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Power and renewable energy M&A: Q&A

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Sector notes | **Maintained** | England, International, Scotland, Wales

A Q&A guide to mergers and acquisitions (M&A) in the power and renewable energy sector.

The Q&A gives a high level overview of the factors affecting asset and share acquisitions in the sector and the key considerations for buyers and sellers. It covers risks and motivations of the parties; acquisition and consideration structures; the due diligence process; third party consents; liability and indemnity clauses and key negotiation points in sale and purchase agreements.

Key commercial drivers

1. What are the key value drivers for private M&A in the power and renewable energy sector?

Key value drivers which are particularly notable are as follows.

The availability of substantial institutional investment from funds which are looking for assets to acquire is a significant driver of private M&A deals in the electricity sector. These investors include:

- Private equity funds.
- Infrastructure funds.
- Major pension funds.
- Japanese trading houses.
- Sovereign wealth funds.
- Other investors from the Gulf and from China.

Energy and infrastructure sector investments are attractive to them and offer a range of risk/return profiles. Many of these investors favour a West European asset base.

The UK electricity generation market has been liberalised for longer than most others (apart from North America and Chile). It continues to be attractive to investors, particularly when there is a longer-term power purchase or offtake agreement in place which limits exposure to volatile wholesale electricity market pricing. The opportunity to acquire assets at attractive prices when larger energy companies are disposing of them for strategic or cash flow reasons also plays a role. Interest also arises from the current shortage of thermal generating reserve capacity, which has been exacerbated by the lack of recent new gas-fired power station developments and state aid challenges to capacity market support mechanism. More capacity of this kind will be needed to provide power when intermittent renewable generation is unavailable and to help fill the gap caused by the progressive shutdown of old nuclear generation capacity, and the uncertainties and lead times involved in developing replacement nuclear capacity.

Regulated infrastructure assets have also traditionally been attractive to long-term institutional investors seeking predictable returns. Electricity transmission and distribution assets offer them an investment with a predictable

customer base and a regulatory structure which includes a substantial degree of inflation protection. Licence price control formulae also contain incentives to achieve cost reduction, and are used to improve standards of customer service and to invest in the reinforcement and development of electricity networks to adapt to new forms of generation. Political discussions about nationalisation and increased regulation of power network assets have increased the perceptions of risk and exerted downward pressure on asset values.

The development of renewable generation, which has been encouraged by various evolving regulatory price support mechanisms over recent years, leads to opportunities for institutional and other investment which generates additional private M&A activity. Major energy companies play an important role in developing renewable generation themselves. However, there are many other smaller players who have the necessary technical and developmental expertise. The classic business model for these developers is to identify opportunities for renewable generation projects, develop them and then at a pre-agreed stage sell them to platforms funded by a variety of institutional investors. This permits the developers to recycle their capital and move on to additional development opportunities, which play to their core skills. It also provides institutional investors with access to generation assets that have been through the higher risk development and construction stages (though in recent years investors have been increasingly willing to take on some construction risk as well).

The platforms that assemble portfolios of generation assets in this way provide a bridge between development activity and sources of funding which brings additional investment into the sector. Many funds and institutional investors also invest directly in operational renewable generating projects rather than developing them through platforms, and a large number of recent offshore wind assets are understood to have been sold to institutional investors who were investing in that market for the first time. The greater technical challenges of developing offshore wind farms have tended to lead to the original development and construction being undertaken by energy and construction companies and institutional investors purchasing later on in the process.

The increased interest from major corporates in sourcing their own electricity supplies, often from renewable sources, through "corporate PPAs" is also giving rise to increased activity in the development of renewable generation assets. Some of these assets are owned by the corporate offtaker. Others are owned by separate project companies that sell the power on to the customer. The entities that set up these project companies, which include banks and engineering companies, may well sell shares in the project companies in the secondary market, which generates additional M&A activity.

Over the years there have also been various pressures on the sell side, which have created a need for some energy companies and utilities to dispose of assets. There can be various reasons for this. In the first few years of the liberalised market there was a desire to reduce market share in generation to attract less regulatory pressure and increase market share in supply and to lower net exposure to price fluctuations in the wholesale market due to the hedging achieved by a presence in the supply market. More recently, some electricity companies have wanted to sell generation assets when they faced increasing costs due to the general economic downturn, which resulted in lower industrial demand for electricity. Some utilities were also affected by the increased costs resulting from the ending of nuclear activity in their home national markets. A number of utilities have made disposals because they were restructuring their groups to conform with EU rules on unbundling of electricity transmission and distribution networks from the generation or sale of electricity.

Much private M&A activity in the electricity market is focused on English law governed agreements, which relate to power sector assets in other jurisdictions, particularly in emerging markets where independent power projects have been a major source of new generating capacity in countries that needed to expand their electricity industry to facilitate industrial development. When an independent power project has gone through the higher risk development and construction phase, shares in the special purpose company which owns the generating assets are often sold on

secondary market private M&A transactions. This has been particularly the case in the Gulf and in emerging markets in Asia, Central and Eastern Europe and, in the last ten years or so, Africa.

2. What are the main risks affecting private M&A in the power and renewable energy sector?

The risks involved in the power and renewable sector private M&A vary greatly according to:

- The type of power business being bought.
- The level of risk inherent in that business.
- The relevant jurisdiction.

The classic form of power sector private M&A is the acquisition of an interest in an independent power project company which owns a single power station or renewable asset which has successfully gone through the development and construction phase and is operating. The normal characteristics of this kind of project make it relatively low risk.

Typically, the project company will have a long-term *power purchase agreement* (PPA) with a utility or with one or more industrial customers. Under the PPA, the purchaser commits to pay charges that, if the power station is available to generate at the expected levels, will cover the project company's anticipated construction, financing and operating costs and equity return, and any relevant fuel costs.

The PPA also commits the purchaser to pay these even at times when it does not call on the power project to produce electricity. The PPA also places agreed limits on liability for failure to generate and it will often pass on the costs of changes in law to the power purchaser. These provisions mean that:

- The project company does not face the risk of its customer choosing to buy power more cheaply elsewhere or deciding that it no longer needs the electricity the project generates.
- If the power station fails to generate, the project company does not face the risk of having to compensate the power purchaser for the potentially large costs of buying replacement power on the open market.

Therefore the main risk the project company takes is that revenue will be lower than expected if the underlying asset does not perform as it should. In this respect the future revenues of the project are likely to be more predictable than most other businesses whose cashflows and profits depend much more on fluctuating business and market trends.

A number of investors also buy interests in renewables projects that have still got to get through the construction phase. In these cases, the purchaser takes the additional risk of potential cost overrun, to the extent not already covered under the engineering, procurement and construction (EPC) contract for constructing the renewables installation. In the case of renewables assets, risk is also reduced by the benefit of any support or subsidy mechanisms they benefit from, which shield them from the risk of being more expensive than other forms of generation. While the support and subsidy mechanisms that have existed at various stages in the UK and other markets operate in different ways, they are a key element to be taken into account in assessing the risk profile of an investment in renewable generation assets.

The risk profile of a single power station generating company which does not have a PPA or offtake contract in place, and which does not benefit from renewables support mechanisms (known as a "merchant project"), would be very different, particularly in the UK where prevailing prices in the short-term electricity market are extremely volatile. For this reason, projects of this kind are in practice very rare.

An acquisition of an energy company which has several power stations but which also has a significant supply business selling electricity to consumers presents a very different risk profile. The business carries a greater degree of risk because it does not have the protection of long term PPAs. However, much of the company's exposure to volatile short-term market prices is eliminated by the fact that its generation is largely matched by the demand of its consumers, so that it is only exposed to market pricing in respect of any mismatch. Typically, a power company of this kind will also have an energy management team that will be active in buying and selling power in the market so as to minimise likely exposure to the particularly high price uncertainties of the day ahead market. Also, because the company owns a portfolio of power plants, the impact of an outage in one of its power stations is reduced by the likelihood that the others will be operating normally, or that they can increase output to compensate.

The main risks for a purchaser of a business of this kind are therefore medium to long-term trends in the power and energy markets. Unlike an independent power project, the company's consumers are not locked in by long-term contracts and, if prices in the market fall, the company will have to match them or risk losing some of its customer base; though experience suggests that many domestic customers are slow to compare prices and switch suppliers. Factors which may make this kind of business less competitive include changes in relative fuel prices, government policy or in technology which make other forms of generation more attractive. In particular, government policy is to encourage the development of renewable power (including by mandatory cross subsidies when renewable generation is more expensive) and the costs of building renewable power stations are falling in real terms anyway. This creates an obvious long-term risk to the demand for generation from traditional thermal fuels, though the current shortage of generating reserve capacity partially alleviates this.

An acquisition of a pure supply business which does not also own a generating plant is a different proposition. These sorts of businesses generally do not take the long-term risk of a generating plant becoming economically unattractive because they do not own the plant and only buy power under short-term contracts. Companies of this kind focus on developing and growing a customer base and supplying it with electricity, which they buy in the wholesale market from generators. Therefore, the key driver is how efficiently they can sign customers up, and service, bill and collect from them, with good credit control being essential. The crucial physical asset they depend on for this purpose is typically an IT-based billing system. Similarly, maintaining the creditworthiness of the company is essential so that it can continue to purchase power and has the financial strength to underpin any credit support requirements that sellers of power may require. The other key business risk the company faces is loss of market share, because customers are not locked in on a medium or long-term basis and if its customer base becomes smaller the fixed costs have to be spread over a reduced number of customers.

The purchase of a transmission or distribution business also presents a very different risk profile. These are natural monopolies, so they do not face any risk of losing market share to competitors. Because they do not buy or sell electricity (except for incidental system maintenance purposes), they do not take price risks in the upstream energy or downstream retail electricity markets. The main determinant of their revenue is the price control formula contained in their transmission or distribution licence and their ability to meet or exceed the targets it contains, which will affect the prices they can charge. So the key challenge they face is efficiency in operating the network and in providing the required service.

An important issue facing network companies is the periodic review of the price control condition in their licences. This has traditionally occurred every five years (subsequently amended to eight years). Recent changes in the regulatory formula applied in England and Wales have heightened focus on achieving specific output targets relating to investment, flexibility and customer service. One of the main risks in acquiring a business of this kind is therefore assessing its ability to respond positively to these altered requirements, which are considered by government to be necessary to adapt the electricity system to necessary changes for environmental and other purposes.

Private M&A transactions in the nuclear sector are few and far between. So far in the UK they have primarily concerned sales of shareholdings in special-purpose companies, which have been set up to develop new nuclear power stations but the sales have occurred before construction or operation have started. In that respect they usually present relatively few of the nuclear liability risks which otherwise cause concern. Some proposed private acquisitions of companies in other jurisdictions with nuclear assets have occurred under English law. The key issues for due diligence have been the prospect of liability for past and potential future incidents, and how variations in the expected "back-end" costs of future decommissioning and storage of spent nuclear fuel are to be quantified and provided for. In cases where government is the seller, there is pressure from buyers for past liabilities and future back-end costs to be retained or dealt with via a decommissioning funding arrangement.

3. Are there any other key factors that affect private M&A in the power and renewable energy sector?

An additional factor which is important for institutional investors, particularly when buying shares in a special purpose independent single power project company, is the degree of commitment that they obtain from the original shareholders, who have relevant industry capabilities or background knowledge of the project, to retain an equity interest or to provide ongoing knowhow and technical support.

This is an important factor because the institutional investor will not have this level of industry experience or project knowledge and most project companies have very small numbers of staff on their payroll and outsource operations to third parties and maintenance contractors. It can often be a difficult point in negotiations because the original developers usually want to extract their capital to invest in new projects.

Deal structuring and process

4. Is one structure more common than another for acquisitions in the power and renewable energy sector and what are the key factors that determine how an acquisition is structured in the sector?

Usually private M&A transactions in the renewable sector are carried out by a share purchase. As regards independent power projects and renewable generation assets, this is the natural approach because, with some exceptions, they are set up as special purpose companies which have a series of complex contracts with different counterparties and which are financed using limited recourse project finance. Transferring shares in this kind of company will not disturb those arrangements, provided that the necessary consents have been obtained. Transferring this sort of business by way of an asset sale would be particularly complex and disruptive to the business because, unlike ordinary businesses, it depends on every one of those major contracts remaining in place to be viable.

A number of North Sea offshore wind projects have, however, been set up in the form of contractual joint ventures, where each investor owns one or more entities that are parties to a joint operating agreement that owns the project. The advantages are that each investor can consolidate profits and losses even if it only owns a small share of the project; and that it owns its share of electricity produced. Assets that cannot be owned jointly are held by a jointly-owned asset holding company.

The same tendency to use corporate entities and to sell them via share purchases holds good for purchases of other types of electricity business because they are generally set up as companies that own multiple complex physical assets (for example, a transmission or distribution network) or consist of multiple other complex contractual documents. If a power company were planning to sell part of a portfolio of power stations that is owned by a single corporate entity it would be likely to do a hive out before sale to transfer them to a separate company that would then be sold.

Another reason why a share sale is normally used is because many transactions concern the sale of a partial interest in the business rather than the whole business and this would be very difficult to do and would require many more consents with an asset sale.

One exception is the classic situation of an insolvent company where an asset purchase enables the buyer to avoid responsibility for the debts of the underlying company (for background, see [Practice note, Buying the business and assets of an insolvent company](#)). One major example of this in the UK electricity sector was the purchase of TXU Europe by EON.

5. What types of consideration and price adjustment mechanisms are commonly used in acquisitions in the power and renewable energy sector?

For acquisitions of an interest in a power project with a long-term PPA, the value of the business is often a function of the future cash flows which are provided under the PPA and the other project agreements. The existence of these documents makes the future cash flow of the business particularly straightforward to measure, without the difficulties referred to in [Practice note, Valuing a business: acquisitions](#). Therefore, prices are generally calculated on the basis of a discounted cash flow valuation rather than on the basis of multiple of earnings, dividend yield or net asset valuation. The agreed price is paid up front and the shares are sold on the basis that there will be no cash or only a defined amount of cash in the business at completion, but no general completion valuation or price adjustment process is necessarily involved.

For purchases of quoted energy companies, particularly those in the relatively stable transmission or distribution businesses, dividend yields can also be used as a valuation method (see [Practice note, Valuing a business: acquisitions](#)).

Otherwise, the considerations affecting the structure of the price clause are much the same as for any other sector (see [Practice note, Structuring the purchase price: acquisitions](#)). Occasionally a particular sector-related uncertainty will have a heavy influence on price (for example, future carbon prices) so the price might be adjustable to reflect the outturn level of that variable. Similarly, regulatory uncertainties may have a bearing on price, for example if a regulatory price review is due for a regulated transmission or distribution network or, as is currently the case, a cap is introduced on the prices that energy supply companies can charge to consumers. In such cases, the parties will decide whether to factor the risk into the price or to have a post completion price adjustment mechanism.

Purchases of assets from an insolvent energy company under a pre-packed sale by the administrator have, when appropriate, included price retentions held in an escrow account to deal with uncertainties about the assets that would transfer or their potential value.

It is also possible to sell a stake in a power project under construction on terms that protect the buyer against construction cost overruns by including a price adjustment clause, or that protect it against certain assumed parameters proving incorrect. This can happen, for example, with institutional investors that are buying stakes in renewable generation projects. Parameters used in price adjustment clauses might include the range of future electricity market prices; or, if the project is still in the development stage at the time of the purchase agreement, price adjustment clauses may reflect whether the company obtains consents for, and builds an array of, the anticipated capacity specification and operating characteristics. These are commercial issues to be negotiated between the parties and these sorts of clauses are most likely to be agreed where they are necessary to attract an incoming purchaser who is not prepared to accept the same risks as the original developers.

6. Are auction sales common in the power and renewable energy sector? Are there any sector-specific considerations which affect the auction process?

Auction sales are common in the power and renewable energy sector (for background, see [Practice note, Selling a company or business by auction](#)). For operational assets a sale can happen at any time but for projects that are under development a sale would typically happen before or after the construction phase rather than during it, when uncertainty about cost overruns and delays is higher. No particularly unusual considerations apply.

The [data room](#) will include the key documents that an electricity company would normally have. For an independent power project these would include:

- The offtake agreement or PPA.
- Fuel supply agreements.
- The operation and maintenance agreement (and any long-term maintenance agreement for the power plant provided by the original manufacturer).
- The EPC or construction contract (unless construction is completed and applicable time limits on claims have expired).
- The financing documents, particularly if, as is normally the case, the independent power project was financed on a limited recourse project finance basis.
- The electricity generation licence, which authorises the company to produce electricity.
- The connection agreements, under which the power station is connected to the transmission grid, offshore transmission infrastructure or local distribution network and agrees to adhere to the applicable [Grid Code](#) and [Distribution Code](#).
- Agreements adhering to the [Balancing and Settlement Code](#) and, for a gas fired project, the [Uniform Network Code](#).
- Relevant planning consents and property documentation.

For projects in development, the data room would normally contain draft project documents and financing agreements which would be conditional on and go live at completion of the sale of shares in the company.

Internationally, some countries use auction sale processes to invite foreign investors to bid for power sector assets that are being privatised. Some countries also use auctions to get international developers to compete to build new power stations and these at times involve the sale of an existing company which may have some of the permits already in place. Those jurisdictions may at times be under a legal obligation to use competitive auction processes or they may just do so because they consider it good practice.

For more information on the typical project documents for a power project, see Practice notes:

- [Anatomy of a gas-fired power project](#).
- [Anatomy of a ground-mounted solar power project](#).
- [Anatomy of a nuclear power project](#).
- [Anatomy of a wind power project](#).

Alternatives to M&A

7. Are any other business combination, collaboration, licensing or joint venturing structures commonly used as alternatives to share or asset acquisitions in the power and renewable energy sector? What factors typically drive the choice of these structures?

As mentioned above, joint venture structures are used to create platforms where power project developers with specific electricity sector experience identify and do the initial development work on potential renewable projects in the name of a project company which then gets sold to the platform which provides equity sourced from institutional investors and takes the projects through the processes of limited recourse project financing and then construction. This process enables developer teams to recycle their limited development capital by selling on projects once they are far enough advanced; and it provides a reliable way for institutional investors to participate in the development of new renewable power generation assets without necessarily having direct developmental and operational experience.

Many sales are in fact a sale of part of an existing stake or a sale by a minority shareholder, so that, while the sale is not structured as a joint venture, the purchaser is in effect entering into a joint venture in corporate form so that the purchaser must consider the classic joint venture issues as part of the sale (for background, see [Practice note, Joint ventures: overview](#)).

At times, sales of major portfolios of power generation assets have started as a joint venture where a new party buys a stake, but have developed into a full sale as the original owner exits the relevant geographic market. In these cases, it is important to structure the joint venture arrangements in a way that allows for the likely sale and the parties' potentially different long term perspectives.

Occasionally parties that have been unable to implement a sale of a shareholding in a power generation company, usually because of consent difficulties, manage to achieve a similar effect by a "virtual" sale. These arrangements vary but work by the project company selling power or hedging contracts to the buyer, or by the shareholder agreeing to transfer a defined earnings or income stream to the buyer which replicates the expected returns from the project. There are important differences between this and a transfer of legal ownership to the shares, but if a sale is not possible contracts of this kind can at times meet some of the needs of a purchaser whose objective in trying to purchase the generating asset is to manage its exposure to power prices.

Preparatory steps and preliminary agreements

8. Are there any sector-specific considerations that apply in relation to preparing a target for disposal in the power and renewable energy sector? Do the preliminary agreements that the parties enter into have any sector-specific features?

It would be usual to sell an asset at a time of relative stability. Sales of power generation projects in the secondary market will therefore normally take place once the power station has been built and operated successfully for a period. The more risky development and construction phases are then over and this should enable the original owners to obtain a better development premium on selling some or all of their equity.

Due diligence

9. What are the main areas of focus of the buyer's legal due diligence enquiry for targets in the power and renewable energy sector? Do the key areas of focus differ depending on whether the transaction is a share purchase or an asset purchase?

Due diligence will vary according to the type of business being bought as it must be adapted to the risks that face that kind of target.

For a generation company with a single power station that is project financed and has a long-term PPA, the focus of legal diligence will be on the terms of the project contracts mentioned in [6. Are auction sales common in the power and renewable energy sector? Are there any sector-specific considerations which affect the auction process?](#) above and on the status of the generating licence and land rights. The analysis will be to check that the terms and the risk allocation they reflect are within the normal range of market practice and that no circumstances exist that could lead to a termination event, as the likely revenue and financial stability of the project would be very different if the contracts were terminated. In the UK it would be unusual to find a project that had reached commercial operations where the contracts did not meet the expected standards.

However, when purchasing partly developed projects, or when working in some countries which are new to private sector power transactions, it can be quite common for proposed project documents to be in a form that would not be "bankable". In these situations, the due diligence of project documents may well reveal issues that if unresolved will affect the willingness to buy.

In many developing countries the creditworthiness of the state-owned utility which is the power purchaser may be weak. Even if there is a government guarantee of the utility's payment obligations under the PPA actual payments are often in arrears and enforcement may in practice be difficult. So careful due diligence of payment history and past defaults is necessary. Where defaults exist under project documents it may well be that the company is in default under its project finance documentation. Many projects that have a sound economic rationale are therefore in a state of ongoing actual or potential default, so a purchaser will need to understand what the position is and what the attitude of key contract counterparties and lenders is. In addition, in a few cases, some developing countries have also sought opportunities to invalidate PPAs, particularly if there has been a change of regime or if the project was negotiated at the start of the country's private power programme and the pricing was high to reflect the higher risk of a first in country project. In these circumstances, buyers need to stress test the project documents and the project history to assess whether the power purchaser or state would be able to find a basis for terminating if they wished to be released from their commitments.

Technical due diligence of power generation companies will focus on past operational performance, because this will help predict what the project's future revenues will be. Also, technical due diligence on operational performance is important because sellers frequently decline to give warranties about how well the power plant operates or what standards it has been maintained to. The justification given for this is that thermal power plants are complex machines, where performance can vary significantly from one generator to another and will depend on maintenance decisions that often involve complex cost benefit analyses.

In renewable projects there will also be a focus on project agreements though there will not be a fuel supply agreement, except for waste to energy or biomass projects. For complex offshore wind projects, the construction contracts may consist of multiple contracts rather than a single turnkey contract. However, the simplicity of solar and wind technology also means that the equipment manufacturer may be able to provide a long-term service agreement with guarantees of output, which significantly reduces the degree of project risk taken by the project company.

In some kinds of renewable project, additional factors relevant to the renewable source may also have to be taken into account. The classic example is the exposure of hydro-electric generating projects to hydrology risk if the continued flow of water is likely to be affected by changes in land use or water rights. In cases where rivers cross international borders, relevant treaty arrangements will also need scrutiny. For wind projects, an important issue will be whether there is any protection against other wind farms being erected in a location that adversely affects the ability of the wind turbines of the target to catch the full force of the prevailing wind. For offshore wind projects, potential issues where grouting material is used to attach the wind turbines to their foundations may need to be the subject of technical due diligence. For renewables projects based on eligibility for subsidies, compliance with eligibility criteria needs to be assessed. Some of the latest renewables projects being developed in Europe offer long-term fixed price firm PPAs and do not limit their liability to compensate the power purchaser for the cost of purchasing replacement power if the wind farm is unavailable. In these cases, a purchaser needs to conduct careful due diligence of the hedging, back up electricity supply and energy management contracts that tend to be used by the project company to mitigate the financial exposures involved, as these projects are relatively high risk where these arrangements contain any significant gaps or ambiguities.

Due diligence for purchases of combined generation and supply businesses is much closer to the normal due diligence undertaken for a commercial business (for background, see [Practice note, Due diligence and post-completion integration: acquisitions: Scope of the due diligence review](#)). This is because the target has a portfolio of physical assets, many more staff members and has a wide range of contracts under which it purchases fuel and other services and sells electricity to customers. It is also normally less dependent on a single source of limited recourse debt.

Depending on the market shares of the target and its buyer, greater concern may arise on the competition side, if the acquisition is investigated under national or EU merger control law (for background, see [Practice note, Competition: share purchases](#)).

A company with a portfolio of different generating plants and/or a supply business will be subject to greater electricity regulation by [Ofgem](#) in the UK or equivalent industry regulators if abroad. For portfolio generating companies, regulatory concerns could, for example, include whether there has been any evidence of market manipulation or strategic withdrawal of generating capacity. So due diligence should cover these areas. Areas of key focus for a supply company will be the way it treats customers it supplies in terms of selling techniques. In England and Wales supply companies will also be subject to the current retail price cap arrangements. Due diligence will therefore cover these areas.

Environmental due diligence will be particularly relevant to generating companies, particularly where the plants are located on old or mixed-use sites or where escaped fuel or waste products may have caused contamination. It can also be relevant to transmission and distribution companies where assets such as substations and connection installations are located on potentially contaminated sites. For more information, see [Environmental impacts of power stations toolkit](#). Environmental due diligence will not be a particular feature of pure supply businesses. For general information on environmental due diligence, see [Practice note, Environmental due diligence in corporate transactions: the basics](#).

IT assets and rights will be important for all types of electricity business. For a generation plant the issue is limited to its operational systems, the ability to interact with industry standard communication and payment and settlement systems and the ability to manage online trading in the contractual market for power and in relevant fuel markets. For a pure supply business, the key commercial issue is the effectiveness of and the rights to use the customer billing system.

Regulatory and other approvals

10. What third party consents and approvals (board, shareholder, regulatory or contractual) must typically be considered and obtained for acquisitions in the power and renewable energy sector?

See [4. Is one structure more common than another for acquisitions in the power and renewable energy sector and what are the key factors that determine how an acquisition is structured in the sector?](#) for potential requirements for consent from project finance lenders in the case, for example, of an independent power project with limited recourse project financing; and for a discussion of power purchaser and host government consent requirements in certain developing countries.

Transactions over certain turnover thresholds may require prior approval from the European Commission before closing. If the concentration has an EU dimension that meets these thresholds, there is an obligation on the parties to notify the European Commission. Other UK transactions may come under the jurisdiction of the UK's Competition and Markets Authority, however prior approval is not required before the transaction is closed. For further information, see [Practice note, Competition: share purchases](#).

Consents may be required under applicable merger control laws.

Sale and purchase agreement: general

11. Is it common to have a split signing and completion in transactions in the power and renewable energy sector? If so, what are the key reasons why an interval between exchange and completion may be necessary for deals in this sector? What are the common conditions to completion?

It is common to have split signing and completion, particularly for purchases of project financed power generation companies, because lender consent under the finance documents will generally be required for the sale and this is normally time consuming. Split signing and completion may be needed if the transaction requires competition clearances. In some countries, government or regulatory approvals can be required for changes of control, though this is not the case in the UK for most types of project.

In some complex power projects other contract counterparties may also have consent rights or rights of first refusal. This can happen, for example, with co-generation projects where the power station is built on a site owned by a major industrial customer that may have sponsored the project in the first place.

When purchasing limited recourse financed projects in the development stage, but where construction has not yet started, conditions precedent will cover reaching financial close and finalisation of any remaining project contracts on satisfactory terms.

In the unusual situation of an asset sale, completing [novations](#) of all key contracts would be a condition precedent and a closing obligation.

12. To what extent and in what respect are the main substantive provisions of a generic sale and purchase agreement (other than the warranty schedule see questions 14-17 below) amended to reflect the sector-specific requirements of an acquisition in the power and renewable energy sector?

No sector-specific issues arise, but see [11. Is it common to have a split signing and completion in transactions in the power and renewable energy sector? If so, what are the key reasons why an interval between exchange and completion may be necessary for deals in this sector? What are the common conditions to completion?](#) above as regards the most common price structure.

For "platforms" where renewable projects are transferred from developers to the funding platform, the terms of the share purchase agreement (SPA) will be relatively simple and standardised for each transfer. This reflects the relatively straightforward nature of the process and the fact that there will usually have been close involvement of the platform in the development history of the project. The framework or joint venture agreement that established the platform will specify whether transfer is automatic at a defined stage and what conditions precedent apply or whether a put and or call option is involved.

13. What are the key areas of negotiation in an acquisition in the power and renewable energy sector? Are there specific points that tend to be heavily negotiated?

Most of the issues that arise are familiar from general private M&A transactions. Sector-specific issues may arise from due diligence in the areas highlighted above and will be negotiated accordingly; for example, for an independent power generation project, any issues with plant performance, or with any of the key project contracts or, for a supply business any concerns about the stability of the customer base.

A particular differentiating characteristic of private M&A concerning independent power generation projects is the time taken to collect the many consents that are required, either from lenders or, particularly in developing countries, from government and regulatory agencies. At times, sellers underestimate the time that will actually be required and agree to a long stop date that is too soon. In markets where the value of assets can fluctuate significantly, purchasers can easily take advantage of a long stop date that leaves too little time by reopening price in exchange for extending the date. For buyers, the corresponding risk is that the assets, business or prospects of the company may deteriorate during the time necessary to satisfy conditions precedent. This tends to make purchasers seek material adverse change clauses which are typically resisted and lead to predictably difficult negotiations.

Warranties and indemnities

14. What amendments would typically be made to the warranties in schedule 4 of *Standard document, Share purchase agreement: single corporate seller: non-simultaneous exchange and completion* for an acquisition in the power and renewable energy sector?

It would be normal for a seller to exclude warranties about the condition performance and degree of maintenance of the generating plant, for the reasons stated above, and the buyer will be expected to inspect the generating plant and its records and rely on its own assessment (see [Share purchase agreement: single corporate seller: non-simultaneous exchange and completion, Schedule 4, Warranties, paragraph 22](#)). For these reasons, there is often a lot of resistance to general or open-ended information warranties.

Warranty cover would be inserted as to the company's right to be, and remain, connected to the grid or offshore transmission infrastructure and as to its status in relation to any relevant renewables subsidy or support mechanism.

Sellers will often be cautious about warranty cover in a sale of an electricity company in a jurisdiction which is seen as high risk, which can be the perception in some developing countries. This is because many of these countries' risk factors will in any event be factored into the price that a buyer will be willing to pay when investing in a higher risk jurisdiction. These can include:

- Political instability, which may mean a loss of the necessary practical governmental support.
- A record of difficult relations with the power purchaser and/or government.
- A poor payment record with the power purchaser and/or government.
- Where there could be concern about governmental or utility challenges to the pricing in the PPA.

In these cases, a seller will show caution regarding warranties about actual potential or threatened termination, default or litigation. Similarly, it will consider significantly qualifying warranties about compliance with law licences and consents if the requirements are in practice too onerous to comply with in all respects or if there is a likelihood that government may at some stage seek instances of non-compliance to use as a lever in price renegotiation. This can lead to difficult negotiations with the buyer who will want to see appropriate warranty cover and to get full information about any known areas of concern so that it can make an informed judgment.

Warranties about defective products and services would not normally be given by a generating company (see [Share purchase agreement: single corporate seller: non-simultaneous exchange and completion, Schedule 4, Warranties, paragraph 10](#)) as the circumstances for delivery of power to the electricity system are normally controlled by grid and distribution system operator rules which contain independent safeguards and liability for consequential loss is typically excluded. So general liability warranties would usually be sufficient.

Material counterparties and contracts can often be defined more specifically, at least for an independent power project, and simplified warranties could be used in these cases (see [Share purchase agreement: single corporate seller: non-simultaneous exchange and completion, Schedule 4, Warranties, paragraphs 11 and 12](#)).

Apart from this, no particular sector-specific characteristics apply.

15. What amendments would typically be made to the warranties in schedule 13 of Standard document, Asset purchase agreement for an acquisition in the power and renewable energy sector?

See the issues referred to in [14. What amendments would typically be made to the warranties in schedule 4 of Standard document, Share purchase agreement: single corporate seller: non-simultaneous exchange and completion for an acquisition in the power and renewable energy sector?](#) above.

16. What are the common areas of indemnity cover in the power and renewable energy sector?

No particular sector-specific characteristics apply (though the usual debates can arise on environmental liability where potentially contaminated sites are involved).

17. Is warranty and indemnity insurance a common feature of acquisitions in the power and renewable energy sector?

No particular sector-specific characteristics apply. Warranty and indemnity insurance is used by many institutional and fund investors when they sell interests in UK renewable projects because they are attracted by the possibility of a clean break. Insurers are reluctant to cover warranties on plant and asset condition or past project specific incidents.

Ancillary documents

18. Beyond the core ancillary documents that routinely feature in M&A transactions, are there any additional sector-specific documents that are commonly required in transactions in the power and renewable energy sector?

The target will normally be party to a significant number of industry-specific agreements, which will vary according to whether it is a project financed single power station generating company, a supplier or an integrated energy company with its own generation and supply activities. With a share purchase these will simply transfer with the company.

However, where credit support is provided under PPAs, *grid trade master agreements* (GTMA) or under the BSC or the Uniform Network Code, there may be a need for the purchaser take over any support role that the seller previously had (for example, if a parent company guarantee was provided to counterparties or to lenders that issue standby letters of credit as security).

Where the company is project financed, lender consent is likely to be required and to obtain this, the buyer will be expected to grant security to lenders over its shares in the target, and to undertake any ongoing commitments to lenders that the seller was subject to (for example, under direct agreements, shareholder equity undertakings or other instances of shareholder support under the project finance agreements). These are not a distinctive feature of the power and renewables sector alone but arise in all sales of project financed companies.

Completion and post-completion

19. Are there any key steps to be taken on completion or post-completion in relation to an acquisition that are specific to the power and renewable energy sector?

All the conditions precedent that the share purchase agreement specified be satisfied before completion can happen. These include providing any replacement credit support as described above. For a project financed power generator this includes getting lender consent and providing any necessary commitments to lenders as described in *18. Beyond the core ancillary documents that routinely feature in M&A transactions, are there any additional sector-specific documents that are commonly required in transactions in the power and renewable energy sector?*



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