

SKELETON TERMS

[General Drafting Notes

- A. The intention of this document is to set out certain elements that the market operator may want to have in place directly with the BiTraDER participant to govern the participant's use of the BiTraDER platform and related functionality and services. This document is not exhaustive.**
- B. We have separated this document into two parts: Part A includes topics that are more commercial/technical in nature (which we have called the Commercial Details) and Part B includes topics that will form the legal terms and conditions (which we have called the Terms of Use).**
- C. How the participant agrees to these terms will also need to be considered. In any BAU phase, we expect that the participant would approach the market operator directly and that the BiTraDER sign up process would be done online utilising a form of portal where all documentation is kept and agreed to, most likely via click acceptance.**
- D. The participant will also need to agree to certain enhancements to its underlying connection agreement with the DNO (see the separate Addendum document). These enhancements should be agreed separately between the participant and the DNO, but we consider that a more streamlined approach would be for the participant to agree these terms with the DNO as part of the sign up process for BiTraDER with the market operator. This approach would require the addendum between the participant and the DNO to be agreed directly by the participant with the DNO, albeit via the portal that will be administered by the market operator. This could be done quite simply by a click acceptance where it is also acknowledged that the enhancements to the connection agreement are direct with the DNO.**
- E. Of course, there will also need to be an agreement in place between the DNO and the market operator. We have included comments in blue within this document where it might be that the DNO and the market operator should consider including similar/related clauses in the agreement between them.**
- F. Please note that, if the market operator is not the "owner" of the platform, the market operator will need to have a licence agreement in place with the owner of the platform.**
- G. The "owner" of the platform may also wish to have an end user licence agreement (EULA) in place directly with the participant. We have identified in green within this document the clauses that could either form part of the EULA and be removed from the agreement between the market operator and the participant, or be duplicated in certain respects between the EULA and the agreement between the market operator and the participant. Clearly the EULA will want to set out terms that are additional to those that are identified in green below, such as intellectual property, warranties, limitation of liability, data flows, termination and the use of personal data.]**

PART A: COMMERCIAL DETAILS

1. Overview of BiTraDER

[An overview of BiTraDER should be included, or alternatively a link to where further information can be found. In addition, this section will need to explain the contractual situation, including the interaction with the connection agreement that the participant has in place with the DNO and any potential conflicts that might arise with other services that the participant might provide, for example to NESO.]

The need for the participant to agree a supplementary addendum with the DNO should also be explained here.]

2. How to Become a BiTraDER Participant

[This clause needs to set out the process for how the applicant can become a participant, including how the application is made, the information needed from the participant as part of the application (this perhaps should link to the application form) and any prerequisites and eligibility requirements that the participant must ensure are in place in order to be considered for participation in BiTraDER (such as agreeing to enhancements to its connection agreement, “know-your-customer” requirements, credit check processes and an independent aggregator having authority to execute / bind any registered asset owners). All of the information provided by the participant as part of the application should be supported by warranties about the completeness and accuracy of this information. This clause will also need to set out steps that the market operator will take to verify the information and the rights that the market operator will have to request evidence in support of any information provided by the participant as part of the application. There will be a period between application and approval and acceptance of the participant by the market operator where certain clauses within these terms will need to bind the participant (including confidentiality and restrictions on use of BiTraDER and boilerplate clauses) and this should be set out.]

Where the participant is an independent aggregator, consideration should be given to how the registered asset owners are to be bound by these terms and any EULA, for example it might be that clauses are included to make it clear that the independent aggregator is authorised to act on behalf of the registered asset owners in agreeing to the terms and the EULA. Such drafting would need to consider including commitments from the independent aggregator that: (i) the independent aggregator has authority to bind the registered asset owners; (ii) such authority has been properly executed and not subject to conditions that would restrict the effective operation of the terms and the EULA; and (iii) such authority has not been revoked, suspended or challenged.]

The DNO will also likely have a role in performing checks on, and approving, the participant. However, the market operator will inform the DNO of the application, which is then verified by the DNO. The DNO will then inform the market operator of any issues and whether the market operator is able to approve the participant's application.]

3. Acceptance of the Application

[This clause should set out the process for how the participant is going to be notified of their acceptance or rejection regarding participation in BiTraDER. Once accepted, all the terms of use and the addendum to the connection agreement come into force.]

As above, the DNO will inform the market operator of any issues it has with the application. If the DNO refuses the application after undertaking its checks, it will inform the market operator, who will then inform the participant of the rejection. The addendum in place

between the DNO and the participant will not come into force until the application has been approved.]

4. Incorporation of Policies and Procedures

[There are numerous policies and procedures that the market operator may want to incorporate into these terms and which the participant will need to comply with. These may include policies and procedures to do with acceptable use of the platform, a market principles document, the trading rules (including what amounts to a successful trade), complaints, dispute resolution, how the merit order stack is determined and traded and data governance. Any and all such policies should be explicitly listed, linked to and explained with a brief overview of what they cover.]

[Acceptable use of the platform will also be dealt with in the EULA.]

5. Participant Profile and Account

[Will the participant create a form of profile/account on the platform? If so, details of how this will be done should be set out.]

6. Communications and Visibility Rules

[There will need to be a clause setting out how communications occur between the DNO, the market operator and the participant and also between participants. If there is to be functionality or an interface within the platform that allows for such communications then this should be set out. In addition, this will need to include details about the visibility rules that the platform provider has incorporated into the platform.]

The DNO will provide the participant with the curtailment instruction but this will not happen directly; instead the functionality of the BiTraDER platform will need to enable the DNO to issue these instructions or notifications to the participant via the BiTraDER platform, which should be covered in the contract between the DNO and the market operator. All communications with the participant will be sent and received by the market operator.]

[It might be that the wording on the visibility rules will, instead, be set out in the EULA.]

7. Services

[If any services, such as support services, are to be provided then this should be addressed here. Commonly any support services are provided in accordance with the market operator's standard support policy as in force from time to time.]

[We have assumed that any platform "owner" will not be providing services directly (i.e. via a direct contractual arrangement) to the participant, but rather any services the owner does provide will be as a subcontractor to the market operator. If the platform owner will be providing services directly, this could be covered in the EULA.]

8. The Trade

[This clause will be critical as it will describe how the trade regarding the place in the merit order stack is going to occur and be controlled.]

The DNO will, as above, provide the curtailment instruction to the participant via the platform. In addition, the initial merit order stack is provided by the DNO to the market operator, which is then reordered by the platform and provided back to the DNO.

In addition, this clause could cover the operational rules and acceptable conduct on the platform, including: (i) bidding processes; (ii) timings; (iii) withdrawing or amending bids;

(iv) when a trade becomes final (v) consequences of invalid trades; and (vi) how conflicts between the DNO instructions and physical constraints will be dealt with.]

9. Participant Default

[This clause could equally appear in Part B, but there should be a clause that sets out what happens if a Participant breaches the terms by, for example, failing to honour a trade or pay the due compensation, does not respond to an instruction to curtail, provides inaccurate or incomplete data, causes disruption to the platform or otherwise breaches the terms and the rules around participation. Consequences could include remediation plans, liquidated damages, breach of contract and/or termination.]

10. Fees, Compensation and Payments

[The structure here will need detailed consideration, including with regards to: (i) any payments that the participant will need to make to the market operator for use and receipt of the platform and services; (ii) how the compensation for the trade will be determined; (iii) how the compensation for the trade will be transacted as between the participants and whether a direct contractual link between participants will be required for these purposes (or if trade fees will go via the market operator); (iv) how VAT will be accounted for, and if there will be any VAT or other relevant taxes; (v) general payment provisions, such as when and how the various payments will be made; (vi) how any refunds or underpayments will be dealt with, for example if trades do not occur as planned or in the event of manifest error; (vii) how long a participant has to dispute any of the fees or compensation and the timeframe after which the stated fees are deemed accepted / can no longer be challenged; (viii) how complaints with regards to the fees and payments will be dealt with; (ix) whether any daily/weekly/monthly statements with regards to the fees and compensation (especially for trades) will be supplied by the market operator; and (x) how the fees and compensation may be adjusted.]

11. Complaints

[A process for complaints should be set out, or a complaints policy incorporated by reference.]

PART B: BITRADER TERMS OF USE

1. Who We Are and How to Contact Us

[What will need to be included here is the name, company number, VAT number and registered address of the market operator. It should also include, for contact purposes, the email address and phone number of the market operator.]

2. Incorporation of Terms

[We would suggest a click-wrap acceptance process that the participant clicks to accept the terms as part of the process for applying to participate in BiTraDER. The terms should be available for review via a link and also be on the market operator's website. Previous versions should also be available for the participant to review. Incorporation of the addendum with the DNO, and any EULA, should also be covered here.]

3. Changes to these Terms, Policies and the Platform

[The market operator should be entitled to update these terms, policies and the platform from time to time, and the process for how this will occur, and how the participant agrees or is deemed to agree the amended version(s), should be set out here.]

[The agreement between the DNO and the market operator will need to facilitate how the DNO can make changes to the addendum it has in place with the participant. The DNO will notify the market operator of the changes and then the market operator will ensure the participant agrees to the changes the next time that the participant logs into the BiTraDER portal.]

4. Defined Terms and Incorporation

[Include here the defined terms used in the terms and also the rules of interpretation.]

5. Subscriptions, Authorised Users and Licence

[The terms will need to set out how the users become authorised to use the platform. The scope of the licence that is granted to the participants will need to be set out. If there will be use of any market operator API by the participant, certain rules and restrictions around use of this API will also need to be set out. The ability for the market operator to audit the participant/authorised users and their usernames and password information should be included.]

[It might be that API use will instead be covered in the EULA.]

6. Permitted Use of the Platform

[This clause will cover matters such as general use of the platform, acceptable and unacceptable use, viruses and prohibited acts. As an example, this clause will also need to replicate elements of the provisions from Schedule 9 of the agreement between ENWL and the platform operator for the trial (unless, perhaps, there is a EULA in place directly between the platform "owner" and the participant).]

[Certainly a clause similar to this will be set out in the EULA. However, it might be that permitted use provisions will be replicated between the EULA and these terms. This is especially the case if there are more technology elements involved in the BiTraDER solution than just the platform covered by the EULA.]

7. Platform Availability and Functionality

[Clauses around how available the platform will be will need to be included. For example, wording from Schedule 9 of the agreement between ENWL and the platform operator for the trial will need to be included (unless this is directly in place between the platform “owner” and the participant via a EULA), which concerns there being no warranties provided that the platform will be free from viruses, uninterrupted or error free or fit for purpose. The functionality of the platform may also change and the market operator will not be liable for matters such as telecoms delays. There should be a statement that the DNO is not in any way a party to these terms and, therefore, not responsible for any issues with the platform itself.]

[Certainly a clause similar to this will be set out in the EULA, including as mentioned above in relation to availability. However, it might be that availability and functionality provisions will be replicated between the EULA and these terms. This is especially the case if there are more technology elements involved in the BiTraDER solution than just the platform covered by the EULA.]

8. Interaction with other Services and Third Party Claims

[This is a clause that will need consideration against the backdrop of the position that NESO takes in relation to services provided to it by its customers. Namely, if the DNO were to take a similar position to NESO, this would result in the participant giving undertakings that its involvement in BiTraDER will not result in that participant breaching any agreement with a third party (like NESO), which is then backed by an indemnity. In addition, a clause could be included providing that the participant's involvement in BiTraDER will not be adversely impacted by any service it offers to a third party. Some competing markets identified as part of the trial include wholesale markets, the Balancing Mechanism and reserve services. Of course, creating a structure of competing contractual and service obligations is not in the interest of any of the relevant parties, so this issue will need to be considered.]

9. Participant Warranties and Representations

[These will include that the participant's systems comply with certain specifications provided by the market operator and around bona fide tendering and non-canvassing.]

10. Market Operator Warranties and Representations

[The market operator will only grant limited warranties and representations to the participant, and disclaimers will be included. This section should also include a disclaimer with regards to the DNO so that it is clear that the DNO is not responsible in any way for the operation of the platform and related services (as well as this also being set out on the addendum between the DNO and the participant).]

11. Audit

[We will need to consider whether the market operator will need the ability to audit the participant's use of the platform and the services. If so, an appropriate audit clause setting out the scope of the audit, notice requirements, audit frequency, audit cost allocation and other audit parameters will need to be included.]

[The market operator should be required to share the results of any audit with the DNO.]

12. Compliance with Law

[Although generally fairly basic with regards to how this clause will operate, consideration will need to be given to how widely the concept of “laws” is that the participant is required

to comply with. For example, it may need to include some of the codes, DCUSA, the applicable connection agreement etc.

We should be cognisant of the impacts of competition law on the arrangements here with regards to one market operator effectively providing the solution throughout GB with the various DNOs involved – this one to keep a watching brief on.

There should also be a process detailing how changes in law will be dealt with, such as resulting changes to the platform and services and the clauses within these terms.]

13. Data

[We will need to understand the data flows as between the participants, the DNO and the market operator (and the platform operator, if the platform operator is not the market operator as such) and what this data consists of. Will any data about the assets of the participant be uploaded to the platform? Will a participant be able to see the data of another participant on the platform? Will there be any need for data to be shared between the DNO and the market operator, or between DNOs themselves? How will the data be stored, retained, protected, returned and destroyed? A lot of this could form part of an overarching data governance policy.]

[Any data shared as between the participant and the DNO should be done pursuant to the contract in place between them.]

14. Data Protection

[We do not consider that there will be a great deal, if any, personal data being processed as part of the provision of the platform and the services (other than perhaps name and contacts details of some individuals relevant to the participant), but this will need to be considered as part of the trial.]

15. Confidentiality

[A relatively standard confidentiality clause is likely all that is required here, but consideration will need to be given to any required disclosures of participant confidential information to entities wider than the market operator, such as DNOs and regulators. In addition, the market operator might want to publish market reports in relation to participation in BiTraDER and the kind of information that may be disclosed as part of these market reports should be identified.

If the market operator wishes to publicly identify and make announcements about the participants, then this should be dealt with here.]

16. Feedback

[A clause setting out that the market operator can freely use any feedback provided by the participant could be included here.]

17. Security

[Security obligations, as they apply to the participant and the market operator, should be set out here. To consider whether the NIS regulations could potentially apply to the market operator (as an RDSP). There will likely be a risk that a participant could introduce or cause security vulnerabilities to the platform so that will need to be covered. Also, would there ever be a risk that one participant could cause security issues to another participant? This clause should also cover cyber security obligations and how security incidents are to be reported.]

18. Record Keeping

[Processes around keeping records should be considered. We wonder whether participants will be able to access records and reports via the platform?]

[Would a DNO need to have access to certain records, such as records of trades that have been made via the platform? In addition, would the DNO need to provide any statements to the participants and the market operator, such as to do with the amount of curtailed hours, number and kinds of trade and whether trades occurred. Alternatively, could this all be recorded via the platform itself?]

19. Intellectual Property

[This clause will just confirm that the intellectual property rights in the platform and the services are retained by the market operator (or its licensors).]

[This will be supplemented by any EULA, which will set out that the licensor retains the intellectual property rights in the platform that it is licensing to the participant via the EULA.]

20. Indemnities

[The participant would likely expect a form of protection from the market operator in relation to third party intellectual property claims, which could be phrased as a warranty, indemnity or obligation in the market operator to defend (or a combination of these options). In addition, the market operator will likely want to include an indemnity from the participant to the market operator in relation to losses that the market operator suffers because of how the participant has used the platform and any violation of the rights in the platform.]

21. Liability

[An appropriate liability profile will need to be considered and included, but this should come at a very late stage in preparing the terms in order to be able to fully assess the risk areas and what an appropriate profile would look like for this platform and services.]

As mentioned elsewhere, it will need to be clear that the DNO has no liability under these terms.]

22. Insurance

[Any specific insurance requirements, as they apply to the market operator or the participant, should be included here.]

23. Suspension of the Platform and Services

[There will be certain circumstances when the market operator will need to suspend a participant's use of the platform and the services (or the platform/services in their entirety), including where there is non-payment of any fees, a security issue or to protect other participants.]

[Suspension of the EULA should suspend these terms, and vice versa.]

24. Term and Termination

[If there is any set duration for these terms, this should be set out. Likewise, if the terms simply roll until a party gives notice of termination, this should be documented as well as the notice period for termination. Additional termination rights, such as for material breach, insolvency, enforced termination etc., should also be included. Because of the flexibility of the participant's involvement in BiTraDER, is important that the termination

clause gives the participant an easy way to terminate for convenience on relatively short notice.]

[We assume that termination of the relevant connection agreement between the DNO and the participant will result in immediate termination of these terms (but not the other way around). If correct, a process will need to be in place as between the DNO and the market operator setting out how the DNO will inform the market operator that the connection agreement has terminated and then requiring the market operator to immediately terminate the participant's involvement in BiTraDER.]

[Termination of the EULA should terminate these terms, and vice versa.]

25. Consequences of Termination

[We expect that this will be a relatively straightforward clause and be limited to matters such as return/destruction of data and materials, survival of provisions and termination of rights to use the platform and services. It will need to be made clear that termination of these terms will operate to also terminate the addendum between the DNO and the participant.]

26. Dispute Resolution

[The dispute resolution process will need careful consideration and there will need to be clear layers to this to ensure that disputes are resolved as quickly as possible. It will also need to consider potential disputes as between participants, and not just between a participant and the market operator. In terms of the formal part of this procedure, it might be that reference to something like the Electricity Arbitration Association would be useful.]

27. Anti-Bribery, Modern Slavery and Tax Evasion

[A set of clauses detailed how these legal "compliance" matters will be dealt with may not be essential but as a matter of good practice could be inserted. It should cover anti-bribery, modern slavery, sanctions and tax evasion measures.]

28. General Boilerplate Provisions

["Boilerplate" clause like force majeure, waiver, rights and remedies, entire agreement, no partnership or agency, third party rights and notices will need to be included. Regarding assignment/novation/subcontracting, we will need to make it clear that the market operator is able to freely assign, novate (but an appropriate novation process will need to be included) or subcontract under these terms. We will need to discuss whether it would ever be appropriate for the participant to assign/novate the terms (or if this would even be required if the individual controlling the premises changed), but we suspect that if there were to be any "replacement" participant, then that participant would have to re-apply and then agree to the terms separately.]

29. Governing Law and Jurisdiction

[English law and jurisdiction of the English courts will apply.]