Standard Agreement for Flexibility Services v3 consultation feedback and response

Clause	Feedback	Response
Definition of DER	The Standard Agreement for Flexibility Services is focused around the procurement of available Distributed Energy Resources (DER) to use in flexibility services, and although this could potentially include domestic energy smart appliances, other industry stakeholders (such as Ofgem) define DER as business owned assets, whereas residential, consumer-owned assets are defined as Consumer Energy Resources (CER). We believe the definition of DER should be amended slightly to clarify that domestic energy assets, such as electric vehicle charge points, are included in the definition of DER to avoid confusion within the industry.	Definition updated in latest version to reflect that both domestic and non-domestic assets are included as well as electric vehicle charge points.
5.2.8 + 5.2.9 +5.3	This appears to effectively sign up anyone taking part in flexibility scheme up to this agreement. How can this be enforceable? Does this mean we are liable for any breaches which may well be out of our control.	The warranties at clause 5 are given by the Provider, and the agreement is between the Provider and the relevant DNO. Clause 5 does not sign up other parties to the agreement. The effect of warranties 5.2.8 and 5.2.9 is to require the Provider to pass through its relevant obligations under the agreement to any relevant affiliate, third party.
3.1.6 + 3.1.7 + other relevant clauses	In respect of non-Accessible Sites (Clause 3.1.7), we cannot guarantee the Company access to underlying DERs because the DERs are the personal property of individuals (EVs / EV chargers etc), and we certainly cannot facilitate tampering with the DERs for the same reason. Even a reasonable endeavours obligation does not reflect the reality of the relationship between a retail aggregator and the underlying DERs. In practice we would not be able to reasonably take any steps to permit such access without undermining its relationship with its individual customers. The ENA should also consider the impact of Clause 3.1.6 on aggregators of thousands of underlying charge points. In our experience, it is unlikely that charge point operators will be	Terms of access to relevant sites will be dealt with individually by DNOs in Service Terms. Paragraph 6.6 of the Service Terms will set out the DNO's specific access terms.

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	willing to grant the Provider such rights of access and testing in favour of the DSO / TSO. In reality, any testing of or tampering with the DER could give rise to a property damage claim against the Provider.	
Clause 3.1.9	This clause seems loosely defined, if this clause is asking us to highlight other flexibility services this should be defined clearly. There is also no established mechanism to provide this notification, therefore it is unclear how we would comply with this Clause. Also, this could be misconstrued to require the Provider to share agreements with other third parties on how it controls assets. This isn't something most Providers will be able to do due to confidentiality restrictions in those arrangements.	Where another agreement could reasonably impact Availability of the DER / ability of the Provider to perform its obligations under the Common Contract, the Provider must disclose its existence as the relevant DNO will require this information from an operational service management perspective. The scope of the obligation does not require the terms of the agreement or the agreement itself to be disclosed, only its existence. The Agreement includes detailed confidentiality obligations at paragraph 12 and so the sharing of this information with the relevant DNO will be subject to these restrictions, which should provide the Provider with sufficient comfort. Processes for giving notice will be set out in the Service Terms and therefore giving notice of the relevant agreements would follow details set out in the relevant Service Terms.
7.1.1	We believe that Clause 7.1.1 should be made subject to Clause 7.3, to make clear that a party should have the right to remedy any breach before it becomes a breach worthy of termination. This seems to be implied by Clause 7.3.3 but as the two Clauses are independent it is unclear whether they should be read together. Where a breach is remediable, it is not to either party's benefit to have a hair trigger termination right.	Paragraph 7.1.1 has been updated to refer to paragraph 7.3.
7.9	It is not a market standard position for the Provider to cover the Company's costs in replacing the Provider. Indirect costs are usually excluded in large scale commercial contracts, with courts	It should be noted that these costs are only payable where the Provider is in default / breach of the agreement and this amount is subject

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	then being left to determine whether a specific loss is direct or indirect in accordance with common law principles.	to a cap (being the Transmission Limit or Distribution Limit). If the Agreement terminates due to the Provider's breach, the DNO will need to procure replacement capacity to cover the Provider's obligation – the cost of this should be borne by the Provider given it is in default under the Agreement.
10.1	Whilst we appreciate the amendments that have been made to narrow the heads of liability under the latest versions of the ENA standard, like many commercial organisations it is very difficult for us to sign up to contracts with significant uncapped liabilities. On this basis, we would look for the contract to contain a maximum aggregate cap for general liability (in addition to the per incident cap). The current lack of certainty in respect of potential liability exposure is the major issue that is preventing us from being able to enter into tenders on the basis of the latest ENA standard contract, and where a per incident cap has already been agreed, we think it reasonable to establish an aggregate cap that is a reasonable multiple of this per incident cap. We would be happy for the aggregate cap to be linked to the fees paid to the Provider under the contract (e.g. the prior 12 months of fees) or to include a fixed liability cap significant enough to protect the Company while not penalising the Provider (for example, 10x the per incident cap).	An aggregate cap of £2,000,000 will be included at clause 10.1.
11.5	Whilst we appreciate that this obligation has been narrowed to only apply to "Accessible Sites", we would like to flag that the need to notify the Company immediately on any change in ownership, occupancy or use of a Site is not appropriate in the context of an aggregator of thousands of assets. In many cases, the Provider may not even be made aware of such a change by the underlying asset owner. It would be useful to understand how the ENA envisions this notification mechanism working for aggregators of tens of thousands of EV charge points (both domestic sites and those managed by charge point operators) where managing this would be extremely laborious. Provided the Provider can fulfil its obligations with there being no impact to the Services, we do not see why this notification is required.	In order for the DNO to effectively exercise its access rights under the Agreement (see paragraphs 3.1.6 and 15.3) it will need to have up to date information in respect of the owner / occupier of the Site. The obligation is to notify "promptly"– this provides DNOs comfort that it will have accurate information while Providers have flexibility as they are not committed to provide this

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		information within a specific timeframe. Paragraph 11.5 is applicable only to the actual Site (and not the underlying DER). We would expect the Provider, where for example acting as aggregators for charge points, to receive this information.
11.6	We would not expect a change of control termination right to exist where the change of control does not impact the Provider's ability to perform its obligations under the Agreement. In any event, we would expect there to be a carve out for solvent reorganisations of the Provider's group, as is common in restrictions of this nature. We would also suggest that any due diligence checks should be limited to cases where there is reason to doubt the solvency of the new owner.	This is customary "know your customer" language. It is intended to cover changes of control to entities subject to sanctions etc, not solvent reorganisations. This wording has been kept high level to reflect the fact that each DNO will have different internal due diligence checks and procedures. We do not consider it appropriate to link this to solvency given the potential range of Providers/their financial standing.
15.1		The undertakings and warranties in respect of Modern Slavery contained in paragraph 15.1 have been updated so as to be mutual.
15.3	It is not practicable to expect an aggregator to be able to provide access to the Sites from which the Services are provided for these purposes, whether these are Accessible Sites or not. In reality, an aggregator will have very limited (if any) audit rights under its contracts with asset owners. We therefore think the reference to Accessible Sites should be deleted and this access right should be limited to the locations being used by the Provider to provide the Services (i.e. the Provider's own locations / offices). In addition, the wording around the scope of the audit right is still unclear in V3. It seems that the intention is for the right to be limited to auditing compliance with paragraph 15, however this is not clear from the drafting as the only reference to Clause 15 is made within the bracketed text.	The updated clause 15.3 limits access to the Provider's premises. The reference to Clause 15 has been removed from bracketed text to provide additional clarity.
General	We believe the ENA should include, within the General Terms of the standard contract, standard terms regarding Data Protection. Currently DSOs have been providing separate Data Protection	Each DNO has separate requirements in respect of Data

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	wording within each contract, but this doesn't always correctly capture the relationships between the parties and it is sometimes missed out entirely. We think it would be helpful to have a standard position as to how the parties process individual personal data in respect of these contracts (to the extent they do) especially as our asset portfolio is made up primarily of domestic Sites.	Protection and these will be provided separately.
Service Terms – Clause 5	There needs to be more clarity on what metric is being used for calculating payments, 'agreed Availability Capacity (MW)' hasn't been defined clearly in the Service Terms. 'Availability' is defined in the General Terms, however it is not clear on whether this is defined as contracted volume or the amount of volume available prior to the service window (especially when we have won contracts for years ahead of time, and our contracted volumes can be more speculative rather than operational). Clarity on this definition is important as it is related to Service Failure and makes it difficult to understand what standard we are being held to for delivery. Our position is we should be held accountable against the volume available before the delivery window rather than a volume that is contracted years ahead. We would also encourage ENA to test how various terms used by different DSOs work together.	Paragraph 5 of the Service Terms is subject to each DNO providing further details of pricing and it is anticipated that specific detail will be given in the Service Terms. Additional drafting has been included in the updated version of the Agreement which defines Agreed Availability Capacity.
Contract parties	The section for the Company providers for company registered numbers whereas presumably this should just be a number (singular)	The wording in the updated draft has been amended in line with feedback.
1.3	The contract already states that any update to the Glossary and Rules of interpretation will not apply to any Agreement already in force at the time of that update. We also suggest, for clarity, wording around the fact that the updated Glossary would not apply to any Service Terms for a service already contracted for. Obviously, this will depend on the mechanism by which Providers bid for those services. If a new agreement would be entered into for each service a Provider signs up for, then obviously that clarification is not needed.	The wording in the updated draft has been amended in line with feedback.
3.1.8	"Defect" includes the communication interface between the Company and Provider which may be maintained or operated by a third party other than the Provider. As it is not fully in the Providers control in such circumstances how quickly the Defect is rectified, we suggest amending Clause 3.1.8 to read "use reasonable endeavours to remedy any Defect of the Flexibility Services in accordance with Good Industry Practice and to the reasonable satisfaction of the Company;"	Remedying a defect in accordance with the Good Industry Practice includes an equivalent to "reasonableness". Given the definition of Good Industry Practice the Provider is not required to go beyond what a skilled and experienced operator engaged in the same type of undertaking and

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		carrying out services of similar nature, scope and complexity as the Flexibility Services would do in the same or similar circumstances. No amendments are required.
3.1.9	As certain such agreements may be subject to confidentially provisions, this clause should be amended to cover this scenario.	Where another agreement could reasonably impact Availability of the DER / ability of the Provider to perform its obligations under the Common Contract, the Provider must disclose its existence as the relevant DNO will require this information from an operational service management perspective. The scope of the obligation does not require the terms of the agreement or the agreement itself to be disclosed, only its existence. The Agreement includes detailed confidentiality obligations at paragraph 12 and so the sharing of this information with the relevant DNO will be subject to these restrictions, which should provide the Provider with sufficient comfort.
4.3	For the avoidance of doubt, we suggest referencing Clause 4.2 when referring to “records”.	The wording in the updated draft has been amended in line with feedback.
5.2.2	Where Providers are not the owners of the DERs but have entered into contracts with the owners to tender them into certain flexibility services (on the owner’s behalf), the Providers may not be able to make a representation that they have obtained and will maintain in force all relevant licenses, permissions and authorisations.	The wording in the updated draft has been amended in line with feedback.
5.2.3	The wording of this clause is unclear. It is not clear how a Provider would fix or adjust a Charge when that term is defined as the charges to be included in the Service Terms (which would in tern be set by the Company and therefore not fixed by the Provider). It would be useful if this could be clarified in the drafting.	“Charges” has been defined in the Glossary in the updated draft. Charges are the relevant availability payments and utilisation payments and are defined by way of reference to the Service Terms.

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		The definitions of Availability Payments and Utilisation Payments refer to the Service Terms to allow DNOs to amend as required to cater to specific uses. By way of summary, 5.2.3 is looking to stop the Provider from: (a) fixing prices or adjusting prices with "that other person" (who would likely be a Provider); (b) disseminating details of the Charges (likely designed to stop Providers co-ordinating in relation to pricing) or (c) restraining that other person/Provider from entering into an agreement for the provision of Flexibility Services.
5.2.9	The end of this clause is extremely broadly drafted and could be difficult to comply with as it encompasses arrangements (as opposed to agreements) with any party	The wording in the updated draft has been amended in line with feedback.
7.2	We believe the reference to paragraph 9.4 on line 2 of this clause should be Clause 9.4	The suggested changes are stylistic and not required. To include them would be otherwise out of line with the rest of the agreement. Note that references are linked to take to user to the relevant paragraph.
7.3	We believe reference to paragraph 7.1.1 on line 1 of this clause should be Clause 7.1.1	Please see comment related to paragraph 7.2.
7.3.1	We believe the reference to paragraph 6 on line 4 of this clause should be to Clause 6	Please see comment related to paragraph 7.2.
7.3.2	We believe the references to paragraphs 8.3 and 15.10 should be to Clauses 8.3 and 15.10	Please see comment related to paragraph 7.2.
7.6	Rather than having the listed provisions (and therefore the Parties' obligations) survive termination of the Contract indefinitely, we suggest mirroring the limitation period of six (6) years set out in statute (which would apply in any event).	This is standard phrasing of a survival clause. Clauses that commonly survive termination (or expiry) of an agreement include those dealing with definitions and interpretation, confidentiality, indemnities, restrictive covenants, limitations on liability, notices, dispute resolution, governing law, jurisdiction

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		and the consequences of termination clause itself. It is intended to ensure that the procedural provisions survive. A clause that survives termination (or expiry) can do so for a limited period or indefinitely.
7.10	It is difficult to be able to say, with certainty, that before entering into the Contract all costs, losses and expenses incurred as a result of termination will be direct losses and costs. We suggest deleting this clause and simply showing, at the time of termination, that the costs and losses are directly incurred as a result of such termination.	It should be noted that these costs are only payable where the Provider is in default / breach of the agreement and this amount is subject to a cap (being the Transmission Limit or Distribution Limit). If the Agreement terminates due to the Provider's breach, the DNO will need to procure replacement capacity to cover the Provider's obligation – the cost of this should be borne by the Provider given it is in default under the Agreement.
16.5	Clause 16.5 states that Clause 16 (on service of notices) does not apply to the service of legal proceedings. Normally such a clause would set out how legal notices should be served and would request that the ENA outlines this.	Please refer to paragraph 17 which deals with the process for disputes. No changes to be made.
General	There are several terms included in the Service Terms that are not defined therein and we cannot see anything to confirm that the terms defined in the General Terms and Conditions will apply to the Service Terms, unless stated otherwise. We suggest that either the latter is confirmed, or new definitions are added for the terms not currently defined in the Service Terms themselves (Contract Award, Service Parameters, Availability, Providers Utilisation Performance etc.).	Additional definitions have been included in the updated draft. Please note that Availability is defined in the Glossary and as the Service Terms are "additional terms", there is no need to include an additional definition. It is the same position for Contract Award. Note that both "Provider" and "Utilisation Performance" are already both defined terms and no amendments are needed.
4.2.1	We believe the reference to Service Parameters here should be a reference to Service Windows.	Definition of Service Window included in the updated draft:

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		"*the relevant service window detailed in the notification of Contract Award*"
4.3.1	We believe the reference to Service Parameters here should be a reference to Service Requirements.	Definition of Service Requirements included in the updated draft: "*the relevant service requirements detailed in the notification of Contract Award*"
5.2.5	Should the reference to Availability at the start of this clause be to Availability Payment instead?	The wording in the updated draft has been amended in line with feedback.
5.2.6	Should "availability payments" on the first line of this clause be capitalised?	The wording in the updated draft has been amended in line with feedback.
8.5	We suggest clarifying whether the options listed in Clause 8.5 would constitute a Service Failure as standalone events, or whether they constitute a Service Failure only once taken together or in combination with another event.	Drafting has been updated to: "*Each of the following shall constitute a Service Failure:*" Consultees to note that in any event DNOs are to agree final wording and that this may therefore change.

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