconsistent with steps taken under the Ofgem Code Governance Review which concluded that Workgroups should not be limited to developing a single Alternative Modification.

Amalgamation of Modification Proposals

Other industry Codes allow for amalgamation of similar proposals, the SEC does not seem to make provision for this. However, amalgamation has rarely been used and the principle of Proposer ownership of specific solutions may render amalgamation impractical. This issue may be more relevant to the start of the SEC, as we found with the introduction of the BSC, numerous Modifications were raised in the first few years to 'iron out' the processes in light of operational experience.

Presentation of Modification Report

The SEC states that a 'member' of the Workgroup shall attend that Panel meeting and may be asked to present. As member is not defined, we believe this should include the Code Administrator, who is most likely to be available to present the report and should be able to provide an independent view of the case for and against the change. This is how the process works under the BSC.

Withdrawal

The SEC does not specify what happens if two Parties wish to sponsor a Modification that has been withdrawn by the original proposer. Other Codes have adopted the 'first comer' principle to avoid conflicts between Parties.

The BSC and CUSC additionally contain the powers for the Panel to withdraw a Modification where a proposer is "deliberately and persistently disrupting or frustrating the work of the Workgroup".

DCC participation in Workgroups

We believe it is appropriate (and in many cases desirable) for the DCC as Licensee to be able to participate in any Workgroups. This is consistent with the rights afforded to other sole licenses (e.g. National Grid).

Refinement Process

There is no limit on the timetable to be set for Workgroup refinement (assessment). Other Codes contain the provision for the Authority to disagree a timetable which exceeds a certain time (e.g. 3 months). We support the need for changes to be assessed in a timely manner.

Legal drafting

It seems the SEC assumes that legal text must always be produced and published for consultation. Provisions are set out in other Codes for the Panel to not commission legal text (this is highlighted in the Code Administrator Code of Practice (CACOP)) where the change is not supported.

It is also unclear who is responsible for drafting legal text, there may be consistency issues if different organisations (proposers, SEC Panel, Workgroups, SEC Administrator) are all attempting this. We strongly believe that drafting should be the responsibility of the Code Administrator.

The CACOP also allows for the amendment of legal text in certain circumstances (see below), however there is no provision for this, or clarity on who may be able to undertake this activity in the SEC:

> 'Code panels can agree to minor corrections to legal text at the time of making its final recommendation" and "If the panel determines that changes to the legal text are appropriate, but considers that they cannot reasonably be considered to be minor, they may instruct the CA to carry out a further consultation on that revised text'.

Urgent Modifications

The SEC should contain further detail under the urgent section to account for:

- Panel processes for dealing with urgent meetings; and
- The ability to deviate from the normal Modification timetable and processes (this is also set out in the CACOP – 'The urgent process will allow for the Authority, after taking advice from the relevant panel, to instruct a Modification to be progressed by deviating from any part of the normal Modification process');
- What the role of the Panel/Change Board is in making any recommendations for urgency and whether the Change Board vote can be omitted from an urgent Modification process.

Provision for a Pre-Change process

The SEC does not seem to provide for a Pre-Change process to allow Parties to raise potential issues for industry discussion. Other industry Codes make provisions for Panels to establish Workgroups to consider issues raised, prior to a Party raising a Modification. This principle is set out in the CACO, ('facilitate a process whereby Parties can submit a potential Modification Proposal to the Code Administrator to have that potential variation refined, developed and discussed prior to the Party deciding whether to formally submit a Modification Proposal').

Liabilities

Question 8: Do you agree that liability provisions for intellectual property rights and confidentiality should be included in the SEC. If so, do you agree that they should be unlimited?

Yes. We believe inclusion of liability provisions for intellectual property rights and confidentiality makes the SEC more robust and comprehensive. Given the nature of data being handled by the DCC, breach of confidentiality and intellectual property rights is a real and perpetual threat, and explicit liability provision for these breaches should act as strong deterrence against such breaches. We note that the SEC Panel has powers under M4.9 to confirm if data is not marked as confidential should be treated as such, it may be prudent to add a provision that states, unless marked confidential (or confirmed to be treated as such by the Panel) data is treated as non confidential.

We also agree to these liability provisions being unlimited, provided comprehensive and robust assurance measures are included in the SEC. While unlimited liability may tend to increase financial risk and insurance costs for the Parties, the robustness of the assurance framework should act as a limiting factor against these risks and costs.

To support the unlimited liability provisions for intellectual property rights and confidentiality, we believe the SEC should:

1. Detail, elaborately and unambiguously, the meaning and scope of confidential and IPR-bound data;
2. Separate data ownership from IPR ownership;
3. Prescribe strict and uniform assurance measures across all Parties; and
4. Provide for regular audits of assurance measures.

Question 9: Do you agree with the Government's proposal that in instances where the DCC is exposed

to liabilities that exceed what it can claim from the person causing the original breach, the net liabilities for the DCC will be recoverable from SEC Parties by way of an increase in the DCC's fixed charges?

No, we believe there may be circumstances where this approach could create more problems for Parties (although we note the principle to justify this method of recovery is consistent with the BSC with regards to the concept of collective responsibility).

Practical challenges may arise in implementing this method in certain situations. We believe any breach of the magnitude under consideration by a DCC Service Provider, in all likelihood, is going to impact multiple SEC Parties simultaneously. The claims made by claimant parties, if not fully recoverable from the DCC Service Provider, (or the User, in the event they caused a breach) due to either a cap on the liability or the inability to pay, will then need to be recovered from all SEC Parties. Depending on the cumulative recovery amount and the number of claimant Parties, the recovery amount may become onerous on SEC Parties (particularly small SEC Parties) and may lead to cascading defaults in the worst case. The first option of cap-limited recovery method may be more applicable in such a scenario. The other option can be to stagger the recovery of costs and payments over several charging cycles.

We believe there is a need for greater analysis and clarity on this front going forward as the charging methodology continues to evolve in the later stages. Analysis should cover the likelihood and distribution of liability claims in different scenarios such as:

- DCC Service Provider in breach and claims from multiple SEC Parties;
- One SEC Party in breach and claims from multiple DCC Service Providers; and
- One SEC Party in breach and claims from multiple SEC Parties.

In cases where multiple SEC Parties are involved, the charging methodology of dividing Fixed Charges among SEC Parties based on Charging Groups may need to exclude certain Parties. This will then require re-calculation of division ratios. It may be useful to include such liability claims under a separate heading, 'Exception Charge' or 'Extraordinary Charge', given the exceptional occurrence of this charge, with a charging methodology of its own to suit the scenarios analysed above. A separate heading will also provide better visibility to the SEC Parties.

Dispute resolution

Question 10: Do you agree that the Government's proposal to allow DCC to link service provider and SEC disputes in the arbitration process?

For reasons of consistency and economy, we agree that SEC Disputes and service provider Disputes

should be linked. However, this should be limited to cases where both Disputes would be subject to arbitration individually.

Where the DCC notifies SEC Parties of a service provider Dispute, the timescale in which to raise a related SEC Dispute should apply if it can be linked to the service provider Dispute and therefore is a candidate for arbitration. This should not restrict a Party's ability to raise a Dispute expressly stated as being subject to determination by the SEC Panel or its Sub-Committee.

We note that the SEC drafting requires arbitration proceedings to take place in London, and would suggest that the parties to the arbitration, should have the ability to vary the location of the proceedings.

As a more general point, we are encouraged that the SEC will provide for Dispute resolution by the SEC Panel or a Sub Committee. We have found that this approach works well under the BSC, providing a cost-effective and transparent alternative to arbitration.

Code co-ordination

Question 11: Do you agree that the proposed legal drafting covering change co-ordination with other codes meets the requirements as set out in chapter 5?

No, we believe the wording is not specific enough. C2.3 (l) makes a general statement regarding establishing joint working arrangements with other Codes and Panels that is not specific to change co-ordination.

Does the obligation extend beyond change co-ordination?

It would be helpful to clarify the wording to confirm if the intention is for the joint working arrangements to extend beyond change. We note that the provisions for joint working arrangements in the BSC and MRA apply to change only, custom and practice has led to there being wider co-ordination but no obligation to do so exists.

Does the SEC fall within the definition of 'Core Industry Document'?

The BSC sets out the obligation for establishing joint working arrangements for change co-ordination in section F1.6. In doing so it establishes that such co-ordination is required with each 'Core Industry Document Owner'. For the avoidance of doubt we ask DECC to confirm that the SEC falls within the definition of Core Industry Document as defined in the Transmission Licence as follows:

"core industry documents" means those documents which:

(a) in the Secretary of State's opinion are central industry documents associated with the activities of the licensee and authorised electricity operators, the subject matter of which relates to or is connected with the BSC or the balancing and settlement arrangements; and

(b) have been so designated by the Secretary of State.

In practice ELEXON, as the BSCCo, would establish the same robust arrangements that we have with the existing industry Codes, whether they are defined as Core Industry Documents or not.

Passing registration information to the DCC

Question 12: Do you agree that the proposed legal drafting for the SEC covering obligations on SEC Parties to pass registration information to the DCC is appropriate? Please provide a rationale for your views.

No, ELEXON has the following comments on the draft legal text:

Supplier Party type and Supplier IDs

Paragraph E1.2 requires the DCC "to use and rely upon the Registration data", when "calculating the Charges payable by a Party". In order to do so, the DCC will need to understand the relationship between a Party and a Supplier Id, a relationship which can change over time. Under the BSC, Supplier Ids within the registration systems are similarly associated with BSC Parties for the purposes of calculating Settlement charges and BSC charges. The BSC arrangements allow for changes in the ownership of Supplier Ids by BSC Parties over time. For example, following mergers and acquisitions or suppliers going into administration. We would be happy to provide further details about the transfer of Supplier Id process in the BSC, if DECC consider that a similar process would be desirable as part of the Smart Energy Code.

Panel use of MPAN/MPRN data to establish Party type

Paragraphs E1.4 and E1.5 refer to the provision of Registration Data by the DCC to the Panel in order (inter alia) to establish into which Party Category a Party falls. The Registration Data defined in E2 is at MPAN/MPRN level and it seems unlikely that the Panel will be equipped to process data at this level of granularity.

ELEXON recommends that the requirement should be for the DCC to provide "any Registration Data or summation thereof". This would, for example, allow the Panel to request the number of MPANs/MPRNs registered to each Supplier (rather than the Registration data itself), for the purposes of identifying Small Supplier Parties.

Transitional arrangements
Question 13: Do you agree with the proposed variation to the SEC modification regime in the transitional period, including a right of veto for the Secretary of State?
Yes, because this provides the necessary means of rapidly introducing fixes into the Smart Energy Code using a tightly defined governance regime during the key transitional period. We would hope that with clear industry wide focus on making the transition work there will be few cases whereby the Secretary of State has to issue a direction. In such circumstances we believe that publishing the rationale for the direction will aid understanding.
Question 14: Comments are invited on the approach to transition as set out in this chapter and section L of the SEC. Please provide rationale to support your views.
Proposed amendment to paragraph L1.4 Paragraph L1.4 places a requirement on the Electricity Distributor /Gas Transporter to provide monthly data in support of market-share based charging during the transition period. The information to be provided consists of all applicable MPAN/MPRNs together with the associated Supplier ID and Network Operator ID. ELEXON suggests that instead, a requirement to provide MPAN counts per Supplier and Network Operator ID could be less onerous, both for the Electricity Distributor and the DCC. Given that costs during Stage 1 of the SEC are to be recovered from Suppliers on a pro-rata basis based on domestic meter points, these counts would need to be limited to Profile Class 1 and 2 customers (excluding unmetered supplies allocated to Profile Class 1). Whilst this information is not included in the Registration Data defined in E2, it is available to Electricity Distributors via their registration systems. This has the advantage of avoiding the situation whereby the Network Operator provides all MPAN/MPRNs and the Supplier notifies whether each MPAN/MPRN is domestic or non-domestic (which has the potential for gaps in the Suppliers' data).
Licence conditions
Question 15: It is the Government's intention to introduce a regulatory obligation on suppliers to enrol SMETS-compliant domestic meters with the DCC and that this obligation would apply in relation to smart meters installed (from a specified point in the future). Do you agree with this intention? Please provide a rationale for your views**.**

Yes, as this is the most efficient way on ensuring SMETS compliant meters are registered and processed by the DCC. In addition, the obligation on Supplier's to ensure they are installing equipment that complies with the latest version of the SMETS provides further comfort that DCC only has to manage a limited number of older equipment.

Question 16: Do you agree in principle with the placing of a licence condition on gas and electricity suppliers to accede to and comply with the SEC?

Yes, accession to and compliance with the BSC, the MRA and other industry codes by suppliers is required as a condition of the supply licence and this approach has worked well. We agree with the policy of recovering appropriate fixed costs from suppliers once Stage 1 of the SEC is designated.

Question 17: Do you agree that the licence conditions as drafted meet the policy requirements as set out in the chapter? Please provide a rationale for your views.

Yes, the draft licence conditions meet the policy requirements that suppliers serving either customers or non-domestic customers via a smart meter must accede to the SEC from the point at which it is designated.

Question 18: Do you agree in principle with the placing of a licence condition on gas and electricity network operators to accede to and comply with the SEC?

Yes, accession to and compliance with the BSC, the MRA and other industry codes by network operators is required as a condition of the distribution licence and this approach has worked well. We agree with the policy of recovering a proportion of the fixed costs from network operators once Stage 1 of the SEC is designated.

Question 19: Do you agree that the licence conditions as drafted meet the policy requirements as set out in the chapter? Please provide a rationale for your views.

Yes, the draft licence conditions meet the policy requirement that network operators must accede to the SEC from the point at which it is designated or whenever they become active, if later.

For more information on our response, please contact:
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