



Department
of Energy &
Climate Change

CONTRACTS FOR DIFFERENCE

Consultation on changes to the CFD
contract and CFD regulations

May 2016

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Consultation on changes to the CFD contract and CFD regulations

The consultation can be found on DECC's website:

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

Contracts for Difference

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Any enquiries regarding this publication should be sent to us at DECCContractsForDifference@decc.gsi.gov.uk.

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General information

Purpose of this consultation

The government is seeking views on proposed amendments to the Contract for Difference (CFD) and associated secondary legislation which are intended to apply to future CFD allocation rounds.

Issued: 11 May

Respond by: 8 June

Enquiries to:

CFD Design & Renewable Technologies
Clean Electricity Directorate
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London, SW1A 2AW
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Email: DECCContractsForDifference@decc.gsi.gov.uk

Consultation reference: URN 16D/225 – Consultation on changes to the CFD contract and CFD regulations

Territorial extent:

Some of the sets of Regulations governing Contracts for Difference formally extend to the whole of the United Kingdom. However, in practice the Contract for Difference regime currently extends to Great Britain only.

How to respond

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome. Electronic responses should be emailed to the above address.

Additional copies:

You may make copies of this document without seeking permission. An electronic version can be found on the [GOV.UK website](#).

Other versions of the document in Braille, large print or audio-cassette are available on request. This includes a Welsh version. Please contact us under the above details to request alternative versions.

Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation (primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation. It would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request.

We will summarise all responses and place this summary on the [GOV.UK website](#). This 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 consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to:

DECC Consultation Co-ordinator
3 Whitehall Place
London SW1A 2AW
Email: consultation.coordinator@decc.gsi.gov.uk

Executive Summary

1. The Contract for Difference ('CFD') scheme is one of the mechanisms created through the Electricity Market Reform¹ programme introduced in the Energy Act 2013. CFDs provide long-term price stabilisation to incentivise investment in low carbon generation. The first CFD allocation round was launched in October 2014. The Secretary of State has announced an intention to hold the next allocation round in late 2016 for 'less established' technologies (Pot 2).
2. This consultation builds on the changes made to the CFD contract as a result of the March 2015 consultation on changes to the CFD contract which focused on the issues of Unincorporated Joint Ventures ('UJVs') and negative pricing.
3. This consultation proposes further changes to the CFD contract in advance of the next allocation round. These proposed changes relate to:
 - Preventing cumulation of state aid
 - The definition of Foreseeable Change in Law
 - Electricity storage
 - A number of other minor and technical changes
4. Alongside this consultation document we have published an indicative version of the CFD Standard Terms and Conditions and CFD Agreement (together the CFD contract), containing proposed amendments in relation to the cumulation of state aid, the definition of Foreseeable Change in Law, and in respect of the minor and technical changes. The amendments outlined in the indicative version of the CFD Agreement for consultation should be considered to also apply to CFD (Phase 1) (Single) Agreement, CFD (Phase 2) (Single) Agreement, CFD (Phase 3) (Single) Agreement, CFD (Phase 1) (Apportioned) Agreement, CFD (Phase 2) (Apportioned) Agreement, CFD (Phase 3) (Apportioned) Agreement, CFD Private Network Agreement and CFD (UJV) Agreement. We may also make other minor or consequential amendments to the CFD contract.

¹ Appendix 5, <https://www.gov.uk/government/publications/2010-to-2015-government-policy-uk-energy-security/2010-to-2015-government-policy-uk-energy-security>

5. Subject to consultation and review, we propose to include these amendments into the CFD contract and CFD secondary legislation for the next allocation round.
6. For the proposed changes to facilitate the use of storage on CFD sites, following the consultation we will consider whether these changes should be made ahead of the next allocation round, or ahead of later allocation rounds.
7. This consultation also includes a call for evidence on options for potential changes to be made for allocation rounds beyond the next round. Such potential changes could include:
 - Mitigating risk to the Levy Control Framework (LCF) budget arising from uncertainty over load factors
 - Clarifying circumstances in which force majeure applies
 - Discouraging the allocation of CFDs to underdeveloped projects
8. A government response will be published following close of the consultation, analysing any responses received and setting out the government's final decisions. We intend to publish the government response in autumn later this year.

Catalogue of consultation questions

Consultation questions	
1.	Is our approach to require repayment of any previous state aid prior to receipt of CFD payments, rather than before CFD application or signature, the right one?
2.	How likely is it that a project has benefitted or will benefit from state aid in addition to that granted under a CFD?
3.	Is it possible for all types of state aid (including tax benefits) to be quantified and for evidence to be provided to the LCCC of its receipt? Are you aware of any forms of state aid for which this would not be possible?
4.	Can state aid that benefits a CFD project be distinguished from other state aid received by the same party and used for other purposes?
5.	When the aid granter is unable or refuses to accept repayment of the aid (with interest), is preventing cumulation by setting off the previous aid against CFD payments, so the aid is in effect deducted from the CFD payments, a fair solution?
6.	Could preventing cumulation via set-off against CFD payments pose a credit risk to the LCCC? If so, how significant do you consider this risk to be and are protection measures required to minimise this risk (e.g. posting of collateral)?
7.	Is the interest rate proposed, based on the methodology published by the European Commission and adjusted to take into account the generator's creditworthiness and collaterals, the most appropriate interest rate to apply to the state aid to be repaid?
8.	Is the proposal a sufficient disincentive for generators not to receive state aid during the term of the CFD?
9.	Is 10 business days sufficient time for a CFD generator to provide evidence to the LCCC of its receipt, or otherwise, of other state aid?

10.	Do you agree that generators should be prohibited from receipt of other state aid during the entire term of the CFD or should this be limited to the period of time after the CFD Start Date (as defined in the CFD contract)?
11.	Do you agree that the proposed ‘for the avoidance of doubt’ drafting relating to Foreseeable Change in Law is helpful?
12.	Do you agree with the proposal, for consistency, to align the wording of limb (J) of the Foreseeable Change in Law with Condition 28.1(G)?
13.	Do you agree that the inclusion of judicial reviews on Applicable Planning Consents that are launched within the timelines set out in paragraph 39 in the definition of Foreseeable Change in Law strikes the right balance between protection for the generator and prevention of ‘budget blocking’?
14.	Do you think any changes in law which result from judicial reviews that commence during the 3 month time limit for challenge (not just changes in law which result from judicial reviews in respect of the grant of Applicable Planning Consents) should be considered to be ‘foreseeable’ where they commence, are pending or are threatened after CFD allocation or signature?
15.	Have you considered installing storage on a CFD site? If yes, what storage services have you considered offering?
16.	Are there any other barriers to installing storage on a CFD site?
17.	Do you think that the use of storage on a CFD site could lead to overcompensation for generators with storage?
18.	Would installing storage units in a separate BM Unit to the CFD Facility meet your aims of installing storage on site? If not, please explain, and propose alternative arrangements.
19.	Do you agree with the proposed definition of a “storage facility”?
20.	Do you have any views on the proposed minor and technical changes?

Introduction

Overview of CFDs

9. A CFD is a private law contract between a low carbon electricity generator and the CFD Counterparty, the Low Carbon Contracts Company ('LCCC'), which is an independently operated government-owned company. A CFD holder 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 measure of the average market price for electricity in the market of Great Britain.
10. The CFD gives greater price stability to generators by reducing their exposure to volatile wholesale prices, whilst protecting consumers from paying for higher support costs when electricity prices are high. In this way, CFDs provide efficient long-term support for all forms of low carbon generation. Full background and details on how CFDs are intended to operate, including the detail of contract terms and conditions can be found on the GOV.uk website².
11. The costs of CFDs are met by electricity consumers via the supplier obligation, which is a levy on electricity suppliers in Great Britain.
12. The process for allocating CFDs is overseen by the EMR Delivery Body (National Grid), who notifies the LCCC of the projects that have been successful in an allocation round. The LCCC will then offer a CFD based on a set of standard terms, with some limited scope to make minor and necessary modifications to these terms. The government retains a power to direct the LCCC to enter into CFDs outside of this procedure.
13. The powers to introduce CFDs can be found under Part 2 of the Energy Act 2013³. Subsequent to the Energy Act 2013 receiving Royal Assent in December 2013, several statutory instruments implementing secondary legislation for the CFD scheme entered into force in 2014 (and which have subsequently been amended):
 - The Contracts For Difference (Allocation) Regulations 2014⁴

² <https://www.gov.uk/government/collections/electricity-market-reform-contracts-for-difference>

³ <http://www.legislation.gov.uk/ukpga/2013/32/contents/enacted/data.htm>

⁴ <http://www.legislation.gov.uk/uksi/2014/2011/contents/made>

- The Contracts For Difference (Definition of Eligible Generator) Regulations 2014⁵
 - The Contracts For Difference (Standard Terms) Regulations 2014⁶
 - The Contracts For Difference (Electricity Supplier Obligations) Regulations 2014⁷
 - The Electricity Market Reform (General) Regulations 2014⁸
 - The Power Purchase Agreement Regulations 2014⁹
14. Further amendments to the secondary legislation are due to be made this year following the March 2015 consultation¹⁰, which focused on changes relating to Unincorporated Joint Ventures, Negative Pricing, Metering Operational Framework and Technical System Requirements, and other minor, technical and clarificatory amendments.
15. The proposed policy changes in this document will principally impact the Contracts for Difference (Standard Terms) Regulations 2014 above (the 'Standard Terms Regulations'). However, the other instruments may be affected depending on the final policy position post consultation.

The CFD contract

16. The CFD contract is composed of two elements, the CFD Agreement and the CFD Standard Terms and Conditions. The CFD Agreement is the document that a successful generator will sign and contains project-specific information. It incorporates the CFD Standard Terms and Conditions, and specifies which conditions of the CFD Standard Terms and Conditions apply to that generator (depending on the technology of the project). There are variants to the generic CFD Agreement drafted for phased offshore wind projects ('Phasing Agreements'), Private Network Generators ('Private Network Agreements') and Unincorporated Joint Ventures ('CFD Agreement for Unincorporated Joint Ventures').

⁵ <http://www.legislation.gov.uk/uksi/2014/2010/contents/made>

⁶ <http://www.legislation.gov.uk/uksi/2014/2012/contents/made>

⁷ <http://www.legislation.gov.uk/uksi/2014/2014/contents/made>

⁸ <http://www.legislation.gov.uk/uksi/2014/2013/contents/made>

⁹ <http://www.legislation.gov.uk/uksi/2014/2511/made>

¹⁰ <https://www.gov.uk/government/consultations/electricity-market-reform-contracts-for-difference-consultation-on-changes-to-the-cfd-contract-cfd-regulations>

17. A key element of the structure of the CFD regime is the certainty provided by the terms that are offered at the time of allocation. The changes to the CFD contract proposed in this consultation cannot therefore be automatically applied to CFDs that have already been entered into by CFD generators in the previous round.
18. However, the CFD contract does set out a change control process by which the LCCC may propose amendments to existing signed contracts. It is a matter for the LCCC whether they wish to use the change control procedures to seek to make any changes proposed in this consultation to existing signed contracts.

CFD contract and regulation changes

19. The proposed changes outlined below include proposals to ensure that CFD payments are not cumulated with any other state aid received by CFD projects, clarify the definition of foreseeability within the definition of qualifying change in law, clarify how storage should be treated on CFD sites, and a number of technical changes that should reduce administrative burdens on CFD generators and the LCCC. We intend for the majority of these proposed CFD changes to be included in the CFD contract published for use in the next allocation round.

Cumulation of state aid

20. Payments made from the LCCC to generators under CFDs are classified as state aid¹¹. The European Commission approved the government granting this state aid in July 2014¹². The approval requires that there will be no cumulation with other state aid, so that low carbon projects are not overcompensated by receiving multiple forms of state aid.
21. To avoid cumulation of aid, Regulation 14 of The Contracts for Difference (Allocation) Regulations 2014 excludes projects that are in receipt of support from other schemes, such as the Renewables Obligation, Feed-in Tariff or Capacity Market, from applying for a CFD.
22. However, state aid can be provided in different forms including grants or subsidies, loans and tax exemptions, which may not be captured by the exclusions noted in the eligibility criteria. In order to prevent cumulation of aid for new CFD projects, we propose to amend both the CFD Standard Terms and Conditions and the Standard Terms regulations. Our objective is to take a proportionate approach whilst ensuring that the scheme complies with the requirements of the state aid approval.

¹¹ Article 107(1) of the Treaty of the Functioning of the European Union sets out that, "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

¹² Conditions 46 and 77, available here: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36196

23. State aid can take a variety of forms, and so we intend that all types of state aid that are received in respect of, or benefits, a CFD project¹³ would not be permitted to be cumulated with the CFD (unless the cumulation of that state aid with the CFD is specifically approved by the European Commission). We would expect that generators should be aware if they have received, or benefitted, from state aid.
24. We considered preventing generators in receipt of state aid from applying for CFDs, or requiring aid to be repaid before the CFD was signed. However, we consider that this would go beyond what is required by the European Commission in the state aid approval for the CFD scheme and could unnecessarily prevent projects from participating in the CFD scheme. We consider that the proposed approach described below, to require repayment after the CFD is entered into by the parties but before receipt of CFD payments, is a more proportionate approach.
25. We therefore propose to make the following changes to the CFD Standard Terms and Conditions:
 - (i) Introduce a new Initial Condition Precedent that would require generators to inform the LCCC whether any state aid has been received in respect of, or benefitted, the project as at that date, and, if so, to provide details of the state aid. This confirmation would be accompanied by a directors' certificate.
 - (ii) Introduce a new Operational Condition Precedent that would require repayment to the original aid granter of any state aid with interest (see paragraph 30 for details of interest) that has benefitted a CFD project. This condition precedent must be satisfied before that project may receive payments under the CFD contract. The generator would have the responsibility of demonstrating the repayment to the LCCC, and this would be certified by a directors' certificate.
 - (iii) Prohibit CFD projects from benefitting from any other state aid during the term of the CFD (except where the cumulation of the other aid with the CFD has been expressly authorised by the European Commission). We propose to implement this by introducing a new generator undertaking to ensure that at all

¹³ The CFD Standard Terms and Conditions define the "Project" as: "the design, development, construction, conversion, installation, completion, testing, commissioning, operation, maintenance and decommissioning of the Facility"

times no state aid is received in respect of or benefits the project, and (in the event any aid is received) an undertaking to repay it (with interest) to the aid granter. We also propose to include a new generator warranty that the project has not received or otherwise benefitted from state aid. If the project does receive or benefit from state aid the generator would have an obligation to notify the LCCC as soon as reasonably practicable. CFD payments would then be suspended until that aid is repaid (with interest) to the aid granter. As soon as possible after the aid has been repaid, CFD payments would start again as normal and the payments that were suspended would be paid to the generator.

- (iv) Introduce new conditions relating to the waiver of the requirement to repay any other state aid, so that the new Operational Condition Precedent requiring repayment and the obligation to repay can only be waived where it is demonstrated to the satisfaction of the LCCC that the aid granter refuses or is unable to accept the repayment (for example where the organisation no longer exists).
- (v) Introduce new state aid set-off conditions, so that where the aid cannot be repaid (see paragraph (iv) above), the amount of aid received (plus interest) would be set-off by the LCCC against any payments under the CFD due to be made by the LCCC to the generator, so that the generator would not receive any payments until the full amount has been deducted. Any payments due from the generator to the LCCC (for example when the strike price is below the market reference price) would be unaffected and the generator would be required to make these payments as normal.
- (vi) Introduce a new item on the Billing Statement that would be set-off from the Net Payable Amount¹⁴, in order to implement the new set-off conditions described in paragraph (v) above.
- (vii) Require the generator to provide evidence to the LCCC, on request, as to its compliance with its obligation not to receive or benefit from state aid. This evidence should be provided within 10 business days of the request. If satisfactory evidence is not

¹⁴ Condition 22.7 of the CFD Standard Terms and Conditions

provided within this timescale, the LCCC will suspend payments to the generator.

- (viii) Once state aid has been repaid in the circumstances described in paragraph (iii) above, the LCCC will be required to pay the suspended sums to the generator without interest. In order to protect the LCCC from having to make large one-off payments, we propose that the LCCC should have the option to make staged payments in a way that minimises the impact of cash flows on suppliers. In returning payments to generators, we expect the LCCC to take into account the impact of repayment on the collection of funds under the supplier obligation. We intend that the repayment to generators would be made by including the amount in the Reconciliation Amount in the Billing Statement. Interest would not be applied to these payments.

- 26. We propose that the suspension and set-off provisions survive termination or expiry, so that they can continue to be applied if the CFD terminates or expires before the state aid has been repaid or set-off in full. If the CFD contract does expire or terminate, and the generator has not yet repaid any other state aid (with interest) to the granter of the aid, or the other state aid (with interest) cannot be set off in full against any payments due to the generator, we propose to permit the LCCC to recover CFD payments which have already been paid to the generator to the value of the outstanding amount of state aid and interest. We propose that the generator is required to make the payment to the LCCC within 10 business days of being notified of the outstanding amount. In the majority of cases we would expect that the suspension of CFD payments would be sufficient to encourage generators to repay the other state aid.
- 27. Any disputes would be subject to the existing arbitration procedure detailed in the CFD Standard Terms and Conditions. We also propose to make any necessary consequential amendments to other terms of the CFD.
- 28. The Standard Terms Regulations list the content that must be contained within a published CFD contract. At present, this regulation specifies that the LCCC is required to pay the generator when the reference price is below the CFD's strike price (except during a period of negative pricing).
- 29. The proposed contract amendments set out above require the LCCC not to make payments to the generator in order to prevent the cumulation of state aid. Consequentially, we propose to amend the Standard Terms Regulations to provide that the LCCC is not required to make payments to a generator in those

circumstances in which the CFD contract specifies that payments should not be made. We intend that this amendment would capture this state aid cumulation situation, and also any other circumstances which might be specified in the contract in the future.

Application of interest

30. If generators were to repay the state aid's original value with no interest applied, the aid would be equivalent to an interest-free loan and likely to still be considered to be state aid. We intend that interest should be applied to the repayable amount outstanding from the day on which that aid was received to the day on which it is repaid or set-off in full.
31. The European Commission publishes a methodology for calculating reference rates to be used as a proxy for market rates¹⁵, which we intend to use to calculate the interest rate that will apply to the amount to be repaid or set-off against CFD payments. The interest rate to apply will be calculated by the LCCC using the base rate applicable at the time with an additional margin to take into account the generator's creditworthiness and collaterals. Interest will be compounded annually.

Consultation questions

1.	Is our approach to require repayment of any previous state aid prior to receipt of CFD payments, rather than before CFD application or signature, the right one?
2.	How likely is it that a project has benefitted or will benefit from state aid in addition to that granted under a CFD?
3.	Is it possible for all types of state aid (including tax benefits) to be quantified and for evidence to be provided to the LCCC of its receipt? Are you aware of any forms of state aid for which this would not be possible?
4.	Can state aid that benefits a CFD project be distinguished from other state aid received by the same party and used for other purposes?
5.	When the aid granter is unable or refuses to accept repayment of the aid (with

¹⁵ The rates and guidance on the margins to be added to take into account the debtor's creditworthiness and collaterals are available here: European Commission, Communication from the Commission on the revision of the method for setting the reference and discount rates: [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0119\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0119(01))

	interest), is preventing cumulation by setting off the previous aid against CFD payments, so the aid is in effect deducted from the CFD payments, a fair solution?
6.	Could preventing cumulation via set-off against CFD payments pose a credit risk to the LCCC? If so, how significant do you consider this risk to be and are protection measures required to minimise this risk (e.g. posting of collateral)?
7.	Is the interest rate proposed, based on the methodology published by the European Commission and adjusted to take into account the generator's creditworthiness and collaterals, the most appropriate interest rate to apply to the state aid to be repaid?
8.	Is the proposal a sufficient disincentive for generators not to receive state aid during the term of the CFD?
9.	Is 10 business days sufficient time for a CFD generator to provide evidence to the LCCC of its receipt, or otherwise, of other state aid?
10.	Do you agree that generators should be prohibited from receipt of other state aid during the entire term of the CFD or should this be limited to the period of time after the CFD Start Date (as defined in the CFD contract)?

Definition of Foreseeable Change in Law

32. We are proposing a small change to the definition of Foreseeable Change in Law in Law with respect to the Qualifying Change in Law ('QCIL') provisions in the CFD contract, for the avoidance of doubt. This will ensure clarity about precisely what situations are 'foreseeable' and accordingly do not result in compensation. Furthermore we propose two other changes to the definition of Foreseeable Change in Law:

- (i) To bring the definition in line with the "No litigation" clause at Condition 28.1(G) of the CFD Standard Terms and Conditions.

- (ii) To widen the definition with respect to the effect of judicial reviews against Applicable Planning Consents¹⁶ relating to the Project.
- 33. The Change in Law ('CiL') provisions are designed to provide CFD holders with an element of protection so that the long-term price stability afforded to CFD holders is not undermined by certain legislative and regulatory changes that have a discriminatory effect.
- 34. Compensation may be payable where the CiL is a QCiL. The provisions are two-way, so that any QCiL which benefits a generator should lead to compensation being provided to the LCCC. Broadly speaking, the aim of the compensation mechanic is to put the generator in a 'no better, no worse' position than had the QCiL not occurred.
- 35. To be classified as a QCiL, the change would have to:
 - (i) Match the definition of CiL in the CFD (e.g. including an act of Parliament, directives issued by Ofgem, industry documents or required authorisations such as planning permission)
 - (ii) Be unforeseeable (i.e. not be a Foreseeable Change in Law as defined in the CFD contract)
 - (iii) Fall into either the "discriminatory", "specific" or "other" CiL classification.
- 36. The existing CFD Standard Terms and Conditions set out a detailed list of occasions in which a CiL should be considered to be a Foreseeable Change in Law¹⁷:
 - “**Foreseeable Change in Law**” means, in respect of a Change in Law, that the relevant change:
 - [...]
 - (J) results from legal proceedings commenced or threatened against the Facility or the Generator on or prior to the Agreement Date,

¹⁶ As set out in the Contracts for Difference (Allocation) Regulations:
<http://www.legislation.gov.uk/uksi/2014/2011/contents/made>

¹⁷ The complete definition of Foreseeable Change in Law in the CFD Standard Terms and Conditions:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/348142/Generic_CfD_T_Cs_29_August_2014_.pdf

provided always that a Change in Law which imposes a requirement that the Facility permanently ceases operation shall not be a Foreseeable Change in Law”.

37. The phrase “against the Facility” is intended to capture legal proceedings that would have an adverse impact on the Facility, such as a challenge to a Facility’s planning consent or other “Required Authorisations” as defined in the CFD contract. However, since such challenges would actually be brought against a third party (i.e. the Competent Authority, as defined in the CFD contract, who granted the authorisation), we intend, for the avoidance of doubt, to clarify that legal proceedings “against the Facility” includes legal proceedings in relation to the Facility and includes challenges brought against a Competent Authority in relation to the Required Authorisations (such as, for example, the judicial review of a planning authority’s decision to grant planning consent).
38. For consistency, we also intend to align the language of part J of the definition of Foreseeable Change in Law with the “No litigation” clause¹⁸, clarifying that “legal proceedings threatened” includes those threatened “by issue of a formal written notice before action or similar” and by adding the phrase “pending before any court, arbitral or other tribunal, administrative or regulatory body or, as the case may be, expert”.
39. Finally, we intend to specify that a CiL is foreseeable if a judicial review is brought against a project’s Applicable Planning Consent within the usual time limits for challenge for the relevant consent, notwithstanding that it has not been commenced, threatened or pending prior to the signing of the CFD. Rule 54.5 of the Civil Procedure Rules¹⁹ provides that applications for judicial review in respect of planning permissions in England and Wales should be brought within 6 weeks, and for other consents, should be brought within 3 months. In Scotland, applications for judicial reviews should be brought within 3 months. We believe that if a generator applies for or enters into a CFD, and their planning permission in England and Wales is subsequently challenged but the challenge is still within the 6 week period, or for any other Applicable Planning Consent in England and Wales and any Applicable Planning Consent in Scotland (including a planning permission), the challenge is within the 3 month period, the risks associated with the challenge should be for the generator to bear.

¹⁸ Condition 28.1(G) in the CFD Standard Terms and Conditions

¹⁹ The time limit for filing a claim set out in Part 54.5 of the Civil Procedure Rules:
<https://www.justice.gov.uk/courts/procedure-rules/civil/rules>

40. Indicative drafting of the applicable elements of the definition of Foreseeable Change in Law can be found in the draft version of the CFD Standard Terms and Conditions, published alongside this consultation document.

Consultation questions

11.	Do you agree that the proposed 'for the avoidance of doubt' drafting relating to Foreseeable Change in Law is helpful?
12.	Do you agree with the proposal, for consistency, to align the wording of limb (J) of the Foreseeable Change in Law with Condition 28.1(G)?
13.	Do you agree that the inclusion of judicial reviews on Applicable Planning Consents that are launched within the timelines set out in paragraph 39 in the definition of Foreseeable Change in Law strikes the right balance between protection for the generator and prevention of 'budget blocking'?
14.	Do you think any changes in law which result from judicial reviews that commence during the 3 month time limit for challenge (not just changes in law which result from judicial reviews in respect of the grant of Applicable Planning Consents) should be considered to be 'foreseeable' where they commence, are pending or are threatened after CFD allocation or signature?

Storage

41. Some generators have questioned whether it is possible to include an electricity storage facility within a facility or project that holds a CFD.
42. The use of storage is not prohibited on CFD sites. However, generators that do install storage must comply with the metering provisions within the CFD Standard Terms and Conditions, or the metering provisions within the Private Network Agreement, which do not expressly provide for storage. CFD payments only support electricity generated by the Facility. This means that if generators with storage also wish to import electricity from the grid in order to store electricity and subsequently sell when prices are high, they will need to ensure that this imported

electricity is excluded from the Balancing Mechanism (BM) Unit Metered Volume used to calculate CFD payments.

43. To maximise the commercial benefits of storage, we believe that storage should be in a different BM Unit to the generation assets. CFD payments would therefore be calculated on the metered volumes of the BM Unit relating to the generation assets and therefore on the wholesale price at the time of the *generation* (rather than the time of sale) of electricity. Including storage in a separate BM Unit to the generation assets would also ensure that imported electricity is not included in the calculation of CFD payments.
44. Although the existing CFD metering provisions do not prevent separate BM Units being used for storage on CFD sites where a BSC dispensation has been received²⁰, this is not explicit and so we are proposing changes to the CFD Standard Terms and Conditions to make clear how storage should be used within the CFD. For the moment, these proposals would not apply to the Private Network CFD.
45. We are consulting without proposed drafting in order to seek views and evidence on whether the use of a separate BM Unit will meet the needs of generators wishing to install storage and on the appropriateness of the proposed definition of storage. Depending on responses, we will consider whether changes can and should be made ahead of the next or future allocation rounds.
46. We propose two changes with respect to storage.
 - (i) First, we are considering further clarifying within the CFD that the BM Unit Metered Volume used to calculate CFD payments should only include the output of generating units of the Facility Generation Technology (as specified in the CFD Agreement).

²⁰ The CFD requires that generators' metering arrangements are in accordance with the requirements of the Balancing and Settlement Code (BSC) (or equivalent conditions as specified in Private Network Agreements for projects located on a private wire network). Unless a BSC metering dispensation has been sought, the BSC meter is installed at the Boundary Point (i.e. the point that the Facility connects to the transmission or distribution network). Placing storage in a separate BM Unit will mean that the meter is not at the Boundary Point. The CFD does not prevent generators from applying to the BSC for a metering dispensation in order to install their meter other than at the Boundary Point. Where a CFD generator has received a metering dispensation, the CFD does not prevent them from installing a different arrangement of meters than would be the norm. This could include installing the storage in a separate BM Unit to the CFD generation assets as long as the entire Facility (as defined in the CFD Agreement) is within one BM Unit.

- (ii) Second, to give CFD generators confidence that storage can be installed on a CFD site and that it should be in a separate BM Unit, we propose defining storage within the CFD and stating that it should be in a separate BM Unit to the Facility.

47. We propose to define storage facility as:

“A “Storage Facility” means a facility which consists of –

- (i) A means of converting imported electricity into a form of energy which can be stored, and of storing the energy which has been so converted; and
- (ii) A generating unit which is wholly or mainly used to re-convert the stored energy into electrical energy.”

Consultation questions

15.	Have you considered installing storage on a CFD site? If yes, what storage services have you considered offering?
16.	Are there any other barriers to installing storage on a CFD site?
17.	Do you think that the use of storage on a CFD site could lead to overcompensation for generators with storage?
18.	Would installing storage units in a separate BM Unit to the CFD Facility meet your aims of installing storage on site? If not, please explain, and propose alternative arrangements.
19.	Do you agree with the proposed definition of a “storage facility”?

Additional minor and technical changes

48. DECC has identified a number of minor, technical or clarificatory changes that it considers will improve the operation of the CFD. These will ensure that there is a greater degree of clarity in the text of the CFD and that the policy intent is better reflected.

49. These are set out below (and indicative drafting is contained in the version of the CFD Standard Terms and Conditions and CFD Agreement published alongside this consultation):

Change proposed	Description
CFD Agreement: Annex 5 (Project Commitments) Part B(vii)	<p>Currently, a generator’s board of directors is required to approve the plan to show how a condition of a consent will be satisfied. We believe that this is unnecessarily onerous, as it does not reflect the level of approval that would normally be given to a plan of this nature.</p> <p>We therefore propose deleting the requirement for the plan to be approved by the generator’s board of directors, although the generator will still be required to have an approved plan in place. The plan will still need to be covered by the project commitments directors’ certificate.</p>
CFD Agreement and CFD Standard Terms: Definition of Offshore Transmission System Assets	We propose to correct a drafting error, by changing the definition of “Offshore Transmission System Assets” to “Offshore Transmission System User Assets” to reflect the term used in the Grid Code.
CFD Standard Terms: Transmission Loss Multiplier Indexation. Condition 47.1(F)	The existing drafting does not fully reflect DECC’s policy intent, which is to ensure that the indexation of the strike price accurately reflects changes in the Transmission Loss Multiplier compared to the Transmission Loss Multipliers listed in the Standard Terms Notice. We propose amending the approach to calculation of the Transmission Loss Multiplier indexation of the strike price.
CFD Standard Terms: Operational Conditions Precedent. Schedule 1, Part B, Conditions 2(C)	The existing requirement places too onerous requirements on the LCCC to check the generator’s metering compliance which duplicates work already carried out by the BSC Company. We propose deleting the requirement for evidence of the Metering Compliance Obligations at 31.1(B), (C) and (D). DECC considers that this wording better reflects the policy intent for

	Communications Equipment to be compliant with the BSC.
CFD Standard Terms: Operational Conditions Precedent. Schedule 1, Part B. Condition 2.1(E)	The existing requirement places too onerous requirements on the LCCC to check the generator's metering compliance which duplicates work already carried out by the BSC Company. We propose removing the requirement for evidence that the Communications Equipment has been "installed, configured, operational, maintained and tested". DECC considers that this wording better reflects the policy intent for Communications Equipment to be compliant with the BSC.

Consultation question

20.	Do you have any views on the proposed minor and technical changes?
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Call for evidence on future options for CFDs

50. This section is a call for evidence on options for changes to the CFD contract for later allocation rounds. These changes would not be made for the next round and any significant changes would be subject to further consultation. We are seeking your views and evidence on issues that have been raised in discussion with stakeholders and delivery bodies about the CFD contract since the implementation of Electricity Market Reform. We invite input from anyone with relevant knowledge, expertise or experience.

Mitigating risk of overspend on the LCF arising from load factor uncertainty

51. Last July, we announced that projections showed a significant potential overspend under the Levy Control Framework (LCF) and that action was needed to address this and put the industry back on a sustainable footing. We are always seeking ways to reduce costs to consumers' bills, while maintaining certainty for investors.
52. A significant contributor to the projected LCF overspend was an underestimation of the load factors that generators were likely to achieve, for example because of faster than expected developments in technology. Under the current CFD design, consumers bear the risk of higher than expected load factors. Particularly for offshore wind, if load factors are underestimated in the valuation formula used in the allocation process, subsidy payments could be significantly higher than DECC anticipated, leading to a breach in the LCF envelope.
53. We are interested in your views on how the risk of underestimating load factors and overspending on the LCF could be reduced and on how the introduction of measures to reduce the risk might impact on the strike prices offered by bidders or the investability of the CFD.

Force majeure

54. The CFD contract provides force majeure relief from certain obligations in the CFD, such as the Milestone Delivery Date (MDD) or Longstop Date (LD). Currently, there is no limit to the length of force majeure relief.

55. We are concerned that this could lead to very prolonged extensions of the MDD or LD. This could result in LCF budget being 'blocked' by projects which are significantly delayed or may not proceed.
56. We are therefore considering whether there should be a time limit for the extension created by a force majeure event, after which further force majeure relief is not provided. We are also considering whether any time limit should be applied on a blanket basis throughout the term of the CFD, or – for example – limited to force majeure events occurring before the MDD.
57. We would be interested in your views on the desirability and impact of introducing limitations to force majeure protection as described above.

Budget-blocking

58. The CFD system is designed to disincentivise speculative bids which, if successful, would block budget that could have been won by an alternative project. A number of elements of the contract work together to achieve this, and on current evidence, including that the majority of CFD contracts signed in 2015 have successfully met their contractual (MDD) requirements to date, these arrangements achieve the right balance of discouraging budget-blocking without adding undue cost, complexity or barriers to commissioning. Whilst this demonstrates that robust projects can and do meet the current requirements within 12 months, we are interested in any views and quantitative evidence about how the current measures might be refined whilst not increasing the risk of speculative bids.

Next steps

59. Following the close of the consultation, we will analyse responses and set out final decisions in a government response. We intend to publish the government response in autumn later this year.
60. The response to the consultation will set out the decisions the government has taken and provide a summary of the views expressed. This document will be published on the [GOV.UK website](#).

