

Assessment Procedure Consultation Responses

P303 'Amendments to the Provisions for BSCCo Directors'

This Assessment Procedure Consultation was issued on 29 July 2014, with responses invited by 19 August 2014.

ELEXON

What stage is this document in the process?

01 Initial Written Assessment

02 Definition Procedure

03 Assessment Procedure

04 Report Phase

Consultation Respondents

Respondent	No. of Parties/Non-Parties Represented	Role(s) Represented
EDF Energy	10/0	Generator, Supplier
Electricity North West	1/0	Distributor
Energy UK	0/0	Trade Association
National Grid	1/0	Transmission Company
RWE Npower plc	10/0	Generator, Supplier, Non Physical Trader
ScottishPower	2/0	Supplier
SmartestEnergy	1/0	Supplier
SSE plc	8/0	Generator, Supplier, Interconnector User
Utilita	1/0	Supplier

P303
Assessment Consultation
Responses

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Version 1.0

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Question 1: Do you agree with the Workgroup’s majority view that the P303 Alternative solution does better facilitate the Applicable BSC Objectives than the current baseline?

Summary

Yes	No	Neutral/No Comment	Other
6	3	0	0

Responses

Respondent	Response	Rationale
EDF Energy	No	<p>Before responding to the specific question, it is worth clarifying that Non-Executive Directors (NEDs), both Industry NEDs and Independent NEDs, should be independent. Even Industry NEDs should be independent of the management of the company and any of its interested parties. In our view, the Nomination Committee should already be assessing the ‘independence of mind’ of both potential Industry and Independent NEDs under BSC Section C, 4.1.2(a).</p> <p>Reading through the Workgroup’s Discussions, there appears to be some difference in opinion as to the purpose of having Independent NEDs as Board Members. We agree that being independent of the management and being free from any business or other relationship which could materially interfere with the exercise of their independent judgement are key attributes of an NED. But this applies to both Industry and Independent NEDs. In our view, Independent NEDs are also recruited so that they can share experience and know-how from a different industry or professional background. The two requirements are not mutually exclusive.</p> <p>The relevant objective is BSC Objective (d). Under the P303 Proposed and Alternative Modifications, the requirement of a five year gap will be removed and replaced with a “new” obligation on the Nomination Committee to have the flexibility to consider independence as part of the appointment process. While we agree the requirement of a five year gap may not be necessary, we think the Nomination Committee should already be considering independence as part of the appointment process. Therefore, placing a “new” obligation on the Nomination Committee will not better facilitate the BSC Objective than the current</p>

Respondent	Response	Rationale
		baseline.
Electricity North West	Yes	We feel that the P303 Alternative solution better facilitates Applicable BSC Objective d), as it will remove restrictions, which will simplify and provide efficiencies to the Nomination Committee, within the processes for the appointment of BSCCo Directors.
Energy UK	Yes	<p>Energy UK agrees that the current requirement for ex-industry candidates to have a fixed 5 year gap between leaving their previous post and being appointed to a non-industry Board member position is too prescriptive and may lead to otherwise exceptional candidates being excluded from applying for this post.</p> <p>The Nomination Committee should assess potential applicants on "independence of mind" instead of the fixed 5 year gap criteria that is currently in place. To add additional transparency to the process, applicants could also be asked to submit a declaration of interest to insure that any other roles, consultancy work, memberships or other areas that could affect their impartiality leading to a conflict of interest could be addressed prior to the individual taking up their position.</p> <p>Taking these points into consideration, we consider that the work group alternative proposal would widen the pool of potential candidates which would better facilitate Applicable BSC Objective d) Promoting efficiency in the implementation and administration of the balancing and settlement code.</p>
National Grid	Yes	We support measures that remove restrictions on the pool of candidates that may apply to the BSC Board of Directors if doing so will improve the calibre of suitable candidates for the role(s). By replacing a rigid 5 year restriction with the new obligation to consider a candidate's 'independence of mind' we agree that, through allowing discretion and flexibility in the BSCCo Board appointment process, the proposal supports more efficiency in the implementation of BSC arrangements (Applicable Objective (d)).

Respondent	Response	Rationale
RWE Npower plc	Yes	<p>For an industry independent Director, we believe that the ability of the Nomination Committee to assess a potential candidates 'independence of mind' based on qualitative measures is a better approach than the current baseline. The 5 year gap is an arbitrary number and does not guarantee that a potential candidate is suitably independent.</p> <p>Compared to the current baseline, the Alternative solution better facilitates Applicable BSC Objective (d) as it allows exceptional candidates to move from one role to another.</p>
ScottishPower	No	<p>While we agree that both the proposed and alternative mods would have a neutral impact on Objectives A, B, and E, we also think both have a largely neutral impact on D, but are possessed of the potential to detrimentally impact on Objective C.</p> <p>This is because the rationale for having the '5-year gap' was, as we understand it, that it complements an overall structure that is designed to shield the Board (and the BSC in general) from the appearance of bias towards one Party over another, or one class of Party over another. Commercial interests are at issue, so it is important that an even handed approach is seen to be taken in selecting candidates, whether for the BSC Board or for the BSC Panel.</p> <p>Although we recognise the individuals concerned are obliged to act with impartiality, suspicion of bias would be likely to remain if, for example, a serving employee of a BSC Party and a recently retired employee of that same BSC Party enjoyed simultaneous, or overlapping, appointments to the Board or the Panel. Such a situation has the potential to detrimentally impact on Objective C, as it might serve to discourage new entrants if they perceive bias in the decisions of this key market influencer.</p> <p>While we also recognise that leaving such decisions to the Nominations Committee might mitigate the likelihood of such an occurrence, we think the existing 5-year gap approach affords greater transparency. A relaxation of the gap to, say, two years would be more acceptable, in the absence of any hard evidence to suggest the pool of suitable candidates is made too small as a direct result of the current 5-year rule, we cannot see any reason for such a relaxation at present.</p>

Respondent	Response	Rationale
		In any event, with two Industry Board members already, and with the guidance of ELEXON and the Panel, the Board would benefit more from experience drawn from the boards of companies operating in other market sectors.
SmartestEnergy	No	<p>To agree that removing the 5 year restriction better facilitates the Applicable BSC Objective (d- Promoting efficiency in the implementation and administration of the balancing and settlement arrangements) would be to criticise the current board as it is indicating that better candidates could have been found if this change had come in sooner. We are not comfortable with this.</p> <p>In addition, removing the 5 year restriction would make even more people eligible for the non-industry NED roles which could potentially detract from the pool of candidates for the industry roles. In the previous statistics presented there were 400+ applications for non-industry NED roles and therefore at a high level it appears that widening the eligibility is unnecessary. If a suitable candidate does not reach the 5 year restriction then they can consider the industry NED role.</p>
SSE plc	Yes	<p>SSE believe that the original intent of the 5 year gap in allowing appointment of an ex-industry candidate to a non-industry Board member position was to ensure that any perceived BSC Party allegiances could not undermine the credibility of that individual to operate independently on the Board. This attempted to recognise the somewhat unique nature of the ownership, governance and funding arrangements associated with BSCCo and ELEXON. Whilst recognising an individual's obligation to act independently in accordance with their duties as a registered Director, the issue, rightly or wrongly, was one of perception, not a reflection upon the character or ability of any particular individual to exercise independence.</p> <p>SSE also believe that the intention of appointing independent non-industry members to the Board of Directors was to ensure an appropriate balance of competence, knowledge and expertise in the governance of the company by offering a broader set of skills and experience obtained through operating in other industries.</p> <p>As such, SSE accepts that a fixed 5 year gap to be able to operate as an independent non-industry</p>

Respondent	Response	Rationale
		<p>Board member may be too prescriptive and unnecessarily exclude exceptional candidates from joining the Board. For exceptional individuals, SSE agree that it would be appropriate for the Nominations Committee to exercise judgement, so long as the Committee can be satisfied that the candidate has acquired the necessary broader set of skills and experience needed to provide balance to the Board. This should be an express criterion for consideration in the Terms of Reference of the Nominations Committee.</p> <p>We therefore agree with the work group conclusions that this change will better facilitate applicable objective d) by allowing greater flexibility in the choice of candidate and expanding the potential pool of suitable candidates able to fulfil the role; so improving the efficient administration of BSCCo.</p>
Utilita	Yes	<p>The current requirement for industry independent directors to possess a five year gap since being a Board member, employee, director or representative of a Party is unnecessary. Furthermore we consider that the five year gap is an arbitrary figure with no justification behind it.</p> <p>We consider that the removal of this gap will increase the pool of suitable industry independent candidates, which will further BSC objective d) promoting efficiency in the implementation and administration of the balancing and settlement arrangements.</p>

Question 2: Do you agree with the Workgroup's initial majority view that the P303 Alternative solution is better than the P303 Proposed solution?

Summary

Yes	No	Neutral/No Comment	Other
7	1	1	0

Responses

Respondent	Response	Rationale
EDF Energy	Yes	<p>We agree with the Workgroup that the restriction that only Independent NEDs can be remunerated should be retained.</p> <p>As highlighted by one of the Workgroup members, we believe Independent NEDs are paid in order to attract them to the post and share their broader expertise with the industry. Industry NEDs on the other hand are high calibre seasoned professionals who are passionate about the electricity industry and its future development. They are more interested in giving something back to the industry than seeking remuneration. Given that that is no evidence to suggest that we cannot attract high calibre industry professionals, we would suggest that the status quo (not to remunerate Industry NEDs) is maintained.</p>
Electricity North West	Yes	<p>We agree with the Workgroup's initial majority as we do not feel it appropriate for industry Directors to be remunerated for undertaking the role of BSCCo Director. We also doubt that the lack of remuneration restricts the pool of candidates from the industry, as it would not be the main driver considered by industry candidates. If there was remuneration for an industry Director would consideration need to be given to remuneration for the company they work for?</p>
Energy UK	Yes	<p>Energy UK supports the workgroup alternative which addresses the issue of overly prescriptive requirements being placed on ex-industry candidates while retaining the restriction on remuneration of industry linked Board members.</p> <p>We do not support the remuneration of industry affiliated Board members and agree with the "unintended consequences" as set out by the workgroup members in the P303 consultation</p>

Respondent	Response	Rationale
		<p>report. Under the current climate, we consider that the proposals to provide remuneration to industry affiliated Board members would not represent the energy industry in a favourable manner by increasing the cost of the Board which ultimately will be passed onto consumers.</p> <p>Irrespective of remuneration, an industry director on the Board has a duty to discharge their duty effectively. At the point of application the candidate would already be aware of the remuneration/benefits they are entitled to. Therefore, under the current arrangements we would expect to see applications from those individuals that sought to use their industry knowledge to benefit and move the energy industry forward.</p> <p>Additionally, we consider that remunerations to non-industry Board members should be based on actual attendance to Board meetings.</p>
National Grid	N/A	We do not have a strong view on the appropriate remuneration arrangements for industry Directors to the BSCCo Board; we are therefore neutral between P303 and P303A. However we suggest that whichever arrangements are determined, the number and suitability of applicants should be monitored and reported to Panel to allow an assessment of whether those arrangements are appropriate.
RWE Npower plc	Yes	We concur with the Workgroup's arguments against remunerating industry directors. The Alternative solution retains the current restriction that only industry independent directors can be remunerated, and delivers the intended benefit of the Proposed solution at lower cost to the industry.
ScottishPower	Yes	<p>Notwithstanding our response to Q1, we do agree that the alternative is better than the proposed.</p> <p>We are not at all persuaded of the arguments for remunerating industry board members. Whether directly employed by a Party, a Trade Body, or simply acting as an independent consultant, we think it would be misleading to suggest there is no resulting remuneration of the individuals concerned, who doubtless perceive an appointment to the board as career progression. For most, the activities associated with being a board member will be very much part and parcel of their 'day-job'. It is, perhaps, somewhat telling we have never lacked</p>

Respondent	Response	Rationale
		<p>candidates for these seats.</p>
SmartestEnergy	Yes	<p>The Alternative solution is better than the Proposed solution as we believe that there is not enough evidence to justify that there is a problem with the lack of remuneration for industry NED roles, nor do we believe that the suggested benefits outweigh the risks of the unintended consequences.</p> <p>We also would like to point out that we do not believe remunerating industry NEDs will help employees of smaller Suppliers to participate. In our view the main issue is with the time that the resource has to dedicate and with smaller Suppliers it is likely that the resource cannot be spared.</p>
SSE plc	Yes	<p>The alternative proposal offers a judgement based solution to the overly-prescriptive timescale currently imposed on enabling ex-industry candidates to be reappointed to the Board, whilst retaining the restriction on remuneration of industry affiliated Board members.</p> <p>SSE do not support the remuneration of industry affiliated Board members, as we believe that the potential unintended consequences (as set out by the work group in the assessment consultation document, all of which we agree with) would outweigh any benefits advocated. In particular, SSE would be concerned that the proposal may create irreconcilable conflicts of interest with potential candidate employment contracts that may actually serve to reduce the available talent pool thus undermining the intent of and justification for the proposal.</p> <p>SSE are particularly perplexed about the notion suggested in the proposed modification that an industry Board member may not be sufficiently motivated to perform the role to the same degree of rigour as non-industry members, without remuneration. We are not sure that this would happen in practice, as we believe that any industry Board member, recognising the terms of the position when applying, would fulfil their duties to the best of their ability. Nevertheless, this seems to suggest a dereliction of responsibilities and duties that are implied when accepting the role as a Director, which is simply unacceptable. SSE would suggest that any member of the Board that did feel this way ought to resign their position and allow another member of the industry to step up and</p>

Respondent	Response	Rationale
		perform the role.
Utilita	No	<p>We consider that the current restriction on the type of director that can be awarded compensation limits the pool of suitable candidate who are able to take on the role. Additionally the lack of remuneration does not reflect the time and effort that a Board member is required to commit in order to fulfil the role to its fullest degree. Remuneration would support industry directors to fulfil their roles both through the remuneration itself and the signal this provides of the positions importance. This, we believe, would result in an increased pool of quality candidates for the role of industry director. It would also eliminate a potential pressure from them acting wholly independently.</p> <p>ELEXON has identified that the remuneration of a Board member is circa £25,000 per year. Therefore the cost of aligning the remuneration between independent and non-independent directors would be approximately £75,000/yr. This is an incremental cost that would, all other things being equal, increase ELEXON's costs by 0.25%, which would be recovered from trading parties.</p> <p>However, this modest increase should not be considered in isolation. In 2013-14 ELEXON's operating activities amounted to £15.7mn. If the increased quality of candidate gained from remuneration leads to a 1% reduction in operating costs, through the improved functioning of the BSCCo Board and the improved quality of scrutiny, challenge and decision-making, then this would result in a saving of approximately £157,000/yr, more than double the predicted cost of removing the discrimination between independent and non-independent directors.</p> <p>A similar situation can be seen in employee costs. ELEXON's employee costs for 2013-14 totalled £8.76mn. Again, if this were to be decreased by 1% as a result of improved decision making, it would see savings of £87,000, £12,000 more than the likely cost of the modifications proposal.</p> <p>Over time any combination of better decisions would be likely to result in significant reductions in costs recovered from trading parties.</p> <p>We also note that in its business plan for 2014-15 ELEXON identifies its top two strategic priorities as "Actively manage, and continually improve, BSC</p>

Respondent	Response	Rationale
		<p>services to ensure that we deliver in an efficient, effective and economic way” and “Drive efficiencies and savings in our operation of the BSC”. We consider that remunerating industry directors will help better to meet these objectives by increasing the skill set of director candidates and so potentially improve the BSCCo’s efficiency through improved scrutiny and decision- making by the Board.</p> <p>We do not agree with the workgroup concerns regarding unintended consequences. The concerns raised in regards to the possible expansion of remuneration to other BSC Panel members and Committee members is not within the scope of the modification proposal. The modification seeks purely to remove the existing discrimination between independent and non-independent directors, despite both being subject to the same time requirements, level of scrutiny and accountability for performance, and legal obligations, and it would also align the BSC remuneration policy with that of the Code of Good Corporate Governance.</p> <p>We also do not agree that implementation would limit the talent pool, by restricting the number of candidates who apply due to issues with employee release. The smaller BSC parties lack the resources of larger organisations to commit employees to the ELEXON board. Remuneration would lessen this impact by removing the cost to a company of the days spent on Board work. Quite the opposite, we see merit in enabling industry directors to be financially independent from their employers in the time they commit to the BSC board.</p> <p>Overall we consider that implementation of the original proposal would better facilitate BSC objective d) promoting efficiency in the implementation and administration of the balancing and settlement arrangements than both the current arrangements and the alternative proposal. Remuneration would increase the pool of potential candidates, and minor improvements in operating efficiency achieved as a result of this would significantly outweigh the modest cost.</p> <p>We would have liked to see the report set out relevant benchmarking information. This would, we believe, establish unambiguously that proxy organisations tend to comply with the Code of Good Corporate Governance with regard to remuneration. A starting point would be the Low Carbon Contract</p>

Respondent	Response	Rationale
		<p>Company and perhaps service organisations such as Gemserv. There are some entities such as NFPA who seem not to pay their non-executives but that is because the companies have an ownership interest. The basic approach seems to be that where true independence and accountability of the Board is sought non-executive directors are paid.</p>

Question 3: Do you agree that the draft legal text delivers the intention of the Proposed and Alternative solutions for P303?

Summary

Yes	No	Neutral/No Comment	Other
8	1	0	0

Responses

Respondent	Response	Rationale
EDF Energy	Yes	-
Electricity North West	Yes	We feel that the draft legal text does deliver the intention of the respective solutions.
Energy UK	Yes	We agree that the draft legal text delivers the intention of the Proposed and Alternative solutions for P303.
National Grid	Yes	-
RWE Npower plc	Yes	-
ScottishPower	Yes	-
SmartestEnergy	Yes	<p>Both proposals seem fairly straightforward in legal terms. However, we would be cautious about removing all limits in 4.1.3 and would suggest that it remain as currently drafted and that instead of the proposed drafting alterations an additional clause is added that states the Nomination Committee may have discretion to waive the 5 year limit for exceptional candidates only, where they have reasonable opinion that the candidates are suitably independent from the electricity industry and that their exclusion would be to the detriment of the BSC Board.</p> <p>However, in any event it would be inappropriate to allow a candidate who has previously been an industry NED to become a non-industry representative without the 5 year gap.</p> <p>Lastly, we note that on page 16 of the consultation one of the reasons given that the potential Alternative Solution better facilitates objective d is because it "Does not allow anyone to be on the BSCCo Board for more than 10 years". However, this restriction seems absent in the legal drafting proposed.</p>

Respondent	Response	Rationale
SSE plc	No	Whilst the legal text presented broadly achieves the intent of the proposed and alternative modifications, SSE would like to see an express provision to a) review the Nominations Committee Terms of Reference and b) seek approval of the revised Terms of Reference by the BSC Panel. This is in our view required to ensure that the test for suitability of independence is adequately enshrined, i.e. that an individual must be able to demonstrate sufficient expertise of another industry to be able to bring a broader skill set to balance the Board. It is also required to ensure that wider good governance principle of limiting the absolute term of office of any single director, as discussed by the work group, is appropriately reflected and taken into consideration.
Utilita	Yes	We agree that the draft legal text delivers the intention of the proposal.

Question 4: Are there any other alternative solutions which would better facilitate the Applicable BSC Objectives?

Summary

Yes	No	Neutral/No Comment	Other
2	7	0	0

Responses

Respondent	Response	Rationale
EDF Energy	Yes	<p>One mechanistic way of trying to ensure independence from the executive and from vested interest is a time gap from employment in the industry. As suggested by two Workgroup members, retaining a shorter timescale (e.g. 3 years) could increase the pool of candidates yet provide a clear criterion for the applicant and the Nomination Committee.</p> <p>Independence is a fundamental attribute of an NED but we believe it is already captured by BSC Section C, 4.1.2(a). If the Workgroup thinks the wording is not sufficient to ensure 'independence of mind', then the legal text could be tightened to ensure that there is no misunderstanding.</p> <p>We would also suggest that the existing arrangements that only industry independent Directors are remunerated should remain.</p>
Electricity North West	No	-
Energy UK	No	We are unaware of any other alternative solutions which would better facilitate the applicable BSC objectives at this time.
National Grid	No	-
RWE Npower plc	No	-
ScottishPower	Yes	The issues we have identified in this response might be addressed if a prohibition were also to apply; this prohibition would be to the effect that there can never be a situation where two or more people from the same employer or its affiliate(s), whether Panel Members, or Board Members, or any combination thereof, can serve simultaneously.

Respondent	Response	Rationale
SmartestEnergy	No	We do not believe that any modifications are required on this issue. We have seen no evidence that the current arrangements are detrimental to the efficiency in the implementation and administration of the balancing and settlement arrangements. Indeed, the current arrangements are probably more efficient by being straightforward (please see our answer under question 5 below).
SSE plc	No	We note that there are ongoing discussions at the Board and BSC Panel regarding the implementation of recommendations from the Knight Report that pertain to the future governance of ELEXON. Any outcome from those discussions has the potential to impact the solution to this modification and possibly make some of the work nugatory. However, SSE consider that whilst a better alternative solution may arise from those discussions, they are insufficiently certain to provide a viable alternative at this point in time.
Utilita	No	<p>We believe that the original proposal will best facilitate the achievement of BSC objective d) promoting efficiency in the implementation and administration of the balancing and settlement arrangements by ensuring that the pool of suitable candidates is not unnecessarily restricted.</p> <p>We believe this will: improve the functioning of the BSCCo Board; improve the quality of scrutiny, challenge and decision making; and ensure that all Board members are able to devote the time and commitment required.</p> <p>The working group alternative is an improvement on the baseline but inferior to the original proposal.</p> <p>A different alternative would be to introduce remuneration but retain the five year time-limit. This is to be preferred over the alternative but not the original.</p>

Question 5: Please indicate the impacts of the Proposed and Alternative solutions for P303 on your organisation, in particular any perceived lead time and costs.

Summary

Yes	No	Neutral/No Comment	Other
4	4	0	1

Responses

Respondent	Response	Rationale
EDF Energy	Yes	The Proposed solution could increase our costs (because Industry NEDs will be remunerated) but this would be modest.
Electricity North West	No	We do not envisage any impact on our organisation with regard to lead times and costs.
Energy UK	No	We do not consider there to be any impact.
National Grid	No	We have not identified any impacts of the Proposed or Alternative P303 solutions on the Transmission Company.
RWE Npower plc	Yes	By removing the current restriction to only remunerate industry independent directors the Proposed solution would increase annual BSCCo costs. As a BSC Party we would incur a proportion of those additional costs.
ScottishPower	Other	No direct cost implications. Impacts are, instead, confined to the risk of conflicts of interest, whether perceived or actual.
SmartestEnergy	Yes	<p>We understand that there are more costs than set out under section 5 of the consultation as there will be additional salaries under Proposed P303 to fund, which we assume would total £50,000 (although the current two salaries are not equal so we wonder what the reason behind this is and what the industry NEDs would be offered). We note that the increased cost to individual BSC parties will be minor but that does not mean that it is acceptable to increase costs at all.</p> <p>Also we are concerned that P303 may have the opposite effect and instead restrict the pool of candidates for industry NED roles due to complications over individual pay and contracts. For example, there might be an exclusivity clause or if the candidate had to deduct part of their main</p>

Respondent	Response	Rationale
		salary this could have an impact on their pension and employment benefits.
SSE plc	No	There is no system or process impact.
Utilita	Yes	The solutions will have no impact on our organisation beyond overall a probable small decrease in costs, resulting from reduced payments to the BSCCo thanks to the efficiency gains realised thanks to the increased director candidate pool.

Question 6: Do you agree with the Workgroup's recommended Implementation Date?

Summary

Yes	No	Neutral/No Comment	Other
8	1	0	0

Responses

Respondent	Response	Comments
EDF Energy	Yes	We agree with the Workgroup's recommendation to implement the change on 1 March 2015 to align with the next round of BSCCo Board Director appointments.
Electricity North West	Yes	This would seem to be appropriate as it ties in with the next BSCCo Board appointments.
Energy UK	Yes	We agree with the workgroups implementation date.
National Grid	Yes	We agree that it is sensible to align the implementation of either solution with the next round of BSCCo Board Director appointments.
RWE Npower plc	Yes	It is appropriate that the implementation date is aligned with the next round of BSCCo Board Director appointments.
ScottishPower	Yes	Yes
SmartestEnergy	No	This change does not require a long lead time but it might be best to delay the implementation to have more rounds of appointments and statistics to make judgements on.
SSE plc	Yes	It is appropriate to implement any revised rules in line with future appointment dates.
Utilita	Yes	We agree with the workgroup's recommended implementation date of 1 March 2015 to align with the next round of BSCCo Board director appointments. Early implementation of the proposals will allow for the potential good governance savings to realised and so maximise the savings. Alignment with the next round of appointments will minimise both disruption to the process and implementation costs.