

Department of Energy & Climate Change,
Area 4B, 3 Whitehall Place,
London,
SW1A 2AW

29 January 2016

Dear Sir or Madam,

ELEXON's response to 'Strengthening enforcement in gas and electricity markets'

ELEXON welcomes the opportunity to respond to the Department of Energy and Climate Change's (DECC's) consultation 'Strengthening enforcement in gas and electricity markets'.

ELEXON fulfils the role of the Balancing and Settlement Code Company (BSCCo). This means that we are responsible for the successful operation of the Balancing and Settlement Code (BSC). The BSC is an electricity industry code that sets out the arrangements for participation in the balancing mechanism and the Settlement of balancing mechanism transactions and imbalances in Great Britain. Licensed electricity transmission companies, suppliers, distributors and generators are required to comply with the BSC in accordance with the Standard Licence Conditions of their licences.

Whilst ELEXON is not a licensed organisation, our role as the administrator of the BSC since 2000 means that we have an in depth understanding of the electricity market arrangements in Great Britain. We are familiar with BSC Parties' requirements to comply with Licence Conditions, the risks of not complying and the processes for and demands of regulatory investigations.

ELEXON is not currently a licensed body (although we are aware that the Competition and Markets Authority (CMA), as part of its investigation into the energy market, is considering whether code administration should be a licensable activity). We have therefore only answered those questions in your consultation that relate to our current experience and otherwise provided general comments on your proposals from the perspective of an experienced industry code administrator.

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

Information gathering powers for unlicensed supply

'Question 6: Do you agree that Ofgem should be able to request information from unlicensed bodies to enable it to investigate their suspected non-compliance with the prohibition on unlicensed activity and any associated consumer detriment?'

DECC's proposal seeks to address a perceived gap in Ofgem's¹ investigative powers by expanding its functions and the scope of its role to unlicensed bodies, e.g. ELEXON. These new powers would enable Ofgem to request information from unlicensed bodies to support its investigation into suspected non-compliance with the prohibitions on unlicensed activity in the Electricity Act 1989 and Gas Act 1986.

We recognise that Ofgem's current powers may generally limit its ability to request information from unlicensed bodies. However, DECC should note that the BSC already enables the Authority to request

¹ We have assumed that references to Ofgem in your consultation document are to it acting on behalf of the Authority. We therefore use references to Ofgem and the Authority interchangeably.

information from and about unlicensed bodies. In addition to the BSC, it is likely that other industry codes and agreements have similar provisions to the BSC.

In particular, the BSC contains provisions relating to the disclosure of data and information, e.g. to the Authority. In particular, BSC Section C3.6 requires ELEXON to provide the Authority with 'all such relevant information as the Authority may specify' (and analysis of this information) upon request. In addition Sections B3.1.2 and 3.3 allow the BSC Panel to disclose data, for example to the Authority.

Such a request could provide the Authority with information about ELEXON or any BSC Parties' activities in accordance with the BSC. For example, numbers and types of registered metering systems, contract positions, trading activity and imbalance volumes as well as performance and data regarding compliance with the provisions of the BSC.

With these provisions in mind, ELEXON and the BSC Panel have a track record of providing data and information to Ofgem and Government to support its work (including regulatory investigations and referrals to the Competition and Markets Authority).

We recognise that the information and data that the Authority may request in accordance with industry codes and agreements is likely to be limited in nature, i.e. to the processes covered by the codes and agreements, rather than to all commercial operations of the bodies that participate in the code arrangements. Furthermore, a large number of parties to the BSC are already licensed (or exempt) (who may discharge their obligations through an unlicensed body, e.g. a Supplier Agent).

Therefore whilst provision of data in accordance with industry codes and agreements might support Ofgem's investigatory work, it is unlikely that the existing code provisions are sufficient to enable Ofgem to collect all information it may require from time to time.

'Question 7: Can consultees provide any information on the costs they typically incur in dealing with information requests relating to licenses from Ofgem and detail the extent to which you consider they are likely to be valid in this situation?'

Should DECC's proposal be implemented, it would introduce a regulatory burden on unlicensed bodies. Organisations typically mitigate regulatory burdens with internal processes and audits to monitor and manage compliance and the risks of non-compliance. These activities can be time consuming and costly to implement and maintain.

We recognise that DECC's proposal is intended to support Ofgem's investigation into bodies it suspects are operating without a licence. However, the consultation did not provide explicit legal text for the proposed power, so we have assumed that any body, including ELEXON, could be suspected by Ofgem and therefore be required to comply with a request for information.

Therefore, based on the information presented in the consultation document, DECC's proposal would have the effect of duplicating existing requirements on ELEXON to provide data and information to the Authority (as described above). Given that ELEXON must already manage its activities in light of existing reporting requirements in the BSC we consider that extending the Authority's scope to request information from unlicensed bodies would be unlikely to have a material impact on ELEXON.

General comments

The consultation document suggests that the proposed power to request information from unlicensed bodies will apply to any body that Ofgem suspects, including those that have or may be eligible to an exemption from a licence.

We believe that it is a positive step that DECC's proposal will clarify Ofgem's role in relation to exempt bodies. This point is of particular relevance to ELEXON as it is possible to become a BSC Party without a licence and fulfil activities that might ordinarily be expected to require a licence. For example, be

responsible for the electricity imported from the high voltage transmission system. However, to date, the terms of exemptions and responsibility for monitoring bodies with an exemption have not been clear. The lack of clear information about and responsibility for exempt bodies can frustrate BSC processes, e.g. market entry, monitoring, audit and compliance.

Whilst DECC's proposal appears to mean that Ofgem has a clearer power to request information in relation to exempt bodies, we encourage DECC to ensure that its and Ofgem's roles in relation to exempt bodies are made clearer where possible. For example, should DECC or Ofgem be responsible for maintaining publicly available details of the terms for individual exemptions granted by the Secretary of State, monitoring compliance with those terms and for taking any necessary enforcement action.

Should you have any questions or would like to discuss ELEXON's response in more detail, please contact me either by email (nicholas.rubin@elxon.co.uk) or by telephone (020 7380 4007).

Yours sincerely,

Nicholas Rubin
Market Advisor