

By e-mail to: futureretailregulation@ofgem.gov.uk

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Dear Adhir,

Ofgem consultation on the future of retail market regulation – ELEXON Response

The Balancing and Settlement Code (BSC) sets out the wholesale arrangements for electricity balancing and settlement in Great Britain. ELEXON is the code administrator for the BSC. The views expressed in this response are those of ELEXON Ltd, and do not seek to represent those of the BSC Panel or Parties to the BSC.

We note that this consultation is focused on supply licences and that Ofgem is not examining industry codes as part of this consultation. However, we also note that Ofgem intends to consider the applicability of the proposed approach to other parts of the retail market at a later time and that Ofgem welcomes early views from stakeholders on this potentially wider scope.

We are mindful of the [Competition and Markets Authority \(CMA\) summary of provisional decision on remedies](#) and [summary of AECs and remedies](#) published on 10 March 2016 in which the CMA recommends that code administration be made a licensable activity. The CMA indicates that such licences should include targets and incentives for code administrators. This is consistent with the [CMA's provisional findings and possible remedies](#) published in summer 2015 in which the CMA indicated that, in its view, licensing code bodies would 'give Ofgem the power to efficiently monitor performance of these bodies, give them directions and impose sanctions when appropriate'. Ofgem echoed this view at the January 2016 meeting of the BSC Panel¹, expressing a preference to license code administrators so as to re-direct lines of accountability from industry to Ofgem, and ultimately consumers.

Given this potential direction of travel, we offer the following comments on the proposed move to principle-based regulation as contemplated in this consultation.

General Observations

While there may be elements of licences where prescription remains appropriate, we are supportive of a principles-based approach to regulation and a general move away from extensive and detailed prescription in licences.

¹ https://www.elexon.co.uk/wp-content/uploads/2015/10/BSC_Panel_248_Meeting_Slideshow_PUBLIC.pdf

We agree that a principle-based approach is better able to deal with a changing market in which new risks and issues emerge. We also agree that well-defined principles should remain applicable to new circumstances as markets develop, thus reducing the burden of change that might otherwise be incurred in modifying existing, prescriptive provisions.

We agree it is important to avoid prescription via the back door. This should be carefully considered when developing and publishing guidance. It is also important to ensure that detail and prescription is not removed from licences, only to re-appear in other documentation (such as industry codes).

We agree that a move to principle-based regulation should focus on securing better outcomes for consumers and enhancing the flexibility for licensees to innovate.

We note the comments made in the consultation regarding the need for culture change and continuing dialogue between the regulator and the licensee. The proposed approach moves the emphasis away from monitoring compliance with rules and towards the assessment of corporate culture and controls in the context of defined outcomes. As this work progresses, we would welcome the opportunity to explore how this approach can best interface with the flexible, risk-based assurance service we operate in relation to the BSC.

Application to industry codes

As noted in the consultation, the direction of travel for many years has been to provide for certainty by capturing prescriptive detail. The same approach is true of industry codes. This is understandable since industry codes are (in one way or another) multilateral agreements. Some are seen as commercial codes, others as purely technical. However, they all have commercial impacts on the parties to those codes which are ultimately felt by consumers.

Given their commercial implications, industry codes attempt to find a balance between certainty, size and complexity. However, capturing detailed rules and requirements increases the size and complexity of codes, which then become less readable by those without specialist technical knowledge. Some areas of industry codes, particularly those that support interoperability, need detailed prescription. Nevertheless, we believe there is merit in exploring the application of a principles-based approach to industry codes where possible. Such re-worked codes should be smaller, simpler and provide for easier innovation.

We would be happy to discuss our comments. If you would like to discuss any areas of our response please contact me, on 020 7380 4117, or by e-mail at adam.richardson@elexon.co.uk.

Yours sincerely,

Adam Richardson
Design Authority, ELEXON