

Renewable power projects M&A: due diligence issues

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A note highlighting some of the key energy sector specific issues to consider as part of a buyer's legal due diligence in relation to a proposed acquisition of a renewable power project in the UK.

Scope of this note

This note sets out some of the key energy sector specific issues for consideration by a buyer (and its prospective lenders) in a due diligence process for a proposed renewable power project acquisition in the UK. It also describes the key development stages for a renewable power project, and highlights those at which mergers and acquisitions (M&A) activity is likely.

This note is applicable to both share and business acquisitions of a renewable power project, since the energy specific issues will be broadly similar.

This note assumes that the proposed acquisition relates to a project which is either at the consented or operational stage. It does not apply to pre-consented stage acquisitions which, being more speculative, have not in the past attracted conventional investors, nor benefit from the developed contractual arrangements existing in later staged projects. For more information on the key stages of M&A activity in the context of a renewable power project, see [Key project stages for M&A activity in renewable power projects](#).

This note assumes that the project may benefit from existing project finance arrangements, or that the buyer intends to structure the acquisition with the intention of obtaining project financing.

Nuclear power projects, which are highly specialised and not "renewable", are outside the scope of this note.

For more information on:

- The due diligence process in corporate transactions generally, including its purpose, scope and practical aspects, see [Practice note, Due diligence and post-completion integration: acquisitions](#).
- A standard document for a long-form legal due diligence report in connection with an acquisition, see [Standard document, Legal due diligence report: acquisitions](#).

- The general environmental and health and safety (EHS) issues to be considered at the due diligence stage of a share or asset purchase, see [Practice note, Environmental due diligence in corporate transactions: the basics](#) and [Environmental impacts of power stations toolkit](#).

What are renewable power projects?

Renewable power projects deliver energy that is generated naturally and continuously in the environment, as opposed to energy generated using the incineration of oil, coal or gas, or from nuclear fuel.

Renewables generate with low or zero net carbon dioxide emissions and play an important role in combating climate change. They also play an important role in ensuring security of energy supplies since they reduce dependence on imported fossil fuels.

The UK government has traditionally supported or subsidised renewable generation, giving rise to secure and stable "contracted revenues" which can make the sector attractive to investors. Support schemes in the UK include contracts for difference (CFDs) which are currently available to eligible new projects, and the Renewables Obligation (RO), which is now closed to new projects but still supports a large number of existing operating projects (see [Overview diagram of key project stages for M&A activity](#)). Renewable technologies include:

- Wind power (onshore and offshore).
- Solar power.
- Wave and tidal power.
- Hydroelectric power.
- Biomass.
- Biofuels.

- Anaerobic digestion.
- Some forms of storage.

For more information on:

- The various types of renewable energy technology, see [Practice note, Renewable energy: types of technology](#).
- Wind power projects, see [Practice note, Anatomy of a wind power project](#) and [Energy.gov: How does a wind turbine work?](#).
- Solar power projects, see [Practice note, Anatomy of a ground-mounted solar power project](#).
- Nuclear power projects, see [Practice note, Anatomy of a nuclear power project](#).
- CFDs and other government subsidies, see [Capacity agreement and Overview diagram of key project stages for M&A activity](#).

Key project stages for M&A activity in renewable power projects

There are three separate stages of acquirable renewable power projects, namely:

- **Stage 1:** pre-consented projects.
- **Stage 2:** consented projects.
- **Stage 3:** operating projects.

Each stage involves different emphasis, considerations and levels of risk, and will attract a different type of investor. However, the stages all lead towards the same goal, so there are common themes.

For a visual overview of the key stages, see [Overview diagram of key project stages for M&A activity](#).

Pre-consented stage

The pre-consented stage will typically involve feasibility assessments, commissioning surveys, certain professional appointments, site location and environmental impact studies. It is the most speculative stage and has not therefore generally attracted many conventional investors, nor does it typically involve lenders.

Consented stage

At the consented stage (sometimes referred to as the “shovel-ready stage”) a project will usually have:

- Secured planning permission.
- Received and accepted a grid connection offer from a distribution network operator (DNO), or from the transmission system operator for a connection to the transmission system.

- Entered into binding option agreements for the main site or sites and secured the right to call down easements or wayleaves (or both) in respect of cable and access routes.
- Obtained the environmental licences or consents required by the project.
- Where eligible, secured government financial support following a successful bid for a CFD, if available.
- Acquired all other necessary consents.

Key agreements will have been signed, possibly in heads of terms format, and the project developers will start developing the site. As the project moves forward to construction, it will require significant capital commitments. At this stage, some developers will look to exit the project to monetise their initial investment, so the first in a series of significant M&A transactions may take place.

Historically, private equity and hedge funds have been willing buyers, as they are prepared to accept a level of project delivery risk to obtain a higher rate of return which matches their fund requirements. However, as the sector has matured (in particular, onshore wind and solar) and debt funders have increasingly become comfortable with project risks, the availability of secured bank finance has increased and pension and infra funds have been prepared to come into projects at the construction and pre-construction stages for properly consented projects.

Operating stage

A project that has been constructed, commissioned, accredited (where relevant) and is producing commercial volumes of power is fully operational.

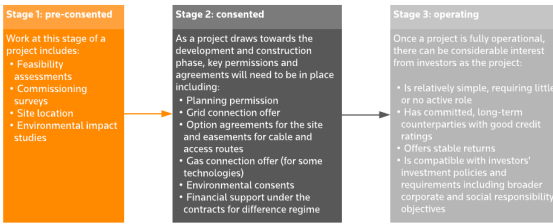
Infrastructure, pension and other funds are attracted to investing where such operational projects:

- Are relatively simple, with fewer complex elements, and require more limited involvement from the purchaser.
- Have a committed, long-term power purchase agreement (PPA) to sell the project’s output to counterparties with good credit ratings (often large utilities companies or corporates with substantial covenants).
- Offer stable returns, with the downside risk of wholesale power price exposure often hedged by an offtaker to give some downside protection, with Feed-in Tariffs, Renewables Obligation Certificates (ROCs) or CFD income streams offering a stable, index-linked yield.
- Are compatible with their investment policies and requirements and can offer the advantage of meeting corporate responsibility and environmental objectives.

Overview diagram of key project stages for M&A activity

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Overview diagram of key project stages for M&A activity



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To expand the diagram, please right click and open in a new tab.

Due diligence: key areas for consideration

Project specific issues

Legal due diligence for the acquisition of a renewable power project will focus on the following key areas:

- **Licensing.** The project must benefit from an electricity generation licence (or exemption from such a licence) and must comply with the terms of such licence or exemption.
- **Project contracts.** The buyer must review in detail the principal terms of the key agreements for the project. Where the buyer needs acquisition finance, it will also need to assess the project's bankability and any credit support requirements. If the project has project financing in place, careful consideration must be given to the need for consent by the existing lenders and release of security and whether the existing financing will be discontinued in favour of a solution prepared by the buyer.
- **Eligibility for any government subsidies.** The buyer must consider the application of, and benefit from, any government subsidies to the project, which may affect whether a funder will lend on the project.
- **Property rights and planning permissions.** The buyer will need to check that the correct leases, easements, planning permissions and all required third party and landlord consents are in place and comply with any conditions.

National security

The energy sector has been specifically included in the new regime to be enacted under the [National Security and Investment Bill](#) (NSI Bill) which was introduced into Parliament in November 2020. Once enacted, the NSI

Bill will confer retroactive powers on the government to call in for review on national security grounds (and, if considered appropriate, impose remedies in relation to) any in-scope transaction that took place on or after 12 November 2020. An in-scope transaction will include a share purchase transaction where the buyer will acquire more than 15% of the voting shares of a company owning a renewables project in Great Britain generating 100MW or more (or 1GW or more when combined with affiliated undertakings). It will be mandatory for a buyer involved in such a transaction to notify the government of the proposed deal.

The call-in power will be exercisable in relation to transactions that completed before the commencement of the NSI regime for up to five years from the date the NSI regime commences (reduced to six months from commencement if the government became aware of the transaction before commencement).

Parties will need to factor in the possibility of their transaction being called in for review, and potentially made subject to remedies for up to five years from the date the NSI Bill becomes law. The parties should consider notifying the Department for Business, Energy and Industrial Strategy (BEIS) before the NSI Bill becomes law to take advantage of the reduction of the challenge period to six months. In advance of implementation, the government welcomes informal representations from businesses about transactions which may be caught by the NSI regime by contacting the Investment Security Unit, a new operational unit that will be housed within BEIS.

For more information on the NSI Bill, see [Practice note, National Security and Investment Bill: overview](#).

Other non-energy specific regulatory issues that should be considered as part of the due diligence process for a share or asset purchase are outside the scope of this note. For more information on such issues, see:

- [A toolkit for asset acquisitions.](#)
- [A toolkit for private share acquisitions.](#)
- [A toolkit for takeovers.](#)

Generation licence

A renewable power project will need to have a generation licence from the Office of Gas and Electricity Markets (Ofgem) under the Electricity Act 1989, unless an exemption applies. Projects with an electricity generating capacity of less than 50 megawatt (MW) generally qualify for an exemption. However, every project needs to be considered on its own facts.

The due diligence review will focus on issues such as:

- Is the project the legal and beneficial owner of a generation licence which is consistent with the actual project and is the licence in full force and effect?
- If there is no generation licence, is the project validly exempt from the requirement to hold a licence?
- Has there been any notice of any breach of the generation licence by either the project or the operator? What are the implications of any such breaches?
- Are there any specific restrictions on transfer or change in control in any special conditions of the licence? (Note that any transfer of licence will normally require the consent from the Secretary of State under the Electricity Act 1989, for more information, see [Practice note, Electricity licensing: overview: Licence transfer.](#))

For more information on:

- The regulatory regime for the grant, modification, transfer and revocation of electricity generation licences under the Electricity Act 1989, see [Practice note, Electricity licensing: overview.](#)
- Various exemptions from the requirement to hold a licence to generate, supply or distribute electricity under the Electricity Act 1989, and the review of those exemptions, see [Practice note, Electricity licensing: exemptions.](#)
- How to find a generation licence, see [Practice note, Electricity and gas licensing: using Ofgem's electronic public register.](#)

Key contractual components of a renewable power project

All renewable energy projects comprise some or all of the following key contracts:

- Where a developer is not acting alone, a shareholders' agreement, joint venture agreement, exclusivity (or "pipeline") agreement (or equivalent).
- Power purchase agreement (PPA) to sell the electricity generated by the project.
- CFD or capacity agreement. A capacity agreement is entered into under the Capacity Market, where a generator agrees to supply back-up electricity at times of high demand in return for a payment (see [Practice note, Capacity Market: overview.](#))
- In the case of biomass or biofuel generating plant technologies, a fuel supply or feedstock agreement and (normally) a digestate agreement.
- Engineering, procurement and construction (EPC) contract.
- Operation and maintenance (O&M) agreement (and sometimes an asset management agreement (AMA) or management services agreement (MSA)).

- Connection agreement.
- Financing documents.

For more information on the specific key contractual components of a:

- Ground-mounted solar power project, see [Practice note, Anatomy of a ground-mounted solar power project: What are the main project agreements for a ground-mounted solar farm?](#).
- Wind power project, see [Practice note, Anatomy of a wind power project: What are the main project agreements for a wind power project?](#).

Set out below are some of the key issues for consideration during the due diligence process for each of the key contracts.

Shareholders' or joint venture agreement

The shareholders' agreement (also known as a joint venture agreement) is an agreement between the project sponsors to form the project company (most commonly as a special purpose vehicle (SPV)) in relation to the development of the renewable power project. It also sets out the ongoing governance provisions applicable to the project company.

Key areas for review will include:

- Capital contribution by each shareholder, whether by way of shares or loans, particularly as it is likely that any loans will need to be repaid as part of the acquisition.
- Voting requirements.
- Dividend policy.
- Management of the project company.
- Conflicts of interest (which is particularly relevant where the project company has any contracts with its shareholders or their affiliates, for example, where one of the shareholders is the EPC contractor).
- Non-competition or exclusivity clauses.
- Pre-emption rights and other transfer restrictions on disposal.
- Drag and tag rights.
- Change of control provisions.
- Reserved matters (decisions requiring a special majority of shareholders, or board members, to implement).

For more information generally on a shareholders' agreement, see [Practice note, Shareholders' agreement and articles of association: joint ventures.](#)

Power purchase agreement (PPA)

The PPA governs the sale of electricity generated by the project company to an offtaker to secure the project company's revenue. An offtaker is typically an electricity supplier, energy trading business or, in the case of a direct PPA (also known as a corporate PPA), a large corporate, industrial customer or public authority. A corporate PPA may be a private wire PPA whereby the electricity output is supplied to the offtaker through a private wire, rather than the grid. For more information on corporate PPAs, see [Practice note, Corporate power purchase agreements: overview](#).

Some power projects are structured as a merchant plant. In this case, the project company will not sell electricity generated by the project under a long-term PPA but under a mixture of short and medium-term contracts or in the electricity wholesale market. This will have implications for the bankability of the project (but does not necessarily mean that the project is not bankable). To date, few standalone renewables projects in the non-biomass sector have been delivered on a merchant basis because the intermittent nature of wind and solar irradiation mean that end-users are less likely to contract to buy power on a short-term basis from such facilities.

Typically, the due diligence will focus on:

- Is the PPA in effect? Have all the conditions precedent been satisfied, and if not, what are they and when are they likely to be satisfied?
- What is the term of the PPA? Is it aligned with the terms of the O&M agreement and other project agreements, including any CFD or other subsidy, and the expected term of any financing arrangements? If not, is the buyer (or its lenders) comfortable with any unfixed price and offtake uncertainty over the life of the project?
- Is the project required to supply its entire output to the offtaker? Will there be any restriction on the project selling electricity to a third party? Is the plant entitled to participate in the balancing mechanism or engage in the provision of ancillary services to National Grid and how will income (or costs) from such activities be shared with the offtaker? How is plant degradation resulting from such activities addressed?
- Are the necessary transmission or distribution facilities installed and operational? If not, who bears the risk of non-completion? What compensation is paid for delays? Is the compensation sufficient to cover the project's costs (including debt service)?
- Who bears the availability risk of the plant and that of the transmission or distribution system (see more on force majeure below)? Does the PPA contain a deemed availability mechanism (also known as take-or-pay) under which the offtaker is required to pay the generator for electricity which the facility is able to generate but which the offtaker does not require to be delivered onto the transmission system?
- What penalties will the project company suffer for delay or failure to deliver electricity under the PPA? Will penalties affect the ability of the project company to meet its debt service obligations? If so, in what circumstances?
- What payments are required from the offtaker and are they fixed or calculated by reference to market prices or reference indices? Are there any price adjustments? Which costs are "passed through" to the offtaker and which must be borne by the project? What happens if the costs of operating the plant increase (for example, following a change in law)? Will increased costs be "passed through" in accordance with a pre-agreed escalator, or by reference to actual costs? When are payments required to be made?
- Are renewable energy subsidies being sold to the offtaker? If so, which ones, and how will the risk of changes to the available subsidies be dealt with?
- How will any embedded benefits (for plants directly connected to the electricity distribution network) be shared? Will any adjustments be made to the extent that embedded benefits are withdrawn or reduced?
- Do any limitations on liability or exclusions apply? Are any indemnities given? Are the liability provisions reciprocal?
- How is force majeure defined in the PPA? What are the consequences of an event of force majeure affecting the respective parties? How does an event of force majeure impact on any payments to the project? How do these force majeure provisions compare with those in the other project agreements? Will a force majeure under a fuel supply agreement count as a force majeure under the PPA, excusing performance?
- How are disputes (including billing disputes) to be resolved?
- What events of default give rise to termination of the PPA by either party? What cure periods are permitted? What are the consequences of termination? What provision has been made for termination payments in these circumstances? (Generally, a developer will expect to recover debt financing costs, breach costs under other projects agreements and invested equity if the PPA is terminated for offtaker default, but will not recover equity where termination is as a result of the project company's breach.) Are liquidated damages payable for some breaches?
- What happens on the expiry or earlier termination of the project? Is it to be transferred to the procurer or is the project company required to dismantle the project

and reinstate the project site to its previous condition? In the latter option, funds will need to be set aside for such decommissioning activities.

- How widely is “change in law” defined and what are its consequences? Are there any limitations on the circumstances in which the offtaker can revisit the pricing of the PPA, particularly where long-term financing is to be provided? The concept of change in law will then need to be passed through appropriately to the balance of the project agreements, in particular the EPC contract and O&M agreement.
- What restrictions apply in relation to the assignment or transfer of rights or obligations under the PPA? Are there any restrictions on the project company’s ability to give security to lenders? Are there any change of control provisions which could hinder the enforcement of share security by the lenders? Will the offtaker enter into a direct agreement with the lenders?
- In relation to a private wire PPA, specific issues to consider will include:
 - the requirement for any specific connection rights if the offtaker has an existing grid connection;
 - the viability of the business using the private wire and whether it will remain a going concern for the tenure of the financing; and
 - are there any take-or-pay obligations on the offtaker to buy a minimum or maximum amount of electricity and to pay whether or not these amounts are taken. The termination provisions should also be considered carefully, as should the likelihood of a replacement private wire PPA being established to cover any lost revenue from early termination.

For more information on:

- Key issues to consider when drafting, negotiating or reviewing a PPA, see [Practice note, Power purchase agreement: key issues for drafting, reviewing and negotiating](#).
- Terms included in a long-term PPA, see [Practice note, Power purchase agreement: overview of a long-term PPA](#).
- PPA terms specifically in a wind power project, see [Practice note, Anatomy of a wind power project: Power purchase agreement \(PPA\) and Standard document, Power purchase agreement: onshore wind](#).
- PPA terms specifically in a ground-mounted solar power project, see [Practice note, Anatomy of a ground-mounted solar power project: Power purchase agreement \(PPA\)](#).
- How the PPA fits into the development of a power project, see [Practice note, Power projects: development phase](#).

- Corporate PPAs, see [Practice note, Corporate power purchase agreements: overview](#).
- How PPAs have developed in the renewables sector, see [EMEA: Developments in UK PPAs for renewables \(September 2016\)](#).
- Risk allocations within a PPA more generally, see [Project Finance \(Sweet & Maxwell, 4th ed, 2013\) \(Vinter\): Chapter 5: The Contractual Framework: Power Purchase Agreements: The Standard Risk Allocation](#).

Capacity agreement

The Capacity Market is part of the UK government’s support for low carbon electricity generation under its programme formerly known as Electricity Market Reform (EMR). It is designed to provide a back-up electricity supply that can meet peak demand at times of system stress, which intermittent renewables (such as wind) cannot meet (for example, when there is a winter cold snap with still, high pressure).

The Capacity Market is technology neutral, but it is not open to renewable projects that are also supported under the RO, FITs or CFD schemes. Generators, batteries, demand-side management and interconnectors can all participate.

In the Capacity Market, the Delivery Body (National Grid) forecasts future peak demand. The Delivery Body runs competitive auctions to contract the net amount of capacity that is needed to ensure security of supply in future years. Auctions are usually held four years (T-4 auction) and one year (T-1) before each delivery period.

In November 2018, the government suspended the Capacity Market, following a successful state aid challenge by Tempus Energy, but it resumed in October 2019, see [Practice note, Capacity Market: overview: State aid and judicial review challenges by Tempus Energy](#).

Capacity agreements cannot be negotiated.

Nevertheless, due diligence is necessary to understand the risks and how these are to be managed. Key considerations include:

- Milestone commitments on financial commitment and substantial completion.
- Credit support to be posted for financial commitment.
- Penalty payments in the event of non-delivery during system stress events (but subject to caps).
- Risk of termination and termination fees.
- Risk of further challenge to the Capacity Market regime.

The capacity agreement is a combination of statutory rights; it is not a contract, so cannot be assigned by way

of security. Security interests can however be noted on the Capacity Market Register.

For more information on capacity agreements generally, see [Practice note, Capacity Market: guide to capacity agreements](#).

Fuel supply for biomass or biofuel generating plant technologies

A fuel supply agreement (FSA), also known as a feedstock supply agreement, will form part of the contractual matrix where electricity is generated using technologies including biomass, waste or anaerobic digestion. The key focus of the due diligence will be on the quality and reliability of the volumes of fuel to be supplied, including the following considerations:

- What is the term of the FSA? Is it aligned with the terms of the PPA and CFD? If not, is the buyer (or its lenders) comfortable with any unfixed price and supply uncertainty over the life of the project? This will depend on the availability of a spot market for the fuel in question.
- Are the contracted volume quantities aligned with and sufficient for the output requirements of the project?
- Are there prescribed quality specifications of the fuel? Does the agreement contain a testing mechanism for assessing the quality of the fuel and is the project company able to reject it where it falls below the requisite standard?
- Can the project company claim compensation for fuel that does not meet contractual specifications?
- How is the quantity of supply managed, and is there a clear nomination procedure by the project company? Can the supply of fuel be suspended, for instance during scheduled maintenance of the plant or unplanned prolonged shut down? The supply of commissioning fuel will need to be timed correctly with the progress of the works under the EPC contract. During the operational phase the O&M agreement will need to allow for access to the site by the fuel supplier to make deliveries.
- The pricing and payment structures, including any adjustments and reviews. Is the cost of fuel linked to the quantity supplied, or the electricity or heat generated? On long-term contracts, is there an annual adjustment or benchmarking procedure?
- Are there any take-or-pay obligations on the project company, to take and pay for a minimum contract quantity during a prescribed period, or pay for it even if it is not taken during that period? Has this take-or-pay obligation been passed through to the offtaker under a PPA?

- Is there any right for the project company to receive a “make-up” quantity in later periods which corresponds to the quantity for which a take-or-pay payment was made?
- Force majeure relief for events that may prevent a party from fulfilling its contractual obligations. How do the force majeure provisions in the FSA compare with those under the other project agreements, in particular, the PPA? As a general rule, these should be closely aligned to avoid scenarios where the FSA is terminated before the PPA.
- What are the rights for the parties to terminate the FSA and what (if any) compensation is payable?
- Does the fuel supplier provide an indemnity for any damage it causes to the plant, and how wide is this indemnity if the damage means the underlying generation assets cannot perform for a prolonged period?
- Are there any limitations of liability of the parties?
- Are there any back-up fuel supply arrangements to mitigate against failure by the fuel supplier? Are there any fuel storage facilities on site and a requirement to keep them “topped up”?
- What restrictions apply in relation to the assignment or transfer of rights or obligations under the FSA? Are there any restrictions on the project company’s ability to give security to lenders? Are there any change of control provisions which could hinder the enforcement of share security by the lenders? Will the supplier enter into a direct agreement with the lenders? On a project-financed transaction, it may be necessary for the fuel supplier to consider amendments to its standard contracts and terms of business requested by the lenders that it would not usually accept, but which are necessary to provide sufficient comfort for the lenders for the project to proceed.
- Are the operators complying with the various sustainability requirements for using biomass or biofuel under different subsidies, including reporting and monitoring (see [Practice note, EU and UK biomass sustainability criteria](#))?

For more information on feedstock agreements, see [Checklist, Energy crops and biomass feedstock contracts](#).

EPC contract

An EPC contract will govern the design, construction, testing and commissioning of the plant and will specify a fixed lump sum price, completion date for construction, any guaranteed performance warranties, liquidated damages for delay and underperformance and limitations on liability.

One of the key aspects of due diligence in the context of the EPC contract is to understand what stage of completion the project has reached. This will depend on the project in question but completion typically comprises a combination of:

- Physical completion of construction.
- Completion of mechanical tests, including commissioning and testing individual parts of the facility (where there are significant elements of mechanical or electrical plant or both) and the entire facility.
- Testing to demonstrate that the facility has achieved minimum performance guarantees and consequences for failure to do so.
- The EPC contractor having provided operation and maintenance manuals and training to the O&M contractor's personnel (although on some renewable projects, particularly those for onshore wind and solar PV, the EPC contractor may perform O&M services for the first two years following taking-over).
- Reliability testing and testing in certain "conditions", which may take place after "taking over" for some projects that are subject to a substantial period of "initial operation" to test the performance.
- Final acceptance, which may take place at the expiry of the defects liability period and will mark the point at which the EPC contractor is finally "off the hook".

The answers to these questions will drive the rest of the due diligence process. For example, if the project has already reached final acceptance, many of the issues relating to, for example, delay, performance testing, rights and obligations during the defects liability period and performance security fall away.

Typically, areas of focus during the due diligence process will include:

- What is the extent of the EPC contractor's design obligation? Does it warrant that the completed works will be fit for a particular purpose or that it will exercise skill and care in carrying out and completing the works? Is the employer providing any information in respect of the plant, and is it warranting any part of it? What are the EPC contractor's obligations for spare parts, and how does this fit with the O&M agreement? Does the EPC contractor provide any other warranties in relation to the works or aspects of the works and what limitation period applies to any claims?
- For projects which remain to be built or are in the construction phase, how is site risk allocated between the employer and the EPC contractor? Has the contractor taken the full responsibility for investigating site conditions and does it accept the responsibility for completing the works irrespective of these conditions?

- When does ownership in work and materials pass to the project company?
- What is the testing regime and what are the performance parameters the EPC contractor is required to meet? What are the consequences of a failed performance test? Does the EPC contract provide for performance liquidated damages in these circumstances? Are there any circumstances in which the project company can refuse to take over the facility and reject it? Are there provisions governing revenue earned during the performance tests?
- What obligations does the EPC contractor have to rectify defects and for what period? What recourse does the project company have if the EPC contractor fails to rectify defects? What is the position for latent defects and is there any exclusion of statutory limitation periods? A buyer should obtain a good understanding of any existing or potential defects and make sure that they are being addressed. Suitable indemnities or other protection may need to be obtained from the seller to protect against ongoing exposure where the EPC contract does not provide adequate protection.
- In what circumstances can the EPC contractor claim an extension of time under the EPC contract? Are there any incentives for the EPC contractor to complete its work earlier than planned? What are the consequences of late or non-completion, for example, is the EPC contractor required to pay delay liquidated damages (LDs) in these circumstances? If so:
 - how are LDs calculated?;
 - is the level of LDs sufficient to enable the project company to cover its costs, including its debt service costs?;
 - is there a cap on the amount of damages payable?; and
 - is the project company permitted to terminate the project for prolonged delay? What are the consequences of such termination?
- In what circumstances can the EPC contract be terminated by each party? What are the consequences of termination for each party?
- Who bears the risk of late or non-completion of ancillary works, such as transmission or distribution connections or fuel supply facilities? Is there a long-stop date for completion of these facilities? Does the EPC contract specify the consequences of non-completion of such facilities, or if not, how else is this dealt with?
- What is the contract price and payment mechanism? To what extent is the contract price subject to revision or adjustment? Can completion of EPC milestones be objectively determined? Does the employer have rights

of set off? Is the payment profile adequately spread over the construction period to keep the contractor incentivised? For construction contracts within the scope of the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996), staged payments must be provided for, unless the period of the works is agreed or estimated at less than 45 days. (For more information, see [Practice note, Payment in construction contracts: Construction Act 1996.](#))

- What remedies are otherwise provided to each party for the other's default? Is there an exclusive remedies provision?
- How is force majeure defined? What are the consequences of force majeure? At what point can the EPC contract be terminated for prolonged force majeure, and by whom?
- What comfort is available to confirm that the contract was executed correctly? If an overseas entity has executed the agreements, have legal opinions or other evidence of due execution been supplied?
- Are the technical schedules consistent with the contract conditions? Typically, construction contracts are complex and include a large number of technical documents. A buyer must ensure it understands what documents comprise the contract and that they are internally consistent (or allocate a clear priority of interpretation where they are not).
- Are there any collateral warranties (for example, from key sub-contractors)? Where an asset sale is proposed, can the benefit of such collateral warranties be transferred or are there restrictions on their assignment?
- What is the maximum limit on each party's liability under the EPC contract? Are there any "carve-outs" from the overall cap on liability? What other material limitations on, and exclusions of, liability are prescribed?
- What are the indemnity obligations under the EPC contract and are they included within, or carved out of, the overall cap on liability?
- What provisions survive termination of the contract or completion of the project?
- How extensive are the EPC contractor's rights to subcontract its obligations, and how extensively has it used these to date? Is the EPC contractor required to take full responsibility for all acts or omissions of subcontractors? For key subcontracts, are there direct agreements in place to allow the employer to step into the EPC contractor's position if the EPC contractor is in material default under the EPC contract?
- Are the warranties given by manufacturers and suppliers of key parts of the generating plant to the EPC contractor capable of assignment to the

employer, and will the employer subsequently be able to transfer these to the entity acquiring the project?

- Is any performance security required, including any parent company guarantee or performance bond supplied by the contractor? In the case of a parent company guarantee, it will be prudent to obtain written confirmation from the parent company that its obligations under the guarantee will remain unaffected by the acquisition of the project.
- What insurance is the EPC contractor obliged to effect and maintain? Are parties with an insurable interest in the project, including the project company (and its lenders), co-insured? Do insurance policies include a waiver of subrogation for the project company and its lenders? Are there any other specific exclusions or endorsements on the policies? Does the EPC contract require the EPC contractor to comply with the terms of the insurance policies?
- What is the dispute resolution mechanism under the EPC contract and is this consistent across other project documents? For construction contracts that fall within the ambit of the Construction Act 1996, a right for either party to refer any dispute to adjudication must be included or, if the parties do not include such a right, it will be implied into the EPC contract (with the default adjudication mechanism being that set out in Part I of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649) (Scheme for Construction Contracts 1998) which is the most common such mechanism in the UK). (For more information, see [Practice note, Adjudication using the Scheme for Construction Contracts 1998.](#))
- What restrictions apply in relation to the assignment or transfer of rights or obligations under the EPC? Are there any restrictions on the project company's ability to give security to lenders? Are there any change of control provisions which could hinder the enforcement of share security by the lenders? Will the contractor enter into a direct agreement with the lenders?

For more information on:

- The bankability of construction contracts, see [Practice note, Bankable construction contracts: key issues in project finance transactions.](#)
- EPC contracts more generally, see [Practice note, Engineer, procure and construct \(EPC\) contracts: key issues.](#)

O&M agreement

Once the construction of the project is complete, the operational phase will begin. The O&M agreement is an agreement between the project company and the operator to manage, operate and maintain a project.

In the early days of renewable power projects, it was typical for the O&M contractor to be the EPC contractor or the equipment manufacturer. However, a vibrant secondary O&M market has since developed in many renewable sectors.

Areas of focus in the due diligence review include:

- What is the term of the O&M agreement? Does it correspond with the term of the PPA (including any extensions)? What are the handover requirements at the end of the term?
 - In what circumstances can the O&M agreement be terminated by the parties? What are the consequences of termination? Is a termination payment payable? Are the termination provisions of the O&M agreement appropriately aligned with those under the PPA?
 - What is the payment mechanism? Is the operator to be paid a fixed fee on a reimbursable basis against costs actually incurred or a combination of the two? Does the payment mechanism comprise any other charges or fees? What is the timing of payments under the O&M agreement, relative to timing of payments under the PPA or other revenue stream for the project? If the operator is a related entity, is the fee set at an appropriate level or will it function as a means of monetary distribution to the affiliate?
 - Does the O&M agreement create adequate incentives (and penalties) to minimise costs and to operate the plant efficiently? Is the operator sufficiently incentivised between maximising revenue and minimising maintenance costs?
 - To what extent are cost savings and losses under the PPA (due to efficiency gains and losses in the operation of the power station) passed through the operator? Conversely, can bonuses payable by the project company to the operator (for example, for reducing operating costs) be passed through to the off-taker under the PPA?
 - Is the operator responsible for providing spare parts and managing them on site? Who is responsible for the costs of spare parts, and is there a distinction between those used in scheduled or unscheduled maintenance?
 - Which party is responsible for managing site security and maintaining access and other facilities?
 - How is force majeure defined? What are the consequences of force majeure? How do these compare with the definitions and related provisions found in the other project agreements?
 - What are the operator's services during both the pre-operational and the operational phase and will the operator need to have some of its personnel work alongside the EPC contractor during the final phases of commissioning and testing to learn how to operate and maintain the facility? What is the maintenance strategy? How does it cater for life-cycle maintenance and does it allow the operator to update, upgrade or replace technology and techniques? Are any services being procured from third parties, for example, is major maintenance of certain equipment to be carried out by the original equipment manufacturer under a long-term service agreement? Are the proposed services adequate for the project?
 - Does the operator guarantee that the project will achieve specified operating levels and performance standards or simply to comply with applicable industry standards with a view to achieving a particular level or standard? What are the consequences if the operator fails to achieve the required performance standards? What is the maximum limit on each party's liability under the O&M agreement? Are there any "carve-outs" from the overall cap on liability? What other material limitations on, and exclusions of, liability are prescribed?
 - What are the indemnity obligations under the O&M agreement and are they included within, or carved out of, the overall cap on liability?
 - How is expenditure on reimbursable operating costs monitored and controlled? What is the procedure for agreeing operating budgets? What are the consequences for the project company and the operator, respectively, if the operator exceeds a budget?
 - What does the O&M agreement require in terms of insurance cover during the operational phase? Which party is responsible for effecting and maintaining the relevant insurance policies? Are parties with an insurable interest in the project, including the project company (and its lenders), co-insured? Do insurance policies include a waiver of subrogation for the project company and its lenders? Are there any other specific exclusions or endorsements on the policies?
 - Do any restrictions apply in relation to the assignment or transfer of rights or obligations under the O&M agreement or change in the control of the project company? Will the operator enter in a direct agreement with the lenders? How easy would it be to find a replacement operator to perform the required services?
 - What is the dispute resolution mechanism under the O&M agreement, and is this consistent across other project documents?
- For more information on O&M agreements primarily in the context of a project in the energy sector, see [Practice note, Operation and maintenance \(O&M\) contract: key issues](#).

Connection arrangements

Renewable generating plants need to be connected to the grid, almost always to the distribution network operated by a distribution network operator (DNO), rather than to the transmission network operated by National Grid.

The two key agreements between the project company and the DNO, which together govern the establishment and ongoing connection to the DNO's electricity distribution network, are the connection offer and, following connection of the project to the grid (once it is commissioned), the connection agreement. For more information generally on connection arrangements in power projects, see [Practice note, Power projects: electricity connection arrangements](#).

Connection offer

Due diligence review of the connection offer is likely to focus on:

- Whether the connection offer has been validly accepted within the required timeframe. If not, what needs to be done, by whom and by when to accept the offer?
- Where is the point of connection to the network (on or off-site)?
- Whether the export and import capacity is sufficient for the project's planned generation output?
- What is the target date for commissioning the project? What will the generator need to do before that date? What are the consequences if it is not ready?
- For DNO connection offers, which parts of the connection works are required to be carried out by the DNO (known as "non-contestable works") and which connection works the DNO would be willing (but is not obliged) to carry out (known as "contestable works"). The project is entitled to arrange for an independent connection provider to carry out these contestable works.
- Any assumptions on which the connection offer is based, including meeting certain construction milestones, obtaining all necessary third party consents within specified timeframes and any technical characteristics and performance of the power plant. It will be important to ensure that these are passed down to the EPC contract.
- What payments are to be made in the period between accepting the offer and commissioning of the project? What (if any) of the connection costs due under the connection offer have been paid?
- In what circumstances can the network operator instruct the generator not to export its power onto

the network, for example, because of network congestion or outages required to facilitate other network projects? In the case of a DNO connection offer, this may include circumstances where the transmission system operator requires the DNO to issue such an instruction because of congestion or outages on the transmission network.

- Are there works elsewhere on the national electricity transmission system or the DNO network which must be carried out or paid for (or both) by the generator, either before the power station is able to export power at all, or before it can be sure of doing so whenever it wants to?
- For transmission connection offers (or DNO offers which require modifications to the transmission network), what will be the generator's liabilities if it does not go ahead with the power station?
- Is the estimated date of connection compatible with the project's eligibility for accreditation under a particular subsidy regime? Given the changing landscape of government support for certain types of renewable projects, it is important to establish eligibility during certain grace periods which may allow the project to benefit from subsidy support even after the subsidy has been formally closed.
- What are the circumstances in which the DNO may unilaterally terminate the connection offer?
- Are there any other bespoke or onerous features of the connection offer, including the offer being interactive with other connection offers, constraints in the distribution network, the requirement for the DNO to apply for Statement of Works with National Grid, or the obligation for the project company to provide security to the DNO?

Connection agreement

Once the project has been commissioned (and therefore connected to the grid), the connection offer is superseded by the connection agreement. The connection agreement will (for distribution-connected projects) usually incorporate the National Terms of Connection (see [National Terms of Connection](#)), which are the standard terms and conditions setting out the basis on which the DNO will maintain the grid connection. Given the standard form nature of this document, the connection agreement will not generally be negotiated.

During the due diligence process, the terms of the connection agreement will need to be identified and understood to ensure they are consistent with the overall project (both in terms of capacity, costs and timescales). It will also be important to understand whether any of the terms are onerous or unusual. Some areas of focus include:

- Where will the point of connection to the network be (on or off-site) and export and import capacities?
- Provisions for early termination.
- Remedies and consequences of default.
- Rights of the DNO (or the transmission owner) to de-energise or disconnect the project.
- The limitations on the liability of the DNO (or the transmission owner), and how the project will manage the risk for which the network company is not liable.
- In what circumstances will the power plant be exposed to export constraints where it can be instructed not to export its power to the network, for example, during network congestion or outage on the transmission system.
- How the connection will be affected during planned maintenance.
- Are there any departures from the National Terms of Connection and, if so, how can these be justified?
- How the costs of local area grid reinforcement works will be split between network users, known as socialised cost.
- Are there works elsewhere on the transmission system or the DNO network that must be carried out or paid for (or both) by the generator, either before the power station is able to export power at all, or before it can be sure of doing so whenever it wants to?

For more information on connection agreements, see [Practice note, Power projects: electricity connection arrangements](#).

Community benefit

The project may have a community benefit element to it. Community benefits may comprise annual donations (often proportionate to the amount of energy produced by the project) to a community benefit society, which will administer the funds for the local community. They can also comprise benefits-in-kind such as direct funding of local projects and local energy discount schemes. These benefits are voluntary and are separate to any conditions attached to the planning permissions obtained.

Due diligence will focus on identifying what benefits have been offered and any ongoing financial (or equivalent) commitments which have been made.

Lenders are also likely to consider compliance with the Bribery Act 2010 in relation to any community benefit arrangements and payments forming part of the power project. For general information on anti-corruption in corporate due diligence transactions, see [Practice note, Bribery Act 2010: acquisitions and joint ventures: Anti-bribery due diligence on acquisitions](#).

For more information generally on community benefit, see [Practice note, Community energy projects](#).

Finance documents and bankability

Where the proposed acquisition is by way of a share sale, a detailed review of any existing financing arrangements entered into by the project company will be necessary (for background information on acquisitions by way of shares, see [Practice note, Share purchases: overview](#)). Similarly, any new lenders being approached for project financing will conduct a detailed review of the key project agreements for bankability. Key areas of focus will include:

- The ownership structure of the project, especially if the borrower under the financing documents is not the project company holding the assets of the project. Are there any shareholder loans in the corporate structure that will need to be assigned to the lenders together with the shares of the project company and any intervening entities?
- Any outstanding obligations or financial commitments under any of the project agreements or any licences or approvals.
- The status of the construction aspects of the project and any remaining obligations or liability of the EPC contractor.
- Any restrictions on the ability of the project company (or its holding company) to give security over all or part of the power project (or assign rights under any of the project agreements by way of security) to its lenders? Has the project company been provided with on-demand performance security by its supply chain (in particular, the EPC contractor and O&M contractor)? What defects, if any, have arisen under the EPC contract and have they been satisfactorily remedied?
- What, if any, security interests have been created over the power station, the project agreements and other relevant assets? Will these be released? Will an intercreditor agreement be required?
- What will be the consequences of a default under the financing arrangements? Do lenders enjoy “step in” rights in relation to the operation of the facility? If so, in what circumstances?
- Are there any direct agreements in place or an obligation on the counterparties to the key project agreements to enter into direct agreements with the lenders? In the absence of an obligation to enter into a direct agreement, are there assignment by way of security provisions in favour of lenders? If not, has consent to the assignment by way of security been obtained from the counterparties to the key project documents?

- Compliance with the Bribery Act 2010 in relation to any community benefit arrangements and payments forming part of the power project.

For more information on:

- Bankability, see [Practice notes, Project finance: UK law overview: Key issues for lenders: Bankability and Bankable construction contracts: key issues in project finance transactions](#).
- Community benefit projects, see [Practice note, Community energy projects](#).

Counterparty risk: credit support requirements

The due diligence process (and lenders' review in relation to new project financing) will include consideration of each of the counterparties to the key project contracts. In particular, this will focus on whether each relevant counterparty is:

- Technically capable to perform its obligations.
- Sufficiently creditworthy.

If technical or financial capability is deemed lacking, the buyer or its lenders may insist on the relevant counterparty providing credit support to protect the performance of its payment or technical obligations under the relevant contract. It will be important that any such credit support is assignable to the lenders as part of the security package supporting the financing.

CFDs and other government subsidies

The due diligence process will need to identify whether any government subsidies apply to the project.

The government has promoted renewable energy in the UK through a combination of FITs and the RO. These replaced the non-fossil fuel obligation system, which was the government's principal mechanism for promoting renewable energy before the RO.

The RO has now closed to new projects (and has been replaced by the CFD regime), but the RO will continue to support existing accredited projects until 2037 under grandfathering arrangements.

The government has replaced the FITs scheme (which closed to new projects at the end of March 2019) with the Smart Export Guarantee (SEG) scheme for small-scale low carbon generation.

The due diligence review will focus on whether:

- The project has been accredited under a support scheme.

- Any requisite annual declaration, or other report, has been submitted to Ofgem to confirm that the project is still eligible for support under the relevant scheme.

For more information on:

- The RO, see [Practice note, Renewables Obligation](#).
- FITs, see [Practice note, Feed-in tariffs \(FITs\): overview](#).
- The Smart Export Guarantee, see [Practice note, Smart Export Guarantee \(SEG\) scheme to support small-scale low-carbon generation](#).

CFD

CFDs are the government's main policy mechanism to encourage investment in new, low-carbon electricity generation. CFDs fix the "strike price" that generators receive for their electricity for a set period, typically 15 years. A government company, the Low Carbon Contracts Company (LCCC), pays generators the difference between the CFD's strike price and the reference price (a measure of the average market price).

Notable terms include the strike price, payment terms, technical obligation on the power plant (such as the requirement to ensure that the metering equipment meets the various applicable rules and standards and accurately records the relevant information), milestone (long-stop) dates, limited compensation rights available in relation to change in law, curtailment and political shutdown and the termination rights (which are also relatively limited). There is a standard form direct agreement relating to the CFD which is intended for use by banks providing long-term financing. For more information on CFDs, see [Practice note, Contracts for Difference \(CFDs\) for low carbon generation: overview](#).

Key considerations in relation to a CFD during the due diligence review include:

- What specific milestone dates and deadlines have been provided in the CFD and whether they have been achieved? Failure to achieve them could have severe consequences and can result in the termination of the CFD. Are these deadlines "back-to-backed" with the EPC contract and with any other relevant project documents?
- Is the O&M agreement aligned with the technical obligations on the plant?
- What is the impact of the CFD price reopener provisions and limited compensation rights relating to aspects such as changes in law and curtailment on other project agreements?
- Does the term of the CFD match the financing? Is it assignable to the lenders as part of the security for the financing? Are there any change of control provisions that could hinder the enforcement of share security?

- Is the price paid under the PPA linked to the market price used for the CFD, so that the overall income to the project will be linked to the strike price?

Property and planning considerations

In general, property due diligence investigations for a renewable project will not be substantively different from those carried out for any major acquisition or pre-funding title investigation.

All potential risks, such as unhappy neighbours, environmental and wildlife protection concerns, deviations from planning permissions and access rights should be identified during the due diligence process. In addition, it is vital to ensure that the development has taken account of existing infrastructure which may affect a site as well as having the benefit of all off site infrastructure rights required to operate the project.

Property

In relation to property, key areas of focus during the due diligence process will include:

- Is the site on which the project is located free of encumbrances (such as the rights of utility operators to lay and operate their equipment)? If encumbrances do exist, what consents are required and have they already been obtained?
- Is the site affected by any restrictive covenants which preclude or limit the development of the project (for example, land use being limited to solely agricultural use)? If so, has a release been obtained or negotiated with the beneficiary of the covenant, or alternatively, has defective title insurance been put in place at a level which would fully compensate the project company for wasted capital costs and loss of future income arising from the project being decommissioned earlier than anticipated?
- Is there sufficient access to the site? Is it connected (directly or indirectly) to a public highway to ensure the right of vehicular access? Are there any gaps in title between the highway and the site? If "gaps" exist, is there insurance in place?
- Is consent required of any mortgagees with charges over the land on which the project is located to ensure that timing issues are managed proactively?
- Is the point of connection to the grid positioned on the site? If not, does the project company and the site benefit from rights to lay cable to the point of connection to the grid? Has the cable or cable works been adopted by the DNO (adoption usually occurs after the project has been commissioned)? If not, a detailed due diligence exercise on the cable route (in addition to the site itself) may be required by lenders.

- Does the lease permit the size of project being operated from the site? Is the permitted user limited to an identified MW capacity? Is the type of technology prescribed or is there scope for battery storage alongside a solar project, for example?
- Does the lease require the landlord to grant any necessary easements or leases to the DNO and permit the project company to share occupation of, or grant a substitution lease to, a DNO?
- In the case of a solar project, does the lease contain a landlord covenant not to do anything which would obstruct sunlight from reaching the PV panels?
- Is the lease assignable to the lenders? Does it contain any change of control provisions that could hinder enforcement of share security? Does the lease contain an express obligation on the landlord to enter into a direct agreement with the lenders to allow them to step-in on the default of the project company?
- How does the lease address the requirement to decommission the project at the end of the lease term? Are there obligations placed on a tenant to fund a decommissioning account? Or provide a bank guarantee? Have these things been put in place at the prescribed time?
- In the case of an offshore windfarm (or other offshore generating technology) project, have appropriate property rights been granted under the Crown Estate lease? In addition, careful consideration will be needed to ensure appropriate land rights have been secured for cables passing through the foreshore and onto land, together with easements to secure connections into relevant substations and existing DNO infrastructure on the shore.

For more information on:

- The Crown Estate lease, see [Practice note, Offshore power projects: Crown Estate lease](#).
- A lease for an onshore windfarm, see [Standard document, Lease of wind turbine site](#).
- The acquisition of property rights during the development phase of a power project generally, see [Practice note, Power projects: development phase: Acquiring the necessary property rights](#).
- Property due diligence in corporate transactions generally, see [Practice note, Real property: asset purchases: Carrying out property due diligence](#).

Planning

In relation to planning, key areas of focus during the due diligence will include:

- Are the necessary planning permissions in place in relation to the power plant and as well as for any cable route works?

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- Are any of the planning permissions subject to judicial review proceedings?
- Have all relevant conditions imposed in the permissions (particularly those required to be discharged before commencing works on site) been discharged?
- Has any enforcement action been taken in relation to the project?
- Has the power project been constructed in accordance with the approved plans and conditions imposed on

the permission? For example, a key issue in the case of incineration plants, such as waste to energy or biomass plants, is a commonly included condition as to the height of the shaft which, if exceeded, will invalidate the planning permission.

For more information on which planning regime and policies apply, see [Practice notes, Power projects in England: which planning regime?](#), [Power projects in Wales: which planning regime?](#) and [Planning policy on renewable energy](#).

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