



Department
of Energy &
Climate Change

Government response to the May 2013 consultation on the proposal to amend the definition of “debtor” in section 189 of the Consumer Credit Act 1974 for the purposes of the Green Deal

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1. Introduction

The Green Deal introduces a framework to support the delivery of energy efficiency measures that includes the option of entering into a new type of credit arrangement. This enables owners and occupiers to make energy efficiency improvements to their property and pay for them over time through instalments added to their electricity bill. The arrangement introduced by the Green Deal is termed a “Green Deal Plan” which includes a novel type of unsecured credit for energy efficiency improvements arranged at the initiative of an owner or occupier of a property (known as the improver). The repayments are paid by whoever is the current electricity bill payer for the property. A Green Deal Plan comprises a contract for the supply and installation of energy efficiency improvements and a credit agreement to finance those improvements. For an owner-occupied property, the owner will sign both the supply contract (as improver) and the credit agreement (as electricity bill payer). However, in a tenanted property, it is possible that the Green Deal Plan will be initiated by the landlord (as improver), but with the instalments paid by the tenant (as electricity bill payer).

Green Deal Plans issued to consumer debtors are likely to be regulated by the Consumer Credit Act 1974 (CCA). The CCA regulates the manner in which credit agreements are entered into as well as the conduct of the creditor during the term of the agreement.

On 9 May, DECC published a 4 week consultation which proposed to amend the definition of “debtor” in section 189 of the CCA for the purpose of the Green Deal.

The proposed amendment was not intended to change policy or the way in which the Green Deal works, but was in response to queries received from stakeholders who sought clarification on whether an improver landlord and tenant bill payer would both need to be classed as debtors under a single Green Deal Plan in certain instances.

The aim of the consultation was to seek views on a draft amendment that would provide creditors with confidence as to the identity of the “debtor” under a regulated Green Deal Plan, and in particular where:

- the improver and bill payer are not the same person, and
- both fall within the definition of “individual” under section 189 of the CCA.

2. Background

The CCA defines a consumer credit agreement as an agreement between an “individual” (“the debtor”¹) and any other person (“the creditor”) by which the creditor provides the debtor with credit of any amount².

Under the Green Deal, the creditor will be the Green Deal Provider. Section 189 of the CCA currently defines a debtor as the “individual receiving credit under a consumer credit agreement or the person to whom his rights and duties under the agreement have passed by assignment or operation of law, and in relation to a prospective consumer credit agreement includes a prospective debtor”.

It has always been DECC’s policy intent that the bill payer will make the repayments under the Green Deal Plan, but in order to provide stakeholders with greater certainty on who will be the “debtor” for the purposes of the Green Deal, DECC published a consultation on 9 May 2013 which proposed to make an amendment to the definition of debtor in section 189 of the CCA, using our powers in section 30 of the Energy Act 2011. The aim of this amendment was to put beyond doubt that:

- a) an improver who is not the bill payer is not a debtor; and
- b) a bill payer who has a liability under a Green Deal Plan is a debtor.

The proposed amendment inserted a new section 189B into the CCA and set out a specific definition of debtor to be applied with regards to Green Deal Plans.

The amendment was drafted on the basis that it would apply to (i) a consumer credit agreement that is a Green Deal Plan and (ii) a prospective consumer credit agreement which is intended to be a Green Deal Plan.

Subsection (2) of the draft section 189B amendment proposed that, with regards to a consumer credit agreement that is a Green Deal Plan to which section 1(6) of Energy Act 2011 applies³, “debtor” means:

- a) the individual who is liable to pay instalments under the Plan as a result of being liable for the time being to pay the energy bills for the property; and
- b) any other individual with outstanding payment liabilities under the Plan as a result of having been liable in a prior period to pay the energy bills for the property.

¹ The term “individual” is defined in section 189 of the Consumer Credit Act 1974 as including (a) a partnership consisting of two or three persons not all of whom are bodies corporate, and (b) an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership.

² Section 8(1) of the Consumer Credit Act 1974.

³ Section 1(6) of the Energy Act 2011 is the provision which states that the bill payer for the time being is liable to pay instalments via the energy bill for the property. It applies if (i) the requirements referred to in section 1(4) were met at the time the plan was entered into, and (ii) the subsequent requirements in section 1(5) have been met.

Subsection (3) of the draft 189B amendment proposed that, in relation to a consumer credit agreement that is a Green Deal Plan to which section 1(6) of the Energy Act 2011 does not apply⁴, “debtor” means the individual who will be liable to pay the energy bills for the property from the time when section 1(6) of the Energy Act 2011 applies to the plan (the “completion date”).

Subsection (4) of the draft amendment proposed that, in relation to a prospective consumer credit agreement which is intended to be a Green Deal Plan, the “debtor” would be the individual who will be liable to pay the energy bills for the property from the completion date. This proposal therefore required Providers to look forward and work out who would be the bill payer on the completion date in the future when they are, for example, issuing pre-contract information, performing credit worthiness assessments and arranging for the Plan to be signed.

Subsections (6) to (8) of the draft section 189B amendment set out a number of presumptions that Providers should use to determine who the bill payer on the completion date will be.

Subsection (9) of the draft section 189B amendment proposed that the creditor can disregard the presumptions set out in subsections (6) to (8) if they are satisfied that a different person will be the bill payer at the time when section 1(6) of the Energy Act first applies.

For full details, a copy of the draft amendment that was consulted on can be found in Annex 1 of the [Consultation on the proposal to amend the definition of “debtor” in section 189 of the Consumer Credit Act \(1974\) for the purposes of the Green Deal](#).

⁴ This scenario will arise if the requirements of section 1(4) were met when the Plan was entered into (and it is therefore a Green Deal Plan), but the requirements in section 1(5) have not yet been met.

3. Outcomes of the consultation

This section discusses the key issues that were highlighted in response to the consultation process and the changes that we have made to address these.

Whilst all the points raised as part of the consultation have been considered, this document discusses the most significant issues raised, rather than responding to individual comments.

Nineteen responses to the consultation were received overall. Most responses to the consultation indicated that a clarifying amendment would be helpful. However, in general, consultees thought that the sections of the draft amendment which required providers to work out and judge for themselves who “will be” liable to pay the energy bill in the future, when the Green Deal Plan is confirmed, were likely to be confusing and difficult to apply in practice. It was also questioned whether it would be legally possible for a prospective tenant to be the “debtor” under an agreement before he became bill payer, and whether this could raise issues of unfairness.

Consultation Question 1:

What are your views on our proposed amendment?

Summary of responses

We received 19 responses to this question in total.

Most respondents indicated that they felt a clarifying amendment would be sensible and that that such an amendment was necessary to ensure that Providers have greater clarity and confidence when issuing Green Deal Plans.

However, some were concerned that subsection (4) and the presumptions set out in subsections (6) to (8), which required Providers to work out who “will be” liable to pay the property’s energy bills at the time when the Green Deal Plan is confirmed might create confusion and ambiguity and therefore might be difficult to apply in practice.

Others suggested that that subsection (4) and the presumptions set out in subsections (6) to (8) might not cover all the potential scenarios which would lead to some uncertainty as to who the debtor would be in certain situations. Some respondents asked what would happen if the intended future bill payer did not actually become the bill payer and enquired whether the agreement could be deemed to be improperly executed in such an instance. One respondent queried what would happen in the instance where the person buying or leasing the property was not the person who would be the bill payer. This could happen, for example, in cases where a boyfriend owns the property and his girlfriend is the bill payer, or an elderly person is leasing a property, and their daughter or son are responsible for paying the property’s bills.

Some stakeholders were concerned that former bill payers, who were in arrears with their payments after they had ceased to occupy the property, had been included as part of the definition of debtor at subsection (2)(b). They enquired whether this would mean Providers would still be required to send post contractual information to such individuals. Others were concerned that the introduction of bill payers in arrears might complicate certain CCA requirements. Some respondents could not understand what the advantage of defining ex-bill payers in arrears as debtors would be and sought clarification on this.

One respondent suggested that the owner of the property ought to be the debtor for the purposes of the CCA, rather than a non-owner bill payer. They felt that such an approach may have a number of advantages from a CCA perspective, but recognised that a more detailed consideration of this proposal would be necessary in order to confirm this and to identify any legislative amendments that would be required to implement such a proposal. Another respondent suggested that credit is granted initially to the improver.

Government Response

As the majority of respondents felt that an amendment to the definition of “debtor” in section 189 of the CCA would be necessary to ensure that Providers have greater clarity and confidence when issuing Green Deal Plans, we have decided to proceed with an amendment.

In response to the feedback from the consultation that references to future bill payers could introduce complexity and ambiguity, we propose to simplify the definition of debtor by removing references to prospective bill payers, including the presumptions set out in subsections (6) to (8). In the case of a prospective credit agreement, the “debtor” will be the person who is the bill payer at the point at which the credit agreement is entered into (and who therefore signs the credit agreement). If this person is different from the person in respect of whom the pre-contractual steps of the CCA have been carried out (including the provision of pre-contractual information and explanation and the assessment of creditworthiness and affordability), the pre-contractual steps will need to be repeated for the individual who is the actual bill payer on the agreement date.

The policy and legislation regarding the requirement in the Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012 for the bill payer to consent to a Green Deal Plan remains unchanged. Therefore, as provided in regulation 36 of the Framework Regulations, when a Green Deal Plan is entered into, the improver must have the consent of the person who will be the bill payer from the time section 1(6) applies in respect of the Plan. Accordingly, if the bill payer is expected to change between the date of the agreement and the date when section 1(6) applies, the person who is the “debtor” on that date, and the person whose consent is required under regulation 36, may be different.

After the agreement has been entered into, it is proposed that the “debtor” will be –

- the person who for the time being is liable to pay instalments under the Plan as a result of being liable to pay the energy bills for the property, and
- any other person who has arrears (outstanding payment liabilities) under the Plan as a result of having been liable in a prior period to pay the energy bill for the property.

In our view persons with outstanding Green Deal arrears must be included in the definition of “debtor” under a Green Deal Plan because:

- a) under the Green Deal legislation, these people remain liable to re-pay their outstanding payment liabilities to the creditor, and
- b) accordingly, they should retain the status of “debtor” under the CCA and the associated consumer protections and rights after they have ceased to be the bill payer at the property.

We recognise the concerns raised by some stakeholders regarding the inclusion of previous bill payers in arrears and we understand that their inclusion will mean that it will be possible for multiple debtors (i.e. more than one person) to become liable for Green Deal payments in respect of different periods in time. In order to ensure that Green Deal Providers will have clarity on their CCA obligations in such a scenario, we propose to make consequential amendments to the CCA to account for this. We will be publishing a separate consultation to seek views on the details of these multiple debtor amendments in the coming months.

We have explored the proposal that the owner of the property or the improver ought to be the debtor for the purposes of the CCA. Although this proposal could mean that the identity of the debtor is likely to change less often during the course of a Green Deal Plan, this concept would be complicated to implement in practice. Comprehensive legislative changes would be required to ensure that this proposal will work effectively, particularly around consumer protection to ensure that consumer bill payers would not be negatively impacted by this change. In addition, these proposals do not fit very well with the Green Deal policy, given that neither the owner nor the improver will be liable for the repayments unless they are or become the bill payer. We believe it is preferable for tenant bill payers to receive all the protections accorded by the CCA.

Consultation Question 2:

Do you think subsection (9), which enables creditors to disregard the presumptions if they are satisfied that a different person will in fact be the bill payer at the time section 1(6) of the Energy Act first applies, is helpful and makes it more likely that the person who will be the bill payer at that time is treated as the debtor when a Green Deal Plan is being formed?

Summary of responses

We received 12 responses to this question in total.

The majority of respondents felt that subsection (9) may be helpful and that it would give Green Deal Providers the flexibility that they need to determine who is the debtor in a variety of circumstances. A few of these thought this would be particularly helpful to ensure Providers can navigate the nuances of the private rented sector.

However most respondents also felt that more clarity was needed to ensure that Providers would understand how subsection (9) would operate in practice. For example, they did not feel that it was clear how the creditor would prove they were “satisfied”, or what criteria and evidence they could use to prove that a different person would be the bill payer. Some respondents were worried that this was open to interpretation and the inclusion of this subsection could lead to confusion.

Some suggested that it would be useful to have defined criteria and conditions that need to be met in order for a Provider to determine whether they are “satisfied” that someone else would be the debtor. A few respondents proposed that subsection (9) would not be used, as creditors may be concerned that such a broad clause could increase their risk of being non-compliant.

Government response

In response to feedback received from the consultation that the inclusion of subsection (9) could lead to confusion, we propose to remove this subsection.

In any event, as we propose, in light of the consultation, to remove the requirement to anticipate who the bill payer will be when section 1(6) of the Energy Act first applies, and therefore also the presumptions set out in subsections (6) to (8), it is no longer necessary to include a provision which allows creditors to disregard such presumptions.

Additional feedback received in parallel to the consultation

In parallel to the consultation some stakeholders enquired, particularly in scenarios where the improver and the bill payer are different individuals, whether for the purposes of sections 11 to 13 of the CCA, a Green Deal credit agreement is:

- a) classed as “restricted-use credit” or “unrestricted-use credit,” and
- b) a “debtor-creditor-supplier” agreement or a “debtor-creditor” agreement.

We recognise that if the improver who signs the supply contract is a different person to the debtor then a Green Deal credit agreement would be “unrestricted-use” and would not be a debtor-creditor-supplier agreement. However, we do not consider that this is an appropriate classification given the nature of the Green Deal Plan, and could have inadvertent consequences. In our view, it is more appropriate to classify a Green Deal credit agreement as restricted-use credit in all cases, because the monies advanced are to be used for the sole purpose of financing the energy efficiency measures set out in the Green Deal Plan, and as a “debtor-creditor-supplier” agreement because there is always a supply agreement as part of the Green Deal Plan.

To remedy the position, DECC proposes to make consequential amendments to the Consumer Credit Act, alongside the section 189B amendment, to ensure that all Green Deal Plans are treated as restricted-use debtor-creditor-supplier agreements. We will also make any further amendments to legislation that may be necessary or appropriate, in consequence of such amendments, to ensure that other CCA provisions work effectively (for example, in relation to withdrawal and cancellation) and that there is no reduction in the protections afforded to consumers.

4. Next Steps

Amendments to the Consumer Credit Act

We are updating the draft section 189B amendment to reflect Government’s response to the consultation (as set out above), in particular by removing reference to prospective bill payers.

We also plan to amend the CCA to provide that a Green Deal Plan will be:

- restricted-use credit; and
- a debtor-creditor-supplier agreement,

irrespective of whether the improver and the debtor are the same person and hence whether the supply contract and credit agreement are ‘linked’ in the usual sense under the CCA. Further amendments will be made, if necessary or appropriate, to ensure that other CCA provisions are effective in such cases and there is no diminution in consumer protection.

These amendments will be made via an affirmative statutory amendment which we intend to lay in Parliament in the autumn.

We also intend to consult on proposals to make consequential amendments to the CCA to account for multiple debtor scenarios in the coming months. As outlined in our response to Question 1, this could occur where the Green Deal has transferred to a new bill payer and a previous Green Deal bill payer is in arrears, resulting in two (or more) different debtors being liable to make payments under a single credit agreement in respect of different periods in time. The usual provisions of the CCA, including section 185, are not sufficient in our view in such cases.

Transfer of consumer credit regulation from the Office of Fair Trading to the Financial Conduct Authority

On 1 April 2014, responsibility for consumer credit regulation will move from the Office of Fair Trading (OFT) to the new Financial Conduct Authority (FCA). The new regulatory regime will be established under a different legislative framework, the Financial Services and Markets Act 2000, although parts of the CCA will remain in force.

Further detail on the new regulatory regime can be found at <https://www.gov.uk/government/consultations/a-new-approach-to-financial-regulation-transferring-consumer-credit-regulation-to-the-financial-conduct-authority>. The key secondary legislation underpinning the transfer to the FCA was made in July and can be found on www.legislation.gov.uk.

DECC proposes to update the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544)⁵ to ensure that the definition of “borrower” and other relevant definitions in the Regulated Activities Order are consistent with the amended definitions in the CCA.

⁵ This Order has recently been amended by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 (SI 2013/1881) to include provision for consumer credit.

Guidance for Green Deal Providers and landlords entering into Green Deal Plans during void periods with the intention that the Plan will be transferred to a consumer tenant

DECC has received feedback on its guidance for Green Deal Providers and corporate landlords entering into Green Deal Plans during void periods with the intention that the Plan will be transferred to a consumer tenant. We recognise that more is needed and therefore we will withdraw this guidance and consider alternative approaches for dealing with this situation. We will engage with stakeholders on this.

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