

Consultation on code manager selection - Energy UK response

30.01.2025

Executive Summary

Energy UK is the trade association for the energy industry with over 100 members - from established FTSE 100 companies through to new, growing suppliers, generators and service providers across energy, transport, heat and technology. Our members deliver nearly 80% of the UK's power generation and over 95% of the energy supply for 28 million UK homes as well as businesses.

The sector invests £13bn annually and delivers nearly £30bn in gross value - on top of the nearly £100bn in economic activity through its supply chain and interaction with other sectors. The energy industry is key to delivering growth and plans to invest £100bn over the course of this decade in new energy sources. The energy sector supports 700,000 jobs in every corner of the country.

Energy UK plays a key role in ensuring we attract and retain a diverse workforce. In addition to our Young Energy Professionals Forum, which has over 2,000 members representing over 350 organisations, we are a founding member of TIDE, an industry-wide taskforce to tackle Inclusion and Diversity across energy.

Energy UK generally agrees with proposed Code Manager selection criteria. However, we feel that there is an opportunity for a more creative approach to selection that involves the input of stakeholders. Overall, stakeholders should have more of an opportunity to review the selection and assessment of the Code Manager candidates.

If you would like to discuss this response in further detail with Energy UK and its members, we would welcome further engagement.

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Consultation Response**Q1. Do you agree with our proposed, three-stage process for assessing code manager candidates?**

The process that Ofgem intends to implement to assess code manager candidates seems broadly sensible.

However, Ofgem should review some shortcomings that may limit the range of potential CMs and leave open the risk of conflicts of interest and suboptimal service for consumers and the wider industry.

Eligibility assessment

Ofgem's approach to eligibility appears generally appropriate, however there is a risk of conflict between the intention to assess eligibility on factors like prior experience as a code manager and the proposed [CM license condition 8.5](#) to ensure directors have not been the employee of a licensee 12 months prior to appointment. Overall, the approach to eligibility must allow a sufficient range of potential options for a CM while also ensuring the CM is focussed on its activities and is independent.

Tighter conditions are required regarding the exact definition of 'conflict of interest' within the interpretation of the CM licence. Intellectual property rights, conditions under which a CM can have investments and conduct business activities besides those of a CM are yet to be clearly defined in the proposed conditions. This shortcoming needs serious consideration. Interested parties must demonstrate this clearly as part of the allocation process. We expect this to be a high hurdle and to be monitored regularly and for information regarding assessment to be transparently and openly communicated by Ofgem.

We also feel Ofgem should consider the applicant's ability to deliver on Ofgem objectives a key criterion for eligibility given the need for the CMs to help facilitate a major transition in Great Britain's (GB's) energy system in the coming years.

Licensing assessment

Regarding non-competitive selection the timelines for each stage described need clearer timelines. Clear conditions are required on the amount of time and milestones between Ofgem publishing a notice to award a licence and the shortlisting of candidates, allowing stakeholder representations and proceeding to the final selection of the CM.

While Energy UK agrees with the need for candidates to be assessed against the proposed CM licence conditions, lessons should be learned from the consolidation of technical codes within the Retail Energy Code (REC), particularly in the level of engagement with a wide range of stakeholders. We are pleased that the proposed

licence conditions are high level enough to enable a degree of flexibility regarding CM operations, objectives and duties. However, this means that greater oversight and consent is required from stakeholders of the codes on the alignment of candidates with the proposed licence conditions. We proposed that Ofgem, while retaining the final decision, allow opportunities for stakeholders to assess and advise on the proposed licensees. Energy UK would like to reiterate our concerns that it's not clear who would be fined if a Code Manager is found in breach of its licence. This is particularly pressing in the case of Elexon now that it is within industry ownership. Ofgem needs to address the still the outstanding liability issue where potential changes from this reform could impact the liabilities of Elexon shareholders; it will be necessary to provide protection to industry against liabilities that otherwise could arise from Energy Code Reform.

Q2. Do you agree with how we have proposed to make our selection route decisions, in line with our considerations of speed of delivery and value for money?

Overall, the conditions for a non-competitive appointment need to be far more explicitly defined. Centring it on a consideration of speed of delivery and value for money, the former based mainly on the convenience of a non-competitive appointment and the latter based on a poorly defined concept of 'low competitive interest' and the balance between cost savings and quality of outcomes, is insufficient.

Ofgem's instinct that appointments to the CM position will mainly be non-competitive while understandable, misses an opportunity for more creative arrangements involving the input of industry stakeholders. While we agree with the need for CM's to be independent of other organisations and interests, Ofgem should be considering proposals a wide range of proposals from stakeholders on what kind of independent body would best serve the interests of consumers and the code participants. This means, following the publication of publication of a call for expressions of interest and the response from candidates, Ofgem should convene working groups made up of representatives that are party to the codes, perhaps represented through the SAF. From here, various approaches to filling the CM position between the regulator and broader stakeholders can be shortlisted, analysed and considered. We consider the current approach to CM selection based on competition, or lack thereof, without prior discussion with and between stakeholders as to the range of options available, to be too narrow and feel may suboptimally serve the interests of consumers and the sector.

The non-competitive appointment of Elexon as the CM for the Balancing System Code (BSC) and the Retail Energy Code company (RECCo) for the Retail Energy Code (REC) is a case in point.

Ofgem should, at minimum, consider instead consulting with the stakeholders and participants of industry codes on how alternate or hybrid arrangements that are more creative might be considered when considering the appropriate CM. Given CM selection is not expected to a frequent occasion, this should at minimum be considered for the first selection process.

Energy UK has a number of reservations with the way that RECCo and Xoserve have handled similar arrangements and are keen that the same mistakes aren't repeated. In particular:

- RECCo board members are independent of the shareholders, which could put them at a distance from industry operations and an understanding of parties' needs.
- On the other hand, Xoserve's constituency system has not worked out particularly well in practice, with some parties not always finding that their representative shares their views.

It is for these reasons we similarly recommend that Ofgem grant a wider set of stakeholders that are party to the industry codes the opportunity to design and shortlist various approaches to the structure of the REC's CM in a way that is accountable and best serves all stakeholders' and consumers' interest.

On the competitive selections for the consolidated gas network code, electricity commercial code and electricity technical code, while agree with Ofgem's intention to competitively award the CM position, more clarity is needed on the involvement of industry stakeholders on their role in scrutinising the options presented and forming safeguards for the final candidate that is put forward. A larger role is also needed for stakeholders to be able to present novel and even hybrid approaches to designing independent CM candidates that may better serve Ofgem's obligations while safeguarding industry and consumer interests. For instance, regarding the technical code, a CM can be presented that provides greater independent input and oversight from engineers and technical bodies to a final decisionmaker. This is a key shortcoming of the existing Quality of Supply Standard (SQSS) governance structure.

We would also propose that Ofgem publish clear, codified guidelines which Ofgem would be bound by, on the exact conditions under which Ofgem would decide to change its selection route for the CM. The justification must be based on Ofgem's obligations, a more complete version of the proposed CM licence and subject to consultation with stakeholders of the consolidated code.

Q3. Do you agree with our proposal to grant code manager licences on an enduring basis?

Energy UK agrees with the logic of having licences being done on an enduring basis for the sake of stability and predictability in the market.

Nonetheless, we propose that, should the selected CM fail to meet performance metrics below a clearly defined threshold, especially those linked to Ofgem's Net Zero and growth duties during this period of rapid change in the sector, Ofgem should open up the position to a competitive process, subject to input by stakeholders and industry code participants.

Q4. Do you agree with the processes and criteria that we have proposed to use during the eligibility assessment stage?

While Energy UK generally supports the proposed criteria, care is needed regarding the conflict-of-interest criteria and relevant experience assessments.

On the former, tighter conditions are required regarding the exact definition of 'conflict of interest' within the interpretation of the CM licence. Intellectual property rights, conditions under which a CM can have investments and conduct business activities besides those of a CM are yet to be clearly defined in the proposed license conditions. Further, regarding Elexon, while Elexon's current governance arrangements go some way to countering incumbent interest and delivering accountability, more can be done to ensure the proposed [CM license conditions 5.3, 5.5 and 7.2](#) are upheld.

We believe the best way to do this is to allow stakeholders the opportunity to input on potential novel or even hybrid structures to ensure the satisfactory nature of the CM. For example, with regard to Elexon, this could include the addition of a partner body made up of wider set of BSC licensed parties than the 13 shareholders of Elexon from which Elexon could draw upon wider industry expertise.

With respect to the assessment of relevant experience, while Energy UK thinks Ofgem's approach is overall right-minded, care must be taken to ensure the criteria does not overly discriminate against candidates that have not themselves been code manager previously. The current wording of the criteria appears to imply this. While prior experience from executives and senior staff of the CM of modification, compliance and/or management of the codes is a necessary criterion, Ofgem should ensure the eligibility assessment is open to novel bodies and structures for the CMs, which may themselves not have been previous managers of the codes in their official capacity.

Q5. Do you have any comments on the draft guidance published alongside this consultation, either in relation to how we have described the eligibility assessment process or the proposed content of the draft form?

As stated in our answers to the previous questions, while we do not disagree with the guidance document's content as it stands when considering Ofgem's current approach, we feel there is a need to tighten the [proposed CM license conditions](#) conflict-of-interest conditions.

Q6. Do you agree with the processes and criteria that we have proposed to use during the licensing assessment stage?

While Energy UK agrees with the overall approach to licensing assessment, there are key areas of concern.

Firstly, Ofgem should assess the candidate at this stage based on their ability of the CM to deliver on Ofgem's objectives, including its Net Zero and growth duties. The candidate should also lay out clear plans to clarify how it would behave should its licence conditions or objectives come into conflict. This is essential transparency that the industry requires.

As stated in our answer to question 1, we proposed that Ofgem, while retaining the final decision, allow opportunities for stakeholders to assess and advise on the appropriateness of the applicant's suitability and ability to meet the proposed licence conditions as well as the assessment of their ability to deliver a cost-effective service. It is insufficient for Ofgem to rely solely on a consultation with industry on the required skillset of a code manager as part of Ofgem's Modification Process Workgroup in September 2024, as well as insights derived from workshops held in 2023 and previous consultations responses. Input from a wider set of participants to the codes is needed on an ongoing basis.

The currently proposed licence conditions also still require tightening with respect to intellectual property rights, conditions under which a CM can have investments and conduct business activities besides those of a CM.

Energy UK would like to reiterate our concerns that it's not clear who would be fined if a Code Manager is found in breach of its licence. This is particularly pressing in the case of Elexon now that it is within industry ownership. Steps must be taken to ensure that there are no liabilities for Elexon shareholders.

Q7. Do you have any comments on the draft guidance published alongside this consultation, either in relation to how we have described the licensing assessment process or the proposed content of the draft form?

Energy UK overall agrees with the wording of the draft guidance regarding licensing.

Q8. Do you agree with the processes and criteria that we have proposed to use as part of the competitive licensing assessment, including our proposal that there should only be a single competitive round rather than multiple rounds?

While Energy UK agrees with the general approach to competitive licensing assessment, we believe there is further scope to widen the range of possible options available for assessing the most suitable candidate for CM.

As stated in our answer to question 2, following the publication of publication of a call for expressions of interest and response from candidates, Ofgem should convene working groups made up of representatives that are party to the codes, perhaps represented through the SAF. From here, various approaches to filling the CM position between the regulator and stakeholders to the codes can be shortlisted, analysed and considered. With respect to licence compliance, this stage can focus on the suitability of the shortlisted candidates and how novel and hybrid arrangements for the final CM might address any shortcomings.

We agree with Ofgem that this stage should only involve a single competitive round given the likely number of candidates that would apply. We believe that involving stakeholders in the formation of the CM would sufficiently form the role of refining the final structure of the selected candidate.

We also strongly caution Ofgem against assessing candidates based mainly on a numerical score of weighted factors relevant to the license conditions. This risks being a highly oversimplified approach that may miss the nuances of the suitability of the candidate in a more qualitative sense, especially if they are a novel body. Ofgem also express their intention to weight the scores though provide no clarity as to how the scores would be weighted. Instead of a points-based approach, we propose that Ofgem instead rely upon a combination of its own judgement and the support of the wider participants to the industry codes.

Q9. Do you agree that the enabling regulations should set out how the competitive process will work, with the use of draft guidance allowing flexibility in some instances?

Energy UK agrees with the need for enabling regulations to set out the competitive process.

We advise Ofgem to make clear in these regulations that a wide range of organisations from the industry can apply in a single stage competition to become a CM. As noted in our answer to question 8, the role of the broader industry stakeholders in assessing the license suitability of the candidate would help narrow down the final option.

Q10. Do you have any views on how we should design a potential tie-break process, such as whether to make use of existing evidence versus requesting follow-up submissions?

As stated in our answer to question 8, Energy UK feel that the point-based approach to the CM selection may be too simplistic and would favour an approach based on the discussion and stakeholder input against Ofgem’s final decision.

In the case of a tie-break in such a structure, it should fall to Ofgem to consider which candidate is most appropriate in light of a holistic assessment of the direction of the sector and which candidate is best suited to facilitate Ofgem’s duties and meet industry and consumer interests.

Q11. Do you agree with our proposal to introduce two additional criteria as part of the competitive licensing assessment, namely “innovation” and “facilitating the move to net zero and clean energy”?

Energy UK agree with the inclusion of these two criteria. However, we feel that “facilitating the move to net zero and clean energy” in a manner that accounts for the needed speed of delivery should be a central assessment criterion and not merely an additional one.

Q12. Do you have any views on how we should approach the implementation and assurance stage, including any potential interaction between these two distinct processes?

Energy UK overall agrees with the approach to implementation.

However, we believe the requirements for sufficient staffing should be part of the up-front assessment process, not a matter to be arranged following selection. There are concerns from members that such an approach could lead to uncertainties about key deliverables being achieved on time and labour resource being unexpectedly sucked

out of other key areas of the sector. We propose that Ofgem instead require that CM candidates explicitly lay down in their application a plan for sufficient staffing against its expected duties.

Given that there may well be a need to ensure the sufficient resourcing of the new CM, especially if it is a novel one, we favour Ofgem taking a more hands-on approach to implementation.

Regarding assurance, Energy UK overall agrees with the approach suggested. We only note the need for transparency and for stakeholders, perhaps through the SAF to be party to the assurance process.

Q13. Do you agree with the proposed scope of the final readiness assessment that would be required of all candidates?

Energy UK agrees overall with the scope of the final readiness assessment but would stress the need for the assessment to focus on the ability of the CM to deliver in line with Ofgem and the sectors' goals and obligations.