

# RENEWABLES IN THE TIME OF CORONAVIRUS

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Headlines continue to be dominated by the spread of the novel coronavirus (COVID-19), the impact of which is being felt globally. The effect of current restrictions on the travel industry and related infrastructure sectors have been widely reported (and we have previously analysed key issues for aircraft lessors and airlines, as well as shipping companies). Less widely reported are the implications for the renewable power sector. In this article we consider key potential practical and legal considerations facing developers and sponsors across the lifecycle of European renewable power projects.

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## PRACTICAL CONSIDERATIONS

European renewables projects face a mix of potential practical and legal issues linked to the coronavirus. The core practical issues affect numerous sectors and have been widely reported. Those same issues give rise to a number of key considerations for European renewables projects.

### Long-term prospects

First, some good news. It is true that the current atmosphere of uncertainty is affecting the ability of sector participants to project long-term trends, in some cases making it challenging to reach agreements based on the expected life of relevant projects. However, while declines in the use of infrastructure such as toll roads and airports are having severe immediate impacts on cashflows for related infrastructure projects, positively for the power sector, markets do not at present appear to be forecasting similarly severe declines in power demand (recent modelling suggests that measures aimed at slowing the spread of coronavirus may lead to an aggregate

decline in power demand across Europe of 6% in 2020, with an associated (average) decline in power price of 9% for the year<sup>[1]</sup>). Meanwhile, it is reasonable to assume that most of that demand will be restored once coronavirus-related restrictions are limited.

The general trend in Europe of renewables becoming less and less reliant for their viability on government subsidies is also helpful. Such reduced reliance on subsidies lessens the likelihood of the European renewables industry finding itself in intense competition with other industries for the provision of coronavirus-related financial support by already stretched governments. The relatively positive outlook on demand for power, coupled with European governments' ongoing environmental commitments and the reduced reliance by European renewables on government subsidies, suggests that the European renewables sector remains underpinned by fundamentally positive long-term prospects, even should coronavirus present immediate challenges to certain projects.

## **Construction timelines**

Projected construction timelines are, in some cases, facing reassessment given, most obviously, personnel and supply-chain issues for project contractors. Supply chain issues are causing some difficulties in sourcing goods. Restrictions on the movement and meeting of individuals meanwhile are presenting challenges with respect to the continued deployment of workers on site, and also the carrying out of physical meetings and site inspections. Similarly, reduced 'in office' staffing at some government agencies has reportedly caused delays to the issuance of permits, while planning processes are, in some instances, being delayed in the interests of avoiding physical meetings. In some jurisdictions, administrative deadlines have been suspended to allow relevant parties to proceed at a pace appropriate to the developing situation, which may further affect construction timelines.

## **Financing timelines**

Projects in the development phase seeking debt financing may face delays in achieving financial close in the current climate. Financiers are revisiting and focussing closely on base case assumptions and projections, and more generally reassessing their risk appetites (including their appetite to underwrite debt for greenfield developments). The volatile immediate debt pricing environment is meanwhile not an attractive one in which to lock-in long term debt pricing. More mundane issues may also threaten delays: due diligence processes requiring site visits may be vulnerable to postponement and financial closings themselves face challenges in an increasingly remote working environment. Those challenges range from the adequacy of available printing and scanning facilities to difficulties with witnessing and notarisation requirements associated with document execution. Delays associated with permitting and administrative matters (noted above) may similarly impact financing timelines.

While these challenges are undoubtedly present, for perspective it is worth noting that we are currently seeing a number of transactions in the sector nevertheless continue to drive towards an imminent financial close.



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## Liquidity

Pre-operational projects (in particular) may face restrictions in liquidity in the short to medium-term, whether as a result of delays in achieving financial close or from utilisation drawstops under closed financings being triggered, in either case resulting in core debt lines for projects not being available when required. They may also potentially flow from sponsors' own coronavirus-related liquidity issues (which may, for example, be triggered by financial covenant breaches triggering drawstops in their own corporate debt facilities), limiting sponsors' ability to contribute equity to their projects as and when required. We note however that we have yet to see this risk manifest in practice.

Despite the unclear immediate situation, it is worth noting that there are reasons to believe that the long-term drivers of the availability of liquidity to the renewables industry more generally should not be adversely affected by the coronavirus pandemic. In particular, it appears likely that the current environment of low interest rates will continue for some time given the various treasury support programmes being invoked by governments globally. Meanwhile, although institutional long-term investors will want to carefully analyse the potential impact of coronavirus on their pending investments (which may accordingly be subject to short-term delay), in principle coronavirus should not change their underlying drive and appetite to invest in long-term cash-yielding assets.

## Distribution delays

Operational projects face potentially difficult discussions with their financiers where those projects wish to make distributions on upcoming calculation/repayment dates. Even where no default has arisen under the relevant financing (blocking distribution), financiers' close focus on the assumptions (including economic assumptions) and projections that will need to be agreed by the parties as part of the distribution process raises the prospect of disagreement and of distributions being delayed or blocked, at least until the immediate uncertainty clears.

## KEY LEGAL CONSIDERATIONS

In navigating the practical challenges of coronavirus, developers and sponsors face a number of potentially relevant legal considerations.

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### Force Majeure

A number of European renewables projects under construction are considering the validity of claims by their contractors for force majeure relief (e.g. under their EPC Contracts) and the potential for the project itself to claim force majeure under its relevant contracts (e.g. power purchase agreements, or EPC contracts where projects are providing components as free issued equipment) if ultimately required. (As a generalisation, force majeure provisions provide for contracting parties being relieved to some degree from performance of their obligations where an event occurs that is beyond the parties' control).

Wherever relevant contracts include express force majeure provisions, careful analysis of the specific wording of the relevant contracts will be required to establish whether relief is available. Contractual force majeure provisions tend to require that multiple levels of tests be satisfied for relief to apply, while relief is often only available where contractually specified procedures (e.g. around notification and mitigation) are followed by the affected party. Such provisions also tend to provide relief from the performance only of directly affected obligations, and only for so long as those obligations are actually affected. Where projects are looking to claim force majeure relief on the basis of one of its contractors claiming force majeure against the project, particularly careful analysis will be required to ensure that force majeure relief flows through the contractual chain as required. Where underlying contracts are subject to civil law systems, careful analysis of relevant legislation will also be required.

Projects should also consider the extent to which any force majeure events may have given rise to (or may in future give rise to) termination rights under their project contracts or may have delayed the occurrence of milestones that have been backed-off under other relevant agreements. In all events, financed projects should not forget to ensure that in managing force majeure claims they comply with the requirements of their finance documents, nor forget to establish what consequences (e.g. a drawstop or default) may flow under the finance documents from the occurrence of force majeure under their project contracts.

## **Frustration**

Outside of force majeure relief, the (English law) legal doctrine of frustration<sup>[2]</sup>, and its civil law equivalents (e.g. the doctrine of *rebus sic stantibus*<sup>[3]</sup>), are also worth considering. While case by case legal analysis will invariably be required, at present frustration (and *rebus sic stantibus*) appear significantly less likely than force majeure to apply in the European context, and it is worth noting that (in the case of English law) successful claims for frustration have historically been few and far between.

## **Material Adverse Effect**

Where projects have financings in place, care should be taken to consider whether, aside from any specific default triggers (e.g. around project timelines), any more general triggers for the occurrence of a default under the relevant finance documents have been or may presently be tripped. The most likely general trigger is that of the occurrence of a “Material Adverse Effect” (“MAE”), or similar, a term which is frequently drafted broadly. While the specific wording of the term will require case by case consideration, particular points to consider are the degree to which the contract provides financiers with the discretion to determine whether or not a MAE has occurred and the degree to which a MAE may be declared in light of anticipated future developments. Positively for developers and sponsors, financiers are generally reluctant to declare events of default based solely on the occurrence of a MAE (given the scope for disagreement as to how to interpret the typically broad language of its definition), although financiers may not be so reluctant to declare a drawstop on the basis of a MAE.

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While it is too early to make judgments of trends, and this is an area that will merit ongoing monitoring, as above we are currently working on a number of transactions that are continuing to drive towards financial close and utilisation notwithstanding the current situation. We are not currently aware of MAE having been declared under any live financings for European renewables projects.

## **MAC and “finance-out” clauses in M&A**

A number of M&A transactions in the European renewables sector are currently between deal signing and completion. In such cases, a close review of the closing conditions under the relevant transactional documents is recommended. Although slightly less common in the sellers’ market prevailing immediately before the outbreak of coronavirus, some M&A transactions will include MAC (material adverse change) or “finance-out” clauses. Under the former, the parties to an M&A transaction seek to prevent or ultimately forego completion of the transaction in case of a material adverse change in market conditions relevant to the transaction, while under the latter the same is sought to occur conditional upon related debt financing for the transaction being available. In each case, careful analysis of the specific language used in the underlying transaction documents will be key in determining the parties’ rights under such clauses in the individual case.

More generally, it is still too early to predict the medium and long-term effects of the coronavirus on M&A activity in the European renewables sector. However, long-term drivers for equity investments in the sector noted above, such as government support for the energy transition, pension fund liquidity and a low interest rate environment, allow for a cautiously positive long-term outlook.

## **Insurance**

Another potential consideration is that of insurance and whether or not any delays associated with coronavirus may be subject to claims under project insurance policies. As a rule, any analysis here will be centred on delay in start-up and business interruption policies. While such policies tend only to insure against risks associated with physical damage rather than delay, the wording of relevant individual policies will need to be interpreted to determine the extent to which those policies may respond. As always with insurance, projects will need to be careful to ensure that they comply with the letter of their insurance policies to maximise the probability of payout.

## **Government action and Change in Law**

One potentially novel source of compensation for projects may prove to be the relevant governments. With government policies responding to the coronavirus pandemic changing on a daily basis, developers and sponsors would do well to watch government policy in this area closely. In the meantime, a careful analysis of the nature of restrictions currently imposed by relevant governments on relevant activities is advisable for affected projects, in particular with a view to establishing whether relevant government action may qualify as a “Change in Law” (or similar), entitling the project or its counterparties to contractual relief, or may render relevant contractual obligations illegal or ineffective and so, depending on the jurisdiction, provide parties with relief from those obligations.

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## Considerations for distressed projects

Finally, while we are not aware of any adverse trends in the European renewables sector linked to coronavirus in this regard, should projects become distressed, as always sponsors and developers should ensure that they fully understand the implications of the insolvency regimes in each potentially relevant jurisdiction (likely to be that in which the project is located and/or the project vehicle is incorporated) and take care to comply with the requirements of those regimes and those regulating directors' duties more generally. This is particularly important given the potential liabilities (including personal liabilities for directors) that could potentially arise from a failure to do so.

## TAKEAWAYS

The circumstances associated with the coronavirus pandemic present developers and sponsors of European renewable power projects with a range of interconnected practical and legal considerations. Those considerations will invariably need to be evaluated on a case by case basis.

Given the ever-changing situation and the complex web of contractual relationships that together form individual projects, in assessing and responding to related issues as they arise, developers and sponsors should seek so far as possible to work hand in hand with their other project parties.

Our experience to date indicates that early, clear and open discussions between affected parties that are pragmatically focussed on short to medium-term solutions for immediate challenges can greatly assist in enabling all parties to address those challenges effectively.

[1] <https://www.icis.com/explore/resources/news/2020/03/16/10482507/topic-page-coronavirus-impact-on-energy-markets>

[2] In broad terms, frustration may discharge contracting parties from performing their obligations where circumstances are such that performance is impossible or would be drastically different from what the relevant parties expected at the time of contracting.

[3] According to the *Rebus sic stantibus* doctrine a party may also be discharged from its obligations due to a drastic change of the circumstances from those at the time of contracting if such changes makes the obligations of one party too onerous, especially in long term contracts.



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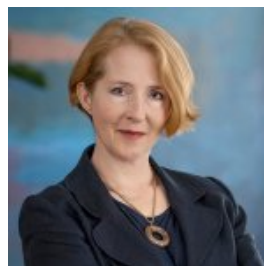
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