



Department for  
Business, Energy  
& Industrial Strategy

# CONTRACTS FOR DIFFERENCE

Government response to the consultation  
on changes to the CFD contract and CFD  
regulations

February 2017

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## Government response to the consultation on changes to the CFD contract and CFD regulations

The consultation can be found on BEIS's web site:

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

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# Introduction

## Overview of the proposed changes

1. On 11 May 2016 the government launched a consultation<sup>1</sup> seeking views on proposed amendments to the Contract for Difference (CFD) and associated secondary legislation which we intended to apply to future CFD allocation rounds.
2. The changes consulted on included proposals to:
  - (i) prevent the cumulation of CFD payments with any other State aid received by CFD projects;
  - (ii) clarify the definition of foreseeability within the definition of qualifying change in law;
  - (iii) clarify how storage should be treated on CFD sites; and
  - (iv) make a number of minor and technical changes that should reduce administrative burdens on CFD generators and the Low Carbon Contracts Company (LCCC).
3. The government's intention was for the majority of these proposed changes (i, ii and iv) to be included in the CFD contract to be used in the second allocation round. We stated that we would further consider whether changes can and should be made with respect to storage (iii) ahead of the second allocation round.
4. The consultation also included a Call for Evidence on options for potential changes to be made for allocation rounds beyond the second round. We asked for views on a number of potential changes, including:
  - mitigating risk to the Levy Control Framework (LCF) budget arising from uncertainty over load factors;
  - clarifying circumstances in which force majeure applies; and
  - discouraging the allocation of CFDs to underdeveloped projects.

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<sup>1</sup> Consultation on amending the CFD contract and regulations, <https://www.gov.uk/government/consultations/consultation-on-amending-the-cfd-contract-and-regulations>

5. In total, we received 62 consultation responses. The respondents are listed in Annex B. This document sets out the government response to the consultation proposals and summarises the evidence received in response to the Call for Evidence (on which we are making no proposals at this stage).
6. As stated in the consultation, the changes to the CFD contract that the government has decided to introduce cannot be automatically applied to those CFDs and Investment Contracts that have already been entered into by CFD generators. However, the existing signed contracts do set out a change control process by which the LCCC may propose amendments to the contracts. It is a matter for the LCCC, acting within the operational framework<sup>2</sup> agreed with government, whether they seek to use the change control procedures to make any of the changes that are introduced following the consultation to existing signed contracts.
7. We have published alongside this government response revised draft versions of the CFD Standard Terms and Conditions and the various front-end CFD Agreements, which together comprise the CFD contract. This is to allow prospective applicants time to review the contract, and to inform any minor and necessary changes to the Standard Terms and Conditions that they may wish to request, before the allocation round and the minor and necessary modification window<sup>3</sup> formally opens. Final versions of these documents will be published in advance of the opening of the CFD allocation round. We do not expect the final versions to be substantially different from the published drafts, but they may be subject to minor change, for example, to correct any inaccuracies or drafting inconsistencies that are identified prior to the final contract documents being published.

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<sup>2</sup> The LCC Operational Framework is available via this link:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/338353/FINAL\\_LCC\\_Co\\_FWD\\_2\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/338353/FINAL_LCC_Co_FWD_2_.pdf)

<sup>3</sup> See Part 3 of The Contracts for Difference (Standard Terms) Regulations 2014/2012:  
<http://www.legislation.gov.uk/uksi/2014/2012/made>

# Decisions on CFD contract and regulation changes

## Cumulation of State aid

### Original proposal

8. In the consultation we proposed a number of changes in relation to preventing the cumulation of other types of State aid with the CFD, in order to prevent projects from being overcompensated. This proposal relates to consultation questions 1-10. The key changes that were proposed can be summarised as:
- Introducing a new Initial Condition Precedent requiring generators to inform LCCC of whether any other State aid has been received no later than the 10<sup>th</sup> working day after the day on which the CFD contract is signed;
  - Introducing a new Operational Condition Precedent requiring the repayment of any other State aid (with interest) to the aid granter before a project can receive payments under a CFD contract (unless the cumulation is expressly authorised by the European Commission), and demonstrating to the LCCC that such repayments have been made;
  - Prohibiting CFD projects from receiving other forms of State aid during the term of the CFD, unless expressly authorised by the European Commission. Where this prohibition is breached, the LCCC would suspend CFD payments until the aid is repaid (with interest) to the aid granter;
  - Introducing new conditions to allow for the requirement for the generator to repay any other State aid to the aid granter to be waived if the aid granter is unable or refuses to accept the repayment;
  - Introducing new set-off conditions so that where the aid cannot be repaid to the aid granter, the LCCC would set-off the outstanding amount of aid received (with interest) against any CFD payments. A new item would be introduced on the billing statement in order to implement this change;
  - Enabling the LCCC to recover CFD payments from the generator up to the value of the outstanding amount of State aid, with interest, if the CFD contract expires or is terminated and the generator has not yet repaid any

other State aid (with interest), or it has not been possible to set-off in full against any CFD payments due to the generator;

- Requiring the generator to provide evidence to the LCCC, within 10 business days of a request, as to its compliance with the obligation not to receive or benefit from other forms of State aid. If satisfactory evidence is not received within this timescale, the LCCC will suspend payments;
- Requiring the LCCC to recommence CFD payments as soon as possible and to pay the suspended sums (without interest) to the generator after the other State aid has been repaid (or the requested evidence has been provided).

9. Consequentially, the government also proposed making amendments to the Contracts for Difference (Standard Terms) Regulations 2014 (as amended) (the “Standard Terms Regulations”), to enable the CFD standard terms to set out circumstances in which the LCCC is not required to make CFD payments when the reference price is below the strike price e.g. where the State aid set-off provisions described above operate.

### Summary of responses

10. Responses were focused on the proposed changes to the CFD contract itself, and did not comment or raise concerns with the proposed amendment to the regulations.
11. The majority of respondents agreed with the principle of preventing projects from receiving more than one type of State aid for the same activity in order to level the playing field between generators. We asked how likely it was that projects may receive other forms of public funding, to which 14 respondents said it was likely, compared to 8 who stated it was unlikely (11 had no comment).
12. Most respondents to question 1 (21 of the 29 respondents that expressed a strong opinion) stated that it was preferable for State aid to be repaid before CFD payments are made (‘the Start Date’) rather than prior to CFD application or the date of signature of the CFD (‘the Agreement Date’). Reasons given for support included that it would make no sense to require State aid to be repaid in advance of an allocation round when there is no guarantee that an application would be successful and that a requirement for advance repayment would be likely to discourage bids from small and independent businesses. Only one respondent argued that repayment should be required before CFD application.
13. Almost all respondents sought clarification on the scope of this proposal. In particular, respondents were unclear about (a) what fell under the definition of

State aid (including Union funding such as Horizon 2020 or NER300 funding), and (b) the circumstances in which cumulation of other State aid with the CFD would occur. It was argued that uncertainty over whether non-CFD related activities were captured within the proposal could: raise strike price bids (although we received no evidence to quantify this claim); prevent a company director from signing a director's certificate to accompany a declaration of compliance with the State aid provisions; and, reduce the scope of projects if non-CFD activities were planned at the site that rely on State aid funding, with negative impacts on other policy goals such as employment creation, regional development, and environmental education.

14. Some respondents considered that the proposal went beyond the requirements of State aid approval, which states that cumulation cannot occur through the CFD scheme with other State aid "*where this results in overcompensation and unless the ability to cumulate with the CFD scheme is specifically approved by the Commission (either through a scheme or individual aid) or covered by the de minimis or block exemption provisions*"<sup>4</sup>. It was argued by some respondents that the CFD could be cumulated with other forms of State aid and the project may not be 'overcompensated'.
15. Two respondents were concerned about budget-blocking if projects secured CFDs and then were unable to repay the State aid. A trade association suggested that the magnitude of the repayment should be a factor in considering the time period of repayment. The majority of respondents (17 of the 22 that expressed a strong opinion) supported the set-off provisions, but similarly with regards to these provisions, some concerns were raised that set-off would have a negative impact on cash-flow, as generators would have anticipated CFD payments in order to pay outstanding debt. A minority of respondents suggested that set-off should be staggered to take place over a period of time, rather than having CFD payments withheld from the generator until the amount of the outstanding State aid (with interest) had been set-off. One respondent claimed that it was not fair that electricity consumers should benefit if the original aid was borne by a different party.
16. The majority of respondents (12 of the 18 that expressed a strong opinion) argued that the prohibition on the receipt of new State aid should be from the Start Date (i.e. the date from which the generator can receive CFD top-up payments in

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<sup>4</sup> Paragraph 46 of the State aid approval for the CFD scheme, [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_36196](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36196)



respect of its generation) rather than from the Agreement Date (i.e. the date of contract signature) as proposed in our consultation.

17. We received mixed comments to our proposal that interest rates should be applied to the repayable amount outstanding from the day on which the aid was received to the day on which it is repaid or set-off in full. Seven respondents supported the proposal, with one noting that they viewed it to be necessary in order for the scheme to comply with its State aid obligations. However, eight respondents disagreed, raising concerns that the generator may not have accepted the aid on those terms and arguing that applying an interest rate would be retrospective, or raising concerns about the additional margins added to the base rate under the methodology. It was suggested that the method could penalise companies with low credit ratings, particularly small generators, and special purpose vehicles with no financial history.
18. Most respondents did not support the suggestion in question 6 that the posting of collateral from generators could be used to reduce the credit risk to the LCCC as a result of the new set-off provisions. Respondents viewed the scenario highly unlikely to materialise and insufficient for the costs of a collateral mechanism.
19. The majority of respondents (22 of the 25 that expressed a strong opinion) argued that 10 business days to provide evidence to the LCCC of its compliance with the obligation not to receive or benefit from other forms of State aid is insufficient. Suggestions ranged up to 2 months, with longer time available where necessary (e.g. to allow information provision from HMRC). Some respondents also raised concerns as to whether they would be able to provide the evidence required to demonstrate compliance to the LCCC when they are already in compliance (i.e. being required to prove a negative).

### Post consultation decisions

20. We consider that the State aid approval for the CFD scheme requires there to be no cumulation with other aid<sup>5</sup> and that it is important that projects are not overcompensated in order to ensure a level playing field, as well as value for money for consumers and taxpayers. Therefore, we intend to implement the proposal that where State aid cumulation occurs, the other aid has to be repaid or set-off prior to receipt of CFD payments. We consider that generators applying in

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<sup>5</sup> Condition 77 of the approval states that “*the aid granted by means of the CfD auction will not be cumulated with any other aid*”, available here:

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_36196](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36196)

future allocation rounds have sufficient visibility in order to ensure that they can manage the repayment or deductions from CFD payments.

21. We intend to make the following changes to the proposal that was consulted on:

- We acknowledge respondents' support for the prohibition of the receipt of new State aid or Union funding (see paragraph 31 regarding Union funding) from the Start Date rather than the Agreement Date (paragraph 16), and have decided to prohibit projects from receiving new State aid from the date on which the new Operational Condition Precedent requiring confirmation of the repayment of any previous aid has been fulfilled (or waived). This means that although projects will be able to receive State aid after the Agreement Date, they will either be required to repay such aid in order to fulfil the relevant Operational Condition Precedent and begin receiving payments under the CFD or have the aid set-off against the payments where a waiver has been granted. After the point the relevant Operational Condition Precedent is fulfilled or waived (which occurs before CFD payments commence), the project will not be able to receive any other State aid without being in breach of the CFD. We believe that this is a more consistent approach to treating State aid or Union funding received before and after contract signature and aligns with the principle that aid should be repaid before CFD payments are received.
- Consequential to this, we will not be implementing the Initial Condition Precedent as proposed in the consultation. Instead, generators will be required to provide information of any State aid or Union funding received in respect of the project at least 3 months in advance of the CFD start date.
- We note the concerns expressed about providing evidence to LCCC in 10 business days and have decided that the generator will have more time to provide evidence to the LCCC when evidence is requested on the compliance with the State aid obligation – 30 business days rather than the 10 business days proposed in the consultation.
- We consider that the repayment of interest on the aid/Union funding is necessary for the scheme to fulfil its State aid obligations and have therefore decided to apply this requirement. We do not agree with the suggestion that requiring interest to be repaid is retrospective because generators will be aware of the terms of the CFD before choosing to submit a CFD application. We have also decided to apply the European Commission's methodology for calculating reference rates to the

calculation of the interest rate that will apply to the repayment of State aid. We note the concerns of some respondents that the use of the Commission's methodology may have a greater adverse impact on companies with low credit ratings or a limited financial histories. However, the methodology is intended to reflect the cost of capital that such companies would have to pay on the financial markets.

22. We agree with respondents, that the credit risk to the LCCC through the set-off provisions is low, because we believe it to be unlikely that a generator will receive cumulative State aid or Union funding that is unable to be repaid to the aid granter, and for the contract to end (at the end of the 15 year term or following termination) before the full amount has been set-off. We therefore consider that the risk does not justify the implementation costs and do not intend to introduce collateral requirements for generators to cover the potential credit risk of the LCCC if any outstanding amount is not set-off from CFD payments before the expiry or termination of a CFD contract. We consider that the recovery provision that was consulted on, (the LCCC would notify the generator of the outstanding amount to be recovered, and the generator should repay the amount within 10 business days of the date of the notice), is sufficient to address this risk.
23. Our intention is that when the LCCC requests information from the generator that it is compliant with the undertaking, the information requested should be reasonable (i.e. sufficiently specific for the generator to understand what is required and to be reasonably obtainable).
24. Aside from the changes and clarifications described above, we intend to implement the proposal as consulted upon. We have also made various minor and consequential amendments related to these proposals, for example, we have cross-referred to the new waiver condition for the new Operational Condition Precedent relating to the repayment of State aid or Union funding in the Standard Terms and Conditions in the Conditional Start Date Notice provisions in the CFD Agreement.
25. We intend to make the proposed changes to the regulations to ensure that the Secretary of State is able to issue revised Standard Terms and Conditions that specify the circumstances in which the LCCC is not required to make payments to a generator to prevent the cumulation of state aid for the second allocation round. The amendment has been drafted to allow the CFD standard terms to specify situations in which the requirement for the LCCC to pay generators the difference

between the strike price and reference price does not apply. This will capture conditions relating to state aid cumulation, negative pricing events<sup>6</sup>, and any other circumstances which might be specified in the contract in the future (although any future proposals to amend the CFD standard terms would require consultation).

26. After the consultation period closed, the EU referendum took place and the people of the UK voted to leave the EU. Until exit negotiations are concluded, the UK remains a full member of the EU and all the rights and obligations of EU membership remain in force. During this period the government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU. The government has therefore carefully considered whether to amend the draft consultation provisions concerning the cumulation of different sources of funding to take into account the outcome of the referendum and the planned exit of the UK from the EU. It has decided not to do so at this juncture, but will keep these provisions under review as those negotiations progress.

### Guidance on what counts as cumulation of State aid in relation to CFDs

27. In view of the large number of respondents who were uncertain about the scope of our proposals on cumulation, we consider it appropriate to provide further clarification of the circumstances in which we consider cumulation of aid with the CFD would occur requiring other State aid to be repaid or set-off. While ultimately the interpretation of State aid is a matter for the Courts, we have provided our view in the context of the CFD. Generators should seek expert advice if in doubt.
28. State aid is any advantage granted by public authorities through state resources on a selective basis to any organisations that could potentially distort competition and trade in the EU.<sup>7</sup> Given that it is standard practice for any granting authority to inform recipients at the time of the aid award that they are being granted State aid, we expect that the party in receipt of State aid will be aware that they have received State aid.

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<sup>6</sup> We are removing the exception relating to negative pricing, so that negative pricing events are caught within a single provision alongside preventing state aid cumulation.

<sup>7</sup> EU rules on what constitutes State aid are set out in article 107 of the Treaty on the Functioning of the European Union. UK Government guidance on State aid rules is available here - <https://www.gov.uk/guidance/state-aid>

29. We consider that cumulation occurs when State aid is received (by any party) for costs specifically relating to the Project<sup>8</sup>, and that cumulation is not permitted with the CFD except where that cumulation is specifically permitted by the European Commission. The specific requirements in the State aid decision<sup>9</sup> are that the UK:
- “will not cumulate state aid through the CfD scheme with other state aid where this results in overcompensation and unless the ability to cumulate with the CfD scheme is specifically approved by the Commission (either through a scheme or individual aid) or covered by the de minimis or block exemption provisions”; and
  - “the aid granted by means of the CfD auctions will not be cumulated with any other aid, any investment aid, or other support previously received or granted being deducted from the support under the CfD scheme.”.
30. So whilst all forms of State aid (grants, loans, tax exemptions, etc.) are captured by the proposal, only in narrow circumstances, when the aid is received to cover the same costs as those covered by the CFD, do we consider that cumulation will occur. Where State aid is received for different costs, then we do not consider cumulation of aid for the costs specifically relating to the Project is occurring, and therefore we do not intend that repayment of the aid will be required. We have amended the drafting in the CFD contract to reflect this intention and provide further guidance on the interaction between CFDs and State aid, Union funding and other public funding in Annex A.
31. Several respondents raised the issue of Union funding, i.e. funding which is allocated from EU resources such as NER300 or Horizon, and asked whether it would amount to cumulation if received in addition to a CFD. Even though Union funding is not always regarded as State aid, we do consider that cumulation would occur where such funding is received in addition to a CFD, and that such Union funding would have to be repaid or set-off. We believe that this is in line with Section 3.2.5.2 of the European Commission’s Guidelines on State aid for environmental protection and energy<sup>10</sup> and the State aid clearance for the CFD scheme.
32. However, as in the case of State aid, Union funding will only be considered cumulation when it is received for costs specifically relating to the Project. Where

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<sup>8</sup> “Project” in the CFD means “the design, development, construction, conversion, installation, completion, testing, commissioning, operation, maintenance and decommissioning of the Facility”.

<sup>9</sup> Decision from European Commission available here:

[http://ec.europa.eu/competition/state\\_aid/cases/134382/134382\\_1153779\\_27\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/134382/134382_1153779_27_2.pdf)

<sup>10</sup> Available here: [http://eur-lex.europa.eu/legal-](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0628(01)&from=EN)

[content/EN/TXT/PDF/?uri=CELEX:52014XC0628\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0628(01)&from=EN)

Union funding is received for other costs, it will not be considered cumulation and therefore will not need to be repaid for the purposes of the CFD.

33. Many respondents were unclear as to whether any research, development or innovation funding would be treated as cumulation. We believe that most State aid or Union funding received for research, development or innovation would not be considered cumulative because this type of funding is usually aimed at covering the additional costs associated with developing new technologies or processes for wider industry benefit, rather than specifically for low carbon electricity generation at one site. The CFD does not primarily support research, development or innovation – the aim of the scheme is to support the deployment of large-scale renewable and low carbon electricity projects on a commercial basis. However, we consider that cumulation would occur where such funding is received for costs specific to the Project (for example, to conduct environmental studies necessary to secure planning consent).
34. Many respondents requested confirmation of how support under the Renewable Heat Incentive (RHI) would be treated under the proposed provisions. Support under the RHI is expressly authorised under the State aid approval for CFDs because the RHI provides support for the costs of heat generation whereas the CFD supports costs for low carbon electricity generation, and therefore is permitted to be received by CFD projects (the exception being for technologies which were not eligible for CFDs under the allocation framework if they had applied for RHI, such as energy from waste with CHP projects). The contract changes do not affect this arrangement.

## Definition of Foreseeable Change in Law

### Original proposal

35. 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.
36. We proposed three amendments to the definition of Foreseeable Change in Law with respect to the Qualifying Change in Law ('QCiL') provisions in the CFD contract to provide clarity about precisely what situations are 'foreseeable' and accordingly do not result in compensation:
  - (i) To clarify, for the avoidance of doubt, that legal proceedings "against the Facility" 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);

- (ii) To bring the definition of Foreseeable Change in Law in line with the "No litigation" clause at Condition 28.1(G) of the CFD Standard Terms and Conditions; and
- (iii) To widen the definition with respect to the effect of judicial reviews against Applicable Planning Consents<sup>11</sup> relating to the Project.

37. Indicative drafting of the proposed amendments to the definition of Foreseeable Change in Law was included in a draft version of the CFD Standard Terms and Conditions published alongside the consultation document. Questions 11-13 in the consultation document relate to these proposed changes.

38. We also asked respondents, in question 14 of the consultation document, to tell us whether they thought 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. No indicative drafting was provided for this purpose.

### Summary of responses

39. The majority of respondents agreed with the proposed amendments to the definition of Foreseeable Change in Law with respect to the Qualifying Change in Law ('QCIL') provisions in the CFD contract for which indicative drafting was provided, and indicated that they offered helpful clarification:

- (i) 13 of the 20 respondents that replied to question 11 agreed with our proposal to clarify that legal proceedings "against the Facility" includes challenges brought against a Competent Authority in relation to the Required Authorisations;
- (ii) 12 of the 15 respondents that replied to question 12 agreed with our proposal to align the wording of limb (J) of the Foreseeable Change in Law with Condition 28.1(G);

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<sup>11</sup> As set out in the Contracts for Difference (Allocation) Regulations:  
<http://www.legislation.gov.uk/uksi/2014/2011/contents/made>

(iii) 11 of the 16 respondents that replied to question 13 agreed with our proposal to include judicial reviews on Applicable Planning Consents launched within the timelines set out in paragraph 39 of the consultation document in the definition of Foreseeable Change in Law.

40. However, several stakeholders strongly disagreed with these proposals and raised a number of concerns which are outlined below.
41. A number of respondents were concerned that the proposed amendments would significantly reduce the protections afforded to the developer and that they would represent a significant expansion in the scope of what is considered a foreseeable change in law. They felt that the changes could result in higher costs to consumers as developers priced in increased risk premiums to their auction bids, or that they would potentially deter some projects from bidding into a CFD round in the first place.
42. A number of respondents questioned whether it was reasonable to expect a generator to be aware of any judicial review or other legal proceedings taken against a Competent Authority in relation to one of the Required Authorisations, especially in the instance where the generator was not a defendant in any such proceedings.
43. Other respondents claimed that any benefits of preventing budget blocking as a result of the proposed changes would be outweighed by the increase in costs they believed would result. However, we received no evidence on the potential scale of such costs. Some respondents also raised concerns that a generator may not have sufficient time to fully assess the risk of a potential legal challenge and would therefore do so at bid submission.
44. A significant majority of respondents (12 of the 15 that replied to question 14) disagreed that the definition of Foreseeable Change in Law should be amended in the way proposed in question 14 (as summarised in paragraph 38 above). Respondents considered that the change would reduce the regulatory certainty provided by the CFD, would significantly alter the balance of risk to the detriment of the developer and was furthermore not sufficiently explained or justified in the consultation document. One respondent commented that not all necessary consents are typically sought in the initial stages of development, due to the need to finalise engineering decisions.

### **Post consultation decisions**

45. We have decided to amend the CFD Standard Terms and Conditions to clarify that legal proceedings “against the Facility” includes legal proceedings brought against a Competent Authority in relation to the Required Authorisations. However, we



accept the concerns expressed by several respondents that it would be unreasonable to expect that developers should be aware of all legal proceedings that may be launched against a Competent Authority. We have therefore decided to clarify in the CFD Standard Terms and Conditions that this will apply only to instances where the generator has been informed of any such legal proceedings, where such legal proceedings have been officially published, or where the generator is aware, or there is a reasonable expectation that the generator would be aware, of such proceedings, for instance, through press coverage of potential or actual challenges to consents.

46. We have decided to implement in full the proposal to align the definition of Foreseeable Change in Law in line with the “No litigation” clause at Condition 28.1(G) of the CFD Standard Terms.
47. We have also decided to implement the proposal to widen the definition of Foreseeable Change in Law to cover the situation where a judicial review is brought against a project’s Applicable Planning Consents within the usual time limits for challenge but after CFD allocation or signature. While we acknowledge the concerns that some respondents raised in their consultation responses, we consider the potential for judicial reviews to be brought against planning consents to be a normal business risk and that such risks should be borne by developers and not consumers. The time period within which such legal actions can be taken are well known and developers are best placed to anticipate and assess the likelihood of any objections to their proposals resulting in a legal challenge at a later stage in the development process. We also consider that developers are best placed to manage their affairs to minimise the impact of such risks to their projects.
48. In view of the practical and other concerns expressed by respondents, we have decided not to widen the definition of Foreseeable Change in Law at this time to include any changes in law which result from judicial reviews (not just changes in law which result from judicial reviews in respect of the grant of Applicable Planning Consents) that commence during the 3 month time limit for challenge and commence, are pending or are threatened after CFD allocation or signature. We will consider further the potential impact of introducing such a change and will consult again on this issue if we consider it appropriate to do so.

## Storage

### Original proposal

49. The government consulted on two changes with respect to storage:

- (i) Clarifying that within the CFD 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); and
- (ii) Defining storage within the CFD and stating that it should be in a separate BM Unit to the Facility.

50. We proposed the following definition:

“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.”

### **Summary of responses**

51. Respondents supported the government’s aim to clarify the treatment of storage under CFDs and the general principle that CFD generators should not be paid for stored electricity which is imported from the grid or produced from non-CFD generating units.
52. Specific concerns were raised about the proposal to install storage units in a separate BM Unit, which many respondents claimed was an unnecessary burden that may restrict innovation. Of the 27 respondents that expressed a strong opinion, 18 stated that installing a storage unit in a separate BM Unit as the CFD Facility would not meet their aims of installing storage on site. Some of the reasons that respondents gave for arguing that the requirement could damage the commercial viability of storage at CFD sites included that it would not be in the generator’s commercial interests: (a) because it is cheaper to balance CFD sites internally via a single BM Unit; (b) when the BM Unit qualifies for a supply licence exemption; (c) if a generator wanted to co-locate a battery with each wind turbine; or (d) as an ‘overplanting’ solution for offshore wind projects.
53. Many respondents claimed that the same goal could be achieved through robust import/export metering or registering separate MPANs under the same BM Unit, rather than the additional burden of registering an additional BM Unit for the storage asset.

54. Whilst respondents were positive about the intention to define storage, the majority of respondents (26 of the 33 that expressed a strong opinion) disagreed with the proposed definition. The main point of contention was defining storage as a generating unit. The proposed definition by the Electricity Storage Network had many proponents:

““Electricity Storage” in the electricity system is the conversion of electrical energy into a form of energy which can be stored, the storing of that energy, and the subsequent reconversion of that energy back into electrical energy.

“Electricity Storage Facility” in the electricity system means a facility where Electricity Storage occurs.”

55. Several respondents noted that, at the time of the consultation, there was an expectation for the government to publish a call for evidence later in the year, and preferred a consistent approach to separate approaches for different schemes. In general, responses preferred an approach that is not restrictive, in order to allow flexibility and innovation.

### **Post consultation decision**

56. Government has made clear in the Smart Energy Call for Evidence<sup>12</sup> that it fully supports the deployment of storage within the electricity network, particularly because of the flexibility it provides and the benefits for consumers through reduced network management costs and improved integration of low carbon generation. Government is also aware of the importance of the timely introduction of the next CFD allocation round.
57. Following analysis of responses, we intend to make amendments to the CFD contract in advance of the second allocation round.
58. We recognise the concerns raised by respondents regarding the prescriptive nature of requiring storage to be registered in a separate BM Unit, and the disadvantages of introducing a definition of storage to the CFD at a time when the government is also conducting a call for evidence which includes options to reduce the barriers to storage.
59. However, we consider that there are significant issues with an alternative approach that merit further consideration:

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<sup>12</sup> Available here: <https://www.gov.uk/government/consultations/call-for-evidence-a-smart-flexible-energy-system>

- Firstly, generators may wish to store electricity imported from the grid and electricity generated by the CFD generating unit and then be paid CFD payments at the time of export. There are different options for how CFD payments could be calculated that we consider require detailed analysis and consultation to ensure the integrity of the CFD mechanism.
- Secondly, moving away from using BM Unit Metered Volume for CFD settlement would be a major change in how the CFD and settlement works, which could be complex and costly to implement.

60. We do not consider that these issues can be fully addressed prior to the second allocation round, and therefore, despite the concerns raised by respondents, the government maintains that at this time requiring storage to be registered in a separate BM Unit remains the most appropriate way of clarifying how storage can be used at CFD sites and ensuring that CFD payments cannot be made on electricity imported from the grid. However, to allow a degree of flexibility whilst maintaining the integrity of the CFD, we have amended our approach to allow for storage to be registered in the same BM Unit as the CFD Facility only if a generator can demonstrate to the LCCC's satisfaction that the arrangement and installation of metering equipment ensures that at all times any electricity storage facility shall only store electricity generated by the generating unit of the Facility and shall not store electricity imported from any other source. We will keep this situation under review and continue to engage on possible solutions that maintain the integrity of the CFD.
61. In addition, we wish to make clear our intention that any storage installed on site is not to be considered part of the Facility (as defined in the CFD). To do this, we are amending the definition of Facility in the CFD contract to explicitly exclude storage.
62. Given the concerns raised by respondents regarding the definition proposed in the consultation, we propose to use the definitions of electricity storage and electricity storage facility put forward by the Electricity Storage Network and included in the recently published Smart Systems Call for Evidence in the CFD Standard Terms and Conditions, with a minor amendment to provide further clarity regarding the distinction between an Electricity Storage Facility and the CFD Facility:
- “Electricity Storage”, in the electricity system, is the conversion of electrical energy into a form of energy which can be stored, the storing of that energy, and the subsequent reconversion of that energy back into electrical energy.
- “Electricity Storage Facility” means a facility where Electricity Storage occurs or can occur and includes all assets performing or contributing to any such Electricity Storage.

63. The decision to use a definition within the CFD does not prejudice the Smart Systems Call for Evidence.
64. We are also introducing an additional Initial Condition Precedent to require that generators submit a description of any electricity storage intended to be located within the CFD site or to be associated with the CFD Facility where they have such plans in place at the time of signing the contract (the Initial Condition Precedent must be fulfilled 10 working days after contract signature). If the generator does not intend electricity storage to be located at the CFD site or to be associated with the CFD Facility, the generator would not be required to submit a description to the LCCC in order to fulfil the Initial Condition Precedent. This does not preclude the option for generators to add storage at a later stage should they wish to. This information provision requirement is to assist the LCCC in managing the contracts and will be of benefit to all parties involved.
65. In the consultation, we stated that our intention was not to apply the proposed storage amendments to the CFD Private Network Agreement at this time. However, given the limited nature of the contractual amendments, we have decided to also implement the storage policy outlined above to the CFD Private Network Agreement.

## Additional minor and technical changes

### Original proposal

66. We invited views on a number of minor, technical and clarificatory changes that we considered would improve the operation of the CFD. We believed that the proposed changes would ensure a greater degree of clarity in the text of the CFD and that our policy intent would be better reflected.

### Summary of responses

67. We received a total of 24 responses, with the majority (19) confirming that they agreed with our proposed changes and the remaining 5 indicating that they had no comments. None of the respondents disagreed with our proposals. Overall, respondents agreed the changes would increase the clarity of CFD drafting and better reflect the policy intent.
68. However, suggestions were made as to how some our proposed changes could be amended, for instance, one respondent suggested incorporating such changes into all existing CFDs and investment contracts.

### Post consultation decision

69. In view of the broad support received, the government intends to implement these minor changes as proposed. These changes will only apply to the CFD contract published for use in the second allocation round. It will be for the LCCC to decide whether to seek to apply these changes to existing CFDs and investment contracts. The table from the consultation document is included below and has been updated to confirm the government’s decisions in respect of each minor change.

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 intend to delete 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 and need to be covered by the project commitments directors’ certificate.</p>
CFD Agreement and CFD Standard Terms: Definition of Offshore Transmission System Assets	We intend 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)	We intend to amend the approach to calculation of the Transmission Loss Multiplier indexation of the strike price in order to fully reflect BEIS’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.
CFD Standard Terms: Operational Conditions Precedent. Schedule 1, Part B, Conditions 2(C)	The existing requirement places too onerous requirements on the CFD Counterparty to check the generator’s metering compliance which duplicates work already carried out by the BSC Company. We therefore intend to delete the requirement for evidence of the Metering Compliance Obligations at 31.1(B), (C) and (D).
CFD Standard Terms: Operational Conditions Precedent. Schedule 1, Part B. Condition 2.1(E)	The existing requirement places too onerous requirements on the CFD Counterparty to check the generator’s metering compliance which duplicates work already carried out by the BSC Company. We therefore intend to remove the requirement for evidence that the Communications Equipment has been “installed, configured, operational, maintained and tested”.

## Summary of responses to the Call for Evidence

70. This section summarises the responses received to the call for evidence on future options for changes to the CFD contract for later allocation rounds. These changes will **not** be made for the second allocation round and any significant changes will be subject to further consultation.
71. We asked for 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, and invited input from anyone with relevant knowledge, expertise or experience.

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

#### Original proposal

72. We invited 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.

#### Summary of responses

73. The majority of respondents stated that projected LCF overspend risk due to an underestimation of load factors was no longer there given substantially improved load factor assumptions. Focus should instead be on further improving the department's assumptions, including increased use of existing information which should be fed back into the auction valuation process.
74. Five respondents suggested that mitigation controls would likely stifle innovation and performance improvements. Some respondents commented that HMG would need to understand the impact on plant behaviour as generation may be diminished. One respondent commented that if there was to be a support cap, then HMG should also introduce a mechanism to allow for limited improvement.
75. Three respondents commented that mitigation measures would increase risk premia and thus auction bidding prices, which would directly translate into higher

costs to the bill payer. One respondent commented that budgetary control would be mistakenly secured at the unacceptable price of budgetary inefficiency.

76. One respondent commented that an introduction of mitigation measures would add further complications to the CFD allocation process and undermines the intention of CFDs to provide political as well as revenue certainty, both of which affect overall UK investability.
77. One respondent suggested that capping would incentivise cheap adequate projects rather than good projects by distorting competition between very windy and less windy sites, even if they are competitive on levelised cost of energy.
78. A couple of respondents commented that an annual support cap would need a banking and rollover mechanism. One representative body asked whether there would be plans to implement a floor for low wind years.
79. Some respondents commented that broader reviews on the LCF should be made more generally rather than just focussing on load factor. It was commented that wholesale risk and weather fluctuation are far more volatile and unpredictable than load factor risk. One business commented that LCF accounting does not truly reflect net consumer costs, so recommended that any cost control measures reflect the cost impacts of the wider system.

## Force majeure

### Original proposal

80. 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.
81. We asked for views on 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 also asked whether a time limit should be applied on a blanket basis throughout the term of the CFD, or whether – for example – a time limit on force majeure should be limited to force majeure events that occur before the MDD.

### Summary of responses

82. We received 24 replies to this part of the consultation. The vast majority of respondents disagreed with the idea of introducing a time limit for the length of time during which force majeure relief may apply, both a blanket time limit or one applied to force majeure events before the MDD. In general, the reasons given for being against the idea of a time limit focused on the adverse impact respondents



considered it would have on the risk profile of affected projects and the likely increase in costs, for instance at bid submission as developers seek to account for an increased risk of having their project terminated.

83. Some respondents commented that a time limit would contradict the principle of force majeure, which is an event or series of events outside of the control of the generator, and argued therefore that any such time limit would be arbitrary.
84. Respondents also argued that there are already a number of qualifying requirements that must be met in order for a force majeure event to remain valid and that this change is a disproportionate way to reduce the risk of budget blocking. One respondent urged the department to consider the cost of incurring legitimate force majeure claims against the increased cost they considered consumers would bear regardless of whether force majeure relief is applied or not (due to the increased risk premium, leading to higher auction prices).
85. One respondent considered that the best way to do this would be through a change to each of the CFD eligibility, Non-Delivery Disincentive (NDD) and MDD requirements. Another highlighted that developers would have no strong incentive to maintain an extended force majeure position as CFDs are effectively the only route to market with developers likely having spend significant amounts in any event.
86. Some respondents considered that any time limit should be applied only to force majeure events that take place before the MDD. Other questioned the existence of any evidence based on which specific time limitations would be based.
87. One respondent commented that they understood the concerns of the department in seeking to avoid situations in which prolonged force majeure events could potentially block budget for other projects that could otherwise deploy, but that developers need to maintain confidence that in a force majeure event, there was not a undue risk of termination when they have already spend significant capex.
88. Another respondent considered it would be reasonable to introduce a time limit for any extensions created by a force majeure event, noting that such time limits are typical in commercial arrangements, in that they provide a degree of protection for the developer, but incentivise a timely introduction of a remedy to the force majeure event.
89. One respondent noted in particular that there should be no time limit that is applied retrospectively to any outstanding force majeure claims to generators with existing CFDs.

## Budget-blocking

### Original proposal

90. 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 the right balance of discouraging budget-blocking without adding undue cost, complexity or barriers to commissioning. We asked for views and quantitative evidence about how the current measures that are designed to disincentivise speculative bids might be refined.

### Summary of responses

91. Although a couple of respondents commented that budget-blocking was not an issue, many said that current arrangements were not stringent enough, so suggested stricter eligibility requirements, with some even calling for increased financial penalties for non-delivery.
92. Some respondents suggested the introduction of alternative mechanisms e.g. bid bonds, six-monthly updates, spend requirement adjustment and delivery deposits. One trade association commented that bid bonds had been previously ruled out due to the impact on smaller developers.
93. Some respondents commented that delivery year timing may encourage underdeveloped projects to apply. One developer commented that the gap from Q4 2016 to 2021/22 was too lengthy and another commented that HMG should limit delivery years to the front-end in order to reduce speculative technology risk.
94. The majority of respondents commented on the MDD, but with differing views. One developer commented that the MDD should be set two years prior to the Target Commissioning Window rather than after signature of the CFD contract.
95. Although out of scope for this call for evidence, a minority of respondents commented that the MDD should not be extended for the next CFD allocation round as there was a need for consistency between CFD allocation rounds and that risk premiums included within CFD bid would be increased.
96. Many respondents suggested there would be benefits of MDD extension from 12 months to either 18 or 24 months. It was commented that an extension would result in lower clearing prices as a result of innovative technology solutions and a more optimal critical path. Some respondents did comment that any extension to the MDD should also include strong financial non-delivery penalties and be made alongside the Non-Delivery Disincentive.

97. It was also commented that clearing prices would be further reduced as developers would have more time to negotiate with their suppliers. One respondent suggested a requirement for projects to have selected and committed their major supplier prior to joining the CFD allocation round.
98. One respondent commented on the need for increased visibility on CFD budget recycling and another suggested the introduction of interim re-allocation of unused budgets to standby projects.

## Next steps

99. The Contracts for Difference (Standard Terms) (Amendment) Regulations 2017 have been laid in Parliament. The revised CFD Standard Terms and Conditions and the various front-end CFD Agreements, incorporating these changes, have been published in draft form alongside this government response. These documents are drafts of the intended contracts to be signed by successful generators in the second allocation round, and final contracts will be published closer to the opening of the round.

## Annex A – Examples of how State aid, Union funding or other public funding may interact with the CFD

This annex provides examples of the circumstances in which we consider cumulation of aid with the CFD may or may not occur. It should be noted that the examples given are purely illustrative and are not intended to be exhaustive or authoritative. It is for parties wishing to apply for a CFD and who are already in receipt of support to confirm with the granting authority whether such support is considered to be State aid or Union funding, seeking their own expert advice where appropriate.

### Situational examples of cumulation/non-cumulation

- If the Generator's parent company receives State aid towards the costs of the Project, we would expect the aid to need to be repaid.
- Company A receives State aid (e.g. a grant) towards the costs of the Project (such as towards gaining planning consent). Company A sells or transfers the Project to Company B, and Company B is allocated a CFD for the Project. Company B would be required to repay the grant prior to receiving CFD payments, as other State aid has been received in respect of the same costs supported by the CFD.
- State aid is received by a technology provider for development of their product, which is then sold to the Generator for use at their CFD Project on a commercial basis. We do not consider that the aid should need to be repaid prior to receiving CFD payments, as aid has not been received for the costs of a specific project.
- State aid is received for the costs of an additional product or service at a CFD site (for example, a grant was received to build an education centre) that is not a requirement for the project to be delivered under the CFD contract. We do not consider that the aid should need to be repaid prior to receiving CFD payments.
- State aid is received for the costs of an additional product or service or to research a particular product at a CFD site, which is a requirement of the project's required authorisations (for example, installing equipment to prevent environmental deterioration of the local area). Because the aid is being used to deliver a necessary part of the project and is specific to the project, the aid is considered to be cumulative with the CFD and repayment is required before receiving CFD payments unless approval is received from the Commission that cumulation is permitted.
- State aid is received for the costs of a demonstration or pilot project, which also has a CFD.

As both types of funding are specifically for the project, we consider that the aid is cumulative with the CFD and repayment is required before receiving CFD payments unless approval is received from the Commission that cumulation is permitted.

- The Generator wishes to apply for RHI funding to support heat generation at the CFD plant. If the technology of the CFD project is energy from waste with CHP, the project is not permitted to receive support under the RHI (under the Allocation Framework, energy from waste with CHP plants are not permitted to apply for CFDs if an application for the RHI has been submitted). If the technology is not energy from waste with CHP, the project may receive support under the RHI for heat generation in addition to CFD payments, which support low carbon electricity generation.
- The Generator receives de minimis aid/aid under the GBER exemption for the costs of the CFD project. Cumulation would occur and repayment is required before receiving CFD payments.
- The Generator wishes to apply for Enhanced Capital Allowances (ECAs). Some but not all ECAs are State aid. There are general rules that apply to ECAs that generators should be aware of and comply with<sup>13</sup>. If the ECA is State aid, the same general principle of whether the aid is to cover the same costs as the CFD applies order to determine whether repayment is required.
- The Generator receives investment under a venture capital scheme (e.g. VCT, EIS, SEIS, SITR). These schemes have been approved by the Commission as State aid. The objective of the EIS/VCT schemes is to support the growth of certain small and medium enterprises which would otherwise struggle to have access to finance. The Commission considers that the entire investment in the investment fund that is received by the generator is considered to be State aid. Where the investment has been spent on costs of the CFD project, the total amount must be declared to the CFD Counterparty and be repaid or set-off.

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<sup>13</sup> All Capital Allowances are subject to general rules. For further information, visit: <https://www.gov.uk/hmrc-internal-manuals/capital-allowances-manual/ca14100>

## Annex B: List of organisations that responded to the consultation

We received a total of 62 consultation responses. Not all respondents commented on every question.

Aardvark Environment Matters (E.M.) Ltd	Infinis
ABO Wind UK Ltd	Independent Renewable Energy Generators Group
AES UK & Ireland	MHI Vestas Offshore Wind
Atlantis Resources Ltd	Morlais Energy
Banks Group	National Grid Electricity Transmission
BH Energy Gap (Walsall) Limited	National Grid Business Development
British Hydropower Association	Nova Innovation Ltd
Brookfield Renewable UK Limited	Orthios Group (Holdings) Limited
Centrica Plc	Peel Energy Limited
CoGen Limited	Renewable Energy Association
Consulting With Purpose Ltd	Renewable Energy Systems Limited
DONG Energy Power (UK) Limited	RenewableUK
Drax Power Limited	RSPB
E.ON	RWE Innogy UK Ltd
Ecotricity	Scottish Renewables
EDF Energy	Scottish Power
EDP Renewables (UK) Limited	Smartest Energy Limited
Eishken Limited	SSE
Electricity Storage Network	Statkraft UK Ltd
Energy Technical & Renewable Services Ltd	Statoil
Energy UK	Swanbarton Limited
Energy Works (Hull) Limited	Tidal Lagoon (Swansea Bay) Plc
ENGIE UK	Tidalstream Limited
Enviva	Triton Knoll Offshore Wind Farm
Floating Power Plant	UK Power Reserve Ltd
Food and Drink Federation	Vattenfall
Green Investment Bank	Velocita Energy Developments Ltd
Highlands and Islands Enterprise	Welsh Government
Highview Power Storage	Wind Farm Analytics Ltd
HRS Energy	Wind Farm Energy UK
Institution of Civil Engineers	Yuasa Battery Europe Ltd

