



Department
of Energy &
Climate Change

EMR: Contracts for Difference (Allocation) Regulations

Consultation on Non-Delivery Disincentive
Exemptions: Government Response

23 February 2015

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Introduction

1. In September 2014 DECC consulted on the Non Delivery Disincentive (NDD) for Contracts for Difference¹ (CFDs). The policy intention is to prevent an inefficient allocation of budget by deterring speculative applications. It is intended to achieve this by incentivising applicants who have been successful in the CFD allocation process to sign the CFD offered to them and to minimise the risk that those who enter into a CFD fail to deliver the project.
2. The consultation covered proposed amendments to the Contract for Difference (Allocation) Regulations 2014 and in particular sought views on exemptions to the NDD policy.
3. We received twelve stakeholder responses to the consultation. This document includes a summary of those responses and decisions taken as a result of the feedback received. A list of all respondents is included in Annex A.
4. The decisions taken in light of this consultation will be reflected in the draft Contracts for Difference (Allocation) (Amendment) Regulations 2015 which are to be laid in Parliament on 23 February 2015 and, subject to Parliamentary approval, are expected to come into force as soon as possible in the new Parliament.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358462/Consultation_on_Non-Delivery_Disincentive_Exemptions_-_FINAL.pdf

Executive Summary

Our policy aims have been to achieve the following:

- To ensure that regulations are in place which incentivise legitimate projects that are able to deliver under the terms of the CFD to enter into the CFD allocation process.
- To prevent an inefficient allocation of the Levy Control Framework budget by deterring speculative applications from participating in the CFD auction through the introduction of a NDD.
- To ensure that appropriate exemptions to the NDD are in place to ensure it is applied appropriately and that an exemption determination process and associated timings are set out.

On the basis of the submitted responses, the Government will take the following actions:

- Implement the NDD policy in amending legislation in accordance with the NDD policy update published on 28 January 2015² in time for potential 2015 allocation round.
- Broaden the definition of property interest in amending legislation so that it includes freehold, leasehold, agreements for lease and lease options.
- Include in regulations that in the case where an offer of a CFD was not accepted, there will be a ground for exemption where litigation commenced or concluded after the last date to withdraw the application and that litigation would have had a material adverse effect on an applicant's ability to comply with the terms of the CFD.

² <https://www.gov.uk/government/publications/non-delivery-disincentive-policy-update>

Analysis of Responses

5. The policy operates by excluding the site of a generating station where the applicant either (i) fails to sign a CFD which was offered or (ii) signed a CFD but failed to meet contractual milestones within 12 months of contract signature. The site exclusion is temporary. The policy is intended to ensure that only credible projects which are able to deliver participate in the CFD auction
6. The consultation sought specific views on exemptions to the NDD policy and set out the following questions:
 - Q1. Are there any other property interests which need to be considered in respect of the exemption as set out in paragraph 49, such as Agreements for Lease as applicable to onshore sites³?
 - Q2. Are there any further scenarios which would warrant an exemption to the exclusion?
 - Q3. Do you envisage any reasons why the proposed timescale for determination of applications for exemptions might be insufficient?
 - Q4. Do you envisage any difficulties with the proposed process for the determination of applications for exemption?
7. Of the twelve responses, half indicated that no further exemptions were required with the remaining responses being mixed, some suggesting further reasons for which and exemption would be appropriate. The issues raised by stakeholders are summarised below.

Issue 1: Property Interests

8. Four respondents directly addressed this question. Two indicated that Agreements for Lease should apply to all technologies, including offshore wind. All four respondents stated that the definition of property interests should be widened to include options for

³ In the September 2014 consultation, 'Property Interests' were defined as 'interests that would entitle the holder to exclusive possession of the site which is the subject of the application and which enable the holder of another person to comply with any CFD entered into further to the application. This will include leasehold interests, as applicable to both onshore and offshore sites and Agreements for Lease as applicable to offshore sites only.'

Lease as well as Agreements for Lease as both represented a high level of interest in and commitment to a site.

9. Two respondents commented on the requirement for exclusive possession of a site that was set out in the definition of 'property interest' in the consultation document, indicating that access routes and other infrastructure could often be shared and that some developers would not take exclusive possession of a site but would co-exist with a landowner.

Response

10. The issues raised by stakeholders have been considered and it is accepted that a lease option represents a considerable commitment on the part of a developer. It is also accepted many lease options are not changed to agreements for lease until much later in the development process.
11. The legislation will provide that a relevant property interest means a freehold, a leasehold, an agreement for lease and a lease option. Exclusive possession will not be a requirement.

Issue 2: Further scenarios warranting an exemption

12. Eleven respondents replied directly to this question. Six indicated that no further exemptions were required, with two respondents stating that exemptions should be kept to an absolute minimum.
13. Three respondents were concerned that legitimate or spurious legal proceedings could prevent an applicant from signing a CFD.
14. Three respondents indicated that the exclusion should not apply where a change has been caused by external circumstances, with two particularly concerned about a situation where grid connection dates were changed.
15. A further two respondents wanted some clarity as to how the policy would operate in relation to the flexible bid mechanism which may result in a CFD being awarded in respect of part of a site's potential capacity.

Response

16. It is accepted that there may be some circumstances which are outside the control of an applicant which may prevent it from signing a CFD. These must however be balanced with the need to have limited and strictly defined exemptions to ensure a robust and credible CFD auction where only legitimate projects compete for limited budget.

17. The risk of legitimate or spurious legal proceedings against an applicant was assessed to be a real risk which would prevent an applicant from being able to sign a CFD, taking into account the no-litigation representation set out in the CFD contract. An exemption will therefore apply where an applicant can demonstrate that non-signature was a consequence of relevant court proceedings which were on-going or concluded and which would have had a material adverse effect on the applicant's ability to comply with the terms of the CFD.
18. The risk of grid connection dates being changed after the point at which an applicant could validly withdraw from the allocation process was assessed to be less likely. It is understood that changes in grid connection dates are likely to be preceded by a period of bilateral negotiations between National Grid and an applicant. It was concluded that, an applicant to the CFD would be aware of a likely change in its grid connection dates in advance and could decide to withdraw from the allocation process before the last date allowed for withdrawals.
19. The NDD policy does not take into account flexible bids. The capacity set out in an applicant's base bid will be the capacity used when determining whether a CFD has been awarded for a particular site. Flexible bids are not considered when implementing the NDD policy in order to prevent the flexible bid mechanism from being used to distort the auction outcome.

Issue 3: Timings

20. Stakeholders were broadly content with the proposed timescale for determination of applications for exemptions set out in the consultation document, with six respondents indicating that an exemption process available at least 30 days before the allocation round commencement date was sufficient. One respondent indicated that a 60 day period was needed and another indicated that 30 days was too long and a reduced period of between 5 to 10 days was sufficient.
21. Three respondents indicated that early visibility of the process was needed and two were concerned that the allocation round commencement date was an unknown date so early visibility of the process and round commencement dates was important.

Response

22. It is accepted that a clear and defined exemption application process is needed. The amending regulations will set out a process whereby the Secretary of State by notice announces a period by which exemption requests must be made. This process must

commence no later than 50 working days before the allocation round commencement date.

23. An applicant will be required to submit a request for an exemption certificate together with all supporting documentation within 15 working days and no later than the closing date.
24. The Secretary of State will issue an exemption certificate or an exemption refusal notice no later than 10 days before the allocation round commencement date.

Issue 4: Process for determination of applications for exemptions

25. Ten respondents commented on the process for determining exemption applications with three respondents indicating that clear and consistent guidance on the forms of evidence required to prove an exemption need to be published and two indicating that the process described in the consultation document was sufficient.
26. Five respondents stated that an appeals process to the exemption decision made by the Secretary of State was required.

Response

27. It is intended to publish further guidance on the exemption process in Spring 2015.
28. Stakeholder comments around the need for an appeals process to the exemption decision have been noted. The amending regulations will not provide for a right of appeal but a Secretary of State exemption determination could be subject to challenge by Judicial Review by an applicant.

Issue 5: Other comments

29. There were a small number of other comments on the consultation which have not resulted in any policy revision. One stakeholder stated that a 13 month exclusion was too lenient in some cases and too strict in others. There was also a suggestion that the NDD policy needed re-designing to incentivise the rapid re-allocation of budget. One stakeholder also indicated that inexperience of the new CFD mechanism may lead to honest mistakes being made and that the policy ought to reflect this.

Next Steps

Analysis of Responses

30. The NDD policy will be implemented in amending regulations laid in parliament on 23 February 2015. Further guidance on the exemption application process will be published in the coming months.
31. We intend to keep the operation of the NDD policy under close review and implement lessons from early allocation rounds.

Annex A – List of consultation respondents

E.ON

GDF Suez Energy

Ecotricity Group Ltd

EDF Energy

Energy UK

National Grid

Renewable Energy Systems Limited (RES)

Renewable UK

RWE Innogy UK Ltd

SSE

Scottish Power

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