

Appendix 5 - Summary of consultation responses

Part 1: Comments on the definition of ‘Pre-Operational Force Majeure’

Respondent	Issue	Comments	Our view
NorthConnect		Pre-Operational Force Majeure events could affect either or both of the connecting countries and, therefore, may be outside of UK jurisdiction, as is the case for NorthConnect. As these events could delay or prevent the development process of the interconnector and we believe that UK and connected country events should be treated equally. Therefore, the definition of ‘ <i>Governmental restraint</i> ’ (as per Annex 1) and related to interconnectors in the Pre-Operational phase should include both UK ‘ <i>Governmental restraint</i> ’ and ‘ <i>Governmental restraint</i> ’ in the connected country.	As noted in the decision letter, we continue to consider the proposed definition of Pre-operational Force Majeure, which is identical to the Force Majeure definition discussed in our May 2020 decision, to be neither overly wide nor completely prescriptive. We also note that, whilst there is some overlap, views varied amongst respondents as to which specific additional events should be expressly included in the definition. We do not consider it necessary or appropriate to broaden the definition of Pre-operational Force Majeure by inserting multiple additional events.
NeuConnect		In NeuConnect’s experience the activities required to achieve regulatory approvals and positive decisions on consents/permissions represent the biggest challenges for developers that are outside their control, and most susceptible to delay. Therefore, the pre-Operational Force Majeure definition should be adjusted to make it clear that delays by regulatory authorities are acknowledged as a Force Majeure event. Such events are clearly outside of developer’s control and have the potential to undermine a project’s viability if the Regime Start Date is not shifted to reflect any delays so incurred.	We would also reiterate that whilst the proposed definition contains a suite of events that could constitute a force majeure, the events listed are not exhaustive and the proposed definition of Pre-operational Force Majeure can also accommodate other events that are not expressly included – so long as such events can be demonstrated by the licensee to have been beyond its reasonable control.
National Grid Ventures (NGV)		In NGV’s opinion, it is important for Ofgem to be aware of the distinct challenges that interconnector developers face during the development phase. To illustrate some of them, they might include: <ul style="list-style-type: none"> • Supply market constraints that materialise after the IPA submission, meaning that it is not feasible or efficient for a developer to proceed according to its original timeline. Maintaining the RSD in that case could create a perverse incentive for developers to compromise efficiency in procurement in order to reduce procurement timescales. • Planning and consenting delays beyond the reasonable control of the developer, in any jurisdiction in which the project is involved. • Speculative claims to the procurement outcome, where they are not vindicated by a court decision. • The effects of a pandemic on construction progress, where appropriately mitigated by the developer. NGV interprets the proposed definition of Pre-Operational Force Majeure as encompassing these events, which are all ‘beyond the reasonable control of the developer’.	
FAB Link		In addition to those currently included, the “Pre-operational Force Majeure” definition should also allow for relief from: <ul style="list-style-type: none"> • <i>Government action in GB or any other relevant jurisdiction - Government action may change the development landscape and</i> 	

		<p>result in delay to the consenting/regulatory process and therefore delay to the project that could not be foreseen and is beyond the control of the project. This could be implemented in the definition by replacing 'Government restraint' with 'Government action'.</p> <ul style="list-style-type: none"> • <i>Delays and costs in obtaining consents and/or approvals from public authorities in GB or any other relevant jurisdiction.</i> • <i>Delays and costs due to insolvency of the Engineer, Procure, Construct (EPC) contractor.</i> • <i>Delays to the project due to uncontrollable and unexpected conditions such as severe weather and unexpected ground conditions in GB or any other relevant jurisdiction.</i> • <i>Force Majeure exclusions under EPC Contracts available in the market</i> – This addition is to support aligning the regulatory terms with those available through the competitive EPC tender process and avoid conflict with project financing. <p>Furthermore, and given recent events, epidemic should be added to the definition. This should be applied to both the pre-operational FM definition and the SLC FM definition to make clear that any unforeseen impacts of an epidemic in GB or any other relevant jurisdiction are beyond the reasonable control of a developer.</p>	
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Part 2: General comments

Respondent	Issue	Comments	Our view
FAB Link	Interactions with Schedule 2 of project specific interconnector licences	<ul style="list-style-type: none"> • Schedule 2 of the project specific interconnector Licence sets out that Ofgem may at any time revoke a Licence, (giving 30 days' notice) if the licensee has failed to commence participation in the operation of the interconnector within 3 years of the date the licence came into force [...] To ensure the credibility of the process set out in the Policy Decision the ability of Ofgem to revoke a licence on the grounds of project delay should be removed. A FM claim provision should therefore be considered in Schedule 2 of the project specific interconnector licence preventing Ofgem from invoking this power in this situation 	<p>As noted by FAB Link in its response, we have previously made clear that our ability to revoke an interconnector licence, on the grounds that the licensee has not commenced operations within the 3 years of the date the licence was granted, is a discretionary power. For the avoidance of doubt, we would consider the submission of a request for an adjustment to the RSD to fall within the scope of the licensee working towards project delivery.</p> <p>We therefore do not agree that Schedule 2 undermines the credibility of the process set out in the Policy Decision Document. We also note that the Schedule 2 of a project's interconnector licence forms part of the 'terms' of that licence which, unlike licence conditions, cannot be readily amended or removed.</p>

NGV	Reference point for the assessment of delays to the regime start date	<ul style="list-style-type: none"> • NGV considers that the level playing field principle requires that Ofgem should provide to Window 1 projects (including those that already have a cap and floor licence) the same flexibility as it has provided to Window 2 projects. That is, Window 1 projects should also have the RSD determined by considering ‘a date up to 12 months after the target connection date’, which in the case of Window 1 project would then be by 1 January 2022. 	<p>In our August 2014 decision¹ to roll-out the cap and floor regime we made clear that our first application window (Window 1) was specifically for ‘near-term’ interconnector projects only. The accompanying appendix to that decision sets out the eligibility criteria for Window 1 and makes clear that this means projects seeking to connect by the end of 2020.</p> <p>We also note that the end of 2020 date (1 January 2021) already contained an inherent and varying grace period (the difference between the project’s target completion date and 1 January 2021) for projects that were granted a cap and floor regime under Window 1.</p> <p>We further note that, for Window 1 projects, we have previously extended the material delay threshold from 2 to 3 years (from the end of 2022 to the end of 2023)² in recognition of the external pressures faced by projects at that time.</p> <p>We do not therefore consider it appropriate to retrospectively amend the January 2021 date.</p>
	Consistent and transparent application of assessment framework	<ul style="list-style-type: none"> • NGV notes that Ofgem does not appear to intend to consult on requests to delay the RSD or publish its decisions as standalone documents, instead only issuing a licence direction/policy decision letter to the licensee making the request. This could make it difficult for licensees to observe how the framework for the assessment of delays to the RSD is being implemented, and whether the level playing field principle is being followed. • NGV would like Ofgem to confirm that decisions on requests to delay the RSD will be published as standalone documents and consider whether it is appropriate to consult on them, particularly in the early stages of the framework implementation. 	<ul style="list-style-type: none"> • We intend to bilaterally consult with the relevant licensee on our minded-to position and provide the licensee with an opportunity make any representations. We will take any such representation into account before issuing a direction under the licence or a decision under the Policy Decision Document. • We can also confirm that we do intend to publish our decision(s) on any requests to adjust the RSD that are received under either SLC26A or the Policy Decision Document. Our published decision will explain our thinking and set out the reasons for our decision.
NeuConnect	Need to align Regime Start Date with Floor Start Date	<ul style="list-style-type: none"> • Lenders will lend to the project based on the duration during which the floor is available, which ends when the regime duration expires. Consequently, it is important to ensure the Regime Start Date is aligned with the Floor Start Date to optimise the terms on which the debt is provided to the project; delivering better value for consumers • It is important for lenders, over the debt tenor period, that equity investors are strongly motivated to perform; aligning both lender, sponsors and 	<ul style="list-style-type: none"> • The points raised are outside the scope of this consultation on the implementation of a force majeure mechanism for the pre-operational period. We are separately consulting on licence modifications to implement the cap and floor regime for NeuConnect and Greenlink, following our May 2020 decision on project finance variations. We may consider broader points raised in the context of that decision.

¹ Decision to roll out a cap and floor regime to near-term electricity interconnectors;
https://www.ofgem.gov.uk/sites/default/files/docs/2014/08/decision_cap_and_floor_near_term_electricity_interconnectors.pdf

² Cap and floor regime: An update on ‘Window 1’ interconnector projects:
https://www.ofgem.gov.uk/system/files/docs/2017/06/w1_update_letter_-_19jun2017_-_final.pdf

		consumer requirements. Without such alignment, lenders will be concerned and adjust lending terms in a way to ensure lenders are protected. This is likely to result in higher financing costs. This can be avoided by implementing a process for allowing the Regime Start Date to be shifted for events outside the developer’s control and aligning this with the Floor Start Date and guaranteeing the floor applies for the entire regime duration.	
	Timing of requests and timescales for decisions on shifting the Regime Start Date	<ul style="list-style-type: none"> The Regime Start Date crucially impacts the viability of a project as it affects the annual debt service requirements. Therefore, any adjustment to the Regime Start Date is required before the debt raise begins to be certain that lending terms can be the most competitive possible. Inevitably this makes the Authority’s decision fall on the critical path to financial close. To enable projects to be planned efficiently it is vital that decisions by the Authority are made quickly and in a definite timescale; from receipt of application to publication of the Authority’s decision. Such commitment to a defined timescale will make it clearer to developers, lenders and suppliers when key information will be known in the development process, thus avoiding large delays. Ofgem has indicated that it “encourages developers to consider submitting requests [.....] alongside their FPA or their PCR submissions”. In our view this is not appropriate for project financed solutions as this would result in the decision on the FPA being required before a debt raise process can begin. This would effectively postpone the debt raise process until after the FPA process has concluded and this adds unnecessary delay (and costs) to the development phase of a project. Instead, the request should be made when the impacts of the events giving rise to the delay are known, or likely to be known, which will almost certainly pre-date the FPA decision. 	<ul style="list-style-type: none"> As noted below in our response to the licence drafting amendments received from NeuConnect, suggesting the insertion of a one-month deadline, we acknowledge the value of timely decisions and the clarity it provides. However, we do not consider it appropriate to insert a blanket, overarching one-month deadline for making a decision on requests for a later RSD. Each request needs to be considered on a case by case basis and taking into account the specific circumstances. We also do not consider it appropriate, as suggested in NeuConnect’s proposed licence amendments, for the RSD to be deemed to be that specified by the licensee in the absence of a decision by the Authority within suggested one-month deadline. We do encourage developers to submit any requests for an adjustment to the RSD due to Pre-Operational Force Majeure alongside their FPA or their PCR submissions where this is possible. We also make clear in the Consultation that developers should exercise their own judgement as to when to submit a request for a later RSD and may submit their request outside of this timeframe, where they consider it appropriate and necessary to do so. Developers are required to ensure the robustness of the evidence supporting any Pre-Operational Force Majeure request.

Part 3: Licence drafting amendments suggested by respondents (suggested amendments shown in blue text)

Respondent	Condition/ reference	Comments	Suggested alternative drafting	Our view	Change to drafting
NorthConnect	SLC 26A - Definition of ‘Pre-Operational Force Majeure’	Propose amendments to the definition of Pre-Operational Force Majeure.	Proposed definition: <i>“an event or circumstance which is beyond the reasonable control of the licensee, including but not limited to act of God, act of war...”</i>	We consider it to be sufficiently clear that the suite of events listed in the definition is not exhaustive.	No change
NeuConnect	SLC 26A - Definition of ‘Pre-Operational Force Majeure’	For the reasons set out above in the section titled “Definition of Pre-operational Force Majeure”, NeuConnect believes it is	a) an event or circumstance which is beyond the reasonable control of the licensee, including act of God, act of the	Please see our views on the definition of Pre-Operational Force Majeure’ in Part 1 above.	No change

	Operational Force Majeure'	both necessary and appropriate to expressly include regulatory delay as an example of Force Majeure.	public enemy, strike, lockout and other industrial disturbance, war declared or undeclared, threat of war, terrorist act (or threat of), blockade, revolution, riot, insurrection, civil commotion, public demonstration, sabotage, act of vandalism, governmental restraint or regulatory delay (in each case, without limiting such restraint or delay to United Kingdom competent authorities, and including the restraint or delay of any organs or emanations of any state), provided that lack of funds of the licensee or performance or non-performance by an electricity transmission licensee or equivalent entity shall not be interpreted as a cause beyond the reasonable control of the licensee and provided that weather and ground conditions which are reasonably to be expected at the location of the event or circumstance are also excluded as not being beyond the reasonable control of the licensee; and"		
GridLink	SLC 26A - Definition of 'Pre-Operational Force Majeure'	The definition of force majeure is silent on whether delays caused by National Regulatory Authorities are deemed to be Force Majeure. As a significant number of interconnector projects have been delayed by NRA's we believe it would be proper to provide for this in the definition of Force Majeure.	an event or circumstance which is beyond the reasonable control of the licensee, including act of God, act of the public enemy, strike, lockout and other industrial disturbance, delays caused by foreign national regulatory authorities ... "	Please see our views on the definition of Pre-Operational Force Majeure' in Part 1 above.	No change
GridLink	SLC 26A, Paragraph 3(b)	Paragraph 3(b) can be read to imply that the event or circumstance of Pre-Operational Force Majeure has ceased. This may not always be the case. In certain circumstances it may be useful for the licensee to establish an event of Pre-Operational Force Majeure is in existence and its existence has been agreed with the Authority. This can be shared with project lenders/sponsors and allow the continuation of the development and funding of the interconnector with the knowledge that the resulting delay can be determined once the licensee event or	the length of any resulting delay that the licensee considers to have been caused as a consequence of that event or circumstance or the licensee's best estimate of the date at which the event or circumstance will cease and the resulting delay;	We consider there to be scope within the current text for licensees to indicate actual or anticipated length of any resulting delay. Developers submitting a request for a later RSD need to ensure that any such request is as complete and comprehensive as possible in all aspects, including with respect to actual or anticipated length of any delays resulting from the event, so that we have the necessary information to make a decision on that request	No change

		circumstance of Pre-Operation Force Majeure has ceased.			
	SLC 26A, Paragraph 6	The proposed text does not provide clarity on how long the Authority will require to evaluate a licensee's request and issue a notice. This creates uncertainty and an open-ended timetable [.....] To facilitate the coordination of the FPA (or PCR) and the interdependency with setting Special Conditions, developers will need to know Ofgem's assessment and decision timetable. There may be cases where the licensee prefers to know the outcome of the Authority's decision before submitting its FPA (or PCR) as the decision may have a material impact on the project's subsequent development. Licensees (and or their lenders) may wish to assess this impact outside of the FPA process. FPA submissions can be subsequently informed by the Authority's decision rather than risk derailing the FPA process.	On receipt of the licensee's written request and any subsequent additional information as the Authority may reasonably request, the Authority shall provide the licensee a direction within 28 (calendar) days. If, in the Authority's opinion, the Regime Start Date[.....]	<p>We acknowledge the value of timely decisions and the clarity it provides. However, we do not consider it appropriate to insert a blanket, overarching 28-day deadline for making a decision on requests for a later RSD. Each request needs to be considered on a case by case basis and taking into account the specific circumstances.</p> <p>We have however amended the text in SLC 26A and the Policy Decision Document so as to require any decision to be issued as soon as reasonably practicable (from the date of receipt of all necessary information that the Authority may reasonably require for the purposes of the Authority's consideration of any request for a later RSD).</p> <p>As we noted in the Consultation, developers should submit any request for an adjustment to the RSD within a reasonable timeframe of an event or circumstance Pre-Operational Force Majeure occurring. What constitutes a reasonable timeframe may differ from case to case, depending on the underlying circumstances.</p> <p>In the Consultation we indicate that we would encourage developers to submit any requests for an adjustment to the RSD due to Pre-Operational Force Majeure alongside their FPA or their PCR submissions – if at all possible.</p> <p>We also make clear that developers should exercise their own judgement as to when to submit a request for a later RSD and may submit their request outside of this timeframe where they consider it necessary to do so.</p> <p>Developers are required to ensure the robustness of the evidence supporting any Pre-Operational Force Majeure request.</p>	<p>Change made - to require decisions on requests to be made as soon as reasonably practicable (from the date of receipt of all necessary information that the Authority may reasonably require for the purposes of the Authority's consideration of any request for a later RSD)</p> <p>We have also made a corresponding change to the Policy Decision Document</p>
NeuConnect	SLC 26A, Paragraph 10 (and corresponding changes to	It is both necessary and appropriate to expressly include regulatory delay as an example of Force Majeure.	an event or circumstance which is beyond the reasonable control of the licensee, including act of God, act of the public enemy, strike, lockout and other industrial	Please see our views on the definition of Pre-Operational Force Majeure' in Part 1 above	No change

	paragraph 12 of draft Policy Document)		disturbance, war declared or undeclared, threat of war, terrorist act (or threat of), blockade, revolution, riot, insurrection, civil commotion, public demonstration, sabotage, act of vandalism, governmental restraint or regulatory delay (in each case, without limiting such restraint or delay to United Kingdom competent authorities, and including the restraint or delay of any organs or emanations of any state), provided that lack of funds of the licensee or performance or non-performance by an electricity transmission licensee or equivalent entity shall not be interpreted as a cause beyond the reasonable control of the licensee and provided that weather and ground conditions which are reasonably to be expected at the location of the event or circumstance are also excluded as not being beyond the reasonable control of the licensee; and”		
	SLC 26A, Paragraphs 6 and 10	<p>It is unclear why SLC 26A requires a different definition of “Regime Start Date” as opposed to being defined fully by reference to the definition in the Special Conditions. In our view, the parallel definitions (in the SLCs and the Special Conditions) may not work. This is because limb (b) of the SLC 26A definition is already contained in limb (b) of the Special Conditions definition of “Regime Start Date”. Limb (b) of the latter is as follows:</p> <p><i>“(b) 1st January 2024, or such later date as the Authority may specify in the direction issued pursuant to Standard Licence Condition [XX] Delay to Regime Start Date caused by Pre-Operational Force Majeure”</i></p> <p>Therefore, the Special Conditions definition of “Regime Start Date” already provides for a direction under SLC 26A.</p> <p>Further, for clarity it would be helpful if it were made clear that any date specified in</p>	<ul style="list-style-type: none"> Define “Regime Start Date” in SLC 26A solely by reference to the definition in NC’s Special Conditions. Amend paragraph 6(a) in LC 26A such that it reads as follows: <ul style="list-style-type: none"> “(a) has been delayed by an event or circumstance of Pre-operational Force Majeure, the Regime Start Date shall fall on such later date as the Authority may specify in a direction. For the avoidance of doubt, the date specified in such direction shall also apply for the purposes of limb (b) of the definition of Regime Start Date set out in the Special Conditions of this Licence; or” 	<p>SLC 26A sits in the Section G: Cap and Floor Conditions of the standards conditions of the electricity interconnector licence. As such it is applicable to all licensees with Section G in effect in the respective licences.</p> <p>It cannot therefore contain any defined terms that apply only to a specific licensee. Such terms are housed in the special conditions which are licensee and project specific.</p> <p>We consider it to be sufficiently clear that the RSD specified in any direction issued by the Authority under paragraph 6(a) of SLC 26A amends the RSD specified in the special conditions of a licence - by virtue of limb (b) of the definition of ‘Regime Start Date’ in the special conditions, which reads “ [...] or such later date as the Authority may specify in the direction issued pursuant to Standard Licence Condition 26A: Delay to Regime Start Date caused by Pre-Operational Force Majeure</p>	No change

		a paragraph 6(a) direction applies for the purposes of limb (b) of the RSD definition in the Special Conditions.			
	SLC 26A, Paragraph 1 (and corresponding changes to paragraph 1 of draft Policy Document)	The reference to the provisions which “may” apply is ambiguous as it introduces uncertainty as to the circumstances that trigger the provisions. NeuConnect considers that the drafting would be more precise and better reflect the intention by omitting the word “may”.	Delete the word “may” from Paragraph 1 of SLC 26A and Paragraph 1 of the Policy Document.	We agree with the respondent that this is potentially ambiguous and have deleted the word ‘may’ from the text of both SLC 2A and the Policy Decision Document.	Change – the word ‘may’ has been deleted from paragraph 1 of SLC 26A and the Policy Decision Document.
	SLC 26A (various, relevant parts) / Corresponding changes to various, relevant parts of the draft Policy Document	We note that the drafting in both documents contemplates that a pre-operational FM event has already delayed the RSD. However, this is somewhat inaccurate as it is now proposed that the RSD can only be extended by Ofgem pursuant to the processes set out in the consultation. In NC’s view, it would be more accurate to refer to pre-operational FM events that delay commissioning, such that the RSD needs to be adjusted to account for such delays.	In both SLC 26A and the Policy Document, insert “Initial Commissioning” as a new defined term with the following definition: “means the successful completion of such procedures and tests in relation to the licensee’s Interconnector that are in accordance with, at the time they are undertaken, Good Industry Practice for commissioning that type of interconnector in order to demonstrate that the licensee’s Interconnector is available for the use of conveyance of electricity at the Rated Capacity” Where relevant, amend references to the Regime Start Date/RSD having been delayed by the FM event to refer instead to the completion of Initial Commissioning having been delayed by the FM event.	We do not agree that drafting is inaccurate in this regard and do not consider it to warrant adding an additional layer of complexity by inserting a new defined term.	No change
	SLC 26A (various, relevant parts) / Corresponding changes to various, relevant parts of the draft Policy Document	NeuConnect consider that it is necessary and appropriate to provide greater certainty regarding the process and timeframes.	Amend paragraph 5 to read as follows: “The licensee must provide the Authority, within a reasonable timeframe, as specified by the Authority, with any additional information that the Authority may reasonably require for the purposes of the Authority’s consideration under this condition. The Authority must specify all such additional information it may require under this paragraph within one month of receiving the licensee’s request. In paragraph 6, insert “ Subject to paragraphs 7 and 8, ” before “If, in in the	As noted above, we acknowledge the value of timely decisions and the clarity it provides. However, we do not consider it appropriate to insert a blanket, overarching 1-month deadline for making a decision on requests for a later RSD. Each request needs to be considered on a case by case basis and taking into account the specific circumstances. We also do not consider it appropriate for the RSD to be deemed to be that specified by the licensee in the absence of a decision by the Authority within suggested one-month deadline.	Change made - clarify that the Authority’s direction ³ specifying the RSD shall be issued “as soon as reasonably practicable” (from the date of receipt of all necessary information that the Authority may reasonably require for the purposes of the Authority’s

³ Or where the request is considered under the Policy Decision Document, a decision under paragraph 8 of the Policy Decision Document

			<p>Authority’s opinion, the Regime Start Date:”.</p> <p>Include new paragraphs 7 and 8 to provide as follows (with the existing paragraphs 7 and 8 and subsequent paragraphs being re-numbered accordingly):</p> <p>“7. In circumstances where:</p> <ul style="list-style-type: none"> (a) the licensee’s request has not specified any additional analysis or information under paragraph 4 and the Authority has not requested additional information under paragraph 5, the Authority must issue a direction under paragraph 6(a) or (b) within one month of receiving the licensee’s request under paragraph 2; (b) the licensee’s request has specified additional analysis or information under paragraph 4 or the Authority has requested additional information under paragraph 5, the Authority must issue a direction under paragraph 6(a) or (b) within one month of receiving all additional information and analysis so specified by the licensee or so requested by the Authority. <p>8. If the Authority has not issued a direction under paragraph 6(a) or (b) within the relevant timeframe specified in paragraph 7:</p> <ul style="list-style-type: none"> (a) a) the length of delay caused by the event or circumstance of Pre-Operational Force Majeure shall be as specified in the licensee’s request (as such length of delay may have been subsequently updated or amended by the 	<p>We have however amended the text in SLC 26A and the Policy Decision Document so as to require any decision as soon as reasonably practicable (from the date of receipt of all necessary information that the Authority may reasonably require for the purposes of the Authority’s consideration of any request for a later RSD).</p>	<p>consideration of any request for a later RSD)</p> <p>We have also made a corresponding change to the Policy Decision Document.</p>
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			<p>licensee in any additional information or analysis provided to the Authority pursuant to paragraphs 4 or 5); and</p> <p>(b) within 7 days of the expiry of the relevant timeframe specified in paragraph 7, the Authority shall issue a direction specifying a later date as the Regime Start Date that reflects in full the length of delay determined under paragraph 8(a). For the avoidance of doubt, the date specified in such direction shall also apply for the purposes of limb (b) of the definition of Regime Start Date set out in the Special Conditions of this Licence.”</p> <p>Very similar amendments as set out above would also need to be made to the drafting in the Policy Document to the equivalent provisions</p>		
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