

Future System Operation Team
Ofgem
10, South Colonnade
Canary Wharf
London
E14 4PU

Electricity Systems Team
BEIS
Abbey 1, 3rd Floor
1 Victoria Street
London
SW1H 0ET

22 September 2022

Dear Sir or Madam,

The future ownership of Elexon

Thank you for the opportunity to respond to this consultation on the future ownership of Elexon. Our full response is in Annex 1.

We broadly support Option 1 in the consultation (ie industry ownership), and would suggest that share ownership be restricted to electricity generation and electricity supply licensees.

However, we would also wish to ensure that no contingent liabilities can arise as a result of being a shareholder under this new ownership model. To this end we would recommend that either an explicit shareholder indemnity be offered, or that a specified (zero) limit of liability be set out in the BSC, the effect of either being broadly consistent with the current ownership arrangements.

I trust you will find this response helpful; however, should you require further clarification of any of the points raised, then please do not hesitate to get in touch.

Yours faithfully,



Richard Sweet
Director of Regulatory Policy

**CONSULTATION ON THE FUTURE OWNERSHIP OF ELEXON
–SCOTTISHPOWER RESPONSE**

1. Do you agree with the proposed criteria to determine the future ownership of Elexon? Please state why.

Yes, we agree with the proposed criteria to determine the future ownership of Elexon.

With regard to the change of ownership process, it is clear that it must not be allowed to interrupt Elexon's BAU operations as that could have serious repercussions for industry; nor should it be allowed to disrupt the FSO delivery timeline.

It is also essential to maintain both independence and accountability; this is something we think best achieved through the industry ownership model.

2. Do you agree that public ownership and industry ownership are the two most credible ownership options? In your view, are there any other ownership options that we should consider, and why?

Yes, we agree that public ownership and industry ownership are the two most credible options. Our preference is for the latter.

3. Do you agree with our stated preference of the potential combinations of BSC parties which could own Elexon if industry ownership were chosen? Please state why.

We agree that each of the combinations of BSC parties suggested in the consultation could reasonably share in ownership of Elexon; however, our own preference would be for ownership to be limited to holders of generation and/or supply licences on a voluntary basis (analogous to the REC Co ownership model).

4. To what extent do you agree with the above analysis of the two main ownership options, public ownership and industry ownership, and our preference for industry ownership?

We strongly believe that Elexon should not be in the public sector for a number of reasons:

- i) The industry response to new requirements can already be slow, due to the burden of code governance processes even when taking into account expected Government reforms. Adding to this with further delays, should Elexon be required to comply with public sector internal controls, could further slow down industry evolution. In addition, such public sector corporate controls (in government bodies) themselves require consultation to be amended¹. This would further hinder Elexon's agility, preventing

¹ If in any doubt, refer by way of illustration only, to [Public Sector Exit Payments: a new controls process for high exit payments - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/publications/public-sector-exit-payments-a-new-controls-process-for-high-exit-payments). We infer from this that similarly restrictive processes might apply to the

swift pivots to expedite appropriate changes to meet the needs of a continuously evolving industry.

- ii) The path to Code Managers under The Code Review is likely to require more authority to be exercised by the code body and a degree of decision-making autonomy that could be at variance with public sector constraints.
- iii) It is very important that this exercise does not hinder Elexon in delivering its BAU services; moving the organisation into the public sector could risk prompting an exodus of highly capable staff on which the industry depends.
- iv) Staff retention also requires flexibility in salaries and conditions of employment, which might not be available in the public sector; this could exacerbate any initial exodus with an inability to attract the right calibre of replacement.
- v) The consultation indicates that there would be no changes to the governance of Elexon. However, BSC Section C.4 affords the Board and Panel a high degree of flexibility and autonomy in the composition of the Board. It is not clear how this would be replicated in the Public Sector scenario, nor indeed how such arrangements could be modified in the way that is provided for under BSC Modification.

We therefore agree that industry ownership is best suited to the purposes of Elexon, noting that restricting ownership to only the main parties concerned (ie suppliers and generators) would be consistent with the model recently established for ownership of RECCo. However, we are also concerned to ensure that the model for share ownership is developed in such a way that the shareholders cannot be held liable, whether individually or collectively, for any additional costs (direct, indirect or consequential) that might arise by virtue of their shareholding(s). For this reason, we believe that the corporate governance arrangements need to include a comprehensive indemnity for owners.

In addition, the ownership should be a right not a licence obligation. This could be achieved through a change to Section C of the BSC and further changes to Elexon's articles.

We agree that the Board of Elexon should continue to:

- have a majority of directors from the electricity industry (refer C.4.1.3(b)) and,
- have two independent directors (refer C.4.1.3(c)), and
- have the Chair of Elexon appointed by the Board (refer BSC C.4.1.8).

However, in our view, there should be four industry NEDs, nominated either directly by the shareholders or by the Industry Panel members (who are voted on by the industry), with two directors being appointed by each of the generator and supplier cohorts. For the avoidance of doubt, we think the board should continue to be comprised entirely of NEDs.

variation of all terms of employment, where the same might require to be changed to reflect the market for suitable personnel

5. To what extent do you agree with our proposal that Elexon should transfer temporarily into the public sector as a subsidiary of the FSO as a last resort, if industry ownership was chosen following consultation but could not be implemented without delaying the creation of the FSO? Please explain why.

We believe it should be eminently possible to implement an industry ownership model without any real risk of delay to the establishment of the FSO; indeed, we would be rather more concerned that overtly contemplating a subsidiary arrangement at this stage risks creating a hostage to fortune, and we would prefer instead to press ahead with ownership featuring on the critical path.

We believe there are a number of ways to reduce this critical path: first, ensuring that licensed suppliers and generators have a *right* to own Elexon, rather than a *licence obligation* mandating share ownership; this would considerably simplify the engagement with licensed parties. Second, the transfer of ownership could be further expedited through an initial transfer (*pro tem*) to one or two volunteer suppliers/generators, who would subsequently be joined in ownership as others also exercised their rights. We believe all this could quite readily be achieved through modifying Section C of the BSC and changing Elexon's Articles of Association.

Nevertheless, in the event the back-up option was to be taken forward, it should include a sunset clause of, say, 2 years, which could always be extended in light of slower than expected progress towards an industry ownership model.

6. Are any other changes required to implement either of the two ownership options?

As the requirement to acceded to, and abide by, the BSC is already enshrined in the generation and supply licences, it may be that extending the roles for both can be most simply achieved through BSC modification. We assume the BSC will need to be modified to set out the approach to share allocation and issuance (ie and to make available sufficient shares for those licensed suppliers or generators to become owners), indeed, all this could be managed urgently if needs be.

7. What are your views on the proposed licence and code changes set out above?

Notwithstanding our other responses, set out above, we have no comment on the proposed licence and code changes as they relate to the NGESO.

8. Have we considered all relevant costs and benefits of these proposals? Please state why.

Apart from the costs and benefits outlined, if the industry ownership model is to be pursued, we are concerned to ensure that the model is developed such that there can be no contingent liabilities as a result of share ownership, consistent with current ownership of Elexon by the ESO. This could consist of an explicit shareholder indemnity or set out as a specified limit of liability in the BSC.

ScottishPower
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