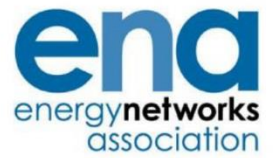


The Voice of the Networks



# Energy Networks Association

## Open Networks Workstream 1A: Product 4 2019

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# 1. Introduction

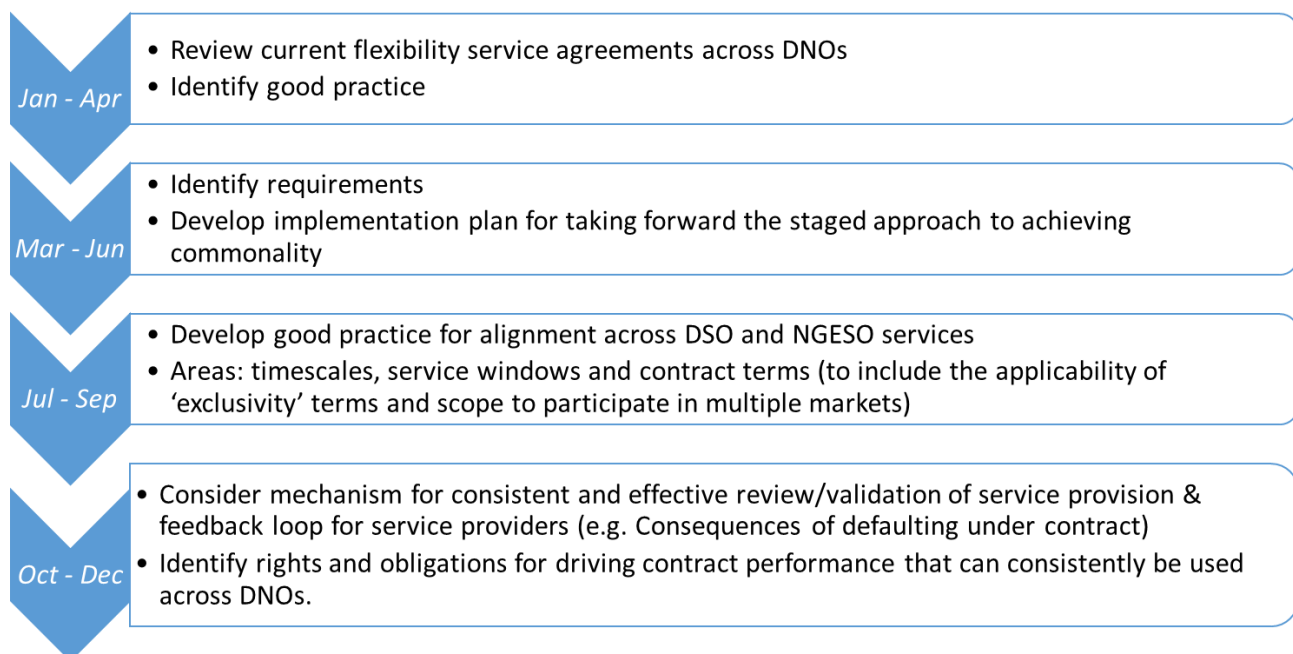
This paper is an output of the ENA Open Networks Workstream 1A – Product 4: DSO Services Commercial arrangements

The aim of the work package is to review and develop the Service Agreements and contracts utilised by DSO's when procuring flexibility services, identifying examples of good practice and producing an implementation plan for a common approach. It will also define common agreements between T&D on exclusivity and service prioritisation in preparation for a sustainable, embedded market offering flexibility services from a whole system perspective. Finally, the product will outline good practice mechanisms for service review, validation and feedback, enabling a common approach which offers confidence to market responders on the management of rights and obligations within contract performance.

The scope of the product, inclusive of the planned works, exceptions and complexities are included for information below.

In April 2019 the WS1A Working Group identified the opportunity to develop the best practice points and areas of existing commonality into a standard template agreement and requested the Product Team to investigate the impacts of developing this option. The Product team developed an initial adjusted scope through internal discussions and consultation with legal resource for approval by the WS1A WG, as the impacts to the delivery timetable and following sub-deliverables are significant. Detail on the adjusted scope and timeline has been included in section 1.1.6.

Phase 1 of this product focuses on the analysis and review of existing service agreements to identify examples of good practice for wider adoption and assess the steps required to achieving commonality in flexibility service agreements across DSOs.



## 1.1 Original Scope

### Phase 1 (Jan – Apr '19)

- Review DSO's existing Service Agreements/Contracts relating to the provision of flexibility services, or those in development (developed in house or by 3<sup>rd</sup> parties) for DER of all types and all service scenarios, implemented in BAU conditions or those tested within innovation parameters, with any supporting detail
- Rationale on costs associated with the agreement/contracts, i.e. insurances and liabilities (not service payments), agreement duration and communications methods employed for agreement management processes
- Feedback from customers on their experience of the SA's in these cases (anonymised)
- Any detail on the development of existing SA's including pertinent decision logs if available
- Success criteria and KPI's currently utilised within SA implementations
- Gap analysis on:
  - SA values in relation to network topography, geographical location, demographic, for example the variation in liabilities relating to risks to asset health at different levels or warranties for specific DER types
  - SA lengths in relation to network drivers and service type, with supporting/developmental detail if available
  - SA implementations across DSO's in BAU scenarios, or detail on the planned development from agreements currently developed within innovation projects to BAU implementation

### Phase 2 (Apr – Jun '19 - currently out of scope for this paper)

- Gap analysis on current DSO approaches with focus on need and ability to adopt common approach
- Planned adoption or implementation across DSO's for contracting flexibility services
- Capability within DSO's (legal, commercial) to adopt common approach
- Recommended timeline and implementation plan based on core service provision

### Phase 3 (Jun – Sept '19 - currently out of scope for this paper)

- Current report on SA alignment across DSO's and ability to align with NGENSO processes
- NGENSO suite of services, contract/agreement types and lengths, current or in development (TERRE)
- GAP analysis on NGENSO and DSO current approaches

- Service prioritisation and whole system agreements on exclusivity, plus communications and implementation means

#### **Phase 4 (Sept – Dec '19 - currently out of scope for this paper)**

- Current Commercial/Contract management processes in use by DSOs and NGENSO and penalty processes for non-provision
- Monitoring processes, KPI's and feedback loops currently utilised in service management (in house or imposed/agreed with 3<sup>rd</sup> parties)
- Review of Service Management systems or systems currently utilised for contract/agreement and service management, with specific attention on provision performance management criteria and feedback processes
- Any detail available from current audit or review processes currently implemented or in development for service provision/contractual agreements.
- Feedback from customers on the above if available

#### **1.1.1 Inclusions**

- Review DSO's existing or in development Service Agreements (developed in house or by 3<sup>rd</sup> parties) for DER of all types and all service scenarios (network conditions, contract/agreement lengths, real-time/forecasted, individual customers or groups), in BAU conditions or those tested within innovation parameters, with any supporting detail
- Rationale on agreement/contractual costs (not service payments), agreement duration and communications methods employed for agreement management processes
- Feedback from customers on their experience of the SA's in these cases (anonymised)
- Any detail on the development of existing SA's including pertinent decision logs if available
- Success criteria and KPI's currently utilised within SA implementations
- Gap analysis on SA values in relation to network topography, geographical location, demographic
- Gap analysis on SA lengths in relation to service type and network drivers, with supporting/developmental detail if available
- Gap analysis on SA implementations across DSO's in BAU scenarios, or detail on the planned development from innovation to BAU

#### **1.1.2 Exclusions**

- Any commercially or personally sensitive data

#### **1.1.3 Assumptions**

- Each DSO will have a live or example SA which can be referenced, either from a BAU or innovation project implementation

- Each DSO will have a development plan or historical development data around SA's applying to flexibility services which can be shared in part/all

#### 1.1.4 Constraints

- GDPR/sensitive commercial detail anonymisation
- Time to collate and review suite of documentation
- Legal support (whether in house or project based) with ability to highlight commonalities and good practice within timeframes required and the subsequent reporting of 'good practice' within contractual documentation
- Progress in SA utilisation or development across DSO's may be staggered

#### 1.1.5 Considerations

The scope of the implementation covers all existing or in development service agreements and contracts for the provision of flexibility services. This is a subject of specific focus within the ENA's Open Networks project primarily within WS1A and builds upon the outputs of the previous working groups.

The interlinks and interdependencies between projects are also frequent, which has driven the need for focused communications between product teams, the working groups, steering group and advisory board. Specific links have been identified between this product and the following in-flight elements of the Open Networks Project:

WS1A P1 – Flexibility Market Principles. Outline guiding principles for flexibility marketplace for DSO services that ensure competition and mitigate against any conflicts of interest or unintended consequences to make sure consumers benefit from a fair and more efficient system.

WS1A P2 – Procurement Processes. Develop consistent processes to support the procurement of the DSO services considering the flexibility market principles from Product 1 and the output from the 2018 development work under Workstream 1.

WS1A P3 – Dispatch and Settlement Processes. Review current activation, dispatch and settlement processes and develop good practice for activation and dispatch and identify what DNO capabilities are required to support this. This good practice should include alignment of DSO and NG ESO services in terms of procurement, timescales, service windows and contract terms as much as possible.

WS1A P5 – This Product will describe conflicts in service and not conflicts of interest in providing services and will provide clarity on the hierarchy for meeting whole system needs with flexibility and will deliver deterministic processes to ensure the system remains operable and costs are reduced through co-optimisation of services by multiple system operators.

Also, a key consideration is the timeliness of this good practice review. The flexibility services market is still in it's infancy, while DSO's are looking to encourage and support the uptake of this market wherever possible the market evolution will drive changes in agreement and contractual structure over the coming years. The Product team have been careful to reference where good practice examples may be subject to ongoing changes driven by that market evolution, especially when

considering the potential in future for day ahead or real-time market interaction. As such the outputs of this review will need to be reviewed and updated to match the developmental outputs of the market evolution.

Additionally, the nature of network services themselves provides the inherent need for alteration, traditional SO related services have been implemented on a national or sub-national scale whereas DSO services will need to be focused upon local areas, which in turn will drive more locational pricing and requirements based on the specific needs of that location. As such within the review the product team have been cautious to not apply governance or best practice suggestion around the pricing of the services themselves, opting instead to look at the costs of the contracts, for example warranty or insurance payments.

Locational drivers will also drive contract lengths to some extent, at least until the points above on the evolution of day ahead or real-time markets is realised, at this point it's likely that a model like that employed by WPD is more likely to be implemented by DSO's – where DER has a standard agreement governing the interaction with a flexibility management system and then services can be provided as the DER's ability, cost and preferences align with the rewards fielded by the DSO or SO for that requirement in or close to real-time.

Finally, for ease of use and reporting and despite both 'contract' and 'agreement' being used to describe the documents under review, from this point forward these will be referred to as 'service agreements' or 'agreements' only.

## 1.1.6 Revised Scope & Timeline

### Phase 1 (Jan '19-May'19)

- Review DSO's existing Service Agreements/Contracts relating to the provision of flexibility services, or those in development (developed in house or by 3<sup>rd</sup> parties) for DER of all types and all service scenarios, implemented in BAU conditions or those tested within innovation parameters, with any supporting detail
- Rationale on costs associated with the agreement/contracts, i.e. insurances and liabilities (not service payments), agreement duration and communications methods employed for agreement management processes
- Feedback from customers on their experience of the SA's in these cases (anonymised)
- Any detail on the development of existing SA's including pertinent decision logs if available
- Success criteria and KPI's currently utilised within SA implementations
- Gap analysis on:
  - SA values in relation to network topography, geographical location, demographic, for example the variation in liabilities relating to risks to asset health at different levels or warranties for specific DER types



- SA lengths in relation to network drivers and service type, with supporting/developmental detail if available
- SA implementations across DSO's in BAU scenarios, or detail on the planned development from agreements currently developed within innovation projects to BAU implementation

### **Phase 2 (June '19-March '20)**

- Pull existing commonality and identified best practise examples from document array and build a 'best practise' agreement template for review and collective adoption.
- Engage support teams (Legal, Procurement, Commercial et al) from each DSO to contribute, review and approve the standard template pre-adoption.
- Identify document 'owner' or hosting organisation (DCUSA, ENA, Ofgem, Other) and map process routes for review, adaptation and circulation.
- Engage stakeholders on developing and finalised versions of the template, absorbing feedback and offering further adaptation if required.
- Engage existing 'in-delivery' products across ON to ensure alignment and collaborative development.
- Identify and produce a recommended timeline and implementation plan for adoption of the standard agreement template based on DSO ability/existing requirements.

### **Phase 3 (currently with WS1A WG for reallocation in 2020/New Product Team)**

- Current report on SA alignment across DSO's and ability to align with NGESO processes
- NGESO suite of services, contract/agreement types and lengths, current or in development (TERRE)
- GAP analysis on NGESO and DSO current approaches
- Service prioritisation and whole system agreements on exclusivity, plus communications and implementation means

### **Phase 4 (currently with WS1A WG for reallocation in 2020/New Product Team)**

- Current Commercial/Contract management processes in use by DSOs and NGESO and penalty processes for non-provision
- Monitoring processes, KPI's and feedback loops currently utilised in service management (in house or imposed/agreed with 3<sup>rd</sup> parties)
- Review of Service Management systems or systems currently utilised for contract/agreement and service management, with specific attention on provision performance management criteria and feedback processes

- Any detail available from current audit or review processes currently implemented or in development for service provision/contractual agreements.
- Feedback from customers on the above if available

## 2. Legal Review of Service Agreements

### 2.1 Process Summary

Example service agreements have been collected from UKPN, WPD, SSEN, ENWL and NPG for the purposes of the analysis; SPEN have supported the analysis but were unable to provide documentation as these are currently in development.

Given the legal scope of the analysis and Product outputs, it was decided that the initial review would be undertaken by legal resources to ensure a complete and detailed review was completed. Resources were committed by the DSOs providing example documents and the analysis took place across February and March 2019. The table below reflects the output in high level from the legal review, displaying that examples of good practice were identified early in the process and identifying areas where further analysis and discussion were required.

Table 1 – Summary of Service Agreement review

Parties	11. Optional Services	22. Indemnity	30. Termination
Recitals	12. Assignment, Sub-contracting and Transfer	23. Compliance with Legislation	31. Invalidity and Severability
1. Definitions and Interpretation	13. Contract Personnel	24. Confidentiality and Announcements	32. Waiver
2. Nature of Contract - Recitals	14. Provider's Performance Obligations	Publicity	33. Notices
3. Duration	CDM	Company Property	34. Third Party Rights
4. Services to be provided by the Provider	15. Terms of Payment	Access	35. No Agency or Partnership
5. Pre-Delivery	16. Event of Default	25. Anti-Bribery	36. Survival
CMZ Capacity and CMZ Energy Nomination	17. Variations	Modern Slavery	37. Entire Agreement
6. Monitoring by the Company	18. Site and Facility Maintenance	Living Wage	38. Inadequacy of Damages
7. Proving test	19. Insurance	26. Reputation	39. Remedies Cumulative
8. Monitoring by the Provider	20. Intellectual Property Rights	27. Data Protection	40. Governing Law and Jurisdiction
9. Utilisation Instructions	21. Warranty Obligations	28. Force Majure	Schedules
10. Declarations of Unavailability	Liability	29. Dispute Resolution	Supporting documents

#### Legend

- Commonality pre-existing
- Good practise Identified in P4
- Subject to further legal analysis and/or stakeholder feedback
- Variation Expected (Scheme specific)

The product team then reviewed the analysis, supporting elements of good practice already identified by the legal review and discussing other examples apparent from the comparison. Further points of clarification were then passed back to legal resource and specific questions generated for stakeholder engagement and subsequent inclusion in this report.

Finally, each DSO has then reviewed the examples of good practice for adoption, assessing the ability to adapt internal processes to absorb and the likely associated timescales, highlighting specific issues which the product team have responded to in preparation for the next phase of this product.

## 2.2 General Review Outputs

A large proportion of the reviewed documents already showed commonality, as was expected from legal documents which tend to utilise similar clauses, such as Third-Party Rights and Governing Law and Jurisdiction clauses. This partially reflects the commonality of the current flexibility services required across all DSOs, so future variations on the type of services (Active/reactive power, islanded operation) could derive further variation. However, there is a clear group of terms and contractual elements which specifically reference the flexibility services, and these often displayed distinct differences across the contributing DSOs, it is these elements which have been the core focus of this product.

From the legal review of the documents and workshops, the product team have identified a group of general points of 'good practice' for adoption;

- The need for a glossary/definition of legal terms which can be universally applied/utilised across DSO's to support service agreement utilisation.
- The unification of role terms within service agreements, i.e. 'the customer' 'the supplier' or 'the company' 'the provider' etc as multiple variances are apparent across (and even within single) service agreements.
- The utilisation of web pages/portals to present a wide array of supporting documentation, schedules and service agreement examples enables a far higher accessibility vs the specific issue of documentation within single tender exercises.
- Defined and easily available supporting documentation, guidance notes and feedback forms reduce the need for more complex service agreements, again increasing accessibility and ease of utilisation.
- Pre-release or accessible website-based example agreements are also useful, allowing potential DER providers to review contractual elements pre-procurement process and to raise concerns/questions before the regulated process commences. In some cases, these could be the subject of consultation before release, enabling a group of potential providers and industry incumbents to offer comment and possible points of adaptation prior to formal release.

Further points of note from the product team and legal review:

Commonality in the simplification of agreements should be achievable in most cases, however there will be marginal variations dependant on business preference, for example when referring to business specific safety rules or code of conduct. There should also be acknowledgment that

certain clauses and requirements will be driven specifically by the service requirements, as such slight variations will remain driven by service location, service criticality and potentially by the nature of the DER provider responding to the requirement.

It must be noted that some agreements are subject to review and potential variation within standard procurement processes, usually within although not limited to the final negotiation rounds between the two lead parties pre-contract placement. The elements of good practice identified within this document should act as guidelines for industry application to flexibility agreements, acknowledging that these may be subject to negotiation and agreement within any specific procurement exercises.

NPG and SPEN are currently in the process of developing documents and agreements to support flexibility services so there is the potential opportunity to inform this development to 'test' the impact of the good practice examples in these suites of documents.

WPD's use of the DPS/service management system (FPP) significantly removes the need for multiple contractual clauses, as a result the WPD service agreement is lighter and again more accessible. WPD cover many elements within the PQQ, ITT and agreements on portal utilisation which again simplifies the specific service agreement. While WPD are currently the only DSO to utilise such a system, the benefits it provides both a DSO and the DER provider engaging with it support the benefits for adoption of similar systems across the industry.

The following section looks to summarise specific contractual elements, the review of potential good practice and the outcomes of the product.

## 2.2.1 Parties

In all contracts and agreements core legal terms will apply, the initial terms or terminology relate to 'the parties', the organisations either releasing or responding to the procurement process and then signing the agreement.

While all the service agreements reviewed commence with a standard approach of 'supplier' and 'customer', many terms then appear within the documents themselves, such as 'provider' and 'resource' in place of supplier/customer, and company names in place of 'the customer'.

The unification of terms covered within 'parties' is seen as an essential step towards good practice as variation is apparent across all reviewed documents. Following focussed review and input from legal representatives around the requirements and options available, including a visual mapping exercise the product team agreed on terms to be utilised and that these should be included within a Glossary. Reference was made to the ENA 'Open Network' Glossary which was produced within the earlier project phases, which could be updated with a specific 'agreement specific' section.

The product team then agreed that the parties should be:

Former term/reference	Good practice references for adoption
-----------------------	---------------------------------------

Customer, Company Name	DSO (or 'company' if DSO legally unjustifiable, needs confirmation from WG)
Supplier, Provider	Provider
Service requirements	Flexible Service Requirements
Asset, Resource, Device, DSR, ADR, Battery, Generator	Distributed Energy Resource (DER)
DER Owner	DER Operator (if contracting with aggregator they are the 'provider', their aggregated DERs will have separate owners, these are individual 'operators' – the distinction is important specifically when considering the need for site visits as 'providers' will need their agreements with 'operators' to reflect this requirement.

## 2.2.2 Durations

The service agreement duration relates to the length of the agreement, not the duration of the flexibility service itself, for example a 4-year contract could cover multiple annual service windows each requiring a 2-hour response. The product team have purely focused on the agreement duration, acknowledging that locational drivers will define the service 'durations' within any agreement and as such have to remain responsive to engineering, business and locational needs.

Across the reviewed documents there are instances of 4-year minimum terms with the potential for extension and 1 year rolling contracts, with contract length primarily driven by the type of flexibility service being procured. The product team acknowledge additional drivers to agreement duration, for example longer contract terms give some DER providers greater financial confidence in ROI for implementing or managing a resource, and that shorter-term contracts can provide the ability to secure the best value for DSO's and by default the UK customer.

Agreement durations are also closely linked to network requirements so are therefore location responsive, for example load growth forecasts often identify issues 18-24 months in advance and longer-term agreements encourage/enable new DERS responding to these needs directly. The length of the contract allowing the time required to connect to the network and build out the asset. In some existing agreements duration terms specifically acknowledge pre-delivery milestones which are specifically defined within the relevant agreements.

A point of caution was raised that extension periods or rolling nature of the shorter-term agreements is not itself a blocker to competition, however, effectively rewarding embedded DER repeat agreements in place of competitive tenders considering new resources as they become available without opening awards to new parties could be seen as anti-competitive. Re-opener stages should avoid this as should service evolution, i.e. areas where historically we've implemented an alteration to a service could become re-tendering points.

There is a need to ensure agreement durations are not adjusted to pursue a 'flexibility at any cost' approach, providing the 'overall lowest cost to customers has to remain a central objective and this will mean that reinforcement remains the preferred option in some scenarios/over certain timeframes.

The product team agreed that as the market evolves and becomes more mature, saturation of DER will enable close to real-time auction style bids which achieve the most cost-effective service provision, for now the ability to offer both longer term agreements driven by reinforcement deferral/avoidance, and shorter term agreements for fault response (example) may offer the best scenario for DSO's and DER's but this point will need external input to define the best approach, i.e. a preference/support for 1 year rolling, 4 year, longer term agreements or current approach to offer options based on service requirements.

To summarise, the examples of good practice identified by the product team are:

- The application of re-opener stages to contract durations are an example of good practice. For rolling contracts and longer duration contracts the product team recommend a maximum of a 5-year period between re-opener stages, with the option for these to be more frequently reopened to new competitions as required.
- The restriction or removal of contract extensions is also seen as an example of good practice, service agreements which enable extension after a fixed period could exclude new market entrants from competing, so should not be referenced within agreements. While 4 or 5-year contracts remain a possibility, 5 years should be the maximum contract length, and at this point the requirements should be subject to a new procurement or re-opener stage where the market can respond to the extended requirements and not just the incumbent supplier.
- Agreement durations should remain responsive to the locational and business drivers which define the flexibility service, implemented by the DSO as required. Agreement duration requirements will naturally evolve and durations reduce as markets mature and flexibility service management systems enable day ahead and real-time markets to become fully responsive. As such the product team have not specified an optimum agreement 'duration' as this could be restrictive until the market has matured sufficiently.

There was some discussion on the need to 'test' the market versus a 'full procurement' exercise, at this point it was noted again that the use of a DPS/Service Management system (such as FPP) significantly reduces the resource impacts of a procurement exercise, however and again as previously noted, not all DSO's currently have access to such a system. It was agreed that the final good practice example would neither specify a test or a procurement exercise, just that the market would be able to 'respond' to the re-opener stage – confidence was gained in this decision as all DNOs/DSOs have committed to utilising flexibility in a 'transparent and open' manner, which in turn will drive internal obligations to provide justified, auditable processes.

### 2.2.3 Service Variations

Some example agreements reserve the right to vary the requirements of the service, but the parameters of that variation are not specified within the agreements. There was some discussion on the level of variation allowed before the DSO should look to procure a new or additional services via a new tender, as a lack of a cap could result in new market entrants not being able to compete against incumbents and could be perceived as a restriction to competition, however the potential to identify a 'cap' which was agreeable was superseded by further outputs.

Two agreements developed specific solutions to the variation question, by stipulating within the agreements an ask for a secondary 'optional' price for additional services outside of the specified contractual service windows/power requirements, the product team recognised this as a potential example of good practice. This optional price could come at a premium compared to the standard service price stipulated within the normal agreement but effectively allows the DSO to request additional services from an incumbent DER provider without any obligation on that provider to respond. This offers some advantages to a DSO, as the DER is already under agreement all system interfaces should already be existing and the DSO has awareness of the capabilities of the DER, adding confidence that the DER should be able to assist if they choose to respond.

This second 'optional' price could be considered or delivered as a second, separate flexibility service dependant on the parameters driving the requirements. An example of this was noted within the product team, where flexibility service providers who agree to respond to service type 'A', also agree to be contacted for service type 'b', with type 'b' offering a premium utilisation payment but with no obligations around service times or power provision.

In either iteration, the ability to offer an 'optional' premium for additional services outside of the stipulated service windows and power requirements is recognised as an example of good practice, however this point is more aligned with the 'optional services' section later in this document.

Another good practice point identified by the product team is the ability for a contracted provider to change assets within the service zone, effectively the agreements award the 'capacity required' and not the specific asset. This enables suppliers to change the source asset(s) of the service as their capabilities change and more DER comes online, providing the new assets continue to meet the requirements of the agreements.

To summarise, the examples of good practice identified by the product team are:

- If additional power inject/demand reduction are required this should not result in an agreement alteration, new or additional requirements should be the subject of a new service agreement and procurement exercise.
- If service windows change, but power requirements remain the same, the market should be tested to see if alternate providers are available before seeking to alter an existing agreement.
- Short-term variations, resulting from marginal, infrequent, one-off and time-restricted changes (e.g. sporting events, unseasonal weather, national events such as elections) should be allowed and requested only if a) there is no change to the overall agreement value, and, b) the variation doesn't result in additional or extra service requirements which should be the subject of new procurement processes.

- Providers must advise of any change in registered DER subject to existing service agreements, change includes an increase/decrease in capacity, type or technology changes.
- Agreements should also allow the ability for a contracted provider to change DER within the service zone, effectively the agreements award the 'capacity required' and not the specific DER. This enables suppliers to change the source asset(s) of the service as their capabilities change and more DER comes online, providing the new assets continue to meet the requirements of the agreements

## 2.2.4 Monitoring

This section references the ability to monitor the provision of services and the ability of the service provider to maintain that provision, for example the use of interfaces between DSO and 3rd party systems and the ability to implement site visits to DER assets. The requirements around monitoring appear across multiple sections in the example documents, the product team have endeavoured to cover each within this section

API and system interfaces are covered across the full suite of documents (or within the structure of the agreements specific to flexibility 'DPS/Service Management systems' where apparent), which in turn allow monitoring of the providers ability to meet requirements and the performance of the provision. However, there were distinct differences in the requirements of those systems themselves, with one example detailing multiple, overly specific requirements which could be seen as restrictive. The simplest examples were apparent in those documents were supported by the use of a 'DPS/Service Management system' or where guidelines and schedules were used to offer supporting instruction and clarifications.

Herein lies an issue, as not all DSO's currently have access to or utilise service management 'systems' and in these cases the need to retain specific clauses around monitoring will remain. The product team agree that the transition to utilising such DPS/Service Management systems is expected, given the advantages both for contracting DERs and the DSO themselves are apparent. In terms of service monitoring, it was identified that the use of Service Management systems negates the need for contractual requirements around many of the specific monitoring/interface requirements contained across the other example documents provided.

Where such DPS/Service Management systems are not available, system interface and monitoring requirements should be accessible and offer the ability to interpret/offer alternative or innovative solutions while retaining the confidence in critical elements such as cyber security and ability to manage services simply. There are two good practice examples resultant from this review, the first being the use of flexibility management 'systems' and the reduction in the need for specific contractual elements is the first, The second is that where such Service Management systems are not available, supporting guidelines and specific schedules should be use to separate technical requirements from contractual obligations, relying on simple cross referencing to secure the required provision.

There was some discussion on the ability to retain the right to perform site visits. Contractual elements across the documents differed especially when considering an aggregated provision. In some cases, the terms would allow the DSO to visit the aggregating company but not the asset specifically. However, this is not uniform. It was felt that the DSO should retain the right to visit any asset within the aggregated provision, to ensure the site was connected in full compliance to engineering



specification and was being operated/maintained to a high safety standard and was able to meet the requirements of the agreements.

As such the product team have decided that agreement terms should confirm this right, directly between the DSO and provider and to review the aggregators terms to ensure this was also an existing clause in their agreements with specific DERs. This would also form a part of ongoing auditable reviews which will appear within P4 sub deliverable d.

To summarise, the examples of good practice identified by the product team are:

- the use of flexibility service management systems which reduce or remove the need for specific contractual elements around monitoring requirements should be adopted as soon as reasonably practicable.
- where such Service Management systems are not available, supporting guidelines and specific schedules should be used to separate technical requirements from contractual obligations, relying on simple cross referencing to secure the required provision.
- Agreements should specifically retain rights for site visits direct with providers and the insistence that agreements between providers and DER Operators enable this retention of site visit access rights. In all instances, agreements must enable DSO's to perform site visits to any DER which provide services within direct or aggregated service examples.

## 2.2.5 Testing & Pre-Delivery

Testing and pre-delivery cover the elements of build, development and proving the assets' ability to meet the flexibility service requirements prior to the service being live. Testing and Pre-Delivery are separate terms within most of the sample agreements, however due to the nature of the clauses and the outputs required the product team have reviewed both within this section.

While agreement elements are reasonably aligned there were questions on testing and its impact on contractual award. Two reviewed agreements specified the final award as subject to test success and proven ability to meet the contractual requirements and this was recognised as both useful and pertinent, however one example also defined a time period to monitor the build/development time of any new DER to ensure the service can meet the start dates for the service requirements. Another example required any testing to be completed one month before the relevant service window that the service will be required for. These stipulations around build times and testing completion prior to services going 'live' were not specific or did not exist in other agreements but are recognised by the product team as examples of good practice.

To summarise, the examples of good practice identified by the product team are:

- The product team agreed that defining a time in which tests are completed (current examples are 1 month, 6 months prior to service start) should remain a point of variance driven by the

priority nature of the service, however, unanimously agreed across all agreements are the need to test:

- The providers API or Interface
- The ability to meet the requirements of the service
- That the individual DER(s) have been built and energised and a connection/export agreement is in place
- The right to perform a site visit to the specific DER.

## 2.2.6 Utilisation Instructions

Utilisation instructions relate to the ability to receive standby and activation instructions from the DSO when the service must be in place, in most cases this refers to a system, API or a set of specific communications requirements, often extending to the timeliness of the response.

Most agreements have adopted a relaxed approach contractually in terms of the issuing, receiving and responding to utilisation instructions, which enables providers to respond with different systems which can then be reviewed within the tender process. One example agreement also followed the approach of including the method of instruction within the Schedules of the agreement entered in to depending on the service and provider, which in turn reduced and simplified the clause within the central agreement.

One example contract has a more specified approach which has been the subject of negative customer feedback, the detail of the requirements having been interpreted as restrictive against individual providers existing systems. The use of a DPS/Service management system negated the need for contractual terms in this case, as the ability to interface and communicate with the Service Management system results in this being an inherent capability for the provider.

To summarise, the examples of good practice identified by the product team are:

- Agreements should keep specific references simple and using schedules/guidance notes to keep agreements accessible is good practice, encouraging a wider range of innovative interface options and not limiting responses.
- The use of the DPS/Service Management Systems will further enable simplification of this clause, as points previously made as soon as it is practicable for DSO's to implement an equivalent system.

## 2.2.7 Declarations of Unavailability

A declaration of unavailability covers any scenario where the contracted resource is unable to respond as agreed, specifically when this unavailability coincides with the agreed service windows. In these cases, this clause implements a contractual obligation to notify the DSO of that unavailability, so the DSO can seek alternative services or a management process to avoid an issue on the network.

One example agreement which utilised a DPS/Service Management System assumes all resources are unavailable unless the provider has marked them as 'available' within the system itself, again reducing the need for specific contractual clauses. While this is considered as an example of good practice, it is also reliant on the utilisation of similar systems when managing flexibility services, not all DSOs currently have this ability and therefore it would be unrealistic to stipulate this at time of reporting.

Across the other agreements reviewed the clauses are similar in formation and terminology, in effect needing no further normalisation. One of the product team advises that an agreement in development has already reviewed this requirement and is opting to put the elements around unavailability within the schedules, not the actual agreement, although this is still not finalised at time of reporting. The default assumption is that the Services will be available in the service windows unless a declaration of unavailability is received.

To summarise, the examples of good practice identified by the product team are:

- As DSO's adopt DPS/Service Management Systems, DERs or Providers must mark DERs as 'available' within the systems themselves to avoid any confusion, alternatively or where such systems are not in use, providers must utilise the steps currently within 'Declarations of unavailability' clauses to ensure DSO's are aware of any issues.

## 2.2.8 Optional Services

This clause outlines any secondary services which are outside of the stipulated parameters of the agreements, these are optional, so non-provision does not instigate any of the management elements such as non-provision or defaults. Optional services can be within the same pricing structure or a separate premium arrangement, often these are bespoke to the locational requirements or agreement types being implemented, as such some variance is to be expected across contracting DSOs.

As before, the example agreements which include the additional 'optional' service clause are seen as examples of good practice from the legal review and the product team discussion. The addition of '2<sup>nd</sup> tier' pricing for optional services offers both the DSO and provider confidence in the availability and cost of optional additional services while not limiting or detailing the level of these services.

While the former discussion suggests the application of a cap or guideline on additional services and the need to move to re-tender, discussion identified that for short notice or real-time (emergency situation) needs this clause should not stipulate limits in detail. Neither has the product team attempted to stipulate any expectation around pricing, this is solely driven by the locational requirements of the network and stipulated by the contracting DSO.

To summarise, the examples of good practice identified by the product team are:

- Variation terms which include provision for optional, premium valued additional or optional services should be adopted across service agreements. These terms offer a preferable

alternative to varying service requirements, which outside of a cap or limit could be considered anti-competitive.

- The product team also highlight the approach of DERs/Providers being signed up to 'optional' emergency response flexibility service type (as an additional service, not a variation or specific 'optional services) should be included as an example of best practice. This addition enables DSO's to call on all DER available should an emergency situation occur, while leaving the option to respond to the providers. To offer a simple example, in this approach DERs/Providers contracting with service 'A' automatically agree to be contacted for service 'B' which looks to provide network support in emergency situations.

## 2.2.9 Providers Performance Obligations

Beyond the need to provide services in accordance to the specific service agreement/contractual parameters, each DSO had additional requirements to meet. For example, one agreement specified business H&S policy and operations manuals, where another added terms around Laws, Standards and codes of practice. This element was another example of where the use of DPS/Service Management systems negated the need for specific clauses within the agreements.

While the product team agreed each DSO would insist upon references to business specific requirements, moving into the following elements of the Product will define the need to identify key elements for performance management. Additionally, the product team agreed that variance on the specific references made in this clause should not impact the overall commonality sought within Sd-a, as such a more detailed review of performance obligations as specified across the sample agreements was undertaken by the product team.

This review located reasonable commonality across the terms provided, with a few exceptions which are noted below. A key output of the review was to identify again that the use of schedules, especially when looking to describe technical requirements or service specific parameters, greatly reduced the content and length of the parent agreement, as such this was a key output of the review and is noted in the good practise examples below. Those areas where significant variance or key questions remained are detailed below;

- Quality of Performance – Each agreement had slight variance in terms although there was broad consistency in the meaning of the clause and laws referenced. The Product team did make note that governing laws could vary in Scotland versus those implemented in England, so for SPEN and SSEN there may be the need to reference both sets and delete where appropriate to avoid needing two separate agreements. Complete alignment of the parent terminology should be accomplished simply within the standard template to be produced in sub-deliverable b.
- Availability – Some terms offered replicated clause elements from the parent agreements in many cases, with this duplication identified and scrutinised by the Product team and legal support. It was agreed by the product team that such duplication was unnecessary, as such the core elements - those deemed legally implicit should be retained within the core agreement, with service or provider specific additional elements added within defined schedules as to remain legally binding. The use of cross referencing in this section would also

enable more accessible agreements and should encourage a more dynamic template agreement within sub-deliverable b. It must be noted that variance should be expected in this section, based on the geographical, network, service specific requirements or individual requirements of a specific provider.

- Utilisation – as with the Availability section, the product team identified replication or repeated elements within this section. It was agreed by the product team that such duplication was unnecessary, as such the core elements - those deemed legally implicit should be retained within the core agreement, with service or provider specific additional elements added within defined schedules as to remain legally binding. The use of cross referencing in this section would also enable more accessible agreements and should encourage a more dynamic template agreement within sub-deliverable b. It must be noted that variance should be expected in this section, based on the geographical, network, service specific requirements or individual requirements of a specific provider. For both Availability and Utilisation, the use of a service specific schedule would reduce the need for cross-referencing or duplicate terms.
- Communications – as per the former sections, the product team identified replication or repeated elements within this section. It was agreed by the product team that such duplication was unnecessary, as such the core elements - those deemed legally implicit should be retained within the core agreement, with service or provider specific additional elements added within defined schedules as to remain legally binding. The use of cross referencing in this section would also enable more accessible agreements and should encourage a more dynamic template agreement within sub-deliverable b. It must be noted that variance should be expected in this section, based on the geographical, network, service specific requirements or individual requirements of a specific provider.
- Systems - as per the former sections, the product team identified replication or repeated elements within this section. It was agreed by the product team that such duplication was unnecessary, as such the core elements - those deemed legally implicit should be retained within the core agreement, with service or provider specific additional elements added within defined schedules as to remain legally binding. The use of cross referencing in this section would also enable more accessible agreements and should encourage a more dynamic template agreement within sub-deliverable b. It must be noted that variance should be expected in this section, based on the geographical, network, service specific requirements or individual requirements of a specific provider.
- Monitoring - as per the former sections, the product team identified replication or repeated elements within this section. It was agreed by the product team that such duplication was unnecessary, as such the core elements - those deemed legally implicit should be retained within the core agreement, with service or provider specific additional elements added within defined schedules as to remain legally binding. The use of cross referencing in this section would also enable more accessible agreements and should encourage a more dynamic template agreement within sub-deliverable b. It must be noted that variance should be expected in this section, based on the geographical, network, service specific requirements or individual requirements of a specific provider. As with the Communications and Systems sections, the use of a technical/provider requirements specific schedule would reduce the need for cross-referencing or duplicate terms.
- CMZ Scheduled System Testing & Pre-delivery testing – The Product team identified variance in this section and within the core agreements in terms of payment for tests. Some DSO's offer

payments for ongoing testing, while most agree the costs associated with initial, proving tests are subject to both parties absorbing their own costs. The manner of paying for ongoing tests was identified as being linked in most cases to the service types, in some cases it was linked to the preference of the parent DSO and the nature of the contract. The product team agreed there would be variance in the case of payments for test, for example it would be unsustainable to pay for testing for background or contract inherent 'additional' or optional services such as those relating to restoration services where restoration was not the subject of the parent agreement. The Product team also agreed that core requirements, such as testing providers capabilities pre-delivery should be included within the core agreement and not duplicated in this section, opting instead for the use of cross-referencing if these need reiteration in the associated schedules or performance obligations.

- Access – The product team agreed that access requirements should be covered within the core agreement and that the use of cross referencing would be sufficient to cover any obligations currently represented within this sub-section.
- ITT Pass/fail criteria – One of the example agreements included the ITT Pass/fail criteria within this sub-section, which the product team agreed while useful should be publicly available within procurement data and was not required within the core agreement or associated sub-sections. However, the use of DSP/Service Management Systems may mean that a repeat of this data within a schedule or sub-section could become more important, as such the Product Team agreed that the use of an additional schedule or variance driven by the use of such systems would be required.

To summarise, the examples of good practice identified by the product team are:

- The use of schedules to ringfence system, service and performance requirements is widely apparent and allows the simple cross-referencing between simple but specific contractual obligations and more detailed technical requirements. This is seen as an example of best practise and if fully applied should further reduce complex and often repeated clauses within agreements.
- Additionally and importantly, ensuring schedules are aligned in name and within the core of the detail across all the host DSOs and the SO will be a core output of sub-deliverable b and will ensure that commonality is not applied to the standard template at the expense of applying increasing variance to the schedules and supporting documentation.
- That either existing products in delivery or planning phase (possible Product 2) look to define a set of industry accepted 'thresholds' for non-delivery, availability, payment terms and default scenarios within performance obligations for flexibility services. Currently there is wide variance on both the application of these thresholds and the limits set, which will continue to cause difficulty for providers in managing services across DSOs. The product team will look to interact with the other products within WS1A to ensure the outputs of this product inform the application of fair, sustainable caps where required.

Further work on Performance Obligations is expected with sub-deliverable D of Product 4, looking specifically at the management of flexibility service provision across the industry, it's review and

validation plus a uniform approach to feedback with flexibility service providers. This deliverable is expected to define in more detail and drive commonality within performance obligations, which are currently spread across schedules, agreements and terms of use for DPS/Service management systems, service agreements and the supporting guidance notes.

## 2.2.10 Payment Terms

The Payment Terms clause governs the invoicing and settlement procedures in place for flexibility service provision, which are dependant on the individual DSO's procurement processes and procurement legislation.

While there was minor variance in payment terms across DSO's, in the main there was general alignment on the invoicing and payment terms and dates for settlement. The product team acknowledge that the governing principles around payment terms are procurement legislation and not a contractual variance between DSO's, as long as the resultant terms adhere to that legislation there should not be significant variance.

The product team will seek input from the SO to progress alignment across the industry in these terms, however small variances are likely to remain dependant on the DSO's procurement systems and the use of DPS/Service Management Systems which have been implemented to provide a more streamlined process. Additionally, as part of the Power Potential Project, UKPN will possibly employ a self-invoicing process similar to that employed by NGENSO which will provide further evidence on payment terms and potential commonality with SO models which could drive additional development for this clause.

To summarise, the examples of good practice identified by the product team are:

- Good practice recommendations within payment terms will be to reflect that each agreement will have minor variance based on the host DSOs utilisation of DPS/Service management systems or application of terms within the governing procurement legislation. While the use of DPS/Service management systems again offers advantages in the ability to automate these terms, the systems themselves still operate within (currently) EU procurement legislation.

## 2.2.11 Event of Default / Under-delivery of service

This clause has strong links to the Performance Obligations but specifies the management process around under delivery, repeat instances of under delivery and defaults, whereby a DSO would have to take corrective action to avoid further problems arising. The clause lays out clear expectations around communication and follow on actions which can be undertaken as part of the resolution process.

In one case the ITT and schedules already stipulate terms around the lack of service provision leading to a default, meaning the agreement clause is simplified. Another DSO confirmed they were developing a similar approach in their suite of documents with reference that 60% or less service provision within a defined window would result in non-payment. There is also reference to reduced payments for availability and the need for explanations and rectification plans which if not provided

could result in termination across examples, and in two cases specific references were detailed of repeat failures leading to termination of the agreement.

The example where a Service Management system is implemented has the ability to drop service providers who default/fail to respond down the list of providers responding to a service, in effect enabling them to remain on the resource 'list' but applying queue management principles based on performance.

This could be a distinct advantage if a resource suffered a prolonged outage to communications for example, where the physical restoration of a service could take months. It is important to note that should such an event occur, the other clauses around performance obligations and declarations of unavailability should allow service providers a similar route to avoid contract termination.

The product team discussion identified a potential need for variance in this clause based on the criticality of the service and the potential for other DERs to respond, however the use of schedule and guidance notes to detail obligations is acknowledged as a simplification tool for the agreements themselves.

Other workstreams in the ON Project, specifically but not exclusively WS1A Product 2 which are currently in delivery may offer further clarification on this section, however in the absence of wider input the product team have identified the following as proposed examples of good practice. It is essential to note that these should be seen as subject to revision as the wider products undergo completion. The examples of good practice identified by the product team are;

- Variance in the 'cap' percentage before non-payment is applied is to be expected and freedom to apply this variance should be allowed when supported by suitable detail. For example, low or non-provision of service in business-critical circumstances such as fault avoidance or supply restoration could result in significant penalties for the host DSO and other services may not be available, as such the ability to absorb low or non-performance from contracted providers is reduced. However, a default baseline for non-fault related services should be adopted and the most common figure stipulated as the threshold 'cap' is 60%, as such the group recommend this as the baseline
- Any failure to provide a contracted service should be the subject of a written explanation to enable a documented reporting process and ongoing performance management. (a pre-planned non-provision advised prior to the service requirement would be covered by clause 10 – Declaration of unavailability)
- The host DSO can request a rectification plan following any repeat failures (2 or more) from the same provider or DER. Should failures continue, a rectification plan is not submitted or does not confidently resolve the key issues then the DSO may terminate the agreement and move to re-tender.
- Use of schedules or procurement/tender documentation can reduce the contractual clauses within the core agreement.
- The use of Service Management Systems may automate or offer more adaptive management of repeat failures or non-delivery, they may also enable the ability to maintain a contractual relationship with poor performing providers while prioritising better performing providers when instructing services. This does offer advantages in service management as well as reducing



contractual requirements, and as points previously made should be adopted as soon as it is practicable for all DSO's to implement an equivalent system.

## 2.2.12 Insurance, Liabilities and Indemnity

While these three clauses are separate in the agreements they're often cross referenced or aligned due to the nature of the agreements themselves. Each clause denotes a specific 'cost' for the agreements, either through the insistence on a level of insurance to cover any losses, or the liabilities of the supplying provider should a failure occur which results in damage to the network or costs associated with an outage (CI's/CML's). Indemnities act as additional protection for both organisations and often stipulate costs within the bounds of the insurance expectations.

These terms are seen as a key issue within this review and was identified prior to the review as a likely subject which will continue to require specific focus. The main problem is the conflict between the inherent need for assurance for DSO's in the event of failure of service and the resultant potential costs (damage to network assets, CI/CMLs) and the inability for smaller providers to provide the required levels of insurance or liability costs.

While there is an element of individual DSO's risk approach to be acknowledged, there is also a question on whether these costs are an industry or regulatory requirement. To detail a scenario, if insurance or liability costs are a restriction to the development of smaller DER providers and by effect the evolution of local energy markets, could these costs be covered in other ways? For example, DSO could assume a higher 'risk' by not insisting on higher insurance, in the event of failure could the DSO recover the higher costs through specific elements of regulated incentives, or, could reductions in fault costs be acknowledged and provisioned if resulting from these agreements. The product team have acknowledged these points further in this report for discussion with regulatory representatives.

One reviewed agreement specifies only that the provider maintains 'adequate' insurance whereas others specify that the provider must insure '£5m for each public and employer's liability' and similar expectations. In this the former approach is more service responsive and seen as an example of good practice as it encourages the DSO to agree this specifically with a provider based on the service itself, although agreement as to what is adequate will need to be considered.

Another example currently caps liabilities to the same level for both themselves and the provider in the event of damage to £1m, with a stipulation that the DSO's total liability will not exceed £2m other than service charges, the matching cap of liabilities to £1m is also seen in another example. Two other agreements have a different approach, the first currently limits it's liabilities to the service payments while insisting upon a higher £3m limit for the provider, the second follows this approach but imposes a £5m limit on the provider.

Caps have clearly been implemented with the intent of restricting risks and exposure to both DSOs and providers, however the variations in how they're implemented is clearly apparent. The product team acknowledge that achieving commonality in this will need focussed effort for each DSO in changing the risk appetite of internal teams, however the cap of £1m for both parties is an existing fulcrum between risk and exposure, as such the product team recommend the £1m shared cap as an example of good practice for adoption. Although some flexibility may need to remain, for example project size may affect the level of appropriate cap. All agreements referenced these limits in exception to death or personal injury which should be maintained.

Indemnities are currently the subject of individual clauses or are cross referenced with liabilities and warranties and subject to the insurance terms/caps. A general point is that these should follow a

common approach across the DSO's, with either a separate clause to improve accessibility or an agreed cross-referencing approach.

Within the review, the conflict between managing risks and related costs of service failures and the inability for small providers in meeting higher insurance premiums/liabilities was reviewed significantly and in detail. While stakeholder feedback would suggest support for DNO's absorbing these costs/higher risks, the recollection of costs through regulatory incentives or even 3<sup>rd</sup> party funds supporting these providers there is an apparent risk of distorting competition in these cases. Alternatively, by implementing caps to insurance and liabilities could enable larger organisations to manipulate services, open the markets to 'gaming' and result in the socialisation of costs which larger organisations are in a better position to absorb.

There is likely to be significant input required from each organisation and the regulator in identifying and implementing a common approach to these clauses, however through the review and discussion it's clear that examples of good practice are identifiable and should be agreed:

- Insurance – 'Supplier to maintain adequate insurance' - removing specific figures in place of figures agreed in supplier and service specific agreements. The Flexibility Market Principles being finalised in WS1A Product 1 stipulates the following;

*'The seller of flexibility is liable for non-delivery and the buyer of flexibility for non-payment.'*<sup>i</sup>

*Nevertheless, this does not preclude the System Operator offering Market Participants protection from liability in some circumstances, subject to conditions, in order to stimulate the market and increase participation.'*

This does result in insurance 'liabilities' and therefore requirements being directly linked to the costs associated with non-delivery of a service, which by definition will vary dependant on the nature of the network condition and topography the service is being secured against. As such allowing variance or specific discussion around these requirements on a service by service basis would seem to be the best option.

- Liabilities – DSO/Provider equivalent 'caps' avoiding provider weighted specific figures (while retaining the exceptions for death & personal injury), the proposed figure for this cap is £1m.
- Indemnities – clearer, common approach required across the DSO's in terms of clauses or cross-referencing.
- The ENA and the regulator should review these clauses and the discussion points raised by the product team to produce guidance for DSO's around the implementation and impact management of any changes, as such the product team have referenced this need in a separate section later in this report.

It was noted that current innovations projects such as SSEN's NIA project 'SCMZ', which looks at the ability to place agreements for flexibility service provision with smaller, community focused groups who may struggle with larger, defined indemnity, insurance and liability costs, may provide additional evidence supporting a recommended good practice approach. It was also noted in the discussion that regulators or industry bodies may also need to be consulted on some points of the financial exposure related to relaxing the required liabilities, indemnities and insurances.

### 2.2.13 Modern Slavery & Living Wage

Modern slavery and terms confirming this is an unacceptable practice are common if not applied in standard to all agreements, not just those relating to flexibility services. Living wage requirements are however still applied on a business by business basis with minimum wage requirements often used in its stead.

Requirements around minimum versus living wage are likely to be complex for individual organisations to adopt, if purely implementing additional requirements in response to flexibility contracts. Only one example agreement within the review stipulated the requirement for living wage not minimum wage from potential providers, as such the product team acknowledge the complexities of defining a best practice commonality for this piece.

However, despite the possibility this could be perceived as an optimistic or idealistic example of good practice for inclusion, the product team acknowledge the wider societal benefits of recognising this as an example of good practice, so the output of this term is to ensure both living wage and modern slavery terms are clear across each DSO.

To summarise, the examples of good practice identified by the product team are:

- Agreements should reference clauses specifically on the avoidance of modern slavery and the adoption of living wage requirements.

### 2.2.14 Dispute resolution & Termination

Again, linking to other terms and clauses such as notification of unavailability and defaults, Dispute Resolution and termination govern the processes should issues fail to be resolved in 'normal' operational parameters. Disputes could result from performance or payment issues and are not limited to the DSO instigating a concern, for examples the clauses stipulate the notice periods both parties must follow.

These clauses displayed some alignment across the DSO's however there were variances in the terms applied and the notice periods leading to termination. One example was more detailed and was again weighted towards the DSO in terms of notice periods, it also referenced service performance and availability within this clause which as per previous sections should be referenced within the appropriate clauses earlier in the agreement.

All agreements referenced breaches of warranty or insolvency of the provider, but terms could be normalised across the DSO's for clarity. Notice periods for termination ranged from 21 days to 24 months, however this was dependant on the leading cause, for material breaches this remained roughly consistent, 21-30 days being quoted.

There are also examples which do not specify a period of mediation or adjudication, opting instead to lead directly from escalation to termination. These examples do not seem to provide suitable routes

for appropriate discussion should a dispute arise between both parties although it is assumed/expected such discussion would take place despite the contractual elements.

Good practice in these clauses is:

- The alignment allowing similar (if not the same) notice periods for both DSO and supplier in general and in the event of an unremedied breach of agreement leading to termination.
- Conditions of breach referenced within the appropriate clauses elsewhere in the agreements or schedules and not repeated/referenced only in this clause.
- Escalation should be followed by mediation or adjudication and not straight to formal court proceedings, while it's expected this process would be followed in any event the lack of definition in the clause provides the potential for this discussion requirement to be avoided.

## **2.3 Points of existing Commonality**

Across the submitted agreements/contracts the following points are already displaying commonality and no further works are required:

Recitals

1. Definitions and Interpretation
2. Nature of Contract – Recitals
12. Assignment, Sub-contracting and Transfer
13. Contract Personnel

CDM

17. Variations
18. Site and Facility Maintenance
20. Intellectual Property Rights
24. Confidentiality and Announcements

Publicity

Company Property

25. Anti-Bribery
26. Reputation
27. Data Protection

28. Force Majeure
31. Invalidity and Severability
32. Waiver
33. Notices
34. Third Party Rights
35. No Agency or Partnership
36. Survival
37. Entire Agreement
38. Inadequacy of Damages
39. Remedies Cumulative
40. Governing Law and Jurisdiction.

### 3 Questions for Stakeholders

In response to areas where further input was identified as required, the product team prepared a suite of questions for stakeholder review and comment which were presented to stakeholders on the 11<sup>th</sup> April 2019, with further feedback requested following the event. Similar questions were then posed to the Open Networks Advisory group on the 5<sup>th</sup> May. Feedback from both events was reviewed and applied to the supporting detail and summary good practice examples proposed within this report.

These questions and a review of feedback are listed below:

#### Service Agreement Q & A – General

*The product team have identified the need for a glossary of terms which can be adopted/utilised by each DNO as an example of good practice, do you agree this would be useful?*

*The product team have identified that the use of supporting documentation and guidance notes which are publicly available is an example of good practice when reviewing agreement terms, do you agree and why? (Example – WPD's Flexible Power Partner Guidelines and UKPN's Flexible Services – Product Definitions)*

*The product team have identified that schedules to explain specific scheme requirements remove the need for associated, detailed contractual clauses which over complicate those agreements. Would you be happy to have scheme-specific requirements reflected more in accompanying schedules and not the base agreement?*

*Should agreements be available and subject to consultation prior to the release of any tenders, or subject to negotiation/agreement during the tender process itself?*

### **Service Agreement Q & A – Variations**

*Some DNOs contracts pre-agree up to a set volume of availability at set times, in these instances what level of variation would you accept to the pre-agreed volume and times before the contract should be re-tendered?*

*Should the existing contract be terminated if additional requirements are considerable (i.e. >10% increase in MWhs), allowing a re-tendering of the new requirements in full, or should the additional requirement be subject to a different tender?*

*An example agreement currently in use includes a provision for 'Optional services', agreeing a price for additional service provision outside the agreement times/amounts while avoiding obligation to respond. Would the addition of an 'Optional services' clause to the agreement be acceptable as a way to avoid re-tendering?*

### **Service Agreement Q & A – Durations**

*Currently DNO's offer up to 4-year or 1 year rolling agreements for services, are these suitable for all resource types or could justifications be made for longer/shorter agreement terms?*

*If so what are these justifications based on, DER technology type, availability of alternative resources, locational?*

*Some 4-year agreements have the ability to extend on a yearly basis up to a maximum of 6 years (total – 4+1+1) when the service requirement would be re-tendered. Should these extensions be allowed, or should a single agreement term followed by a complete re-tender be implemented instead?*

### **Service Agreement Q & A – Indemnities, Liabilities & Insurances**

*In terms of insurance, would a pre-defined insurance level reflected in the agreements be useful or should this be the subject of location/service specific negotiation? (I.e. £3m vs 'suitable insurance' examples)*

*Shared/similar caps for liabilities have been identified as a potential example of good practice, example levels from existing agreements range from £1-3m.*

- *Are there any scenarios where shared caps may not be applicable?*

- *What would be an acceptable, universally applied cap (to scenarios which qualify, as per q above)?*

*The three clauses/contractual descriptions are often cross-referenced, would stakeholders support a simplification of these clauses and improved supporting detail?*

## **Service Agreement Q & A - Closing**

*Is there anything else you would like us to focus on or explain?*

*Is there anything we have missed which you feel needs specific attention?*

## **3.1 Stakeholder Responses**

### **General**

Stakeholders raised the example of work undertaken in the Netherlands – DNV GL suggested this is being incorporated to the FUSION project.

Work within P4 and later on needs to avoid stifling innovation, which may hinder the improvement of the contract agreements later on as markets evolve.

Stakeholders were practically unanimous in that DSOs should avoid bilateral contracts – this has potential implications for several items raised (e.g. Variations as these may be seen as bilateral agreements bypassing the tendering process).

Stakeholders suggested that contracts need to facilitate stackable revenues.

Should contracts need to be negotiated? Contracts/Agreements should be as transparent and standardised as possible.

Stakeholders raised the issue of transparency providers' characteristics with a focus on the carbon intensiveness of flexible resources. The aim is for information to drive the policy debate. However, they understood that other providers that appear as carbon neutral, e.g. storage facilities (batteries) may actually be using carbon intensive sources to charge (e.g. coal plants overnight) and discharge later during the flexibility window.

Stakeholders suggested that they would want to understand more about the DNOs/DSOs decision making process when it relates to assets and service needs.

Stakeholders supported the visibility of offers received/accepted, whilst cautioned against any market distortion outcome. A suggestion is that high prices may make it easier for DNOs to justify investments.

Guidance notes would be useful, but depends who would produce them? Appreciate commonality would be very useful across DNO's.

ADE is preparing a Code of Conduct which may help drive the behaviours in relation to flexibility, further work in P4 should review this CoC to ensure collaborative development and avoid conflict.

## **Durations**

If prices are set a year or further in advance this will not result in an efficient price for tomorrow, prices would not reflect the value of that service at that point in time and would not work in a liquid market.

DSOs could offer both longer and shorter term contracts as long as requirements are clear. Offer longer term agreements until a real time Service Management system is available, as once that is in place these longer contracts could inhibit participation.

## **Additional/Optional Services**

Stakeholders raised question about the consistency in pricing these (outside of a tender).

Issues could be caused by not going out to tender for additional services.

Secondary trading could become more valuable once there is sufficient liquidity, agreements should prepare for this.

## **Performance Obligations/Monitoring**

The contract should aim to focus Flexibility Provider's efforts towards delivery instead of Penalties – Stakeholders suggested that the claw back mechanism of WPD's contract is a useful approach

## **Insurance, Liabilities and Indemnities**

Contractual responsibilities (e.g. liabilities, insurance, etc) should be proportionate to contract value, esp. for smaller providers. At the same time stakeholders acknowledged that this may facilitate free-riding. A wider point was made in order to facilitate the parties to undertake risk in a proportionate manner to their size.

There are a lot of small flex providers coming through, how can you make these (clauses) more palatable for them, as the threat of penalties can quickly make their business cases fall through. If the DSO is best placed to manage that risk, then why pass it onto the DER/flex provider?

If terms were standardised – could a potential 3rd provider step in as an insurance provider?

## **4 Points for industry & regulatory consideration**

### **Insurance, Liabilities and Indemnity**

As outlined in section 2.2.12, this is seen as a key issue within this review and was identified prior to the review as a likely subject which will continue to require specific focus. The main problem is the conflict between the inherent need for assurance for DNO's in the event of failure of service and the resultant potential costs (damage to network assets, CI/CMLs) and the inability for smaller providers to provide the required levels of insurance or liability costs.



While there is an element of individual DNO's risk approach to be acknowledged, there is also a question on whether these costs are an industry or regulatory requirement? (i.e. could these costs become specific elements of regulated incentives in the event of failure or could reductions in fault costs be applied in the event of failure if DNO's took more risk 'absorbent' approaches).

The referenced section details the cases both for and against DSOs relaxing requirements, the product team recommend that the ENA lead a separate review of this issue with Ofgem, which should also acknowledge the points raised by stakeholders, copied below:

*'Contractual responsibilities (e.g. liabilities, insurance, etc) should be proportionate to contract value, esp. for smaller providers. At the same time stakeholders acknowledged that this may facilitate free-riding. A wider point was made in order to facilitate the parties to undertake risk in a proportionate manner to their size.*

*There are a lot of small flex providers coming through, how can you make these (clauses) more palatable for them, as the threat of penalties can quickly make their business cases fall through. If the DSO is best placed to manage that risk, then why pass it onto the DER/flex provider?*

*I terms were standardised – could a potential 3rd provider step in as an insurance provider?'*

This review should include the other Products in delivery from WS1A, specifically within Product 1 – Flexibility Market Principles, to produce additional guidelines or instruction for DSOs and DER/Providers when looking to implement or respond to the concerns around insurance, liabilities and indemnities.

## 5 Recommendations for good practice adoption

	<b>Location/area of good practice (i.e. Supporting data or term)</b>	<b>Good Practice Detail</b>	<b>Source DNO/reference examples</b>
1	General	A glossary/definition of legal terms should be compiled and adopted by all DNO's which can be universally applied/utilised across flexibility service agreements to support agreement utilisation.	All
2	General	All DSO's should agree on the unification of role terms within service agreements, i.e. 'the customer', 'the supplier', or 'the company', 'the provider', etc., as multiple variances are apparent across (and even within single) agreements.	All
3	General	The utilisation of web pages/portals to present a wide array of supporting documentation,	WPD/UKPN

		schedules and agreement examples enables a far higher accessibility vs the specific issue of documentation within single tender exercises.	
4	General	Defined and easily available supporting documentation, guidance notes and feedback forms reduce the need for more complex agreements, again increasing accessibility and ease of utilisation.	WPD/UKPN
5	General	Pre-release or accessible website-based example agreements are also useful, allowing potential DER providers to review contractual elements pre-procurement and to raise concerns/questions before the regulated process commences. In some cases these could be the subject of consultation before release although once commonality has been achieved the need for this additional step is unlikely to be required.	WPD/UKPN/NPG
6	Agreement Duration	Agreement durations should remain responsive to the locational and business drivers which define the flexibility service and be implemented by the DSO as required. This will naturally evolve and agreement durations will reduce as markets mature and flexibility service management systems enable day ahead and real-time markets to become fully responsive.	N/A
7	Agreement Duration	The application of re-opener stages to contract durations and the restriction of contract extensions is also seen as an example of good practice. For rolling contracts and longer duration contracts the product team recommend a maximum of a 5-year period between re-opener stages, with the option for these to be more frequently re-opened to new competitions as required.	N/A
8	Agreement Duration	The restriction or removal of contract extensions is also seen as an example of good practice, service agreements which enable extension after a fixed period could exclude new market entrants from competing, so should not be referenced within agreements. While 4 or 5-year contracts remain a possibility, 5 years should be	N/A

		the maximum contract length, and at this point the requirements should be subject to a new procurement or re-opener stage, where the market can respond to the extended requirements and not just the incumbent supplier.	
9	Agreement Variation	If additional power inject/demand reduction are required this should not result in an agreement alteration, new or additional requirements should be the subject of a new service agreement and procurement exercise.	N/A
10	Agreement Variation	If service windows change, but power requirements remain the same, the market should be tested to see if alternate providers are available before seeking to alter an existing agreement.	N/A
11	Agreement Variation	Short-term variations, resulting from marginal, infrequent, one-off and time-restricted changes (e.g. sporting events, unseasonal weather, national events such as elections) should be allowed and requested only if a) there is no change to the overall agreement value and b) the variation doesn't result in additional or extra service requirements which should be the subject of new procurement processes.	N/A
12	Agreement Variation	Providers must advise of any change in registered DER subject to existing service agreements, change includes an increase/decrease in capacity, type or technology changes.	ALL
13	Agreement Variation	Agreements should also allow the ability for a contracted provider to change DER within the service zone, effectively the agreements award the 'capacity required' and not the specific DER. This enables suppliers to change the source asset(s) of the service as their capabilities change and more DER comes online, providing the new assets continue to meet the requirements of the agreements.	UKPN
14	Monitoring	The use of flexibility service management systems which reduce or remove the need for specific contractual elements around	WPD

		monitoring requirements should be adopted as soon as reasonably practicable.	
14a	Monitoring	Where such Service Management systems are not available, supporting guidelines and specific schedules should be used to separate technical requirements from contractual obligations, relying on simple cross referencing to secure the required provision.	N/A
15	Monitoring	Agreements should specifically retain rights for site visits direct with providers and the insistence that agreements between providers and DER Operators enable this retention of site visit access rights. In all instances, agreements must enable DSO's to perform site visits to any DER which provide services within direct or aggregated service examples.	WPD
16	Testing & Pre-delivery	The product team agreed that defining a time in which tests are completed (current examples are 1 month, 6 months prior to service start) should remain a point of variance driven by the priority nature of the service, however, unanimously agreed across all agreements is the need to test: <ul style="list-style-type: none"> <li>○ The providers API or Interface</li> <li>○ The ability to meet the requirements of the service</li> <li>○ That the individual DER(s) have been built and energised and a connection/export agreement is in place</li> <li>○ The right to perform a site visit to the specific DER.</li> </ul>	N/A
17	Utilisation Instructions	Agreements should keep specific references simple and using schedules/guidance notes to keep agreements accessible is good practice, encouraging a wider range of innovative interface options and not limiting responses.	N/A
17a	Utilisation Instructions	The use of the DPS/Service Management Systems will further enable simplification of this clause, as points previously made as soon as it	WPD

		is practicable for DSO's to implement an equivalent system.	
18	Declarations of Unavailability	As DSO's adopt DPS/Service Management Systems, DERs or Providers must mark DERs as 'available' within the systems themselves to avoid any confusion, alternatively or where such systems are not in use, providers must utilise the steps currently within 'Declarations of unavailability' clauses to ensure DSO's are aware of any issues.	WPD
19	Optional Services	Variation terms which include provision for optional, premium valued additional or optional services should be adopted across service agreements. These terms offer a preferable alternative to varying service requirements, which outside of a cap or limit could be considered anti-competitive.	UKPN
20	Optional Services	The product team also highlight the approach of DERs/Providers being signed up to 'optional' emergency response flexibility service type (as an additional service, not a variation or specific 'optional services), this should be included as an example of best practice. This addition enables DSO's to call on all DER available should an emergency situation occur, while leaving the option to respond to the providers. To offer a simple example, in this approach DERs/Providers contracting with service 'A' automatically agree to be contacted for service 'B' which looks to provide network support in emergency situations.	WPD/UKPN
21	Performance Obligations	The use of schedules to ringfence system, service and performance requirements is widely apparent and allows the simple cross-referencing between simple but specific contractual obligations and more detailed technical requirements. This is seen as an example of best practise and if fully applied should further reduce complex and often repeated clauses within agreements.	WPD, ENWL, SPEN, UKPN
22	Performance Obligations	Importantly, ensuring schedules are aligned in name and within the core of the detail across	ALL

		all the host DSOs and the SO will be a core output of sub-deliverable b and will ensure that commonality is not applied to the standard template at the expense of applying increasing variance to the schedules and supporting documentation.	
23	Performance Obligations	Existing products in delivery or planning phase (possibly Product 2) will look to define a set of industry accepted 'thresholds' for non-delivery, availability, payment terms and default scenarios within performance obligations for flexibility services. Currently there is wide variance on both the application of these thresholds and the limits set, which will continue to cause difficulty for providers in managing services across DSOs. The product team will look to interact with the other products within WS1A to ensure the outputs of this product inform the application of fair, sustainable caps where required.	ALL
24	Payment Terms	Good practice recommendations within payment terms will be to reflect that each agreement will have minor variance based on the host DSOs utilisation of DPS/Service management systems or application of terms within the governing procurement legislation. While the use of DPS/Service management systems again offers advantages in the ability to automate these terms, the systems themselves still operate within (currently) EU procurement legislation.	WPD
25	Event of Default	Variance in the 'cap' percentage before non-payment is applied is to be expected and freedom to apply this variance should be allowed when supported by suitable detail. For example, low or non-provision of service in business-critical circumstances such as fault avoidance or supply restoration could result in significant penalties for the host DSO and other services may not be available, as such the ability to absorb low or non-performance from contracted providers is reduced. However, a default baseline for non-fault related services should be adopted and the most common	ALL

		figure stipulated as the threshold 'cap' is 60%, as such the group recommend this as the baseline	
26	Event of Default	Any failure to provide a contracted service should be the subject of a written explanation to enable a documented reporting process and ongoing performance management. (a pre-planned non-provision advised prior to the service requirement would be covered by clause 10 – Declaration of unavailability)	ALL
27	Event of Default	The host DSO can request a rectification plan following any repeat failures (2 or more) from the same provider or DER. Should failures continue, a rectification plan is not submitted or does not confidently resolve the key issues then the DSO may terminate the agreement and move to re-tender.	ALL
28	Event of Default	The use of schedules or procurement/tender documentation can reduce the contractual clauses within the core agreement.	ALL
29	Event of Default	The use of Service Management Systems may automate or offer more adaptive management of repeat failures or non-delivery, they may also enable the ability to maintain a contractual relationship with poor performing providers while prioritising better performing providers when instructing services. This does offer advantages in service management as well as reducing contractual requirements, and as points previously made should be adopted as soon as it is practicable for all DSO's to implement an equivalent system	WPD
30	Insurance, Liabilities and Indemnities	Insurance – 'Supplier to maintain adequate insurance' at a level to be agreed with the DSO - removing specific figures in place of supplier and service specific agreements.	NPG
31	Insurance, Liabilities and Indemnities	Liabilities – DSO/Provider equivalent 'caps' avoiding provider weighted specific figures (while retaining the exceptions for death & personal injury), the proposed figure for this cap is £1m.	WPD/NPG/UKPN

32	Insurance, Liabilities and Indemnities	Clearer, common approach required across the DSO's in terms of clauses or cross-referencing.	N/A
33	Modern Slavery and Living Wage	Agreements should reference clauses specifically on the avoidance of modern slavery and the adoption of living wage requirements.	SSEN
34	Dispute Resolution and Termination	The alignment allowing similar (if not the same) notice periods for both DSO and supplier in general and in the event of an unremedied breach of agreement leading to termination.	ALL
35	Dispute Resolution and Termination	Conditions of breach referenced within the appropriate clauses elsewhere in the agreements or schedules and not repeated/referenced only in this clause.	N/A
36	Dispute Resolution and Termination	Escalation should be followed by mediation or adjudication and not go straight to formal court proceedings, while it's expected this process would be followed in any event the lack of definition in the clause provides the potential for this discussion requirement to be avoided.	UKPN/NPG/WPD

## 6 Summary & Next Steps

The WS1A review of existing agreements identified both a degree of existing commonality and a range of good practice examples which can be agreed by all UK DSOs developing or implementing flexibility services. Most DSO's were able to provide source agreements and supporting documentation to perform the review with exceptions only where documentation does not currently exist in final format, so it is with confidence this report is a conclusive review of distribution implemented flexibility service agreements.

A positive point is the existing alignment across multiple clauses apparent across the reviewed documents, which provide some assurance to DER Providers and positively reflects the collective ideologies of the host organisations in developing and procuring flexibility services. Also positive is the wide array of good practise examples already in practise across the DSOs, and the initial support and acceptance of each DSO in acknowledging and moving to adopt these examples.



A key point of note within this summary is the use of Schedules and supporting documents to provide additional detail which are apparent across some of the source material, and in most cases this material is publicly available ahead of specific procurement processes, on DSO websites for example. This has been identified as a key good practice point within this report but more than this it is an example of best practise for customer service and engagement within this emerging market. The ability to review and absorb detailed information and example contracts before entering a procurement exercise or committing an asset does not just benefit providers but should also improve the quality of service offerings available to DSOs. However, it is essential that the required variations in certain agreement clauses are not hidden or moved to schedules purely to produce more common standardised agreements.

It is critical to note that network locational requirements, network technical requirements, service requirements and in some cases DSO business needs will continue to drive some essential variances in clauses and agreements. These should be highlighted, where needed explained and accompanied by supporting detail but ultimately accepted across flexibility service agreements, the product team recommends that these essential variances are not moved into accompanying schedules or supporting notes, as it could be perceived as less transparent.

The use of DPS/service management systems to both procure and manage services and how they impact the contractual clause requirements, both within agreements and in the management of services overall has also been recognised as a good practise point. The use of these systems has had a distinct impact on the detail included with the associated agreements and schedules, with many of the good practise points already absorbed within the system use requirements. As DSO's develop or procure similar systems it should be expected that similar refinement and reductions occur in the need and interpretation of flexibility service agreements.

While this report must acknowledge the resource impact for each DSO in engaging the internal teams required to review and plan the changes, impact assessing existing contracts and how these changes may impact current or planned roll-outs, each contributing organisation has committed to this piece of work as it is widely recognised there is significant benefit to the industry in doing so. Improving commonality, transparency and approachability in flexibility services will encourage new market entrants and support additional providers to join this emerging market. Clarity and confidence in the terms, conditions and management principles employed by hosting DSOs will also enable a more comparative reviewing and auditing process across flexibility services in the UK industry.

Initially the scope of this product was to include these examples within this report, and then to develop an implementation plan across the host organisations within sub-deliverable b. However, as a result of the scope changes detailed in section 1, this report is now the precursor to the production of a standard agreement template for industry adoption. The planned approach is to collate the existing points of commonality identified within this report to form a structurally formatted template for agreement across the host DSOs.

The Product team will then add the elements of good practice detailed within this report and apply a gated review and approval process to enable all DSO's to offer feedback and informed adaptation where required, with key gates also resulting in stakeholder interaction and feedback processes. A draft of this agreement should be available for review in December 2019 with a final version ready for review and approval in March 2020. (subject to ON WS1A WG approval). The final point of note is that the very process of collating, drafting and reviewing these good practice points into a draft agreement may identify further good practice points and additional points of variance where that

variance is essential and justifiable. The product team are proposing to add to this report on an ongoing basis throughout the development of the standard template agreement.

The Product team are now progressing this next stage of Product 4.

## 7 Glossary

Term	Definition
Asset	A physical resource attached to the Distribution network, such as a battery or distributed generation plant.
Contract/Agreement	A written contract utilised by the host DSO when procuring network flexibility services, usually supported by several schedules and supporting documentation and agreed by both parties at the end of the procurement phase.
DER	Distributed Energy Resource, which could be an asset or a demand response service or device.
Distribution Network Operator (DSO)	The person or legal entity named in Part 1 of the Distribution Licence and any permitted legal assigns or successors in title of the named party.
Distribution System	The System consisting (wholly or mainly) of electric lines owned or operated by the DSO and used for the distribution of electricity between the Grid Supply Points or Generation Sets or other Entry Points to the points of delivery to Customers or Authorised Electricity Operators, or any Transmission Licensee within Great Britain and Offshore in its capacity as operator of the licensee's Transmission System or the National Electricity Transmission System and includes any Remote Transmission Assets (owned by a Transmission Licensee within Great Britain), operated by the DSO and any electrical plant and meters and metering equipment owned or operated by the DSO in connection with the distribution of electricity, but shall not include any part of the National Electricity Transmission System.
DPS	Dynamic Purchasing System, a system which simplifies the procurement of DER to provide network flexibility services.
Embedded/Distributed Generator	A Generator including a Customer with own generation whose generation sets are directly connected to the DSO's Distribution System or to another authorised distributor connected to the DSO's Distribution System. The definition of Embedded Generator also includes the OTSO in relation to any embedded Transmission System.
ENA	Electricity Networks Association
Generator	A person who generates electricity under licence or exemption under the Electricity Act 1989 (as amended, including by the Utilities Act 2000 and the Energy Act 2004).
ITT	Invitation To Tender – Part of the EU regulated procurement process.
ON	The ENA's Open Networks Project, which looks to identify, implement and document alignment throughout the DSO transition and whole system operation.
National Electricity Transmission System Operator (NETSO)	National Grid Electricity Transmission (NGET) in its capacity as operator of the National Transmission System, alternatively referenced as the SO within this document.
PQQ	Pre-Qualification Questionnaire – Part of the EU regulated procurement process.
Provider	An asset owner or aggregator responsible for the provision of network flexibility services and subject to agreements and the clauses therein.

Term	Definition
SA	Service Agreements, term utilised to cover DSO offered contracts or agreements for the provision of flexibility services.
SMS	Service Management System, for example WPD's Flexible Power system.
System Operator (SO)	The System Operator is responsible for ensuring the stable and secure operation of the whole transmission system.
WS1A	The Open Networks Workstream 1A, which looks to clarify and provide commonality across flexibility requirements and provisions within the DSO transition.