GL ARTICLE 18 AMENDMENT CONSULTATION – RESPONSE PROFORMA

NGESO invites responses to this consultation by **13:00 28th March 2019**. The responses to the specific consultation questions (below) or any other aspect of this consultation can be provided by completing the following form.

Please complete this form regarding the proposal titled: "**Electricity Balancing Guideline (EB GL) Article 18: Terms and Conditions related to Balancing".**

Please return the completed form to europeancodes.electricity@nationalgrid.com

Respondent:	Garth Graham
Company Name:	SSE Generation Ltd
Does this response contain confidential information? If yes, please specify.	No.

No	Question	Response	NGESO Response

1	Do you agree with the approach taken in the proposal? Please provide rationale.	[See our answer below]	The approach taken in the amended proposal for balancing terms and conditions is believed to be the best and most efficient way of implementing this requirement for the GB market, and further rationale of why this is the case is included in our amended proposal letter. In this proposal we have made every effort to address the feedback from Ofgem in the Request for amendment letter. This letter suggested updates to the detail of the mapping and treatment of SCTs but did not suggest that any fundamental changes to the structure of the proposal. As per Ofgems letter "Implementing the Electricity EU Network codes" dated 18/12/14, the approach of only making necessary changes has been taken. Feedback from other stakeholders is supportive of the approach that has been taken, particularly given that we are already in the midst of balancing services reforms, and our approach means that the way that market participants are required to comply with the GB frameworks does not change. We acknowledge that other TSOs have taken differing approaches to our own, and we would like to highlight that not all TSOs who have had their proposals approved have created a new document to house the Ts and Cs. In fact, Czech Republic have adopted an approach much like our own. They have mapped to existing documentation, and this proposal has been approved by their regulator. Slovakia also have also adopted this approach, although their proposal may not yet be approved. Therefore, it's clear that there is no common EU approach to implementing Article 18 One of the aims of the EBGL is to harmonise electricity markets across Europe. In this area, the EBGL sets out that all TSOs must have terms and conditions for balancing but has not specified that these must be harmonised across Europe. Some areas of the EBGL require all TSOs to come together and develop a single proposal, which is then subject to approval by all regulators. For Article 18 however, each TSO is required to develop their own proposal, and this is subject to approval by their own regulator. This means that there are differences in the approaches from country to country, and

No	Question	Response	NGESO Response
			these differences do not mean non-compliance with the EBGL. We believe that our proposal fulfils the requirements of Article 18 and is the most efficient and appropriate way to achieve compliance.

2	Do you have any comments on the proposal letter?	[See our answer below]	The title of the letter published by Ofgem 4th February 2019 is " Decision to request amendment to the Transmission System Operators' proposal for the terms and conditions related to balancing" For this reason, we have referred to the document as a "request" or "request for amendment" in our proposals and supporting materials. Furthermore, in the decision section of Ofgem's letter on page 2, Ofgem have used the following wording: " We hereby request the relevant TSO to amend the proposed balancing T&C, taking into account the following recommendations". NGESO would like to emphasise that we are very aware that our response to the Request for amendment constitutes a legal requirement and we have carefully considered and acted upon Ofgem's recommendations. However, we would also like to highlight that Ofgem's letter clearly sets out recommendations, and invited NGESO to do further work to ensure that all necessary areas have been covered. Ofgem then have complete discretion in considering our updates proposals and deciding whether the amendments are appropriate and adequate. With regard to the feedback given on the A16.6 exemption proposal, we would like to note that the full quote included in the amended proposal letter is as follows: *"The price of the balancing energy bids or integrated scheduling process bids from standard and specific products pursuant to paragraph shall not be predetermined in a contract for balancing capacity. A TSO may propose an exemption to this rule in the proposal for terms and conditions related to balancing set-up pursuant to Article 18."* This quote includes the information on timing that has been highlighted in yellow in the response below. No effort was made to mislead the reader on the requirements of the EBGL. NGESO's interpretation of this requirement is that the amended proposal submitted under Article 6(1) constitutes a part of the proposal to be developed by NGESO under Article 18 i.e. references to the "proposal" under EBGL are effectively to the proposal and any amendments to it in the context of creating the initial terms and conditions. Therefore, in our view, the exemption can be proposed at either stage. For this reason we have included our proposal for exemption in the Article 18 letter. The reasoning for our decision to do this is based upon the news of the capacity market

No	Question	Response	NGESO Response
			suspension, and this development came to light in the intervening period between the original proposal and the amended proposal. Having proposed the exemption in our amended proposal, we recognise that for the exemption to apply, further details and a justification are required to be provided to Ofgem in order that they are able to approve. We intend to provide this information to Ofgem.
3	**Annex 1**: Do you have any comments on the mapping?	[See our answer below]	This stakeholder feedback includes the following quote from Ofgem's request for amendment letter: *"The mapping in the TSO submission should be reviewed to include all the provisions in the GB regulatory framework that set obligations on BSPs and BRPs"*. When reading this line in context of the wider context of Ofgem's letter, NGESO have interpreted it to mean that the mapping should include all provisions in the GB regulatory framework that set obligations for BSPs and BRPs which the terms and conditions "shall contain" or "may include" under Article 18. This is what was completed when reviewing the mapping, although we acknowledge that feedback from stakeholders through this consultation has led to some further updates to the mapping. EBGL only covers terms and conditions for Frequency Restoration Reserves and Replacement Reserves products and so we believe that a mapping for other services including FCR is not required. Please see also our response to your points on question 1 in relation to the form of our Article 18 proposal.
4	**Annex 2:** Do you have any comments on the summary of changes to the mapping?	[See our answer below]	-Please see our response to your points on question 3

No	Question	Response	NGESO Response
5	**Annex 3:** Do you have any comments on the proposed changes to the code governance process?	[See our answer below]	Our proposal is that the mod processes are updated to ensure that all EBGL requirements are complied with. This may mean that in certain cases the self-governance and fast track routes cannot be used. We have set out our thinking for how this might be implemented into the codes but recognise that the detail will need to be thought through in the context of a modification proposal, and by workgroups such as the P374 workgroup. The intention is that in combining the processes the requirements of both the national code modification process and the EBGL amendment process will be met and delivered in terms of consideration and decision. of both We believe that our proposal in Annex 3 meets these requirements in principle, with further detail to be worked out in the relevant workgroups. The SCTs that we have included in the mapping are those which fall into the categories of Replacement Reserves (RR) and Frequency Restoration Reserves (FRR). We interpret products falling into the category of Frequency Containment Reserves (FCR) as out of scope of Article 18. This is because FCR products are not defined or covered by the EBGL, other than when mentioned in the context of settlement or cross-zonal capacity. As with the approach to amend the national code amendment process so it is compliant with the EBGL requirements, the STC variation provisions will need aligning so that for a variation to the Art 18 T&C to be effective it must be compatible with the EBGL requirements.
6	**Annex 4:** Do you have any comments on the proposed changes to the standard contract terms?	[See our answer below]	Feedback has been responded to in previous questions

No	Question	Response	NGESO Response
7	**Annex 5:** Do you have any comments on the proposed implementation timelines?	[See our answer below]	Article 5.5 of the EBGL says that the proposal for terms and conditions or methodologies shall include a proposed timescale for implementation, and that this implementation timescale shall be no longer than 12 months after the approval by the relevant regulatory authority. In the amended proposal NGESO have proposed an implementation timeline of 10 months following approval by Ofgem. As stated in our response to your points on question 2, NGESO's interpretation of this requirement is that the amended proposal submitted under Article 6(1) constitutes a part of the proposal to be developed by NGESO under Article 18, and so it is our view that we are permitted to include an implementation timeline as part of the amended proposal. Although Ofgem do not directly mention an implementation timescale in their request for amendment, they advise that "it is important that the necessary code modifications are initiated". They also set out recommendations for the treatment of SCTs in relation to Article 18. This means that the nature, scope and so timeframe of the original proposal has changed. The proposed implementation timescale, in order for the relevant process changes to be implemented into GB processes, recognises this. As it is possible to avoid a "short-term incompatibility" between the national framework and EU law, we would like to achieve that by including an implementation timescale. We believe any incompatibility has the potential to cause confusion for stakeholders and lack of clarity and transparency as to what the change process is. Thus, we maintain that an implementation timeline is an important and necessary aspect of our amended proposal.

No	Question	Response	NGESO Response
8	Do you have any other comments in relation to the proposal?	[See our answer below]	The SCTs that we have included in the mapping are those which fall into the categories of Replacement Reserves (RR) and Frequency Restoration Reserves (FRR). We interpret products falling into the category of Frequency Containment Reserves (FCR) as out of scope of Article 18. This is because FCR products are not defined or covered by the EBGL, other than when mentioned in the context of settlement or cross-zonal capacity.

[The formatting of the table is not conducive to the provision of detailed answers to the questions posed – hence why we are setting out our answers to the eight questions below.]

Q1 Do you agree with the approach taken in the proposal?

Please provide rationale.

The general approach suggested by the GB TSO (NGESO) is not helpful to Balancing Responsible Parties ('BRP') or Balancing Service Providers ('BSP') as they have failed to produce meaningful, actual, terms and conditions related to balancing for either BRPs or BSP.

It is our understanding, from the '*All NRA process on Electricity Balancing GL*' presentation given to the relevant (EU) Stakeholder Committee[1] meeting on 5th March 2019, at slide 5, that only six[2] (out of the 28) Member State NRAs have approved the relevant Article[3] 18; of the Electricity Balancing Guideline ('EBGL') 2017/2195, dated 23 November 2017; terms and conditions related to balancing, whilst two (GB and Sweden) are with the relevant NRA(s) for approval.

In this regard we understand that in those six Member States that the TSOs have produced meaningful, actual, terms and conditions related to balancing (for BSPs and BRPs) such as in the case of France, which can be found at:

https://clients.rte-france.com/lang/fr/clients_producteurs/services_clients/regles.jsp

This stands in stark contrast to the TSO's 28th February 2019 proposition which fails to set out all the requirements, obligations or provisions[4] necessary for a BSP or BRP seeking to participate in balancing in GB (be they GB market participants or market participants in other Member States) to clearly understand what their actual terms and conditions related to balancing are.

As such the TSO's 28th February 2019 proposition fails to comply with the legal requirement placed upon the TSO by the NRA, for the reasons we detail further in our answer to Q3 ('mapping') below.

Q2 Do you have any comments on the proposal letter?

[1] Established by ACER in accordance with Article 9 (of EBGL).
[2] Austria, Czech Republic, France, Greece, Italy and the Netherlands.
[3] References to 'Article' in this response are to Articles of the EBGL, unless otherwise stated.
[4] The NRA's letter of 4th February 2019 references all three – provisions, requirements and obligations – in the context of the Article 18 terms and conditions related to balancing.

We note that the approach suggested in the 28th February 2019 letter is that the TSO is responding to a 'request' from the NRA.

For the avoidance of doubt, the legal position is that the TSO is responding to a clear legal 'requirement' from the NRA to amend, according to Article 6(1)[5], the TSO's 18th June 2018 (Article 5(4) (c)) proposal for terms and conditions related to balancing.

As such, there is no 'recommendation' per se set out in the NRA's letter of 4th February 2019, but rather a legal 'requirement' on the TSO to amend their Article 5(4) (c) 18th June 2018 proposal in the way set out, and required, by the NRA in the 4th February 2019 letter.

Article 16(6) 'Request for Exemption'.

We note the reference; at the end of the 28th February 2019 letter; to the TSO now (belated) seeking to make a request for an Article 16(6) exemption.

In this regard the wording from Article 16(6) that the TSO quotes in their letter appears to inadvertently mislead the reader in that it does not include the timing aspect.

The full quote, as follows (where the blue highlighting is what the TSO quoted) make the position clear:

> "*The price of the balancing energy bids or integrated scheduling process bids from standard and specific products pursuant to paragraph 4 shall not be predetermined in a contract for balancing capacity. A TSO may propose an exemption to this rule in the proposal for the terms and conditions related to balancing set-up pursuant to Article 18. Such an exemption shall only apply to specific products pursuant to Article 26(3)(b) and be accompanied with a justification demonstrating higher economic efficiency*."

As can be seen from the yellow highlighted part from the full quote such a request for an exemption, under Article 16(6), can only be made "*in <u>the proposal for the terms and conditions</u> related to balancing set-up pursuant to Article 18*" [emphasis added] which was submitted by the TSO on 18th June 2018 – this the TSO failed to do.

We make four points on this matter.

Firstly, the TSO; back in the spring and early summer of 2018, as it developed its Article 5 (4)(c) proposal; took the deliberate decision <u>not</u> to make such a request for an Article 16(6) exemption: there was no impediment upon the TSO preventing it from doing so at that time (18th June 2018).

This was confirmed by the TSO in their recent response[6] to questions posed by stakeholders in the 13th March 2019 Webex event held halfway through this consultation, when the TSO started that:

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[5] "Where one or several regulatory authorities in accordance with Article 37 of Directive 2009/72/EC <u>require</u> an amendment in order to approve the terms and conditions or methodologies submitted in accordance with paragraphs 2, 3 and 4 of Article 5, the relevant TSOs shall submit a proposal for amended terms and conditions or methodologies for approval within two months following <u>the requirement</u> from the relevant regulatory authorities…." [emphasis added]

[6] https://www.nationalgrideso.com/document/140136/download

> "*The [Article 16(6)] exemption proposal Was not included as part of our [TSO] original [18th June 2018] proposal because our intention was to implement the requirement*."

The TSO went on to say that:

> "*However, given the uncertainty arising from the [November 2018] suspension of the Capacity Market, NGESO [the TSO] felt it was the right thing to do to pursue this [Article 16(6) exemption*."

These two statements reinforce that the reason for the TSO now seeking an Article 16(6) request for exemption was based on circumstances arising after the Article 5(4) (c) deadline. The EBGL drafters did not include an ex post change procedure to take account of changes after the Article 5(4) (c) deadline had passed. To do so now would not only run counter to the EBGL but also give rise to regulatory risk that further changes may be made, after the requisite deadline(s) pass.

Secondly, it must be recognised that procedurally the TSO is now required, according to the letter from the NRA (to the TSO) on 4th February 2019 (as per Article 6(1)) to "*submit <u>a proposal for amended terms and conditions</u> or methodologies for approval within two months following the requirement from the relevant regulatory authorities….*" [emphasis added].

This is an entirely different procedure to the Article 5(4) (c) "*proposal for the terms and conditions*" (which the TSO submitted on 18th June 2018).

The drafters of the EBGL were clear as to when an Article 16(6) exemption request was to be submitted by the TSO – namely "*in the proposal for the terms and conditions related to balancing set-up pursuant to Article 18*" as per Article 5(4) (c) stage – and it's not now, at the Article 6(1) "*proposal for <u>amended</u> terms and conditions*" stage.

Thirdly, there is no ability, within the relevant Articles 4, 5 or 6, for the TSO to seek (or, importantly, for the NRA to grant) a late request for an Article 16(6) exemption which is submitted, in this case, some nine months after the deadline (which was a deadline the TSO was fully aware of at least six months prior to the 18th June 2018 submission date of its Article 5(4) (c) "*proposal for the terms and conditions related to balancing*").

Fourthly, it is important to recognise that the TSO is required; in its forthcoming Article 6(1) "*proposal for <u>amended</u> terms and conditions*" related to balancing; to only submit a proposal which addresses those amendments <u>required</u> by the NRA "*in order* [for the NRA] *to approve the terms and conditions"* related to balancing.

The TSO is not free to make any additionally amendments, to the Article 5 (4) (c) proposal, over and above those required by the NRA as per Article 6(1).

Again, the drafters of the EBGL are, quite rightly, clear on this as they have set out; in Articles 4, 5 and 6; the procedure to be followed.

If this were not the case, then it would open up a '*moral hazard*' situation whereby a TSO could submit a (deliberately?) incomplete Article 5 (4) (c) "*proposal for the terms and conditions related to balancing*" in the expectation (nay certainty?) that as it was incomplete the NRA would have no option but to require an Article 6(1) "*proposal for <u>amended</u> terms and conditions*" from the TSO and then the TSO could submit the complete proposal (upon which the NRA could not then be able to require further amendment(s) in accordance with Article 6(1) as this relates to the initial Article 5 (4)

(c) proposal and not any Article 6(1) amended proposal, as required by the NRA, as this could (would?) frustrate the two month, NRA decision, timeline).

Put another way, by way of illustration – if the Article 5 (4) (c) "*proposal for the terms and conditions related to balancing*" contains, say, ten items, and the NRA states that items 7, 8, 9 and 10 requires (as per Article 6(1)) to be amended by the TSO in an Article 6(1) "*proposal for amended terms and conditions*" then the TSO is not free (in that Article 6(1) amended proposal) to (i) also amend items 1, 2, 3, 4, 5 or 6 or (ii) propose to amend the proposal by including any further item(s) 11 (or 12 etc.,).

If this were to be allowed then the whole proposition, that the NRA had before it, in the TSO's "*proposal for amended terms and conditions*", would be materially different to that which the NRA required (as per Article 6(1)) the TSO to submit to it (the NRA) in order to approve the terms and conditions related to balancing: it would make a travesty of the process.

In this regard we note that the NRA's letter of 4th February 2019 makes no reference whatsoever to the NRA requiring an Article 16(6) request for exemption to be submitted, by the TSO in the Article 6(1) "*proposal for amended terms and conditions*", in order for the NRA to provide its approval of the proposed terms and conditions related to balancing.

Therefore, in our view, the TSO is not allowed to take a '*flight of fancy*' and add in any additional item(s), over and above those the NRA set out (in the 4th February 2019 letter) that they required in order to approve the (Article 18) terms and conditions related to balancing, especially where (as in the case of an Article 16(6) request for exemption) there was already a legal deadline set within EBGL for such a situation (namely, as set out in Article 16(6), in the 18th June 2018 Article 5 (4) (c) "*proposal for the terms and conditions related to balancing*").

Furthermore, we would point out in passing that we understand that the TSO had made representations to the NRA over the intervening period between 18th June 2018 and 4th February 2019 about the TSO's proposal as, for example, the NRA stated[7]. If the matter of the Article 16(6) exemption was of importance to the TSO then, presumably, the TSO made their case about this to the NRA who, by virtue of not including this in the items it (the NRA) required, in its 4th February 2019 letter, the TSO to amend (in order that the NRA could approve the said terms and conditions) means it cannot be raised at this (late) stage in the proceedings.

We therefore conclude, in respect of these four points, that the TSO could perhaps be considered to be acting *ultra vires* in seeking to make an Article 16(6) request for exemption at this time and that the NRA could, likewise, perhaps be acting *ultra vires* if it were to accept or grant or approve this Article 16(6) request for exemption in this case.

Notwithstanding the above, we note that the "*justification demonstrating higher economic efficiency*" (highlighted in purple in the Article 16(6) quote above) has not been provided by the TSO in either the 28th February 2019 letter or in the 45-minute *Webex* held by the TSO on 13th March 2019 event during the consultation period[8]. Therefore, it is not possible for any respondent to this 28th February 2019 consultation to meaningfully provide any comments as to the veracity of any TSO justification or the merit for the granting of an exemption (if it was legally permissible for the NRA to

[7] Page 2 of the 4th February 2019 letter "We furthermore engaged with the Electricity System Operator (ESO) and Elexon to clarify our understanding of the proposed balancing T&C."

[8] Details on the questions posed by stakeholders and the answers provided by the TSO can be found in Appendix 1 to this consultation response.

do so which, as we have set out above, is not now possible as the legal deadline has past). In this respect it would appear that the TSO has not complied with ensuring transparency (as required in Article 3(2)(b)).

Finally, we note that the 28th February 2019 Article 16(6) request for exemption:

(i) was not subject to an Article 10 compliant public consultation; and
(ii) was not "*accompanied with a justification demonstrating higher economic efficiency*[9]"

Accordingly, a question that arises in this situation is whether this Article 16(6) request for exemption proposal is defective.

Q3 Annex 1: Do you have any comments on the mapping?

Part (b) on page 2 of the NRA's 4th February 2019 letter sets out that the NRA requires of the TSO that:

> "*The mapping in the TSO submission should be reviewed to include <u>all the provisions in the GB regulatory framework that set obligations on BSPs and BRPs</u>*".

The mapping in Annex 1 of the 28th February 2019 TSO proposition demonstrably fails entirely to comply with this legal requirement.

For example, many of the provisions within the BSC Code Subsidiary Documents (identified[10] as such in Section H[11] of the BSC) that set obligations on BSPs and / or BRPs are not reference anywhere in the Annex 1 mapping.

That there are obligations, within the BSC Code Subsidiary Documents, on BSPs and / or BRPs, is clear from Section H itself, at paragraph 1.2.3:

> "*The [BSC] Code also refers to and creates obligations in respect of Code Subsidiary Documents*".

Equally, it is beyond question that the BSC Code Subsidiary Documents form an integral part of the GB regulatory framework related to balancing.

Furthermore, the mapping in Annex 1 only refers to (incomplete) terms and conditions regarding just three; namely STOR, FFR and FR; of the (numerous) balancing Specific Products for GB.

Where within the TSO's 28th February 2019 proposition are the (complete) terms and conditions to be found for the other GB balancing services; identified by the TSO (for GC0114 purposes); such as Mandatory frequency response, Commercial Frequency Response Service, Enhanced frequency response, Commercial Frequency Management Service, Demand Turn Up, BM Bids & Offers and Fast Start?

Given this, how can the TSO's Annex 1 mapping be said to "*include all the provisions <u>in the GB regulatory framework that set obligations on BSPs and BRPs</u>*" [emphasis added] when so many of the provisions are patently missing from the Annex 1 mapping.

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[9] Article 16(6).
[10] See, for example, the references to 'provisions' being contained within Code Subsidiary Documents as stated in (Section H) paragraphs 1.5.1, 1.5.2 and 1.5.3.
[11] https://www.elexon.co.uk/documents/bsc-codes/bsc-sections/bsc-section-h-general-2/

It is also clear, from the complete Standard Contract Terms for STOR, FFR, and FR that there are detailed obligations / provisions / requirements in those contractual terms and conditions which relate to balancing (that BRPs and / or BSPs have to comply with) which are missing from the Annex 1 mapping.

We note the requirement set by the NRA; at point (c) in their 4th February 2019 letter; on the TSO that:

> "*The relevant provisions contained within the Standard Contract Terms (SCTs) and required for compliance with Article 18, need to be transposed into the GB network codes so that we can have a clear and transparent role in approving and amending them in the future*."

However, the TSO is suggesting in their 28th February 2019 proposition, as referenced in the Annex 1 mapping, that only certain parts of those Standard Contract Terms for STOR, FFR, and FR; and thus only <u>some</u> (and not all) of the "*provisions in the GB regulatory framework that set obligations on BSPs and BRPs*"; form the terms and conditions related to balancing for GB.

Taking, as an example, the Annex 1 mapping for Short Term Operating Reserve ('STOR') it can be seen that in the view of the TSO only a limited number of all the obligations / requirements / provisions within the requisite Standard Contract Terms are, apparently, related to balancing.

However, as the TSO set out in their GC0114[12] proposal, STOR in its entirety is just one of a number of 'Specific Product' (as defined in Article 2) in GB for the purposes of balancing – see the table below for the TSO's own mapping (which they published for the GC0114 proposal purposes) of the various GB balancing services in terms of being either a Standard Product or a Specific Product, with STOR highlighted in yellow.

Finally, it is of concern to us that in answering to the question posed (at the 13th March 2019 Webex) by stakeholders *"will the SCT as published for each specific product constitute the entire terms and conditions in totality for that specific product*" that the TSO responded[13] that:

> "*Not in totality, SCTs are following the same process as codes. The mapping highlights which parts of the SCTs are relevant to A18. Looking at the best way to make it clear when changes to SCTs would need to comply with Article 18 of the EBGL.*" [and]
>
> "*We [the TSO] will work to ensure that its very clear which elements of the SCTs are relevant to Article 18 of the EBGL*."

It has always been our understand that the terms and conditions related to balancing, as required by EBGL would be in totality – that is containing all the necessary terms and conditions with the associated obligations such that as a BSP or BRP we could clearly see what was expect of us and of the TSO.

However, the TSO's 18th June 2018 proposal as well as its 28th February 2019 letter and the 13th March 2019 Webex stakeholder discussion[14] points to the TSO thinking that it is required to produce a 'methodology', rather than 'terms and conditions', for the purposes of Article 18. EBGL uses both terms, but they are not interchangeable: a methodology is a high-level document approved by the

[12] https://www.nationalgrideso.com/codes/grid-code/modifications/gc0114-system-operation-guideline-prequalification-processes

[13] https://www.nationalgrideso.com/document/140136/download

[14] See Appendix 1 to this response.

NRA (from a TSO proposal) setting out principles to be followed by the TSO. However, the terms and conditions are not the same as a methodology: as is clear by the detail, set out in Article 18, of the numerous requirements that must be included within those terms and conditions related to balancing – a level of detail which is not suggested in EBGL being required where 'methodologies' are concerned.

Balancing Services		Proposed Final ProduType		Estimated activation date of final product type	Current Product Type
Contract Type	Service	Group	Type		
Mandatory frequency response	Primary response	FCR	Specific	2022+ (TBC)	GB existing
	High response	FCR	Specific	2022+ (TBC)	GB existing
	Secondary response	FRR	Specific	2022	GB existing
Commercial Frequency Response Service	Primary response	FCR	Specific	2022+ (TBC)	GB existing
	High response	FCR	Specific	2022+ (TBC)	GB existing
	Secondary response	FRR	Specific	2022	GB existing
Firm frequency response (FFR)	Primary response	FCR	Specific	2022+ (TBC)	GB existing
	High response	FCR	Specific	2022+ (TBC)	GB existing
	Secondary response	FRR	Specific	2022	GB existing
Enhanced frequency response	Enhanced frequency response	FCR	Specific	2022+ (TBC)	GB existing
Commercial Frequency Management Service	N/A	FCR	Specific	2022+ (TBC)	GB existing
STOR	Delivery < 15 minutes	FRR	Specific	2022	GB existing
	Delivery > 15 minutes	RR	Specific	2020	GB existing
Demand Turn Up	Delivery < 15 minutes	FRR	Specific	2022	GB existing
	Delivery > 15 minutes	RR	Specific	2020	GB existing
Fast Reserve		FRR	Specific	2022	GB existing
BM Bids and Offers	Delivery < 15 minutes	FRR	Specific	2022	GB existing
	Delivery > 15 minutes	RR	Specific	2020	GB existing
Fast Start		FRR	Specific	2022	GB existing
MARI		FRR	Standard	2021	Draft Standard Product
TERRE		RR	Standard	H2 2019	Draft Standard Product

Thus, the Annex 1 mapping from the TSO suggests that the only 'relevant' terms and conditions related to balancing in respect of obligations / requirements / provisions within those STOR Standard Contract Terms[15] for a BSP or BRP in GB (in the order shown in the Annex 1 mapping) are: 2.2, 2, 3.13.1, 3.13.2, 4.7.4, 3.13, 4.3 and 3.6.

So, if this is the case, where exactly are, for example, the GB terms and conditions related to balancing, in respect of the STOR specific product, to be found by the BSP or BRP for:

1.1 CONTRACT FRAMEWORK
1.3 FRAMEWORK AGREEMENTS
1.4 STOR CONTRACTS
1.5 STOR UNITS AND CONTRACTED STOR UNITS
3.2 SERVICE AVAILABILITY
3.3 SERVICE INSTRUCTION
3.4 SERVICE DELIVERY
3.5 PAYMENT
3.8 MAINTENANCE AND STATUS OF CONTRACTED STOR UNITS
3.9 WEEKLY AND ANNUAL LIMITS AND REVISION OF PRICE
3.10 THIRD PARTY CLAIMS
3.11 PROVISION OF OTHER SERVICES
3.12 COMMUNICATIONS
4.4 LIMITATION OF LIABILITY
4.5 TERMINATION
4.6 ASSIGNMENT
4.8 WAIVER
4.9 NOTICES
4.10 RESERVE PROVIDER'S AGENT
4.11 DISPUTE RESOLUTION
4.12 JURISDICTION
4.13 GOVERNING LAW
4.14 FORCE MAJEURE
4.15 SEVERANCE OF TERMS
4.16 ENTIRE AGREEMENT
4.17 THIRD PARTY RIGHTS
4.18 ANTI-BRIBERY
4.19 EMR 64
SECTION 5 INTERPRETATION AND DEFINITIONS
5.1 INTRODUCTION
5.2 INTERPRETATION AND CONSTRUCTION
5.3 DEFINITIONS
SECTION 6 FORMULAE
Availability Prices Adjustment Formula
Payment Calculations – BM Participation
Payment Calculations – Non BM Participation
SECTION 7
FORMS
BM Participation
Non BM Participation

[15] https://www.nationalgrideso.com/sites/eso/files/documents/STOR%20SCTs%20-%20Issue%2011.pdf

Without these additional items listed above it cannot credibly be argued that the TSO has produced the actual complete terms and conditions related to balancing for STOR (or indeed, similarly, for FFR or FR, as set out in the Annex 1 mapping or those that are missing[16]from the mapping, as we noted above) needed by BSPs or BRPs in order for them to understand "*all the provisions in the GB regulatory framework that set obligations on BSPs and BRPs*" [emphasis added].

Notwithstanding the above, we note the statement provided by the TSO in response[17] to questions raised during its stakeholder discussion of its 28th February 2019 consultation document that:

> "*We [the TSO] have stated that the mapping document does not constitute compliance with Article 18, and is purely a tool to demonstrate where compliance can be found.*"

For BSPs and BRPs the need is to find, as the NRA has stated, within the mapping "*all the provisions in the GB regulatory framework that set obligations on BSPs and BRPs*". It is therefore of concern that this appears not to have been done and leaves the BSPs and BRPs struggling to locate the GB terms and conditions related to balancing that set out the obligations they need to show compliance against.

Q4 Annex 2: Do you have any comments on the summary of changes to the mapping?

We note that the changes to the mapping, provided by the TSO in its 28th February 2019 proposition, fails to comply with the NRA's legal requirement for the TSO to set out *"all the provisions in the GB regulatory framework that set obligations on BSPs and BRPs"* for the reasons we detail in our answer to Question 3 above.

Q5 Annex 3: Do you have any comments on the proposed changes to the code governance process?

We note the TSO's proposed changes to the code governance process, in Annex 3 of the 28th February 2019 proposition, to reflect (as the TSO sees it) the requirements for all amendments to the terms and conditions related to balancing to follow the procedure set out in Articles 4, 5, 6, and 10.

We have set out in great detail our position on this topic in our (BSC) P374 proposal (which is referenced in Annex 3); along with our detailed responses provided to the BSC Panel (which includes a representative of the TSO and NRA) in November and December 2018 as well as the P374 workgroup meetings (at which the TSO and NRA were represented); as well as our detailed correspondence with the TSO and NRA on this matter via numerous emails over the summer, autumn and winter period - for the sake of brevity we avoid repeating in detail those arguments we have previously provided to the TSO and NRA here. However, we wish the TSO and NRA to take all those comments that we have provided previously (as well as in this response) on this topic into account here.

We will consider in due course any Grid Code, CUSC, BSC and Distribution Code change proposals necessary to ensure that the TSO complies with the NRA's requirement that:

[16] Such as Mandatory frequency response, Commercial Frequency Response Service, Enhanced frequency response, Commercial Frequency Management Service, Demand Turn Up, BM Bids & Offers and Fast Start

[17] https://www.nationalgrideso.com/document/140136/download

> "*The relevant provisions contained within the Standard Contract Terms (SCTs) and required for compliance with Article 18, …[are] to be transposed into the GB network codes so that we can have a clear and transparent role in approving and amending them in the future*."

Notwithstanding the above, we would note that the Annex 3 proposition does not appear to reflect all the requirements set out in EBGL as regards amendments to the terms and conditions related to balancing; such as the role of the TSO in terms of the provision of detailed justification and the NRA in terms of making a decision (in, for example, the context of Self Governance, Fast Track changes etc.,) or the one month consultation period (in, for example, the context of urgent proposals).

We further note that the current Standard Contract Terms for STOR, FFR and FR identified by the TSO in the Annex 1 mapping includes variation provisions; such as the 'special conditions'[18] provision; which, on the face of it, allows the TSO and contracting party (or parties) to amend any of those Standard Contract Terms (which, as the TSO states in its Article 5 (4) (c) and Article 6(1) proposals, are terms and conditions related to balancing).

For the avoidance of doubt, such Standard Contract Terms (or similar) variation provisions would not be compatible with the amendment procedure; set out in Articles 4, 5, 6 and 10; that applies to all terms and conditions related to balancing (which, as per the TSO's Annex 1 mapping, includes those for STOR, FFR and FR).

Finally, we note the statement provided by the TSO in response[19] to questions raised during its 13th March 2019 Webex that:

> "*our [TSO 28th February 2019] proposal is that when there is an amendment, the consultations required for the code change process and the A18 process be combined*." [emphasis added]

However, the criteria against which national network code amendments are considered (such as the Applicable Code Objectives) are not the same as the criteria against which any amendment of the terms and conditions related to balancing must be considered against. The TSO's suggestion of a combined process would be fatally flawed if it's not based on the separate applicable criteria for considering the amendment in question.

Q6 Annex 4: Do you have any comments on the proposed changes to the standard contract terms?

For the reasons we detail in our answer to Questions 3 and 5 above, there are serious deficiencies in respect of the proposed approach (including changes) in the context of the Standard Contract Terms and the legal requirement for the TSO to publish, in the terms and conditions related to balancing, "*all the provisions in the GB regulatory framework that set obligations on BSPs and BRPs*".

Q7 Annex 5: Do you have any comments on the proposed implementation timelines?

For the detailed reasons we set out at 'Request for Article 16(6) Exemption' under Question 2 above, it is not possible in our view for the TSO to now seek to amend the implementation timeline that it

[18] See, for example, paragraphs 1.3.1, 2.7.7, 2.9.2, 2.9.4, 4.2.13, 4.2.21(a) and page 84 (definition) of STOR for references to 'special conditions'.
[19] https://www.nationalgrideso.com/document/140136/download

proposed, in its 18th June 2018 submission to the NRA, which was immediately[20] upon a decision from the NRA.

We also note that the NRA's letter of 4th February 2019 makes no reference whatsoever to the NRA requiring from the TSO; in order for the NRA to approve the TSO's proposed (Article 18) terms and conditions related to balancing; any amendment in terms of implementation, within the TSO's forthcoming Article 6(1) "*proposal for amended terms and conditions*".

It is important to recognise that Article 5(5) deals with implementation timescales for the Article 5(4) (c) proposal concerning the Article 18 terms and conditions related to balancing.

Article 5(5) states that:

> "*The* [Article 5 (4) (c)] *proposal [submitted by the TSO] for terms and conditions or methodologies shall include a proposed timescale for their implementation and a description of their expected impact on the objectives of this Regulation. The implementation timescale [proposed by the TSO, as per the preceding sentence] shall not be longer than 12 months after the approval by the relevant regulatory authorities, except where all relevant regulatory authorities agree to extend the implementation timescale or where different timescales are stipulated in this Regulation [which, in the case of Article 18, is "at least one month before the application" (but not implementation?) as set out in Article 12 (3) (g)]* ". [emphasis added]

The TSO's Article 5 (4) (c) proposal, of 18th June 2018, for the terms and conditions related to balancing had to include (and did include) a proposed timescale and this was not longer than 12 months after the approval by the relevant NRA (in this case Ofgem); noting that the NRA has not agreed to extend the implementation timescale beyond 12 months; although it was not at least one month before the application (but not implementation?) of those NRA approved terms and conditions.

Therefore, we do not see how it is legally permissible for the TSO to seek (or, importantly, the NRA to grant) a ten month 'extension' to the original implementation timescale that was, as per Article 5(5), proposed by the TSO in its 18th June 2018 Article 5 (4) (c) submission to the NRA; especially where, as in this case, the NRA has not, in its Article 6(1) 4th February 2019 letter, required such an amendment (to the TSO's 18th June 2018 Article 5 (4) (c) proposal) in order for the NRA to approve it.

Notwithstanding the above, we note that the proposed national network code changes suggested by the TSO in Annex 5 should not prevent the application of the terms and conditions related to balancing from occurring on or before 4th July 2019; this being one month (as per Article 12 (3) (g)) after the 4th June 2019 deadline for the NRA to approve the TSO's Article 6(1) amended proposal submitted in response to the NRA's 4th February 2019 letter.

[20] As per page 2 of the 18th June 2018 letter "As this proposal for the Terms and Conditions related to Balancing utilises the existing frameworks, there is no need for implementation following approval. Similarly, Article 5 (5) of the EB GL states that the proposal for terms and conditions should include a timescale for their implementation. The governance processes in place for the existing frameworks already encompass implementation timescales and therefore it is not necessary to propose anything additional in this respect."

If there is any short-term incompatibility between, for example, the national network codes[21] governance requirements and EU law, as set out in this case in Articles 4, 5, 6 and 10, then it is clear in law which prevails (and thus which the TSO, NRA and other stakeholders have to follow).

A further delay to implementation beyond 4th July 2019 would not be necessary or warranted and could, furthermore, impede the delivery of Project TERRE as it would introduce uncertainty for stakeholders as to what are the terms and conditions for that balancing standard product (as the national implementation could be delayed, according to the TSO in Annex 5, till April 2020 which is four months after Project TERRE is due to 'go live'.

Q8 Do you have any other comments in relation to the proposal?

We note the statement provided by the TSO in response[22] to questions raised during its 13th March 2019 Webex that:

> "*In the [TSO 28th February 2019] amended proposal, we have been clearer that the Terms and conditions exist within our GB frameworks (codes and Standard Contract Terms)*."

For the avoidance of doubt, the Article 18 terms and conditions related to balancing covers "*all actions and processes, on all timelines, through which TSOs ensure, in a continuous way, the maintenance of system frequency within a predefined stability range as set out in Article 127 of Regulation (EU) 2017/1485, and compliance with the amount of reserves needed with respect to the required quality, as set out in Part IV Title V, Title VI and Title VII of Regulation (EU) 2017/1485*[23]" [emphasis added].

In doing so it ensures compliance with EBGL which *"establishes an EU-wide set of technical, operational and market rules to govern the functioning of electricity balancing markets. It sets out rules for the procurement of balancing capacity, the activation of balancing energy and the financial settlement of balance responsible parties*.[24]"

In terms of electricity balancing markets we are also mindful that this "*means the entirety of institutional, commercial and operational arrangements that establish market-based management of balancing*[25]*"* [emphasis added] – in passing we note that the Annex 1 mapping, in our view, falls well short of providing the entirety of commercial arrangements for market based management of balancing in GB.

The Article 5(4) (c) proposal (and any subsequent amendment(s)) from the TSO for the (Article 18) terms and conditions related to balancing have to be considered within this legislative context and must, accordingly, cover *all [balancing] actions and processes, on all timelines"* taken by the (GB) TSO.

In that context we also are mindful that Article 2 defines a number of items that are directly relevant to the terms and conditions related to balancing set out in Article 18 (as well as the Article 16(6) request for exemption) including, but not limited to, the following:

[21] Such as the Grid Code, CUSC, BSC, Distribution Code STC etc.,
[22] https://www.nationalgrideso.com/document/140136/download

[23] Article 2(1).
[24] (EBGL) Recital (5).
[25] Article 2(2).

"(1) 'balancing' means all actions and processes, on all timelines, through which TSOs ensure, in a continuous way, the maintenance of system frequency within a predefined stability range as set out in Article 127 of Regulation (EU) 2017/1485, and compliance with the amount of reserves needed with respect to the required quality, as set out in Part IV Title V, Title VI and Title VII of Regulation (EU) 2017/1485;

(2) 'balancing market' means the entirety of institutional, commercial and operational arrangements that establish market-based management of balancing;

(3) 'balancing services' means balancing energy or balancing capacity, or both;

(4) 'balancing energy' means energy used by TSOs to perform balancing and provided by a balancing service provider;

(5) 'balancing capacity' means a volume of reserve capacity that a balancing service provider has agreed to hold and in respect to which the balancing service provider has agreed to submit bids for a corresponding volume of balancing energy to the TSO for the duration of the contract;

(6) 'balancing service provider' means a market participant with reserve-providing units or reserve-providing groups able to provide balancing services to TSOs;

(7) 'balance responsible party' means a market participant or its chosen representative responsible for its imbalances;

(25) 'exchange of balancing capacity' means the provision of balancing capacity to a TSO in a different scheduling area than the one in which the procured balancing service provider is connected;

(26) 'transfer of balancing capacity' means a transfer of balancing capacity from the initially contracted balancing service provider to another balancing service provider;

(27) 'balancing energy gate closure time' means the point in time when submission or update of a balancing energy bid for a standard product on a common merit order list is no longer permitted;

(28) 'standard product' means a harmonised balancing product defined by all TSOs for the exchange of balancing services; [and]

(36) 'specific product' means a product different from a standard product".

The TSO, in its table (which we reproduce in full above in our answer to Question 3) mapping the existing (GB) balancing services shows only <u>some, not all</u> of the existing GB balancing services.

For many of those (missing) balancing services; such as Mandatory frequency response, Commercial Frequency Response Service, Enhanced frequency response, Commercial Frequency Management Service, Demand Turn Up, BM Bids & Offers and Fast Start; "*<u>all the provisions in the GB regulatory framework that set obligations on BSPs and BRPs</u>*", in the context of the terms and conditions, are not identified in the Annex 1 mapping.

Finally, we note the statement provided by the TSO in response[26] to questions raised during its 13th March 2019 Webex that:

"…. the direction from Ofgem that European Network codes should be implemented with minimum changes required have led us to believe that our proposal is the most efficient and pragmatic way to implement the requirement." [emphasis added]

As we have repeatedly reminded the TSO, the NRA does not use the word 'minimum' in the instructions the NRA gave to the TSO concerning the national implementation of the European Network Codes – the NRA referenced 'necessary' (not 'minimum', despite the TSO repeatedly asserting otherwise) and, in our view, the necessary changed to implement the EBGL into the GB national regulatory framework is greater than the TSO is proposing with its 28th February 2019 submission.

[26] https://www.nationalgrideso.com/document/140136/download

APPENDIX 1

[The questions and answers raised during the TSO's Webex event held on Wednesday 13th March 2019 during the consultation period[27]]

"*This document intends to provide a useful summary of the questions asked during the webinar, as well as the answers provided by NGESO. In some cases, we have summarised these questions to make sure they are easy to follow, and in other cases we have added some detail to provide a more comprehensive answer. For a full view of questions, comments and responses please watch the webinar recording.*

So where exactly are all the actual terms and conditions for BRPs and BSPs?
In the amended proposal, we have been clearer that the Terms and conditions exist within our GB frameworks (codes and Standard Contract Terms). We have stated that the mapping document does not constitute compliance with Article 18, and is purely a tool to demonstrate where compliance can be found. This update was made in reaction to Ofgem's feedback that this must be made

Is the requirement for public consultations only in relation to A18 T and Cs, rather than two consultation processes being required?
The changes that we propose to make will require code modifications, and so some of this detail will be subject to the work and recommendations of the mod workgroup. However, our proposal is that when there is an amendment, the consultations required for the code change process and the A18 process be combined. For instance, the workgroup consultation could be open for one month and this would also fulfil the requirement for consultation under Article 18 of EBGL.

Other TSOs have complied with Article 18 by producing actual complete terms and conditions - not mapping to partial terms and conditions which is what NGESO is proposing: why is NGESO adopting this approach of mapping and limiting it to only some, but not all, of the provisions / requirements / obligations that BRPs and BSPs have to comply with?
The required elements specified under Article 18 of the EBGL already exist within our GB frameworks (in codes and Standard Contract terms. We also have robust processes which govern these frameworks. This, combined with the direction from Ofgem that European Network codes should be implemented with minimum changes required have led us to believe that our proposal is the most efficient and pragmatic way to implement the requirement.

Will the entire SCTs form the terms and conditions for the Standard Product or Specific Product?
Our proposal is that Ts and Cs exist throughout codes and SCT. The areas that are covered by SCTs are more relevant to specific products. Terms and Conditions related to standard products will be implemented into our codes. An example of this is the work done under P344 and GC0097 which implemented the arrangements for the Replacement Reserve product (Project TERRE).

But will the SCT as published for each specific product constitute the entire terms and conditions in totality for that specific product?

[27] https://www.nationalgrideso.com/document/140136/download

Not in totality, SCTs are following the same process as codes. The mapping highlights which parts of the SCTs are relevant to A18. Looking at the best way to make it clear when changes to SCTs would need to comply with Article 18 of the EBGL.

Putting the SCTs into the codes will allow stakeholders to put forward modifications, for Ofgem to decide on
We know from some Market participants that there are significant barriers to entry when trying to get involved or have a say in the code modification process. The existing SCT change process includes a consultation process provides a more accessible way for these parties to give their opinion on proposed changes.

There is a total lack of transparency on SCT specific conditions - this contravenes the EBGL requirements.
The Standard Contract Terms are publicly available on the NGESO website, and are standard for everyone wishing to participate in each service. The process used to change these terms includes a public consultation where providers can provide their feedback. We will work to ensure that its very clear which elements of the SCTs are relevant to Article 18 of the EBGL.

The deadline for Article 16(6) set in EBGL has passed - why are you submitting it eight months late?
EB GL says that this exemption needs to be submitted part of A18 proposal. The exemption proposal Was not included as part of our original proposal because our intention was to implement the requirement. However, given the uncertainty arising from the suspension of the Capacity Market, NGESO felt it was the right thing to do to pursue this exemption. Given that we are amending and re-submitting the proposal we have taken the opportunity to request this exemption as part of this process.

Will the economic justification be a public document?
The justification itself contains analysis of capacity market and balancing costs. This data is confidential and we aren't able to share this at the moment. The justification itself will be submitted directly to Ofgem as part of the submission. We will continue to share any updates in this area.

Article 18 says that the TSO must produce Terms and conditions relating to balancing. If it is only the elements highlighted in the mapping, does this mean that other Terms and Conditions in SCTs and GB code are not relevant to Balancing?
Our proposal for Article 18 aims to provide a pragmatic and efficient solution to Article 18, by demonstrating that the content of our GB frameworks mean that we are already compliant. This means there is no change to the current structure of frameworks or to what providers must do in order to provide a Balancing Service.
Article 18 of the EBGL specifies the requirements which the proposal for Terms and conditions must contain. In our proposal we have tried to be really clear which aspects of the GB frameworks are relevant to these requirements, and therefore which parts of the frameworks form compliance with Article 18. This does not mean that areas of the code which we have not highlighted as being directly applicable do not need to be complied with by a provider."

[end]