

Centrica plc
Regulatory Affairs
Millstream
Maidenhead Rd
Windsor
SL4 5GD
www.centrica.com

Kate Elsworth
Elexon Ownership Policy Manager
Electricity Governance Reform team
Department for Energy Security and Net Zero
1 Victoria Street
London
SW1H 0ET

Sent by email to: kate.elswood@energysecurity.gov.uk

21 February 2024

Dear Kate

Elexon Transfer Scheme Consultation

This is a non-confidential response to the above consultation on behalf of Centrica Group, which may be shared with other future shareholders.

Thank you for the opportunity to provide comments on the draft Transfer Scheme Document. Our comments on the draft new Articles of Association of Elexon Limited, the proposed modifications to the Balancing and Settlement Code and the draft modifications to industry participants Licences are appended, for your convenience, as our response to the separate statutory consultation *The Future Ownership of Elexon: new electricity supply and generation licence conditions and Balancing and Settlement Code (BSC) changes*.

We note from the December 2023 dated project plan that further drafting and consultation with future shareholders on this Transfer Scheme Document does not appear. We would expect to have the opportunity to review proposed amendments and make additional comments in at least one further round of consultation following this submission.

Transfer Scheme Document

On the Transfer Scheme Document, we have a series of comments and questions, some of which are substantive in nature, whereas others are more procedural or relate to drafting. We therefore set out our comments under these two categories, and headings, below:

Substantive points

1. We note that the Transfer Scheme Document does not include any warranties or indemnities to be given by the Transferor in favour of the Transferees, including fundamental warranties (such as the Transferor having good title to the shares, the shares having been properly allotted and the shares comprising all the issued shares in the Elexon Limited) general warranties (such as those relating to the assets, liabilities, employees and

pensions etc. in Elexon Limited) or indemnities for specific potential liabilities (such as those relating to defined benefit pension schemes).

While we anticipate that DESNZ's, and the Transferor's, position may be that general warranties and/or indemnities are not necessary on the basis that the Transferees are not paying value for the shares and should not be exposed to liabilities within Elexon Limited, we consider that, at least:

- i. the Transferor should provide warranties or other assurance in favour of all the Transferees that it has good title to the shares being transferred, they those shares have been duly allotted credited as fully paid and that all the shares being transferred together comprise all the issued share capital of Elexon Limited at the time of the transfer, in part to ensure the effectiveness of the Scheme (as we do not consider paragraph 3(3) of Schedule 9 to the Energy Act 2023 is intended to operate to enable the transfer of assets which a transferor does not have title to, or would operate to give any kind of comfort that other shares that are not subject to the transfer exist) and in part to ensure there are no amounts to be paid up by the Transferees on shares after the transfer; and
- ii. the Transferor should provide a warranty or other assurance in favour of all the Transferees that nothing has been done by either Elexon Limited or the Transferor which has had, or will in future have, the effect of exposing the Transferees to the liabilities of the Elexon Limited (for example, by passing a resolution to change the unlimited liability status of Elexon Limited or by acting in a way that has or could result in a piercing of the corporate veil of Elexon Limited), to justify the position that more general warranties are not needed as shareholders should not be exposed to the liabilities of the company of which they are shareholders; and
- iii. absent any greater clarity on the proposed future arrangements for the Elexon defined benefit pension scheme members, the Secretary of State should provide all Transferees (and their transferees of the shares in Elexon Limited) with an indemnity against any costs, losses or liabilities suffered or incurred by the Transferees, in their capacity as shareholders in Elexon Limited, as a result of The Pensions Regulator using its "moral hazard" powers to seek any form of financial contribution from them in such capacity, including for example if pensions law were to be amended in future in a way which would increase the risk to Elexon Limited's shareholders of this happening.

For such limited warranties and pensions indemnity to be meaningful to the Transferees, the Transferor and/or the Secretary of State, as appropriate, would need to financially stand behind them, in the case of the Transferor beyond the value of the shares received by it as compensation, in order to provide the Transferees with a remedy for losses or liabilities arising from breach of such warranties or under the indemnity, should they arise. Even though the risk of a breach of such warranties or a claim needing to be made under the indemnity is small, on the basis that these risks are those industry participants would not be exposed to but for their being directed to hold shares in Elexon Limited, it seems appropriate for someone other than the Transferees to bear these risks.

2. Clause 7 (same person in law), specifying that the Transferees will be treated as the same person in law as the Transferor for all purposes connected with the transfer should be deleted, as it unnecessarily confuses the scheme. The Transferor and Transferees are not the same persons in law, and do not need to be for the transfer to take effect (and in fact it would be perverse to treat them as the same when there need to be two distinct legal entities for a transfer of an asset to take effect between them). We also would not wish for there to be any implication that the Transferees have any of the obligations of the Transferor under the scheme itself, including under the obligation to transfer shares or any warranties or other assurances to be provided as requested in point 1 above.

3. Clause 8 (transfer of liabilities), specifying that *“the provisions of this Transfer Scheme shall not have the effect of transferring to the Transferees or imposing on the Transferees any responsibility where the Transferor did not, prior to the Effective Date, itself have the corresponding liability or responsibility”* should be deleted as the underlined words suggest the Transfer Scheme could transfer some pre-existing liabilities of the Transferor to the Transferees (and it is unclear whether these are liabilities relating to the shares, or otherwise). If the shares themselves are fully paid, and assuming neither Elexon Limited nor the Transferor has done anything to expose the Transferor to the liabilities of Elexon Limited, then the Transferees should not assume any liabilities at all in connection with the Scheme. The suggestion that Transferees would assume pre-existing liabilities of the Transferor is not acceptable.

Timing and Procedural points

1. We note that the definition of the *“Effective Date”* currently refers to the transfer scheme coming into effect *“at or about the time at which the last Preparatory Instruments comes into effect.”* This should be expressed explicitly as it is not clear when the transfer scheme occurs.
2. Please may the main operative transfer clause, in clause 2.1 of the Transfer Scheme Document, be re-drafted to ensure absolute clarity about which shares are being transferred to which Transferees. We respectfully submit that it should read: “Subject to the provisions of this Transfer Scheme, on the Effective Date the Transferor shall transfer to each Transferee, which may be a nominated wholly one subsidiary as permitted by [insert SLC reference], identified in the table in the Schedule the number of Shares set out against the name of that Transferee in the table in the Schedule.”
3. We question whether Elexon Limited should be a party to the Transfer Scheme Document, to receive the direction issued to it in clause 2.3 to register the transfer of the shares. We would also suggest that clause 2.3 refer to and confirm the fact that there will be no separate instrument of transfer, and no requirement for such instrument to be stamped or certified as exempt from stamp duty, for the transfer to take effect. In this regard, please can DESNZ confirm that it considers that paragraph 3(3)(b) of Schedule 9 to the Energy Act 2023 will operate to effectively override the requirements of the Companies Act 2006 and relevant Finance Act regarding the need for directors of a company to register a share transfer and not to do so before stamp duty is either paid or certified as not payable.
4. We question the language used in clause 2.3 of the Transfer Scheme Document, that the Scheme will take effect “notwithstanding the time taken by Elexon in registering the transfer and updating its register of members” and suggest it would better read: “irrespective of whether or not Elexon registers the transfer or updates its register of members and irrespective of there being no separate instrument of transfer which is either duly stamped or certified as exemption from stamp duty”. Arguably, this is also what clause 5.2 is seeking to confirm, but that clause would be better if it also expressly referred to the payment of taxes or certification of exemption from taxes. It would also be helpful if the Transfer Scheme Document could expressly confirm that the Transferees will be entitled to exercise all rights attached to the shares, including voting rights, from the time at which the scheme takes effect, without the need for registration of the transfer of the shares.
5. Regarding clause 3 (employees), it is somewhat incongruous for the Transfer Scheme Document to call out, by way of a negative statement, that the scheme does not transfer any employees, but to remain silent on what else it does or does not operate to transfer. We suggest it would benefit all parties for clause 3 to specify instead that the scheme does not

transfer any assets or rights, except for the shares, nor does it transfer any liabilities or obligations. Please also see our substantive point 3 made above.

6. We note that clause 4.1 (contracts) currently only refers to rights and restrictions in contracts to which Elexon Limited is party, but we suggest this should also refer to rights and restrictions to which the Transferor is party.
7. Regarding clause 6 (compensation), and reference to the Transferor's right to receive the nominal value of the shares as compensation for the transfer, please can DESNZ clarify whether, as it is referred to as compensation, DESNZ will satisfy this compensation (in which case, the Transfer Scheme Document would helpfully confirm this) or whether the intention is for each Transferee to pay the Transferor the nominal value of the share transferred to it (in which case, the Transfer Scheme Document should provide for the mechanics of how and when such payments should be made). The Transfer Scheme Document would also usefully confirm that the transfer of the shares will take effect notwithstanding any non-payment by the relevant person(s) of the compensation.

We hope you will find this response helpful, in terms of the procedural and drafting points, and equitable and proportionate in terms of the substantive points raised and how we propose they be addressed.

Yours sincerely

Kirsty Ingham
Head of Industry Transformation, Governance & Forecasting
Centrica Regulatory Affairs & Policy