



Department for  
Business, Energy  
& Industrial Strategy

# Contracts for Difference for Low Carbon Electricity Generation

Consultation on further drafting amendments  
to the CfD contract for Allocation Round 4

Closing date: 31 October 2021



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# General information

## Why we are consulting

The Contracts for Difference (CfD) scheme is the Government's main mechanism for supporting new, low carbon electricity generation projects in Great Britain. Since March 2020, we have consulted, and published our decisions, on a series of changes to the CfD scheme and contract terms in preparation for Allocation Round 4 (AR4), which will open to applications from developers of renewable technologies in December 2021.

The Government indicated in its consultation published on 24 November 2020<sup>1</sup> that it would review the CfD Standard Terms and Conditions following Implementation Period Completion Day (11pm on 31 December 2020)<sup>2</sup>. Views are now invited on further clarificatory amendments to the contract for AR4 which ensure it continues to function as originally intended and to reflect the UK's position in a number of specific areas relevant to the CfD scheme following the UK's exit from the EU.

Ofgem indicated in an open letter dated 10 December 2020<sup>3</sup> that they agreed with the recommendation by the Second Balancing Services Charges Task Force led by National Grid ESO to remove the requirement on electricity generators to pay Balancing Services Use of System (BSUoS) charges to use the electricity network. Ofgem restated this view in a letter published on 7 July 2021<sup>4</sup>, while clarifying that nothing in that communication fetters their discretion as to their final decision. On this basis, we are inviting views on proposed contract amendments which would potentially align with a final decision from Ofgem in this regard, if and when such a decision is made. The proposed drafting amendments would potentially disapply the annual strike price adjustment for changes to balancing system charges from the date that Ofgem's decision may take effect, currently anticipated to be 1 April 2023.

Pot 1 technologies, including onshore wind and solar PV, will be able to participate in AR4. We are therefore anticipating a larger number of applications than in previous allocation rounds. To facilitate the efficient administration of the delivery of initial contract obligations, we are proposing to allow generators who are awarded contracts in AR4 more time to fulfil their Initial Conditions Precedent following contract signature.

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<sup>1</sup> <https://www.gov.uk/government/consultations/contracts-for-difference-cfd-changes-to-supply-chain-plans-and-the-cfd-contract>

<sup>2</sup> "IP Completion Date" means 31 December 2020 at 11pm, as defined in section 39 of the European Union (Withdrawal Agreement) Act 2020

<sup>3</sup> [https://www.ofgem.gov.uk/search?keyword=Ofgem%20response%20to%20publication%20of%20the%20final%20report%20of%20the%20second%20Balancing%20Services%20Use%20of%20System%20\(BSUoS\)%20Task%20Force](https://www.ofgem.gov.uk/search?keyword=Ofgem%20response%20to%20publication%20of%20the%20final%20report%20of%20the%20second%20Balancing%20Services%20Use%20of%20System%20(BSUoS)%20Task%20Force)

<sup>4</sup> <https://www.ofgem.gov.uk/publications/reform-bsuos-charges-analysis-proposal-remove-bsuos-generation>

We welcome views from interested parties on the amendments to the CfD contract terms proposed in this consultation.

## Consultation details

**Issued:** 4 October 2021

**Respond by:** 31 October 2021

**Enquiries to:** Email: [BEISContractsforDifference@beis.gov.uk](mailto:BEISContractsforDifference@beis.gov.uk)

**Consultation reference:** Contracts for Difference for Low Carbon Electricity: consultation on further drafting amendments to the CfD contract for Allocation Round 4

### **Audiences:**

The Government welcomes responses from anyone with an interest in the proposals. We envisage that the consultation will be of particular interest to those considering participating in AR4.

### **Territorial extent:**

This consultation applies to Great Britain only as the CfD scheme does not currently operate in Northern Ireland.

## How to respond

Your response will be most helpful if it is framed in direct response to the questions we have asked, though further comments and evidence are also welcome.

Your response should be submitted online using the dedicated online portal:

**Respond online at:** <https://beisgovuk.citizenspace.com/clean-electricity/cfd-contract-amendments-ar4>

Alternatively, please email your responses to the following address and including ‘**CfD consultation on contract amendments**’ in your email subject line.

**Email to:** [BEISContractsforDifference@beis.gov.uk](mailto:BEISContractsforDifference@beis.gov.uk)

Please do not send responses by post to the department, as we may not be able to access them.

When responding, please state whether you are responding as an individual or representing the views of an organisation.

## Confidentiality and data protection

Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004).

Please let us know if you want the information that you provide to be treated as confidential but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

We will process your personal data in accordance with all applicable data protection laws. See our [privacy policy](#).

We will summarise all responses and publish this summary on [GOV.UK](#). The summary will include a list of names or organisations that responded, but not people's personal names, addresses or other contact details.

## Quality assurance

This consultation has been carried out in accordance with the Government's [consultation principles](#).

If you have any complaints about the way this consultation has been conducted, please email: [beis.bru@beis.gov.uk](mailto:beis.bru@beis.gov.uk).

# Introduction

## Context

1. A CfD is a private law contract between a developer of low carbon electricity and the Low Carbon Contracts Company (LCCC), a government-owned company. These are referred to in the contract as ‘Generator’ and ‘CfD Counterparty’ respectively. The generator is paid the difference between the ‘strike price’ – a price for electricity reflecting the cost of investing in a particular low carbon technology – and the ‘reference price’ – a cost measure of the average GB market price for electricity. Contracts are awarded in a series of competitive auctions. The lowest price bids are successful and this drives efficiency and cost reduction. CfDs incentivise investment by giving greater certainty and stability of revenues to electricity generators by reducing their exposure to volatile wholesale prices, while protecting consumers from paying for higher support costs when electricity prices are high.
2. The terms of the CfD contract have been amended ahead of each allocation round to evolve with policy and ensure that they remain fit for purpose. In May 2021<sup>5</sup>, the Government confirmed its intention to adopt several contract changes to give effect to some of the policy decisions on changes to the scheme on which it consulted in 2020, as well as several minor and technical adjustments to improve the functioning of the contract.
3. Further to the indication in our consultation of 24 November 2020<sup>6</sup> on changes to Supply Chain Plans and the CfD Contract, the Government is now consulting on additional changes to bring the contract terms into line with the UK’s policy on subsidy control following the Implementation Period Completion Day. The contract contains a variety of references to EU legislation, including to EU Directives, Regulations and Decisions. We have made some minor changes to the drafting of the CfD Standard Terms and Conditions which clarify how these references are to be read. Finally, changes are proposed to reflect the possibility that Ofgem will decide to remove the requirement on GB electricity generators to pay BSUoS charges and to extend the deadline for AR4 generators to fulfil their Initial Conditions Precedent. These changes will ensure that the contract remains fit for purpose and continues to function as intended for developers who secure a contract in AR4.
4. The CfD contract consists of two components: the CfD Agreement and the CfD Standard Terms and Conditions. The CfD Agreement is the document that a successful developer will sign following an allocation round. It contains project-specific information and specifies which conditions of the CfD Standard Terms and Conditions apply to that

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<sup>5</sup> <https://www.gov.uk/government/consultations/contracts-for-difference-cfd-changes-to-supply-chain-plans-and-the-cfd-contract>

<sup>6</sup> <https://www.gov.uk/government/consultations/contracts-for-difference-cfd-changes-to-supply-chain-plans-and-the-cfd-contract>



project. There are variants to the generic CfD Agreement drafted for phased offshore wind projects ('Phasing Agreements'), private network generators ('Private Network Agreement') and Unincorporated Joint Ventures ('CfD Agreement for Unincorporated Joint Ventures'). The proposed further drafting changes are shown as tracked amendments in the CfD Standard Terms and Conditions, published alongside this consultation document. **Please note that due to formatting issues with the Standard Terms and Conditions document, page numbers in the table of contents and some internal links within the document (e.g. which cross refer to other Conditions or annexes in the document) appear to have been amended when they have not and should be ignored.** Any final changes will be transposed into the other variants of the CfD contract as appropriate and published before AR4 opens to applications in December 2021.

## Proposed changes to the CfD contract

### Subsidy Control

5. The United Kingdom left the European Union on 31 January 2020 and the Implementation Period, during which the UK remained part of the EU Single Market and Customs Union, ended on 31 December 2020. Earlier this year, the Government undertook a public consultation on proposals to establish a UK subsidy control regime. The government response<sup>7</sup> was published on 30 June 2021 and set out the key elements of a new, bespoke regime for subsidy control within the UK. The Subsidy Control Bill<sup>8</sup> currently before Parliament will in due course provide the legal framework for the operation of the regime across the whole of the UK.
6. In the CfD consultation of 24 November 2020<sup>9</sup>, the Government said that it would consult again on further changes to the CfD contract to reflect the relationship between the UK and EU after the Implementation Period had come to an end. We now invite views on further clarificatory amendments to the contract for AR4 to ensure it continues to function as originally intended and to reflect the UK's position in a number of specific areas relevant to the CfD scheme following the UK's exit from the EU. The drafting changes proposed in this consultation are intended to align with the UK subsidy control regime and thereby ensure that the terms of the CfD contract reflect our international obligations.
7. This section of the consultation document summarises the main drafting changes that we believe are necessary to achieve this aim. The subsidy control drafting amendments proposed in this consultation will apply to the contract for AR4. They anticipate that a

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<sup>7</sup> <https://www.gov.uk/government/consultations/subsidy-control-designing-a-new-approach-for-the-uk>

<sup>8</sup> The Subsidy Control Bill and associated papers and policy documents were introduced to Parliament on 30 June 2021: <https://www.gov.uk/government/collections/subsidy-control-bill>

<sup>9</sup> See the link at footnote 2.

bespoke UK subsidy control regime will be in place in domestic law before contracts are signed following the conclusion of the allocation round in 2022.

## Changes to State aid terminology and other EU references

8. The CfD contract was last updated in 2019 for Allocation Round 3 when negotiations on the terms of the UK's withdrawal from the EU were still underway. Interpretative provisions were inserted then (Conditions 1.10 and 1.11) to enable the contract to operate in a range of scenarios while the UK and EU continued to negotiate the terms of their future relationship. Now that the UK is no longer in the EU, and as the Government has clarified its future approach to subsidy control, we are following through on our earlier undertaking to review the CfD Standard Terms and Conditions following Implementation Period Completion Day and to reflect the Government's vision for how subsidy control will operate in the UK.
9. The contract contains a large number of EU-related terms and requirements which now need to be updated. We propose to do this by replacing "State aid" terminology with references to "subsidy" or "subsidy control" where appropriate and removing obsolete references to the "European Union", "EU", "European Union Law" and "EU law". Some EU terminology remains in the CfD Standard Terms and Conditions, however, where it is considered necessary to ensure the proper functioning of the contract, for example, in relation to the operation of the rules on non-cumulation of subsidy or aid.
10. We are also adjusting several of the contract terms where necessary, including some of the definitions, to align with the new subsidy control arrangements and changes in jurisdiction following the UK's departure from the EU. For example, we propose to replace the definitions of "State Aid Rules" and "State Aid Competent Authority" with "**Subsidy Control Rules**" and "**Subsidy Control Competent Authority**" respectively.
11. As part of Allocation Round 3, the references in the standard terms to "State Aid Competent Authority" and "State Aid Rules" were drafted so as to be applicable to whatever State aid authority and State Aid Rules applied in the UK following the conclusion of the EU withdrawal negotiations, whether emanating from the EU or the UK. At that time, it had also been indicated that at the point an independent UK State aid competent authority would be required, the Competition and Markets Authority would be best placed to take on such a role and thus the contract was drafted to reflect that potential outcome.
12. The design of the new subsidy control system in UK domestic law, however, does not provide for a specific UK competent authority for subsidy control as such. Instead, the Bill as currently drafted provides for public authorities (for example national or local government) to be given the flexibility and discretion to award subsidies. They must also comply with high-level principles and the terms of these principles which are subsequently used as criteria for evaluating possible subsidies. A court and tribunal enforcement system will have competence to review the subsidies awarded.

13. In light of this position, the functions of a “Subsidy Control Competent Authority” within the contract are described by cross-reference to the new definition of “Subsidy Control Rules”. In this context, a “Subsidy Control Competent Authority” will be a “UK Competent Authority” which has jurisdiction to enforce, through relevant decisions or judgments, provisions relating to subsidy control in Law or through provisions which have legally binding effect in the UK.

**Consultation questions:**

- 1. The Government welcomes views on the general approach to removing EU-related terms and other obsolete references and replacing them where appropriate with “subsidy” and “subsidy control”.**
- 2. The Government welcomes views on the proposed treatment of “Subsidy Control Rules” and “Subsidy Control Competent Authority” in the draft Standard Terms and Conditions published alongside this consultation document.**

### New definition of “Subsidy”

14. One of the specific changes that we propose to make is to insert a new definition of “**Subsidy**” into the contract. This will cross-refer directly to the definition of “Subsidy” in the Subsidy Control Bill (see footnote 5 above) and will mean that the final definition of “Subsidy” in the contract will be the definition in the Subsidy Control Act, subject to Parliamentary approval in due course. The definition of “Subsidy” in the Bill has been designed to allow the UK to meet national policy objectives and its international obligations<sup>10</sup>, including under the UK-EU Trade and Cooperation Agreement (TCA). Applying this definition to the CfD will therefore also ensure that the use of the term “subsidy” within the contract is consistent with how this term is defined in the TCA.

**Consultation question:**

- 3. The Government welcomes views on the proposal to use the definition of “Subsidy” in the Subsidy Control Bill for the purposes of the CfD contract.**

### Cumulation of other aid/funding with CfD subsidy

15. Many of the State aid provisions in the CfD contract function to prevent cumulation of other forms of aid or public support with CfD subsidy. The CfD scheme currently does not allow generators to cumulate CfD subsidy with any other forms of State aid or Union Funding granted in respect of the same eligible project costs for which CfD subsidy has

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<sup>10</sup> Subsidy Control Bill Explanatory Notes - <https://bills.parliament.uk/bills/3015/publications>

been awarded. Generators must repay any such aid received, with interest. If the recipient is unable to repay the aid (for example, because the awarding body is unable to accept it back or no longer exists), the LCCC will deduct the value of the aid, plus interest, from the generator's CfD payments until the liability is fully discharged.

16. The Government's policy on cumulation was set out in a government response<sup>11</sup> published in February 2017 following a consultation on changes to the CfD contract and regulations in May 2016. This policy will remain in place for AR4. The February 2017 government response included examples of how State aid, Union Funding or other public funding may interact with the CfD.
17. We propose to update some of the terminology in relation to the cumulation provisions to reflect the UK's new subsidy control policy. Given that UK public authorities will now grant subsidy rather than State aid, we will add the term 'subsidy' to the categories of public support that generators awarded a CfD contract may not cumulate with CfD subsidy. We consider it prudent to maintain the exclusion on cumulation with State aid and Union Funding to account for the possibility that a CfD generator may either directly or indirectly have received, or receive during the contract term, State aid from an EU member state or Union Funding from an EU programme which could give rise to cumulation. This will mean that there will be no change in practice to the range of support categories prevented from cumulating with CfD subsidy as specified under the contract. As is now the case, the generator will be responsible for declaring any such subsidy or support and taking the actions required under the contract to prevent cumulation with CfD subsidy. The main contract provisions on cumulation are in Conditions 3.28-3.34 and 32 of the CfD Standard Terms and Conditions.
18. We also propose to remove a redundant provision from the contract which allows cumulation between State aid or Union Funding and CfD subsidy to occur where this is "expressly authorised" by the "State Aid Competent Authority", which was effectively the European Commission. This is achieved by amending the relevant sections of Conditions 32.4(A)(ii), 32.5(A)(ii) and 32.11, and paragraph 2.6(B) of Schedule 1, Part B (Further Conditions Precedent) in the draft Standard Terms and Conditions published alongside this consultation document.

**Consultation question:**

- 4. The Government welcomes views on the proposed amendments to the cumulation provisions outlined above and as set out in the draft Standard Terms and Conditions published alongside this consultation document.**

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<sup>11</sup> <https://www.gov.uk/government/consultations/consultation-on-amending-the-cfd-contract-and-regulations>

## Amendments to certain contract definitions

19. Several definitions in the Standard Terms and Conditions need to be amended as a consequence of the approach that we are taking to update the contract, as explained above. While views are welcome on any of the amendments that we have proposed to contract definitions, we would particularly welcome comments on the proposed amendments outlined below.
20. We propose to remove from the definitions of “**CfD Counterparty Permitted Purposes**” and “**Generator Permitted Purpose**” the obligation on the CfD Counterparty and CfD generators to comply with “any European Union law”. We propose to make the corresponding amendment to the definition of “**CfD Counterparty Permitted Purposes**”.
21. We propose to delete the reference to “European Union” from the definition of “**Competent Authority**”. We consider that it is no longer necessary or appropriate to specifically highlight the EU as a potential “Competent Authority” in this definition. It is the Government’s view that even with this amendment, the definition of “**Competent Authority**” will be drafted sufficiently broadly so as to potentially include the European Union within its scope. The proposed amendment should not, however, be interpreted to mean that the European Union is a de facto competent authority wherever and whenever this definition is used or applied by the contract. Whether an entity is a “Competent Authority” for the purposes of the contract will be determined through an assessment of fact and of particular circumstance as to the entity’s competence and jurisdiction in the contract (and as to the extent of both).
22. Under the devolution settlements and until the end of the Implementation Period, devolved legislative and executive competence was required to be exercised compatibly with EU law. As at Implementation Period Completion Day, this requirement was removed by the European Union (Withdrawal) Act 2018 (EUWA) and decision-making powers and control of areas where EU and devolved law overlapped, transferred by default directly to the devolved legislatures. As a result of this, we are aware that there is subject matter relevant to our Standard Terms and Conditions, aspects of which now fall within devolved competence. It is our intention therefore, to align our definition of ‘Law’ to reflect, as closely as possible, the position of the devolved legislative and executive competence as it now stands.
23. Our previous **definition of ‘Law’** catered for ‘enforceable EU rights within the meaning of Section 2 of the European Communities Act 1972’. We have amended our definition to reflect the fact that the European Communities Act 1972 has been repealed by the EUWA and ensured, as far as possible, that the aspects of law applicable in Scotland and Wales (or parts thereof) and relevant to the CfD, that have now become unrestricted by EU law or fall within devolved competence, are preserved within the definition.

24. It is the Government's view that the proposed revisions to the definition continue to protect the rights of generators and provide as similar a level of protection as possible to projects in England, Scotland and Wales. We have also added a definition of "Devolved legislation" in the Standard Terms and Conditions which aligns with the definition of the same as set out in the Subsidy Control Bill in relation to England, Scotland and Wales. In addition, we have included several consequential amendments to the definition of Foreseeable Change in Law to clarify where changes in devolved legislation, including draft devolved legislation, are foreseeable and would therefore not result in compensation being paid to a generator or the CfD Counterparty.
25. We are also aware that just as EU laws created common UK-wide approaches even where policy areas were otherwise within devolved competence, the UK Government and devolved administrations have agreed that common approaches continue to be required in some areas following Implementation Period Completion Day including those of importance to the CfD. This is through the establishment of Common Frameworks, i.e. mechanisms for the UK and devolved governments to mutually agree some amount of regulatory consistency for policy areas where returning EU powers are within devolved competence. These frameworks will allow for consistency and coordination across certain policies relevant to the CfD as well as the management of any material regulatory divergence in England, Scotland and Wales.
26. It is of note, however, that changes to CfD legislation are reserved to the UK Government and by amending the definition of 'Law', we are not widening rights to amend the CfD Scheme or its contract terms as a result.

**Consultation question:**

- 5. The Government welcomes views on the proposed amendments to contract definitions in the draft Standard Terms and Conditions published alongside this consultation document.**

## Contract provisions derived from EU legislation

27. Several provisions in the contract are derived from EU legislation, including the GB Day Ahead Hourly Price, used to set the market reference price for intermittent CfD technologies, and a range of biomass sustainability requirements in Annex 7 of the Standard Terms and Conditions, many of which transposed requirements of the 2009 EU Renewable Energy Directive (RED) in respect of the CfD contract. In this section we describe how we propose to treat these legal references in the contract for AR4 to ensure that the provisions continue to apply in the context of the UK's legal framework following on from Implementation Period Completion Day.
28. The EUWA created a new constitutional framework for the application and interpretation of former EU law in the UK legal system and established 'retained EU law' as a new

body of domestic law. Retained EU law ensures that the rights and obligations derived from EU law continue to apply in the UK, and domestic legislation can alter retained EU law in the usual way. Amendments made to EU law by the EU after the Implementation Period Completion Day, however, will not form part of retained EU law in the UK and have no effect on the operation of it.

29. Retained EU law falls under three distinct categories, each with its own provisions: (1) EU-derived domestic legislation (Section 2 EUWA); e.g. legally binding decisions and regulations made or primary legislation passed in the UK in order to implement the UK's EU obligations, (2) Direct EU legislation (Section 3 EUWA); e.g. EU regulations, EU decisions and EU tertiary legislation and (3) Other directly effective EU law rights and obligations (Section 4 EUWA) e.g. rights and obligations, in EU Treaties or Directives, recognised as being directly effective prior to Implementation Period Completion Day as well as the case law relevant to their interpretation.
30. The CfD Standard Terms and Conditions refers to a small number of former EU regulations and decisions which have been converted into retained EU law. Each of these references have then been defined in the Condition 1 (Definitions and Interpretation) section of the draft CfD Standard Terms and Conditions to signify that the version of the EU legal instrument which remains in the contract is the version as it now exists in retained EU law. These legal instruments are referred to using the prefix EUDN, to signify a former EU or Commission decision, or EUR, to signify a former EU or Commission regulation. The definitions indicate whether and how the decision or regulation has been amended by the UK since Implementation Period Completion Day. The provisions in the contract relating to the GB Day Ahead Hourly Price and the application of land use criteria in respect of the meaning of "legally harvested" wood fuel, "highly biodiverse grassland" and the "calculation of land carbon stocks" are thereby maintained.
31. As explained above, amendments made to EU law by the EU after the Implementation Period Completion Day will not form part of retained EU law in the UK and will therefore have no effect on the operation of the contract. Where a reference to EU law remains in the contract and it is not part of retained EU law (see references to RED in paragraph 35 below), then the reference will be to the static version of the EU law as it had effect at Implementation Period Completion Day. This is regardless of whether the EU law has since been amended, as the provision in the contract will not continue to track the subsequent developments to it in EU law.
32. In relation to the 2009 RED, this has been revoked by EU Directive 2018/2001 on the promotion of the use of energy from renewable sources (the so-called REDII), which came into force in the EU in July this year. The UK has not adopted the sustainability standards in REDII for electricity or heat generation and, as a Directive, the 2009 RED is not retained EU law. The Government invited evidence and views in its recent call for evidence<sup>12</sup> on the role of biomass in achieving net zero on how the UK could strengthen

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<sup>12</sup> <https://www.gov.uk/government/consultations/role-of-biomass-in-achieving-net-zero-call-for-evidence>

its existing biomass sustainability criteria. The responses to the call for evidence are being analysed and a response will be published in due course.

33. In the meantime however, to ensure that biomass generators who secure a contract in AR4 continue to operate to the current sustainability standards applicable to biomass CfD generators, and to avoid any gap in coverage, the Government proposes that the requirements in the contract remain as they stand or be replaced with similar terms.
34. Annex 7 of the Standard Terms and Conditions includes several cross-references to provisions in the 2009 RED. These references mostly apply sustainability standards for bioliquids used by CfD biomass power stations to generate electricity. Due to the large number of references to the RED in the contract and the scale of the CfD requirements that they cover, we consider that the most practical approach would be for the references to remain as they are in the contract rather than to take a 'copy out' approach. It is our view that a 'copy out' approach in this instance would be unwieldy and to do so would not align with our aim to ensure the contract is as clear, concise and easy as possible for generators to follow.
35. The Government wishes to make it clear, however, that references to the RED in the contract are to the provisions of the original Directive as it stood at Implementation Period Completion Day, and the definition of "RED" in the CfD Standard Terms and Conditions has been amended accordingly. This is because, as outlined above, legislative instruments such as EU Directives, of which RED is an example, are not part of retained EU law and furthermore the RED has been revoked under EU law since Implementation Period Completion Day. We are not therefore expecting generators awarded a CfD contract in AR4 to comply with EU legislation that no longer binds the whole of the UK and references to the RED remain in the contract as contractual obligations only.
36. The CfD contract currently requires biomass CfD generators to minimise harm to ecosystems, including through the use, wherever possible, of integrated pest management within the meaning given in Article 3(6) of Directive 2009/128/EC establishing a framework for Community action to achieve the sustainable use of pesticides. This is one of several requirements in the contract to ensure that biomass CfD generators obtain wood fuel from a sustainable source. Although Directive 2009/128/EC is not retained EU law, we wish to ensure that generators awarded a contract in AR4 continue to have regard to the application of integrated pest management in relation to the wood fuel that they source. We therefore propose to insert a new definition of "Integrated Pest Management" into the contract based on the definition in Directive 2009/128/EC as it stood at the end of Implementation Period Completion Day. This new definition is located at paragraph 3.7(A) of Part B (Sustainability Criteria) of Annex 7.



**Consultation question:**

- 6. The Government welcomes views on the proposed treatment of EU legal references as outlined above and on the specific drafting proposals in the draft Standard Terms and Conditions published alongside this consultation document.**

## For information

### Methodology for determining the interest rate for the repayment/recovery of subsidy

37. The contract stipulates (at Condition 32.11) that interest shall be due and payable by CfD generators in relation to any amount of State aid and/or Union Funding (and in AR4, 'subsidy') which they have received in relation to the costs of the Project. The LCCC are required to calculate interest using the interest rate determined in accordance with the "Reference Rate Methodology". The contract defines this term to mean: "...*the State Aid Competent Authority's methodology for setting reference rates which applies in the United Kingdom from time to time (whether as set out in the "Communication from the Commission on the revision of the method for setting the reference and discount rates" (2008/C 14/02) or otherwise)*".
38. The legal basis for using the EU methodology to calculate interest on subsidy to be repaid or recovered no longer applies to the UK<sup>13</sup> and we are considering what reference rate methodology will be applied to contracts through AR4. On this basis, and to reflect the current position, we are proposing to simplify the definition so that "Reference Rate Methodology" means: "...*the methodology for setting reference rates, which applies to the United Kingdom from time to time*".
39. The Government will confirm details of the reference rate methodology to be applied before AR4 contracts are signed.

## Balancing Services Use of System Charges

40. In our consultation of 24 November 2020<sup>14</sup>, the Government indicated that it may need to consider amending the CfD contract to reflect future possible changes to BSUoS charging arrangements, subject to a final decision by Ofgem.
41. Balancing Services Use of System (BSUoS) charges represent the costs that are incurred by the System Operator (National Grid ESO) in balancing the transmission system in any given year. BSUoS charges are levied in a flat tariff across transmission-

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<sup>13</sup> EU regulations setting out the requirements for the recovery of aid and the calculation of interest rates were revoked in the UK by The State Aid (Revocations and Amendments) (EU Exit) Regulations 2020.

<sup>14</sup> See the link at footnote 2.

connected generators and suppliers. They are not levied on embedded generators, i.e. small generators connected to the distribution system or generators operating behind-the-meter.

42. Transmission-connected generators with a CfD are protected against increases in the cost of balancing system charges over and above the Initial Balancing System Charge set in the contract before actual balancing charges are known. The CfD strike prices for these generators are adjusted annually for changes in balancing system charges and this is applied to both existing and new CfD contracts. This adjustment is designed to make the CfD contract broadly long-term neutral to changes in balancing system charges, which are outside of generators' control.
43. As part of a review of BSUoS charges requested by Ofgem, the Second Balancing Services Charges Task Force led by National Grid ESO, recommended in its final report<sup>15</sup>, published on 30 September 2020, that all balancing services charges should be removed from generators and paid by "Final Demand", i.e. the final consumer of the electricity generated. It further recommended that Ofgem should give two years' notice from the date of its final decision before implementing changes to the charging methodology. Ofgem responded in an open letter<sup>16</sup> dated 10 December 2020 agreeing with the Task Force's recommendation that BSUoS should be recovered from Final Demand only and that April 2023 would be an appropriate target for the implementation of this change. Ofgem also indicated that further work would be needed to evaluate industry's proposed solutions for a code modification and to consider the impacts of this change on consumers and market participants before it reaches a final decision, which it is expected to do in late 2021 or early 2022. In a letter published on 7 July<sup>17</sup> 2021, Ofgem reiterated their view in their letter of 10 December 2020 while clarifying that nothing in their July letter or the accompanying independent report on BSUoS fetters their discretion as to their final decision.
44. The Government wishes to signal its intention to amend the contract to remove balancing system charges from the existing Strike Price indexation formula in the CfD Standard Terms and Conditions. The proposed amendments would apply if in fact this is the final decision made by Ofgem, and the new provisions would apply from the date that Ofgem's decision has effect. Ofgem have indicated that April 2023 would be an appropriate target for this change to come into effect. Our drafting has therefore been left as flexible as possible to be made subject to Ofgem's final decision and to potentially accommodate a different implementation date. The effect of this potential change would be that successful AR4 applicants would not receive any compensation for BSUoS charges from the date the current charging arrangements on generators cease to apply. Government believes that it would not be appropriate for any CfD generators to be

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<sup>15</sup> <http://www.chargingfutures.com/charging-reforms/task-forces/second-balancing-services-charges-task-force/resources/>

<sup>16</sup> [https://www.ofgem.gov.uk/search?keyword=Ofgem%20response%20to%20publication%20of%20the%20final%20report%20of%20the%20second%20Balancing%20Services%20Use%20of%20System%20\(BSUoS\)%20Task%20Force](https://www.ofgem.gov.uk/search?keyword=Ofgem%20response%20to%20publication%20of%20the%20final%20report%20of%20the%20second%20Balancing%20Services%20Use%20of%20System%20(BSUoS)%20Task%20Force)

<sup>17</sup> <https://www.ofgem.gov.uk/publications/reform-bsuos-charges-analysis-proposal-remove-bsuos-generation>

compensated for these charges through the CfD if and when they no longer have to pay them.

45. We have provided illustrative drafting to reflect these potential changes at Condition 14 (Baseload Strike Price Adjustments) and Condition 20 (Intermittent Strike Price Adjustments) of the attached draft CfD Standard Terms and Conditions. The main proposed changes are to amend the Strike Price indexation formulae at Condition 14 and 20 and to deactivate Condition 46 requiring the CfD Counterparty to apply the Balancing System Charge Strike Price Adjustment to the strike price on 1 April each year (the Indexation Anniversary).
46. We propose to make two changes to the Strike Price indexation formulae at Conditions 14 and 20 respectively, as follows: (1) the sum of the previous Balancing System Charge Strike Price Adjustments (“ $\sum$ BSCSPA”) is removed, and (2) the Initial Balancing System Charge ( $I^{base}$ ) is deducted from the Base Year Strike Price. By removing  $\sum$ BSCSPA, changes in the strike price as a result of previous variations in the cost of BSUoS charges are no longer applicable. Deducting the Initial Balancing System Charge also removes the portion of the initial strike price that we expect generators to have included in their strike prices when bidding. The amended formulae are set out in the sections on Other Strike Price Adjustments in Conditions 14 and 20 and, as indicated in new proposed text at Conditions 14.8 and 20.8, would be used to calculate the annual strike price adjustments for baseload and intermittent CfD units from the date on which Ofgem’s decision begins to apply.
47. As we cannot be sure of the date on which any Ofgem decision might come into effect, if the BSUoS charges are not removed from generators on 1 April of a given year, the last Indexation Adjustment will be recalculated following the new formula and it will apply from that removal date. This calculation ensures that generators are not compensated for BSUoS charges from the date their liability to pay those charges no longer applies.
48. To complement the new proposed drafting at Conditions 14 and 20, we are proposing to add new definitions at Condition 1.1 of “**BSUoS Change in Law**” and “**BSUoS Removal Date**”. Given that Ofgem have been consulting for some time on removing BSUoS charges from generators, we are proposing to amend the definition of “**Foreseeable Change in Law**” to confirm that a “**BSUoS Change in Law**” is categorised as a foreseeable change in law for AR4 generators.
49. Interested parties should note that it may be necessary to finalise the contract drafting on this point at a later date if Ofgem’s final decision is not announced until after the allocation round has commenced or is materially different to what is anticipated.

**Consultation question:**

7. **The Government welcomes views on the illustrative drafting which reflects the possible decision by Ofgem to remove generators’ liability to pay BSUoS charges in respect of CfD generators.**

## Additional minor and technical change

### Extended deadline to fulfil Initial Conditions Precedent

50. The Initial Conditions Precedent (ICPs) are the first milestone of the CfD. They are set to ensure that generators who are awarded a contract provide specific information to the LCCC after signing their CfD contract. Generators must fulfil the ICPs for the CfD contract to come into force. For offshore wind generators holding phased project agreements, each phase will require a separate ICP submission.
51. In order to fulfil the ICPs, a generator must provide:
- A Legal Opinion confirming their legal capacity and authority to enter into the CfD;
  - A 'Know Your Customer' form which enables the LCCC to be satisfied as to the legal identity, ownership and control of the generator;
  - A Facility Description providing details of the assets comprising the Facility and a map or plan of the Facility; and
  - A description of any Electricity Storage Facility, including details of any assets which are intended to be located within the Facility site or used by or associated with the Facility.
52. The ICPs are part of the contract signing process following an allocation round. Following contract signature, the ICP criteria must be met within 10 Business Days of contract signature. Failure by a generator to fulfil its ICPs in this timeframe may result in their contract being terminated (see Condition 51.1(D) of the Standard Terms and Conditions).
53. The Government confirmed in March 2020<sup>18</sup> that Pot 1 technologies, including onshore wind and solar PV, will be eligible to participate in AR4. We are anticipating that this will result in a larger number of applications than in previous allocation rounds. To facilitate the efficient administration of the delivery of the ICPs, we are proposing to increase the time allowed for generators who are awarded contracts in AR4 to fulfil their ICPs from 10 Business Days to 20 Business Days. This proposed amendment is reflected in the drafting of Conditions 3.3 and 51.1(D) of the draft Standard Terms and Conditions published alongside this consultation document.
54. Potential applicants to AR4 are encouraged to read the LCCC's guidance<sup>19</sup> on the ICPs to familiarise themselves with the requirements and process.

**Consultation question:**

**8. The Government welcomes views on the proposed extension of the ICP deadline from 10 Business Days to 20 Business Days.**

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<sup>18</sup> [DN: Insert link to March 2020 consultation and point to section called Pot 1 'established' technologies]

<sup>19</sup> <https://www.lowcarboncontracts.uk/publications/initial-conditions-precedent-icp-guidance>



## Consultation questions

- 1. The Government welcomes views on the general approach to removing EU-related terms and other obsolete references and replacing them where appropriate with “subsidy” and “subsidy control”.**
- 2. The Government welcomes views on the proposed treatment of “Subsidy Control Rules” and “Subsidy Control Competent Authority” in the draft Standard Terms and Conditions published alongside this consultation document.**
- 3. The Government welcomes views on the proposal to use the definition of “Subsidy” in the Subsidy Control Bill for the purposes of the CfD contract.**
- 4. The Government welcomes views on the proposed amendments to the cumulation provisions outlined above and as set out in the draft Standard Terms and Conditions published alongside this consultation document.**
- 5. The Government welcomes views on the proposed amendments to contract definitions in the draft Standard Terms and Conditions published alongside this consultation document.**
- 6. The Government welcomes views on the proposed treatment of EU legal references as outlined above and on the specific drafting proposals in the draft Standard Terms and Conditions published alongside this consultation document.**
- 7. The Government welcomes views on the illustrative drafting which reflects the possible decision by Ofgem to remove generators’ liability to pay BSUoS charges in respect of CfD generators.**
- 8. The Government welcomes views on the proposed extension of the ICP deadline from 10 Business Days to 20 Business Days.**

## Next steps

Following the close of this consultation, we will analyse the responses, summarise the views expressed and set out final decisions in a government response. We intend to publish this alongside the final versions of the CfD contract documents for AR4 before the allocation round opens in December 2021.

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This consultation is available from: [www.gov.uk/government/consultations/contracts-for-difference-allocation-round-4-further-changes-to-the-cfd-contract](http://www.gov.uk/government/consultations/contracts-for-difference-allocation-round-4-further-changes-to-the-cfd-contract)

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