

P374 'Aligning the BSC with EBGL'

P374 seeks to ensure that the BSC is aligned with the Derogation and Change processes described in the European Balancing Guideline (EBGL)

This Assessment Procedure Consultation for P374 closes:

5pm on Friday 18 July 2019

Please note that the Workgroup may not be able to consider late responses.



The P374 Workgroup initially recommends **approval** of the P374 Alternative Modification and **rejection** of the P374 Proposed Modification

This Modification is expected to impact:

- ELEXON as the Balancing and Settlement Code Company (BSCCo)
- BSC Panel
- BSC Parties engaging in the Modifications process
- The National Electricity Transmission System Operator (NETSO)

ELEXON

Phase

Initial Written Assessment

Definition Procedure

Assessment Procedure

Report Phase

Implementation

P374
Assessment Procedure
Consultation

27 June 2019

Version 1.0

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About This Document

The purpose of this P374 Assessment Procedure Consultation is to invite Balancing and Settlement Code (BSC) Parties and other interested parties to provide their views on the merits of P374. The P374 Workgroup will then discuss the consultation responses, before making a recommendation to the BSC Panel at its meeting on 12 September 2019 on whether or not to approve P374.

There are six parts to this document:

- This is the main document. It provides details of the solution, impacts, costs, benefits/drawbacks and proposed implementation approach. It also summarises the Workgroup's key views on the areas set by the Panel in its Terms of Reference, and contains details of the Workgroup's membership and full Terms of Reference.
- Attachment A contains the draft redlined changes to the BSC for the Proposed Modification for P374.
- Attachment B contains the draft redlined changes to the BSC for the Alternative Modification for P374
- Attachment C contains the specific questions on which the Workgroup seeks your views. Please use this form to provide your response to these questions, and to record any further views or comments you wish the Workgroup to consider.
- Attachment D contains the BSC Panel's request for further information from Ofgem to assist its decision on how to progress P374.
- Attachment E contains Ofgem's response to the Panel's letter in Attachment D



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Why Change?

The legally-binding Commission Regulation (EU) 2017/2195, European Electricity Balancing Guideline (EBGL), came into force on 18 December 2017. The EBGL is one of eight European Network Codes (ENCs) and Guidelines, with much of its scope covers Balancing and Settlement. The EBGL contains a process for changing the national balancing terms and conditions for the BSC, which must be adhered to, alongside the existing BSC change process.

P374 was raised by SSE on 5 November 2018 to ensure BSC compliance and clarity with the provisions of the EBGL, specifically in respect of amendments to the BSC (the BSC Change process) and BSC derogations ([BSC Sandbox](#)).

Solution

Proposed Modification

The Proposed solution seeks to amend [BSC Section H 'General'](#) 10.4.3(d) to make it explicitly clear that derogations cannot be granted from any BSC provision that constitutes EBGL Article 18 terms and conditions related to balancing. Moreover, it seeks to amend BSC Section H 10.1.1 to highlight those provisions that cannot be derogated from (H 10.4.3(d)) to add clarity to the current drafting within Section H.

The Proposed solution also seeks to amend the Self-Governance criteria within BSC [Section X Annex X-1 'General Glossary'](#) to preclude any BSC Modification that seeks to amend BSC provisions that constitute EBGL Article 18 terms and conditions related to balancing from being progressed as Self-Governance, with the exception of housekeeping Modifications.

Alternative Modification

At its third meeting, P374 Workgroup members voted to raise an Alternative Modification that is identical to the Proposed, except in that it will not explicitly preclude derogations from BSC provisions that constitute Article EBGL Article 18 terms and conditions related to balancing. Instead, it will allow each derogation application to be assessed on a case-by-case basis against the existing derogation criteria set out in BSC Section H 10.4.3(d), which do allow derogations to be granted from any BSC provision which constitutes Legal Requirement or Relevant European Legal Requirement as defined in the BSC.

Impacts & Costs

The central implementation costs for P374 as a document only change will be £2040, 8.5 ELEXON Working Days (WDs) effort.

We do not expect there to be any direct market participant impacts or costs from this Modification, which we seek clarification on through this Assessment Procedure Consultation.



What is a Self-Governance Modification?

A BSC Modification that has been progressed as Self-Governance will only be considered by the BSC Panel, who will determine if (and when) the change should be implemented without reference to the Authority.



What is a Housekeeping Modification?

Housekeeping Modifications are changes to the BSC that seek to correct the BSC and have no impact on the provisions or requirements therein. For example, amending an incorrect reference number.



What is the BSC Sandbox?

The BSC Sandbox is a process by which BSC Parties, or interested third parties can apply for a time bound, specific exemption from the BSC requirements in order to trial new or innovative technologies or business models.

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Implementation

The P374 Workgroup propose this Modification be implemented **5 WDs after Authority decision** as an ad-hoc BSC Release, to ensure clarity for market participants on the BSC Change Process Self-Governance arrangements and derogations process at the earliest opportunity.

Recommendation

The **majority** of the Workgroup believes that the P374 **Alternative Modification** would **better facilitate** Applicable BSC Objectives (c) and (e) compared to the P374 Proposed Modification, and so should be **approved**.

The Workgroup unanimously believe that both the Proposed and Alternative Modification better facilitate the Applicable BSC Objectives compared to the current baseline.

Assessment Consultation Question

Do you agree with the Workgroup's initial unanimous view that the P374 Proposed Modification does better facilitate the Applicable BSC Objectives than the current baseline?

Please provide your rationale with reference to the Applicable BSC Objectives

The Workgroup invites you to give your views using the response form in Attachment C

Assessment Consultation Question

Do you agree with the Workgroup's initial unanimous view that the P374 Alternative Modification does better facilitate the Applicable BSC Objectives than the current baseline?

Please provide your rationale with reference to the Applicable BSC Objectives

The Workgroup invites you to give your views using the response form in Attachment C

Assessment Consultation Question

Do you agree with the Workgroup's initial majority view that the P374 Alternative Modification does better facilitate the Applicable BSC Objectives than the current baseline and the Proposed Modification?

Please provide your rationale with reference to the Applicable BSC Objectives

The Workgroup invites you to give your views using the response form in Attachment C

2 Why Change?

What is the issue?

SSE raised Modification P374 as it believes the BSC does not explicitly reflect the changes introduced by the legally-binding [European Electricity Balancing Guideline](#) (EBGL) in respect of derogations (Article 62(2)) and amendments (Articles 4, 5, 6 and 10) to the terms and conditions related to balancing (Article 18).

SSE believes that without this Modification, the BSC will not be aligned with the EBGL Amendment process, which could cause confusion for BSC Parties, or lead to potential inadvertent breaches of European Law by the BSCo and the BSC Panel when applying or interpreting the BSC arrangements. SSE felt it prudent to take immediate action to seek to correct the defect and to ensure that the related defect, in respect of BSC Derogations, was also addressed in a timely way.

Derogations

BSC Modification [P362 'Electricity Market Sandbox'](#) introduced the ability to grant BSC Derogations against provisions of the BSC upon application and consideration of the merits on a case-by-case basis. SSE assert that the terms and conditions related to balancing submitted in accordance with Article 18 cannot be derogated against once approved by the Authority, as Article 18 is not listed as a provision that the Transmission System Operator (TSO, i.e. the National Electricity System Operator (NETSO) in GB) can be derogated from under Article 62(2).

Amendments

Article 6(3) of EBGL (referring to Articles 4, 5 and 10) sets out a process that will need to be followed in respect of any amendments proposed to the terms and conditions related to balancing (as set out initially in Annex 1 to the 18th June 2018 proposal submitted by the TSO). The BSC does not currently cater for this additional process.

For example, Self-Governance Modifications that seek to amend a BSC Section that will constitute the EBGL Article 18 terms and conditions related to balancing would not be compliant with the Article 10 public consultation requirements and should be sent to the Authority for approval.

What is the EBGL?

The EBGL came into force on 18 December 2017. The regulations for this were published as Articles of Regulation from the European Commission. The EBGL is one of eight ENCs and Guidelines and is intended to create an interconnected internal energy market where, for example, countries can share a level of common provisions. The EBGL is the Network Code most relevant to the BSC as much of its scope covers Balancing and Settlement. The European Network of Transmission System Operators (ENTSO-E) was responsible for developing the Network Codes.

Relevant EBGL Provisions to P374

Article 18 'Terms and conditions related to balancing'

Article 18 of the EBGL requires participating regions' TSOs to develop proposals regarding the terms and conditions related to balancing for Balancing Service Providers (BSPs)¹ and Balancing Responsible Parties (BRPs) and submit them to the National Regulatory Authority (NRA) for approval. This ensures all participating nations fulfil basic obligations in regards to balancing, but does not dictate precisely how they should be fulfilled.

Article 4 'Terms and conditions or methodologies of TSOs'

Article 4 requires the relevant TSOs of each participating region to develop, amongst other conditions or methodologies, the balancing and imbalance terms and conditions required by Article 18 and to submit them to the relevant NRA for approval. In the case of Great Britain (GB) the NETSO is the TSO and the Authority (Ofgem) is the relevant Authority.

Article 5 'Approval of terms and conditions or methodologies of TSOs'

Article 5 requires Ofgem to consider for approval (amongst other conditions or methodologies) the Article 18 terms and conditions related to balancing submitted by the NETSO in accordance with Article 4. Article 5 also requires the proposal for terms and conditions related to balancing to include a proposed timescale for their implementation, which is required to be no longer than 12 months after the approval by Ofgem.

Article 6 'Amendments to terms and conditions or methodologies of TSOs'

Article 6(1) gives powers to Ofgem to require the NETSO to amend the proposed terms and conditions related to balancing, where it believes this is needed to allow Ofgem to approve the terms and conditions. If this is required, the NETSO would be required to submit a proposal for amended terms and conditions related to balancing for approval within two months of the direction from Ofgem. Ofgem would then have two months following the submission of the amended proposal by the NETSO to make its determination.

Article 6(3) also states that TSOs and the NRA may develop proposals for amendments to those terms and conditions related to balancing, once they have been approved initially by the NRA, in which case the proposals for amendments shall be subject to consultation in accordance with Article 10 and approved in accordance with Articles 4 and 5.

Article 10 'Public consultation'

Article 10 requires the TSO to consult with stakeholders on the proposals, or amendments to the proposals, of the terms and conditions related to balancing for at least one month. It also requires the TSO to '...duly consider the views of stakeholders resulting from the consultations...' and '...in all cases, provide a sound justification for including or not including the views resulting from the consultation together with the submission and publish it in a timely manner before or simultaneously with the publication of the proposal for terms and conditions or methodologies.'

¹ BSPs and BRPS are define in Article 2 of EBGL

Article 62 'Derogations'

Article 62 of the EBGL allows the NRA to grant the TSO derogation from specified EBGL provisions. This may be at the request of TSO or the NRA's initiative. Article 18 is not listed in Article 62 as a provision that can be derogated against.

BSC Sandbox

Modification [P362 'Introducing BSC Arrangements to facilitate an Electricity Market Sandbox'](#) was implemented on 28 August 2018 and introduced provisions in the BSC to enable the Panel to grant derogation of certain BSC obligations. This allows the opportunity to trial pre-competitive and innovative products and services. A brief description of the high-level process approved by Ofgem is below.

As part of P362, it was agreed that Ofgem will act as the point of entry to coordinate applications across the industry. ELEXON will receive applications via Ofgem and prepare relevant information for the BSC Panel's consideration. The Panel will then make a recommendation to Ofgem on whether to approve or reject the application. Ofgem will then decide whether to grant the derogation and synchronise derogations across the impacted codes and licenses.

Anyone can apply for derogation (BSC Parties and interested third parties), however non-Parties will be required to accede to the BSC and complete the relevant market entry processes before the derogation can be effective. This is because you cannot be granted derogation from something you are not a Party to.

BSC Companies (i.e. BSCCo or ELEXON) and the NETSO cannot apply for, or be granted, BSC Derogation.

History of P374

Original NETSO Proposal and Consultation responses

In its original 18 June 2018 Article 18 submission, the NETSO proposed to the Authority that the Article 18 terms and conditions related to balancing be held within the existing GB framework. To that end, Annex 1 of the original NETSO proposal set out those parts of the BSC (and other impacted industry framework documents) to show how the existing GB framework meets the requirements of the EBGL Article 18 terms and conditions related to balancing. The original proposal can be found here:

<https://www.nationalgrideso.com/document/117301/download>.

There were two respondents to the NETSO consultation on its initial proposal: ELEXON and SSE.

ELEXON responded largely agreeing with the intent of NETSO's proposal. SSE responded to the consultation disagreeing with the approach being proposed by the NETSO and subsequently raised P374 on 5 November 2018 to ensure compliance with the EBGL.

As a consequence, ELEXON agreed to postpone the operational launch of the BSC Sandbox pending the outcome of this Modification.

P374 initial timeline

Due to the limited amount of information available to the BSC Panel at the time P374 was raised, a decision on progression was deferred from the November 2019 meeting until the December 2019 meeting. A letter was sent to the Authority, requesting information regarding seven pertinent questions the Panel had that were felt to provide clarity and assist in its decision. The Authority replied to this letter prior to the December Panel meeting where the Modification was progressed to the Assessment Procedure. The Panel's letter can be found in Attachment D and the Authority's reply can be found in Attachment E to this paper.

A summary of the initial timeline of P374 can be found in the table below:

Summary of P374 initial timeline	
1. SSE raises BSC Modification P374	5 November 2018
2. P374 Initial Written Assessment (IWA) presented to Panel. Decision deferred pending further information requested from the Authority	8 November 2018
3. The Authority provides formal written response to Panel's questions	11 December 2018
4. Panel progresses P374 to Assessment Procedure	13 December 2018

NETSO's proposals for balancing terms and conditions

Setting the GB balancing and imbalance terms and conditions

As per EBGL Article 18(1), the NETSO was required to develop a proposal regarding the terms and conditions related to balancing within 6 months of the EBGL coming into effect. As the EBGL came into effect on 18 December 2017, the NETSO was required to submit this proposal to the Authority for consideration by 18 June 2018.

The proposal was duly submitted by the NETSO on 18 June 2018 and the Authority subsequently requested amendments be made in accordance with Article 6(1) on 4 February 2019. The Authority's full letter can be found here:

<https://www.ofgem.gov.uk/publications-and-updates/decision-request-amendment-transmission-system-operators-proposal-terms-and-conditions-related-balancing>. The NETSO then had two months to make the requested amendments, and consult on them for one month in accordance with Article 10, as is required under Article 6(3).

The amended proposal was submitted on 4 April 2019, and the Authority had two months to decide on whether they would approve them or not, again in accordance with Article 6(1). On 4 June 2019 the Authority again formally requested further amendments be made to the proposals. The Authority's full letter can be found here:

<https://www.ofgem.gov.uk/publications-and-updates/decision-request-further-amendments-transmission-system-operators-proposal-terms-and-conditions-related-balancing-accordance-article-18-commission-regulation-eu-20172195>.

This means that the above process repeats itself, in that the NETSO now has two further months to make the required amendments and consult on them and the Authority has two months to decide whether or not it will approve the amended proposals once the revised proposals are submitted by the NETSO for the Authority's consideration.

As such, the latest expected date for the Authority's decision on the most recent amended proposal is 4 October 2019.

A summary of the above can be found in the table below.

Summary of Article 18 Procedure and Status	
Step	Key Date
1. EBGL comes into effect	18 December 2017
2. NETSO submits its proposal for the balancing terms and conditions to the Authority	18 June 2018
3. The Authority submits a formal request for amendment to the NETSO proposed balancing terms and conditions	4 February 2019
4. NETSO submits its amended proposed balancing terms and conditions to the Authority	4 April 2019
5. The Authority submits a formal request for further amendments to the proposed balancing terms and conditions	4 June 2019
6. NETSO submits its amended proposed balancing terms and conditions to the Authority	Expected by 4 August 2019
7. The Authority considers the proposal and either approves the balancing terms and conditions or requests further amendments	Expected by 4 October 2019

What is contained within the NETSO's proposal?

The NETSO proposed that the terms and conditions related to balancing as described under Article 18 currently exist in provisions contained within the BSC, Grid Code, Connection and Use of System Code (CUSC) and C16 Statements and Methodologies within the Transmission License.

Within the Article 18 proposal, the NETSO provided mapping (in Annex 1) to the relevant provisions in the above documents that, according to the NETSO, constitute the terms and conditions related to balancing for GB.

As above, the amended NETSO proposal and consultation (submitted 4 April 2019) and can be found here:

<https://www.nationalgrideso.com/codes/european-network-codes/meetings/consultation-amended-proposal-ebgl-article-18-terms-and>

3 Solution

Proposed Solution

Amendments

The draft legal text originally presented to the Panel has been refined over the course of P374 to reflect the discussions held.

This Modification proposes to amend the Self-Governance definition to preclude any Modification that seeks to amend BSC provisions constituting Article 18 terms and conditions related to balancing from being progressed as Self-Governance, with the exception of housekeeping Modifications. This will avoid any risk that the Panel approves a Modification that impacts Article 18 terms and conditions related to balancing under the Self-Governance process, as for them to do so would not be consistent with the relevant EBGL requirements. Articles 6 and 10 of the EBGL require that all amendments to the EBGL Article 18 terms and conditions related to balancing are approved by the Authority following consultation of not less than one month, performed by the NETSO.

For the avoidance of doubt, any future Urgent BSC Modifications that seek to amend BSC provisions constituting the EBGL Article 18 terms and conditions related to balancing must also undergo the amendment process detailed in the EBGL and the one month public consultation required therein.

Where a BSC Modification Proposal impacts Article 18 terms and conditions related to balancing, the P374 Workgroup anticipates that the NETSO will perform the required EBGL Article 10 consultation in parallel with the BSC Modification Process. Section 6 of this paper provides further information on how this is expected to work, but these processes are not included in the P374 solution as they are NETSO obligations falling outside of the BSC process.

Derogations

This solution proposes to make clear in BSC Section H 10.4.3.d.(iii) that no BSC derogation can be granted from any BSC provisions that constitute the Article 18 terms and conditions related to balancing, and that attention should be drawn at the first instance (H 10.1.1) to provisions that cannot be derogated from (e.g. any License conditions).

The Proposer believes this will add clarity to the BSC Sandbox provisions, particularly for new market entrants and small participants.

Alternative Solution

The P374 Workgroup developed an alternative solution, which is identical to the proposed, except that it will not directly preclude all BSC provisions constituting Article 18 terms and conditions related to balancing from being granted a BSC derogation. Instead, it will enable each BSC derogation request to be assessed on a case-by-case basis.

Derogations

The alternative solution reflects the majority Workgroup's belief that it is not appropriate to preclude all BSC provisions constituting EBGL Article 18 terms and conditions related to balancing from the BSC Sandbox, given that the BSC process already precludes any BSC derogation that contravenes any relevant European Legal Requirement. As such, it does not include any amendment to that effect, and the Workgroup believes in this sense that the Proposed solution, in some cases, could restrict BSC derogations that could otherwise be approved.

However, the Alternative solution does align with the Proposed solution in that it proposes the inclusion of a sentence to highlight the provisions and requirements that market participants cannot be granted derogation from.

Legal Text

The draft redlined changes to the BSC to deliver the P374 **Proposed** Modification can be found in Attachment A and the draft redlined changes to the BSC to deliver the P374 **Alternative** Modification can be found in Attachment B.

Assessment Consultation Questions

Do you agree with the Workgroup that the draft legal text in Attachment A delivers the intention of the P374 Proposed Modification?

Please provide rationale for your response

Do you agree with the Workgroup that the draft legal text in Attachment B delivers the intention of the P374 Alternate Modification?

Please provide rationale for your response

The Workgroup invites you to give your views using the response form in Attachment C

Self-Governance

The Workgroup unanimously believes that P374 does not meet the Self-Governance Criteria. Both the Proposed and Alternative P374 Modifications propose to amend the criteria for Self-Governance Modifications. The majority of members also believed the Alternative Modification would have a material impact on competition for the reasons given against the BSC Applicable Objectives described in Section 7 of this paper. P374 therefore has a material impact on the Code's governance and Modification procedures (Self-Governance criteria (iv)) and the competition in the generation, distribution, or supply of electricity (Self-Governance criteria (ii)).

Assessment Consultation Question

Do you agree with the Workgroup's unanimous view that P374 does not meet the Self-Governance Criteria and so should not be progressed as a Self-Governance Modification?

Please provide your rationale

The Workgroup invites you to give your views using the response form in Attachment C

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Proposed and Alternative Solution

Estimated central implementation costs of P374

The central implementation costs for both the Proposed or Alternative P374 solutions will be approximately £2040 to implement the document changes and amend the ELEXON processes. This includes the amendment of guidance notes, simple guides and internal ELEXON documentation.

Indicative industry costs of P374

We do not anticipate any material market participant costs arising as a result of the implementation of this either the Proposed or Alternative solutions, but wish to confirm this via the Assessment Procedure Consultation.

P374 Proposed and Alternative solution impacts

Impact on BSC Parties and Party Agents	
Party/Party Agent	Impact
Parties and Party Agents	No implementation impacts expected. Parties seeking a BSC Derogation or seeking to amend provisions of the BSC that form part of the terms and conditions related to balancing will be impacted if P374 is approved. Impacts on derogations in respect of the Proposed solution will depend on the derogation a market participant seeks. There will be no impact on the derogations (Sandbox process) in case of the Alternative solution.

Impact on NETSO
The NETSO will be required to implement the processes required under EBGL to ensure the parallel EBGL consultation runs alongside the BSC Modifications process, where such BSC Modification impacts the EBGL terms and conditions relating to balancing. The NETSO and ELEXON will work collaboratively to highlight where Modifications do impact the EBGL terms and conditions relating to balancing, to ensure BSC Modifications are progressed efficiently.

Impact on BSCCo	
Area of ELEXON	Impact
BSC Derogation processes	Changes will be required to working procedures and guidance notes to ensure compliance with EBGL and P374 in respect of the Proposed solution. There are no impacts in respect of the Alternative solution.
BSC Modifications processes	Changes will be required to working procedures and guidance notes to ensure compliance with EBGL and P374.

Impact on Code	
Code Section	Impact
BSC Section H	Changes will be required to implement P374. Please see Attachment's A and B for the draft legal text.
BSC Section Annex X-1 'General Glossary'	

Impact on Code Subsidiary Documents	
CSD	Impact
BSCP40 'Change Management'	Changes will be required to implement P374. Per BSC requirements, the draft redlining for CSDs does not need to be provided at the time the Modification is approved. However, due to the short implementation timescales proposed, and the importance of BSCP40 for market participant understanding of the BSC Change processes, we will provide the BSCP40 draft redlining at the point of the Report Phase Consultation. This will ensure BSCP40 can be approved by the BSC Panel alongside the P374 Draft Modification Report.

Impact on Consumers and the Environment
The P374 Workgroup has not identified any direct impacts on consumers or the environment during its assessment of P374.

Impact on on-going Significant Code Reviews (SCRs)
Both ELEXON and the Proposer do not believe this Modification impacts any on-going SCR. ELEXON submitted P374 to the Authority to request SCR exemption on 5 November 2018, to which the authority confirmed exemption.

5 Implementation

Recommended Implementation Date

The Workgroup recommends an Implementation Date for P374 of:

- 5WDs following Authority's decision.

The P374 Workgroup recommends that the Modification is implemented as quickly as possible following Authority approval to ensure market participants have clarity as to BSC compliance with the EBGL requirements at the earliest possible opportunity.

Assessment Consultation Question

Do you agree with the Workgroup's recommended Implementation approach?

Please provide your rationale

The Workgroup invites you to give your views using the response form in Attachment C

Over the course of three meetings (20 February, 24 April and 7 June), the P374 Workgroup developed the Proposed and Alternative solution to Modification P374. Discussions focused on different legal interpretations of the EBGL and their impacts on the BSC Sandbox. Discussions also centred around the EBGL amendment process and whether the BSC Modification process would be in compliance once the Article 18 terms and conditions related to balancing become live. These discussions are described in detail below.

Derogations

The Proposer and ELEXON hold contrasting legal interpretations of the impact of EBGL Article 62 on the BSC Sandbox provisions introduced under Modification [P362](#). ELEXON highlighted that the EBGL could be interpreted in a variety of ways, and is not definitive that BSC provisions constituting EBGL balancing terms and conditions cannot be derogated against. On the other hand, the Proposer's interpretation suggests a different interpretation that it is definitive BSC provisions constituting EBGL balancing terms and conditions cannot be derogated from. As such, the Workgroup requested alternative legal text be drafted and the rationale behind each interpretation clearly outlined for consideration. The full rationale behind both the Proposed and Alternative solutions in respect of derogations is outlined below.

Proposed Solution - Rationale

The Proposer's view is that Article 62 (Derogations) of the EBGL allows the NRA (i.e. Ofgem) to grant the Transmission System Operator (i.e. NETSO) derogations from specified EBGL regulations only. This may be at the request of the TSO or of the NRA's initiative. EBGL Article 18 is not included within Article 62(2) as an obligation that can be derogated from.

On 11 December 2019, the Authority sent a letter (Attachment E) to the BSC Panel specifying that, once approved, those BSC provisions that the TSO has mapped to the EBGL will constitute the Article 18 terms and conditions related to balancing. It is the Proposer's position that those provisions will be ineligible for BSC derogation in accordance with Article 62(2). It would be against the recitals and requirements of EBGL to allow derogations against the EBGL Article 18 terms and conditions related to balancing, as, in an extreme scenario, a TSO or a BSP or a BRP could potentially circumvent the document entirely by derogating against those provisions that constitute the EBGL Article 18 terms and conditions related to balancing.

Therefore it is the Proposer's belief that, to comply with European Law, the BSC Sandbox cannot provide derogations to those provisions within the BSC that constitute the Article 18 terms and conditions related to balancing and this should be made clear within BSC Section H. The Proposed Solution legal text sets out the desired wording.

Alternative Solution – Rationale

ELEXON highlighted that the EBGL Regulation only set out obligations on TSOs and NRAs. EBGL Article 62 provides for a derogation to be granted to a TSO from fulfilling specific obligations under the EBGL Regulation (set out under (a) to (e) of Article 62(2)). Article 18

of EBGL requires the TSO to develop a proposal regarding the terms and conditions for BSPs and BRPs and also sets out what the terms and conditions for each must contain.

ELEXON noted that EBGL Article 18 is not included within Article 62(2) and therefore a TSO may not be granted a derogation from its obligation to develop the Article 18 proposal and submit it to the Authority for approval. However, it would be prudent to make a distinction between derogations that can be granted under Article 62 to a TSO and derogations that may be granted to BSC Party under Section H 10.1.

ELEXON suggested that requests for BSC derogations received under the BSC Sandbox programme will not constitute requests for derogations under EBGL Article 62 and will not cover the same subject-matter.

ELEXON recognised that certain requirements specified in EBGL Article 18 will constitute Legal Requirements from which derogations will not be possible under BSC Section H 10.1. However, BSC Section 10.4.3 already contains wording which renders ineffective any BSC derogation to the extent that it purports to derogate from “relevant legal requirements”, as defined in BSC Section 10.4.3, which includes Relevant European Legal Requirement.

For example, ELEXON acknowledged that any Article 18 terms and conditions requirements directly set out in EBGL Article 18(5)(b), such as the requirement that the Article 18 terms and conditions related to balancing for BSPs shall contain timescales for the procurement and transfer of balancing capacity, would constitute Legal Requirement for being contained in a regulation. However, where the Article 18 terms and conditions related to balancing specify a particular timescale (such as 5 weeks, for example), it should be possible for BSC Parties to seek a derogation from the BSC provision specifying the 5 weeks to enable such transfer to occur in, for example, 6 - 8 weeks. The Party would not be able to acquire a derogation from the requirement to have timescales for the procurement and transfer of balancing capacity, as the requirement to have a timescale would constitute Legal Requirement for the purposes of Section 10.4.3(d).

External Legal Counsel

The Workgroup acknowledged that the pertinent question was one of legality and, as such, considered submitting both solutions to external legal counsel for an independent view.

The majority of the Workgroup believed that this would be an inefficient use of BSC Parties’ resources as the ultimate decision on which option should be implemented lies with the Authority. As there are two distinct interpretations the Workgroup discussed, the prevailing view was to submit both the Proposed and Alternative solution for consideration, recognising that the Authority can acquire its own independent legal advice, should it so wish.

The Proposer held the view that external legal advice would be of benefit to the Workgroup discussions as well as to BSC Parties, the Panel and the Authority when considering the Modification, but this view was in a minority.

Potential Impacts on Current Market Arrangements

As the ultimate determination as to which interpretation is legally sound lies with the Authority, the P374 Workgroup discussed the implications of each solution on current market arrangements.

The Proposer noted that their solution provides absolute clarity that BSC derogation cannot be granted from the Article 18 terms and conditions related to balancing, thus providing certainty to market participants, preventing nugatory work and ensuring compliance with European Law.

The majority of the Workgroup felt that explicitly ruling out those BSC provisions that constitute the terms and conditions related to balancing from being granted a BSC derogation would be unnecessarily limiting and potentially stifle innovation. Further, the current text of BSC Section H 10.4.3(d) already precludes BSC derogation from ‘...any Legal Requirement (including, for the avoidance of doubt, any Relevant European Legal Requirement)’. The Workgroup agreed that, whilst some relevant BSC provisions may constitute a Legal Requirement, this does not necessarily mean that they all do – this should be assessed on a case-by-case basis based on which BSC provisions the proposal is seeking to derogate from.

The Proposer highlighted that the current drafting of Section H10 (BSC Sandbox) can be difficult for small Suppliers and new market participants to fully understand, wherein the provisions that highlight those areas that cannot be derogated from (H 10.4.3(d)) are not sufficiently clear. The Workgroup agreed with this view, and requested the transposition of the Proposed solution’s amendment of paragraph H10.1.1 to the Alternative legal text in order to provide this added clarity.

EBGL Amendments

How should the Article 18 Terms and Conditions be treated?

The Authority’s first formal request for amendment of NETSO’s proposal makes clear that it considers the Article 18 terms and conditions related to balancing to be constituted of existing provisions within the BSC and other related Codes. This means that, once the Authority approves the NETSO’s proposals, the approved parts of the BSC will constitute the Article 18 terms and conditions related to balancing.

The Workgroup considered this and determined that, once the Authority has approved the NETSO’s proposals, any Modification seeking to amend provisions that constitute the Article 18 terms and conditions related to balancing (BSC or otherwise) will be subject to the EBGL Amendment process as detailed in Articles 6 and 10.

Is the BSC compliant with the EBGL?

As the Authority has yet to approve the NETSO’s Article 18 proposed terms and conditions related to balancing, the BSC is not at risk of non-compliance at this stage – it is impossible to comply with obligations that do not yet exist. Further, as referenced above, all relevant obligations and requirements currently rest with the NETSO and the Authority.

However, the Workgroup unanimously agreed that Self-Governance criteria must be amended to exclude any Modification seeking to amend BSC provisions that constitute the Article 18 terms and conditions related to balancing to provide clarity to market participants.

Self-Governance Modifications are not subject to Authority approval; EBGL Articles 4, 5, 6 and 10 state that the Authority must approve all amendments to EBGL Article 18 terms and conditions related to balancing. A future Modification seeking to amend BSC provisions constituting Article 18 terms and conditions related to balancing would therefore

contravene EBGL requirements and would not be legitimate if it did not follow the EBGL Amendment procedure set out in Articles 4, 5, 6 and 10 and subsequent Authority approval.

The Workgroup considered the prospect of a month long consultation (as required by Article 10) on housekeeping Modifications and concluded that it was not the intention of the EBGL for participants to do so, and drafted legal text into both solutions to reflect this.

Who will operate the EBGL Amendment process?

As it currently stands, all obligations regarding the operation and approval of the EBGL Amendment process lie with the TSO and the NRA (NETSO and Ofgem in GB).

The Workgroup understands that under EBGL Article 13 it would be possible for the NETSO to delegate some or all of the EBGL Amendment process to ELEXON as the BSCCo or the BSC Panel for the Article 18 terms and conditions related to balancing that are being met by the BSC. There is also the possibility of ELEXON as the BSCCo or the BSC Panel being assigned the relevant EBGL Amendment obligations by the Member State (i.e. BEIS). This could have several advantages, such as being able to make use of the existing Modification consultations, such as the Report Phase Consultation, to minimise timescales, and align more closely with existing processes, minimising disruption and inconvenience to market participants.

However, in lieu of any such delegation or assignment and with a pressing need to provide clarity over BSC compliance with the EBGL to the industry, all obligations and responsibilities regarding the operation and approval of the EBGL Amendment process do not lie with ELEXON or the BSC Panel.

At its third meeting on 07 June, the Workgroup agreed that P374 was not the appropriate vehicle to develop an aligned process. It agreed that any Modification to the BSC Change process should only be raised if and when any of those relevant obligations are agreed to be delegated or assigned to the appropriate body undertaking a similar function under the BSC change process.

How will the EBGL Amendment process work?

ELEXON recognises that arrangements will need to be in place for certain Modifications to be compliant with EBGL requirements. To this end, we have been liaising with National Grid ESO (NGESO) in their capacity as the NETSO to determine how this will look in the immediate future and briefed the P374 Workgroup to this effect.

Indicative EBGL Change Process

It was determined that an Article 6(3) EBGL Amendment proposal should only be raised by the NETSO once the solution to the BSC Modification has been finalised i.e. Assessment Report submission to the BSC Panel.

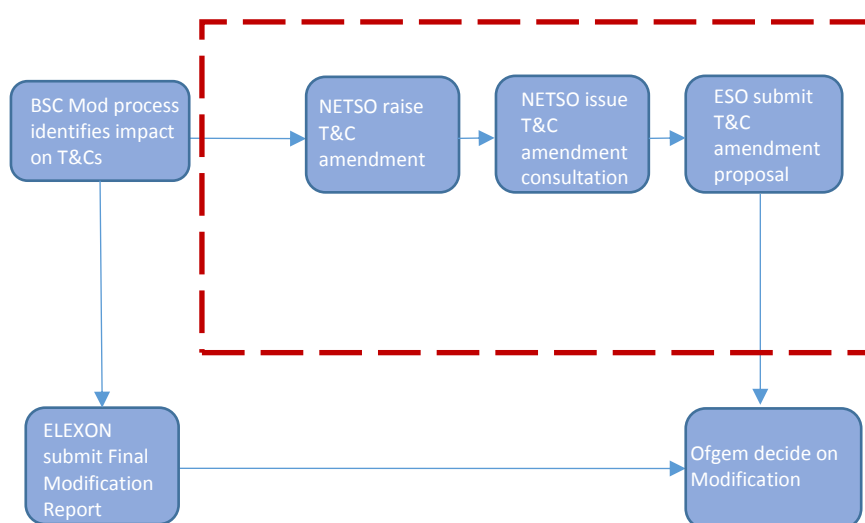
It is at this point that ELEXON will provide a view to the NETSO as to whether it believes a Modification is likely to impact any BSC provisions constituting Article 18 terms and conditions related to balancing. In order to make this assessment clear and visible to market participants, we have committed to the following:

- Amending BSC Modification document templates to include a clear indication as to whether the Modification impacts Article 18 terms and conditions related to balancing; and
- Amending the standard BSC Modification terms of reference to ensure the Workgroup actively considers Article 18 impacts as it progresses.

ELEXON will action the above by the time the Article 18 terms and conditions related to balancing have been approved by the Authority (currently expected to be on or before 4 October 2019).

Once the solution has been finalised, it is proposed that NETSO will raise the corresponding EBGL Article 6(3) Amendment proposal and perform the required one month public consultation before submitting its final proposal to the Authority, to be considered alongside the BSC Modification Report.

This process is summarised in the diagram below:



What is an 'in-flight' Modification?

Modifications that are 'in-flight' are those that have been formally raised and are currently progressing through the BSC Modification process.

In the context of P374, an 'in-flight' Modification refers to those Modifications that seek to amend provisions constituting Article 18 terms and conditions related to balancing as approved by the Authority.

Impact on BSC Change Process

The Article 6(3) EBGL Amendment process is an entirely separate legal procedure to the BSC Change process and will occur in parallel. Although the existence of a parallel process will have no direct impact on the BSC processes, it is likely to impact the time it takes for the Authority to make a decision due to the expected timeline overlap. It should also be noted that any Modification seeking to change the BSC Sections constituting Article 18 terms and conditions related to balancing, will be rendered ineffective unless a corresponding proposal to amend the Article 18 terms and conditions related to balancing is also raised by the NETSO or Authority in compliance with EBGL Article 6 and approved by the Authority in accordance with EBGL Article 5.

The relevant Article 6(3) EBGL Amendment proposal will unlikely be raised by the NETSO until the BSC Assessment Report has been submitted to the BSC Panel. BSC Section F 2.7.4(d) notes that the Report Phase Consultation can be consulted on for no more than 15 business days. This allows most Modifications to be presented to the following month's Panel meeting and submitted to the Authority within 7 business days, as required under F 2.7.6.

Therefore, it can be reasonably assumed that the drafting, consultation period and consolidation of responses to the corresponding Article 6(3) EBGL Amendment proposal will mean its submission to the Authority at a later date than its BSC equivalent. Whilst this

is compliant, as the Authority must consider both the BSC Modification Report and the EBGL Amendment proposal before making its decision, there could be an increase in the time taken to approve and subsequently implement some BSC Modifications in the future.

The Workgroup was concerned that the NETSO may have a veto over BSC Modifications where it chose not to raise the necessary corresponding Article 6(3) EBGL Amendment proposal. However, it was highlighted that EBGL Article 6(3) grants the NRA (i.e. Ofgem) the ability to itself propose an amendment to the Article 18 terms and conditions related to balancing. Therefore, if the NETSO does not raise an Article 6(3) EBGL Amendment proposal necessitated by a BSC Modification, the Authority can do so in its place. In such an instance, the Authority may wish to consider the merits of the BSC Modification contained in the BSC Final Modification Report before it uses its EBGL powers to request amendment.

In-Flight Modifications

The Workgroup discussed the likely impact of Authority approval of the NETSO's Article 18 proposal on BSC Modifications that are currently 'in-flight'. A conservative expectation is that all Modifications that have been approved by the Authority prior to the submission of the NETSO's proposals (currently expected to be 4 August 2019) will form the baseline for the BSC that the Article 18 terms and conditions related to balancing will be mapped to by the NETSO in its Article 18 proposal. This would mean that any 'in-flight' Modification would need to undergo the EBGL Amendment process.

This is by no means a definite outcome and is subject to the position proposed by the NETSO in its revised 4 August 2019 proposal for Article 18 terms and conditions related to balancing with respect to 'in-flight' Modifications. ELEXON anticipates clarity on this point in the NETSO's upcoming amended Article 18 proposals. However, we are unable to assume any specific outcome and shall consider all possible outcomes and prepare accordingly to ensure Modifications are progressed through to implementation in the most efficient manner for market participants.

Next Steps

Both ELEXON and the NETSO recognise that the process of amending Article 18 terms and conditions related to balancing by raising BSC Modifications is subject to two parallel processes - one under the BSC and one under the EBGL Regulations. It is therefore not as streamlined or efficient as would be preferred; the NETSO therefore intend to raise a Modification to the BSC in the near future to minimise the impact on industry and align the processes as much as possible. This is expected to be raised once any decision at the NETSO regarding a possible Article 13 delegation/assignment has been reached.

EBGL Amendments

The Workgroup unanimously agree that BSC Section X Annex X-1 should be amended to clarify that any Modification seeking to amend BSC provisions constituting EBGL Article 18 terms and conditions related to balancing cannot be progressed as Self-Governance, with the exception of housekeeping Modifications.

The Workgroup agreed that designing the aligned process for EBGL Amendments is out of the scope of P374, as the BSCCo currently has no obligations or requirements under the EBGL. A separate Modification to the BSC will be raised by NGESO if and when these are delegated or assigned, according to Article 13, to either ELEXON as BSCCo or the BSC Panel.

Derogations

The Proposer maintains that according to EBFL (in particular the Recitals and Article 62) no BSC derogation can be granted to TSOs or BSPs or BRPs from BSC provisions that constitute Article 18 terms and conditions related to balancing. The majority of the Workgroup recognises this interpretation but acknowledges that it is not definitive. As such, it was agreed that an Alternative Modification should be raised recognising the interpretation that requests for BSC derogation received under the BSC Sandbox programme will not constitute requests for derogations under EBGL Article 62 and will not cover the same subject-matter, as detailed in Section 6 of this document (Alternative Solution – Rationale).

Ultimately, it was felt that the Proposed solution provides more clarity to market participants but potentially limits innovation, whereas the Alternative allows each BSC derogation application to be assessed on a case-by-case basis.

By voting to develop an Alternative Modification, the Workgroup intends to present the Authority with these separate legal interpretations to allow it to use its own judgement in determining which is compliant with the intent of the EBGL.

Workgroup's Recommendations

As the final determination of which legal interpretation is correct lies with the Authority, the Workgroup voted on the premise that each interpretation is legally accurate.

The majority of the Workgroup believes that both the Proposed and Alternative Modifications better facilitate the Applicable BSC Objectives compared against the baseline.

However, the **majority** of the Workgroup believes that the P374 **Alternative** Modification **would overall better facilitate** the applicable BSC Objectives compared with the Proposed Modification and so **should be approved**. This is largely in relation to Applicable BSC Objective (c) as the Workgroup believes that, in comparison to the Proposed Modification, the Alternative does not limit innovation and so better promotes competition in the electricity market.

The minority of the Workgroup believes that by failing to clarify that BSC provisions constituting Article 18 terms and conditions related to balancing cannot be derogated against puts the BSC and Parties granted a BSC derogation at risk of contravening

European Law. The **minority** of the Workgroup therefore believes that the **Proposed** Modification **better facilitates** Applicable BSC Objective (e) compared with the Alternative Modification.

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

Applicable BSC Objective (a)

The **majority** of the Workgroup agree that **both** P374 solutions would have **no discernible impact** on BSC Applicable Objective (a).

The **minority** of the Workgroup believe that the **Proposed** Modification would **better facilitate** BSC Applicable Objective (a), as the changes introduced would likely be beneficial to the NETSO and ELEXON in providing more clarity in fulfilling their obligations under EBGL.

A **minority** also believe that the **Alternative** Modification would be **detrimental** to Applicable BSC Objective (a), as the NETSO and ELEXON would not have clarity in their obligations under EBGL.

Applicable BSC Objective (c)

The Workgroup **unanimously** agree that the **Proposed** Modification is neutral against Applicable BSC Objective (c).

Assuming both legal interpretations are correct, the **Proposed** Modification does not cause detriment to Applicable BSC Objective (c) as it is merely providing clarity as to what BSC Parties are legally able to be granted BSC derogations from. However, in comparison the **Alternative** Modification does not limit the BSC derogations that may be granted to BSC Parties, preferring instead to have each application assessed on a case-by-case basis.

This would be more beneficial for innovation, and therefore competition, thus the **majority** of the Workgroup agree that the P374 **Alternative** Modification would **better facilitate** BSC Applicable BSC Objective (c) in comparison to the **Proposed** Modification.

Applicable BSC Objective (d)

The **majority** of the Workgroup agree that **both** P374 Modifications would have **no discernible impact** on BSC Applicable Objective (d).

The **minority** of the Workgroup believe that the **Proposed** Modification would **better facilitate** BSC Applicable Objective (d), as the changes introduced would likely be beneficial to the NETSO and ELEXON in providing more clarity in fulfilling their obligations under EBGL.

A **minority** also believe that the **Alternative** Modification would be **detrimental** to Applicable BSC Objective (d), as the NETSO and ELEXON would not have clarity in their obligations under EBGL.

Applicable BSC Objective (e)

The Workgroup **unanimously** agree that **both** P374 Modification would **better facilitate** BSC Applicable Objective (e) as they both look to ensure compliance with the EBGL.

Applicable BSC Objectives (b), (f) and (g)

Workgroup members unanimously believe that P374 is neutral against Applicable BSC Objectives (b), (f) and (g).



What are the Applicable BSC Objectives?

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

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

(c) Promoting effective competition in the generation and supply of electricity and (so far as consistent therewith) promoting such competition in the sale and purchase of electricity

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

(e) Compliance with the Electricity Regulation and any relevant legally binding decision of the European Commission and/or the Agency [for the Co-operation of Energy Regulators]

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

(g) Compliance with the Transmission Losses Principle

Does P374 better facilitate the Applicable BSC Objectives?

Obj	Proposed Modification	Alternative Modification
(a)	<ul style="list-style-type: none">Majority neutralMinority positive – additional clarity in fulfilling obligations	<ul style="list-style-type: none">Majority neutralMinority detrimental – is not as effective as the Proposed
(b)	<ul style="list-style-type: none">Neutral	<ul style="list-style-type: none">Neutral
(c)	<ul style="list-style-type: none">Neutral	<ul style="list-style-type: none">Majority positive – less restrictive of derogation arrangements, beneficial to innovation and competitionMinority neutral
(d)	<ul style="list-style-type: none">Majority neutralMinority positive – additional clarity in fulfilling obligations	<ul style="list-style-type: none">Majority neutralMinority detrimental – is not as effective as the Proposed
(e)	<ul style="list-style-type: none">Positive – ensures BSC compliance with EBGL provisions related to derogations and amendments	<ul style="list-style-type: none">Positive – ensures BSC compliance with EBGL provisions related to amendments
(f)	<ul style="list-style-type: none">Neutral	<ul style="list-style-type: none">Neutral
(g)	<ul style="list-style-type: none">Neutral	<ul style="list-style-type: none">Neutral

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Workgroup's Terms of Reference

Specific areas set by the BSC Panel in the P374 Terms of Reference	
a)	How should derogations be treated within the BSC on items related to the balancing terms and conditions?
b)	How should the balancing terms and conditions be treated within the BSC?
c)	Is any other information required to better inform a legal position?
d)	What are the implications of the legal interpretations on the GB market arrangements?
e)	What is the level of risk that is appropriate to take in regards to the processes and legal interpretations?
f)	What changes are needed to BSC documents, systems and processes to support P374 and what are the related costs and lead times?
g)	Are there any Alternative Modifications?
h)	Should P374 be progressed as a Self-Governance Modification?
i)	Does P374 better facilitate the Applicable BSC Objectives than the current baseline?
j)	Does P374 better facilitate the Applicable BSC Objectives than the current baseline?

Assessment Procedure timetable

P374 Assessment Timetable	
Event	Date
Panel submits P374 to Assessment Procedure	13 Dec 2018
Workgroup Meeting 1	20 Feb 2019
Workgroup Meeting 2	24 Apr 2019
Workgroup Meeting 3	07 Jun 2019
Assessment Procedure Consultation	27 Jun – 18 June 2019
Workgroup Meeting 4	25 Jun 2019
Panel considers Workgroup's Assessment Report	12 Sep 2019

Workgroup membership and attendance

P374 Workgroup Attendance				
Name	Organisation	20 Feb 2019	24 April 2019	07 June 2019
Elliott Harper	ELEXON (<i>Chair</i>)	✓	✓	✓
Craig Murray	ELEXON (<i>Lead Analyst</i>)	✓	✓	✓
Garth Graham	SSE (<i>Proposer</i>)	✓	✓	✓
Andy Colley	SSE (<i>Proposer's Alternate</i>)	✓	☎	✓
Simon Sheridan	National Grid ESO	✓	✗	✓
Peter Berry	Calon Energy	✓	✓	✓
Grahame Neale	National Grid ESO	✗	✓	✗
Bill Reed	RWE	✓	✓	✓
Joshua Logan	Drax	✗	✓	✓
Rick Parfett	ADE	✗	✓	✓
Marta Krajewska	Energy UK	✗	☎	✗
John Lucas	ELEXON (<i>Design Authority</i>)	✓	✓	✓
Aditi Tulpule	ELEXON (<i>Legal Counsel</i>)	✓	✓	✓
Steve Wilkin	ELEXON	✓	✓	✗
Leonardo Costa	Ofgem	✓	☎	✗
Jordan Clarke	Ofgem	✓	☎	☎

Appendix 2: Glossary & References

Acronyms

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

Acronyms	
Acronym	Definition
BRP	Balancing Responsible Party
BSC	Balancing and Settlement Code
BSP	Balancing Service Provider
BSCCo	Balancing and Settlement Code Company
CUSC	Configuration and Use of System Code
EBGL	European Balancing Guideline
ENC	European Network Code
ENTSO-E	European Network of Transmission System Operators for Electricity
NETSO	National Electricity Transmission System Operator
NGESO	National Grid Electricity System Operator
NRA	National Regulatory Authority
TSO	Transmission System Operator
WD	Working Day

External links

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

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

External Links		
Page(s)	Description	URL
3	BSC Sandbox Procedure	https://www.elexon.co.uk/bsc-and-codes/bsc-related-documents/bsc-sandbox-procedure/
3	BSC Section H 'General'	https://www.elexon.co.uk/the-bsc/bsc-section-h-general/
3	BSC Section X, Annex X-1 'General Glossary'	https://www.elexon.co.uk/the-bsc/bsc-section-x-annex-x-1-general-glossary/
5	European Balancing Guideline	https://www.entsoe.eu/network_codes/eb/
7	BSC Sandbox (P362)	https://www.elexon.co.uk/mod-proposal/p362/
7	NETSO's original proposal for Article 18 terms and conditions (submitted 18 June 2018)	https://www.nationalgrideso.com/document/117301/download

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External Links		
Page(s)	Description	URL
9	NETSO's amended proposal for Article 18 terms and conditions (submitted 4 April 2019)	https://www.nationalgrideso.com/codes/european-network-codes/meetings/consultation-amended-proposal-ebgl-article-18-terms-and
9	Ofgem's original request for amendment (submitted 4 February 2019)	https://www.ofgem.gov.uk/publications-and-updates/decision-request-amendment-transmission-system-operators-proposal-terms-and-conditions-related-balancing
9	Ofgem's further request for amendment (submitted 4 June 2019)	https://www.ofgem.gov.uk/publications-and-updates/decision-request-further-amendments-transmission-system-operators-proposal-terms-and-conditions-related-balancing-accordance-article-18-commission-regulation-eu-20172195